

## THE RIGHT TO ROAM IN THE INNER HOUSE

Scottish local authorities which seek to enforce access rights under Part 1 of the Land Reform (Scotland) Act 2003 [1] normally do so by serving a notice under section 14 of the Act. Following the decision of the Inner House in the first case in which it considered this legislation, *Tuley v Highland Council* [2], 2009 CSIH 31A1 [3], this may change; effective challenges to such notices will be easier. *Tuley*, in which I acted for the successful appellant, is an important decision which should substantially alter perception of how the Act works in practice.

### **‘Purpose or main purpose’**

It is a precondition of an effective notice under section 14 that the action complained of was done by the landowner *‘for the purpose or for the main purpose of preventing or deterring any person entitled to exercise [access rights] from doing so’*. It is not enough that the action has that effect. If a landowner puts cattle in a field, or blocks up a gate, as an ordinary act of farm management, section 14 does not bite. This is deliberate drafting; when the Bill was being considered in the Scottish Parliament (Justice 2 Committee, 25 September 2002: Col.1827 to 1844 [4]), an amendment which sought to substitute for the words in section 14(1) *‘for the purpose or for the main purpose’* the words *‘if it is likely to have the effect (whether or not intentional)’* was rejected after an intelligent and full debate. The difficulty is in ascertaining the landowner’s purpose. The approach of the sheriff in *Tuley* had been simple, if not simplistic: the pursuers had erected barriers to keep out horses: that was accordingly their purpose: it was not relevant to consider why they wished to keep out horses. The Inner House rejected this: paragraphs 36 to 43. In a passage from my argument accepted by the Court, I said this: *‘the act in question was the act of ... putting up a barrier which prevents the entrance of horses. But the act was not its own purpose. The purpose, and particularly the main purpose, was something different, namely what the landowner wished to achieve.’*

It will not however always be easy to answer that question. What if the landowner simply wishes solitude? That seems to be the issue in *Forbes v Fife*

*Council*, which is, I understand, at avizandum in Kirkcaldy Sheriff Court: see this description on the Scotways site [5], which gives, as Scotways usually does, a reliable and fair account of current access litigation. The ‘purpose’ of solitude, and the ‘purpose’ of excluding access takers, may be indistinguishable. It may be over-simplistic to say, as I did, that an act cannot be its own purpose: what, as Alexander Herzen famously asked, is the purpose of singing a song?

Local authorities, and sheriffs, must also be prepared to look behind landowners’ descriptions of their purposes, which may be self-serving and unreliable.

One of the attractions of using section 14 notices has been that it is the landowner, not the local authority, that is forced to litigate. The corollary, which seems fair, is that such notices cannot be used against the mistaken but well-intentioned landowner; they are for use against the malicious, the bloody-minded, and those opposed to access rights in principle. The Tuleys were none of these; they were not mistaken in their claims of the damage that would be done by horses; but, on the approach of the Court, they would have succeeded anyway. That does not, as the sheriff thought, leave a gap in enforcement. Against those who are not ill-intentioned but are simply wrong, the remedy is interdict under section 13. One positive advantage of interdict to a local authority is that it allows it to take some control over which cases are litigated. A criticism of Highland Council which I have heard repeatedly is that it was stupid to fight *Tuley* as the test case on the overall working of section 14. This strikes me as rather unfair; having served the notice, it had little choice but to do so. It could not adopt an intelligent test case strategy, as this was inevitably controlled by the pursuer.

### **Damage to land, or to the interests of access takers and others**

The first instance decision in *Tuley* [6] seemed to have the practical effect that a landowner could never anticipate damage, but had to wait until it had happened (whether remediable or not) and only then take action. The pursuers were criticised by the sheriff because they had ‘engaged in an exercise of speculation as to the extent of damage which horses might cause... it cannot be said

*with certainty that any use of the red path by horse riders would be irresponsible..’.* The court, however, observed *‘In our view it makes little sense to say that the landowner must allow a mode of access which will be likely to prove productive of damage to the land and suffer that damage without being able to take preventative steps’.* Equally, a landowner is now permitted to bar access when this appears necessary for safety reasons; for example, in a wood where trees are to be felled, or to a dangerous path. There is no longer a need to wait for an accident. This, of course, involves a balancing of the rights and interests of all concerned. Rather than an approach by which the landowner’s interests invariably trump the interests of access takers, or vice versa, the local authority and the court should seek to balance not only these rival interests but the interests of others likely to be affected. Thus, in *Tuley*, the Court pointed out *‘what the pursuers were doing appears to be a responsible exercise of land management. While, as counsel for the pursuers put it, the Feddonhill Wood is a “working wood”, the fact is that the pursuers welcome public access to it by a variety of users - walkers, mountain bike users, and equestrians. What they seek to do is to make these activities compatible inter se by dedicating or allocating areas or paths to the particular recreational activities in question. That is in our view in compatibility with and in furtherance of their principal duty in section 3(1) of the Act.’* The converse was that horse-riding would turn the paths into mud, to the detriment of other users. This was, perhaps, an unusual case. Less benevolent and public-spirited landowners than these particular pursuers would not, I suspect, be very hard to find. The proper approach if the damage to the land (or to the interests of the landowner or others) from allowing access would be minimal remains to be tested.

### **Variation of notices**

It may turn out in court that a section 14 notice calls for the wrong remedy; the question then is whether the court can substitute a better one. In its final paragraph, the court leaves this open. This may be decided in the appeal to the sheriff principal in *Aviemore Highland Resort Ltd v Cairngorm NPA*, in which again I act for the appellant, which is at avizandum at present. The primary issue there is however whether section 14 can be used in respect of actings which entirely predate the coming into force of the Act on 9 February 2005.

**Footnotes:**

[1] Land Reform (Scotland) Act 2003: <http://tinyurl.com/cvnh5j>

[2] *Tuley v Highland Council*:

<http://www.scotcourts.gov.uk/opinions/2009CSIH31A.html>

[3] Odd style of citation, but seems to be correct.

[4] Col.1827 to 1844:

<http://www.scottish.parliament.uk/business/committees/historic/justice2/or-02/j202-3202.htm#Col1827>

[5] Scotways site: <http://tinyurl.com/cakpuq>

[6] first instance decision in *Tuley* :

<http://www.bailii.org/scot/cases/ScotSC/2007/34.html>

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