Tuley v Highland Council

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Case Report: [2009] CSIH 31; 2009 S.L.T. 616

Court of Session, 21st April 2009

Scottish Courts Service decision on appeal.

This was a successful appeal by Mr and Mrs Tuley to the Court of Session, against a ruling by the Dingwall Sheriff Court, July 2007.

The facts: Mr and Mrs Tuley had purchased Feddonhill Wood in 1992 from the Forestry Commission on Mr Tuley's retirement. It was a small wood, mainly coniferous, and located on a slope above the village of Fortrose in the Black Isle, with views to the south over the inner Moray Firth. The wood was bisected by a private road providing vehicular access eastward to a few private houses and a livery stable/riding school at Broomhill Farm, with about 60 horses. That part of the wood to the south of the private road suffered severe wind throw in 2006, and this was being cleared. When owned by the Commission there had been public access for walking and riding, but Mr Tuley had not allowed riding on the main path through the northern section of the wood, and which led to the vehicular road to Broomhill Farm. He had been managing the wood for amenity and public access, aiming to provide separately for different categories of user, his original intention being to provide for riders in that part of the wood which had been storm-damaged.

On the coming into force of statutory access rights, Mr Tuley erected padlocked pole barriers to deter riders at either end on the path through the northern section of the wood, although there were narrow gaps to allow others to pass. Mr Tuley feared that use of this track by riders would cause unreasonable damage on account of parts of the path having a steepish gradient. This action led to complaints by some local riders to Highland Council, which entered negotiation with Mr Tuley, but there was no agreement and the Council issued a Notice under s.14(2) of the Land Reform (Scotland) Act 2003 requiring that the barriers be removed or sufficient space provided for the passage of all users. This order was challenged by Mr and Mrs Tuley, arguing that the purpose of the barriers was not to inhibit all access but to ensure that the said track was not damaged by horses to the disadvantage of walkers. They said this was responsible management in line with section 3 of the Act.

Evidence: both parties to the case provided technical evidence. Mr Tuley had an expert witness in soil science whose report predicted that any major use of the track by horses would inevitably lead to damage, which was supported by a recreation professional, and a local walker expressed concern about meeting horses given the narrowness of the track. For the Council, evidence was led by the Council's access officer and the access specialist for the British Horse Society, to the effect that the track could stand use by horses and that some impact from such use was not unreasonable – riders had to exercise judgement and act responsibly when conditions were unsuitable for riding. The owner of the stables said that she would limit use of the track to a small number of ponies ridden by children as part of a circuit using the vehicular road. The Council offered to assist should problems arise, but it did not dispute the evidence of the main expert witness on path damage.

Decision in the Dingwall Sheriff Court

In a thoughtful review of the evidence, the Sheriff reflected on the uncertainties that still remained: the prospect that all users would always act sensitively and responsibly seemed uncertain; the Act made clear that the land manager should not limit access except in obvious or extreme circumstances, and without some objective evidence of the nature of the impacts that might arise; there was uncertainty in the number of riders that might use the contested track if access were to be opened up to all; there was uncertainty in the evidence as to the degree of impact that would arise; and there could be adverse effects on other users of the wood, although, on balance, this last point was not a major issue in the case. In conclusion, the Sheriff came to the view that while Mr Tuley had valid concerns, he had acted prematurely in limiting access for riding, and had denied the opportunity to assess objectively what damage might arise, given use by horses. He also had a remedy available in cooperating with the Council, which had offered assistance. The appeal against the Notice was refused.

Appeal hearing at the Court of Session – 21 April 2009

Mr and Mrs Tuley appealed to the Court of Session against the above decision. There were two main issues in the appeal.

The first issue was whether the landowners had acted responsibly in placing barriers preventing horse access along the disputed path. An expert witness had given evidence for the landowners about the soil damage that would occur on the disputed path as a result of horse use. The Council had not disputed the expert evidence, but argued that the Tuleys had acted prematurely in

preventing access by horses. They said that horse riders should not be prevented from using the route unless/until it could be shown that damage was being caused as a result, and they had offered to assist if drainage problems arose. The appeal judges rejected this argument. The uncontested expert evidence had indicated that, in all probability, horse use would damage the track, and the Tuleys were therefore acting responsibly in preventing horse access to the part of the wood that was intended for pedestrian use. It was stated that the Tuleys were exercising land management responsibly in the way that they were managing different recreational uses of the wood.

The Court went on to give its views on the second issue, which was whether the purpose, or main purpose, for erecting the barriers had been to prevent or deter access. Section 14(1) of the 2003 Act prohibits landowners from putting up any obstructions if the purpose, or main purpose, is to prevent or deter people from exercising their access rights. The appeal judges said that ‘purpose or main purpose’ should be given a flexible interpretation. In the present case they said it was recognised and accepted that the Tuleys encouraged public access, and were only seeking, in good faith, to regulate different uses of access. The ‘main purpose’ of the barrier to horses was the landowners’ genuine concern to prevent damage by horses to the track and the paths leading off it. The Tuleys were therefore not in breach of section 14(1).

Comment: As the case had been decided on the first issue, the Court’s views on the second issue were only ‘obiter’, i.e. not part of the decision and therefore not binding in any future cases.