Renyana Stahl Anstalt v Loch Lomond and The Trossachs National Park Authority Appeal Decision

Cases under the Land Reform (Scotland) Act 2003 · https://scotways.com/ken/renyana-stahl-anstalt-v-loch-lomond-and-the-trossachs-national-park-authority-appeal-decision/

Introduction

This note provides a refresher of the right of responsible access introduced by the Land Reform (Scotland) Act 2003, then analyses an access dispute that was played out between Ben Venue and Loch Ard which recently culminated in the Court of Session decision of Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority [2018] CSIH 22.

The case is particularly instructive about several aspects of the right to roam, such as the steps an access authority can take when faced with a landowner who seeks to restrict access, and also how to assess whether a landowner's actions (or inactions) are legitimate management practices which just happen to catch responsible access in the crossfire. It is also useful in clarifying that a landowner cannot simply carve out portions of land from a larger area and class such areas as not suitable for access without a legitimate reason to do that.

A reminder of the law

Part 1 of the 2003 Act introduced rights of access to be on or to cross land, subject to limited exceptions relating to either the characteristics of any given parcel of land or the conduct of the access taker. Access can be taken for recreational, educational and in some cases commercial activity on land where access rights are exercisable. On such access land, the landowner or manager must act responsibly when using, managing or otherwise conducting the ownership of it. As we shall see, the Scottish Outdoor Access Code is an important factor in determining whether a landowner or anyone else has acted responsibly. There are also some situations that can never be responsible conduct in terms of the law. From a landowner's perspective, this would be where they act (or indeed fail to act) in a way that unduly deters access where it should be permitted. This would be a breach of section 14(1) of the legislation. In the scheme of the 2003 Act, access authorities have a duty to uphold access rights. They can do this in a variety of ways, including

serving a notice on a landowner when they consider there has been a breach of section 14(1). Such a notice was served on the landowner at Drumlean.

The case at Drumlean

In this case, the landowner sought to limit and discourage access to an area of some 120 hectares which were described as open hillside, in-bye [separately fenced] fields and woodland at the Drumlean estate. Three gates to the enclosure were left in a default locked position, and a sign warned of the danger of wild boar when there were in fact no such animals present at the given time. (Other animals – namely deer – were reported to be present.) These measures had the effect of restricting and discouraging access to 10% of the whole estate.

The relevant access authority – the national park authority – took issue with this restriction and served a section 14 notice. A landowner is entitled to appeal to a sheriff about such a notice. This is what the landowner did, leading to the first of three levels of judicial consideration. Each of those levels had a slightly different result.

At first instance, a sheriff ruled against the access authority, holding that the landowner had been (subjectively) acting for a legitimate land management reason. A previous case (Tuley) relating to an access dispute at the Black Isle suggested that any landowner conduct was to be measured by what a landowner was actually thinking when managing land, hence the subjective approach adopted by the sheriff. The access authority then successfully appealed to the Sheriff Appeal Court, which ordered that all three gates must be opened and (separately) the removal of a sign warning of the dangers of wild boar (a decision linked to the fact there were no wild boar on-site at the time). In this most recent case, the Court of Session has largely followed the Sheriff Appeal Court, but with the subtle difference of only requiring two gates to be accessible (as it was held, one of the other two gates provided suitable access without the need for the third gate), and also not ordering the sign about boar to be taken down (as, from the evidence, that sign had actually been required by Stirling Council in connection with an earlier boar herd).

Those subtle variations apart, the Court of Session decision essentially endorsed the practical effect of the Sheriff Appeal Court: namely that the land is accessible, and the landowner was correctly ordered to take steps to allow for access. From a legal point of view, this clarifies that a landowner can indeed be ordered to do something when access land has been (metaphorically) ringfenced.

As explained above, section 14 is about impediments to access. It was considered in an earlier case, where a fence across a path in Aviemore was allowed to remain in place. This was because

the fence was erected prior to the law coming into force and the access authority had not framed its notice in a way that could catch the pre-existing fence. This newer case suggests a future case like that could now be decided differently. In the dispute at Drumlean, the issue was not about the erection of gates in contravention of section 14 (as, once again, the gates were in existence prior to the new law coming into force), but rather the continuing failure of the owner to unlock them under section 14(1)(e). Even with that distinction, the Court of Session has now suggested the earlier Aviemore case went too far when it implied historic impediments could generally be allowed to remain.

Also of crucial importance is the fact the Court of Session has moved away from a subjective test as to why a landowner did something that had the effect of restricting access and ruled that any landowner actions or inactions must be assessed objectively. Objective tests also apply to other matters in the 2003 Act, such as how much land is needed around a home for privacy purposes. The focus on subjective intention had been the result of an earlier Court of Session case that first the sheriff and then the Sheriff Appeal Court felt bound to follow. This new Court of Session case has shifted to an objective analysis, which means future assessments can actually look at the situation on the ground when access is restricted (taking guidance from the Access Code) rather than seeking to establish exactly what a landowner thought. Restricting some access in certain circumstances can be allowed, as might be the case with planned forestry operations, or as seen in a case relating to the management of equestrian access and another case to do with the overnight closure of a path relatively near some houses, but any such restrictions must be objectively justifiable.

Meanwhile, the Court of Session proceeded on the basis that landowners are obliged to have regard to the Access Code (as mandated by the legislation). That Access Code does cater for some interaction of access takers and animals without the need for a blanket exclusion of people. The court also noted that individual buildings in the enclosed area would be excluded from access rights. Landowners could be entitled to restrict access around such features for privacy or security purposes, but a general exclusion of a larger area would not be appropriate.

Conclusion

To conclude, a linguistic tangent. In its Scots Gaelic form, Ben Venue is A’ Bheinn Mheanbh, which means the miniature mountain. There seems to be a certain irony in the fact that the landowner of the Drumlean estate objected so strongly to access taken below the miniature mountain, and thus made a mountain out of a molehill. A further irony might be that this individual attempt to roundly object to access has resulted in a definitive ruling as to the steps an access authority can take to

facilitate access and how any land management decisions fall to be assessed. Responsible access takers should maybe be grateful for the (former) land management practices at Drumlean after all. They should also be grateful to the access authority, who played an important role in laying the groundwork for this ruling for the right of responsible access. There must have been stages in the litigation, especially after the original decision of the sheriff, where taking this case any further would not have seemed attractive. Other access authorities might not have had the resources – or the determination – to do so. The fact that they did will reverberate around the great Scottish outdoors.

Malcolm M Combe 19th April 2018