FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 22
XA59/17

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Appeal by

RENYANA STAHL ANSTALT

Pursuers and Appellants

against

LOCH LOMOND AND THE TROSSACHS NATIONAL PARK AUTHORITY

Defenders and Respondents

Pursuers and Appellants: Lindhorst; Russel & Aitken LLP
Defenders and Respondents: O'Brien; Harper Macleod LLP

27 March 2018

Introduction

[1] This litigation is about the access rights given to everyone over land in terms of Part I of the Land Reform (Scotland) Act 2003; known colloquially as "the right to roam". On one level it just involves a question about whether two gates on the pursuers' estate ought to be unlocked. This issue has already occupied some seven days of proof. The answers provided by the Sheriff and the Sheriff Appeal Court have differed. Their accuracy

depends, to a large extent, on whether: (i) a judgment of the Sheriff Principal (Young QC) in *Aviemore Highland Resort* v *Cairngorms National Park Authority* 2009 SLT (Sh Ct) 97, which concerned a fence constructed before the 2003 Act came into force, was correct; and (ii) *obiter dictum* of an Extra Division in *Tuley* v *Highland Council* 2009 SC 456, to the effect that the "purpose" of taking action which may prevent or deter access should be judged subjectively, is right.

Statutory Framework

[2] Section 1 of the Land Reform (Scotland) Act 2003 provides, *inter alia*, that everyone has the right to be on land, for recreational purposes or educational activities, and to cross land. The right is exercisable in respect of all land, except that specified in section 6. The main exceptions, which are relevant for present purposes, are: land on which there is a building or other structure; land forming the curtilage of a building which is not a house, or a compound or enclosure of such a structure; land which is sufficient to enable residents to have a reasonable degree of privacy and to ensure that their residence is not unreasonably disturbed; and land on which crops (plants, s 7(10)) are growing.

[3] Although general access rights are given to everyone, they are immediately constrained as they are said to exist only when "they are exercised responsibly" (s 2); that they do not cause unreasonable interference with the rights of others, including landowners. In assessing responsibility, regard must be had to the Scottish Outdoor Access Code (s 10). Section 3 of the 2003 Act provides that:

> "(1) It is the duty of every owner of land in respect of which access rights are exercisable –
>
> (a) to use and manage the land; and
>
> (b) otherwise to conduct the ownership of it,

in a way which, as respects those rights, is responsible."

This reciprocal responsibility is not to use the land in such a manner as would cause unreasonable interference with the access rights of others. Again, regard is to be had to the Code.

[4] Section 14 prohibits owners from doing certain acts "for the purpose or for the main purpose of preventing or deterring" persons from exercising their rights. These include: (a) erecting a sign or notice; (b) putting up a fence, wall or hedge; (c) having any animal at large; (d) carrying out agricultural or other operations; and (e) taking, or failing to take, any other action. Where a local authority consider that anything of that nature "has been done", they may require that remedial action, specified in a notice, be taken. Failure to comply with the notice entitles the local authority to remove the sign or notice or to take the specified remedial action.

[5] The Act provides (s 16) local authorities with powers to acquire land compulsorily in order to facilitate access rights. It imposes (s 17) an obligation on local authorities to draw up a system of core paths, creating reasonable access throughout the local authority's area. Local authorities may delineate a route by making a path order (s 22). The sheriff is given (s 28) a general jurisdiction, upon summary application, to determine the extent of access rights. The sheriff also has (s 14(4)) a special jurisdiction to hear appeals "against" any notices served under section 14.

The Land

[6] It is critical to understand the layout and nature of the land over which this dispute lies. The findings in fact made by the sheriff are important, although it has been necessary to supplement them (*infra*) with additional facts which are not in dispute in order to paint a

complete picture. The pursuers are an institution based in Liechtenstein. They are the owners of the Drumlean Estate, which is situated in the Trossachs, between Ben Venue and Loch Ard. Although the sheriff found that the estate extends to 1,500 acres, it is not disputed that it is much larger at 1,500 hectares (3,700 acres), as described by the pursuers' agent, Dr Reiner Brach, in his testimony. The sheriff found that part of the estate is operated as a farm, although the nature and extent of this operation are not clear.

[7] There is a farmhouse, other farm buildings and offices, which can be accessed by persons and vehicles through two gates (Main and Kennels) on the north side of the public road from Milton to Kinlochard (marked 3 and 2 on the estate plan, Annex A to this Opinion). Although the gates are not described in the sheriff's findings in fact, it is not disputed, and photographs used at the proof show, that they are large (not merely stock proof). They would make entry for persons, other than the particularly intrepid, exceedingly difficult. They form part of what the sheriff describes as a "fenced enclosure". However, the area enclosed extends to some 120 hectares (300 acres) of open hillside, in-bye (ie separately fenced) fields and woodland. The farmhouse and associated buildings are within this area. Rather than what might normally be described as an enclosure, it is effectively a farm surrounded by deer fencing, incorporating the two gates.

[8] It was agreed that the farm area is shown delineated in yellow on the estate plan. The roads from each gate lead up to the collection of farm buildings, where they join each other to form an inverted U shape. Beyond the buildings lies what is now a disused wild boar enclosure. Although the pursuers have expressed an intention to re-introduce the boar, this enclosure, which was surrounded by an electrified fence, ceased to be used in December 2013. Although again not described by the sheriff, it was not disputed, and it is clear from the estate plan and an Ordnance Survey map (Annex B to this Opinion) also produced, that

the internal roads from the gates formerly led to two tracks; one to the east, and one through the west, of the boar enclosure. The tracks zig zag up the hill to give access by different routes across the rest of the estate and up to Ben Venue. There were, also until 2013, Highland cattle on the farm. Although described as a "small herd" by the sheriff, it appears to have been little more than an ornamental group. The sheriff has found that between 120 to 150 deer occupy the estate; most of which are enclosed within the farm area.

[9] The sheriff made some general findings about the potential dangers to persons posed by deer, boar and cattle in certain limited circumstances. The propensities of such beasts might be thought to have been within judicial knowledge (eg *Hennigan* v *McVey* (1882) 9 R 411 (boar); *Harpers* v *Great North of Scotland Railway Co* (1886) 13 R 1139 (cattle)), especially that of a sheriff with a rural jurisdiction, rather than something requiring expert evidence. However, the sheriff expressly held that stags can pose a danger to persons in the rutting season (October). Deer can be "startled" by people. Cattle can present a danger during calving or if a person has a dog. The pursuers' farm manager, John Gardiner, had been attacked by the cattle in 2010 and 2013. Boar can be dangerous when with young.

[10] Since before the coming into force of the 2003 Act, the two access gates had been generally locked (other than when opened to afford access), as was a further gate (Altskeith) on the south-western fringe of the estate (no 1 on the estate plan). The latter gives access to a forestry road leading up through the estate to, amongst other popular hill walking locations, Ben Venue. There is a stile at this gate, albeit one in a dilapidated and dangerous state. Dr Brach did not dispute that this gate did not (given the state of the stile) require to be locked.

[11] The pursuers erected a sign stating "Danger Wild Boar" on the Main Gate prior to the 2003 Act's commencement. This Gate is about 300 metres from the boar enclosure. The

sign had been put up in order to keep people out of the area near the boar enclosure and to comply with a request from Stirling Council, who had licensed the keeping of the boar under the Dangerous Wild Animals Act 1976. Both the Kennels and Main Gates had been replaced in about 2009. The sign had been taken down in 2014.

[12] The sheriff found-in-fact that, over the years and prior to the general locking of the gates, there had been a number of incidents on the estate including: mountain bikers cutting fences; deer being shot; dogs chasing cattle; car and motorbike racing; the use of quad bikes; property damage and theft. On an occasion, several hill walkers had entered the kitchen of the farmhouse where Dr Brach had been in residence.

The Notice and Appeal to the sheriff

[13] By Notice dated 31 October 2013, the defenders alleged that the pursuers had contravened sub-sections 14(1)(a) and (e) of the 2013 Act, by erecting the wild boar sign and locking the three gates. The pursuers were required to remove the sign and unlock the gates. The Notice stated, presumably somewhat carelessly, that a failure to comply could result in the removal of "the fence".

[14] The pursuers appealed by summary application. The sheriff allowed the appeal. He did so on the basis of two findings "in fact and in law". First, (finding 2) the gates had been in place and locked, and the sign erected, before the coming into force of the 2003 Act. The pursuers were therefore not, according to the sheriff, the owners of land in respect of which access rights were exercisable as at 5 November 2013. The sheriff relied upon *Aviemore Highland Resort* v *Cairngorms National Park Authority* (*supra*), which concerned a fence built across a lane prior to the 2003 Act. The Sheriff Principal (Young QC) declined to order its removal. Secondly, (finding 3) the sheriff found that the "purpose or main purpose" of

locking the gates and putting the sign up was "to use, manage and conduct its ownership ... responsibly and not to prevent or deter responsible access being taken". The sheriff followed *obiter dictum* in *Tuley* v *Highland Council* (*supra*) (at paras [42]-[43]) to the effect that it was the subjective purpose of the landowner which had to be considered.

[15] In reaching his decision on purpose, the sheriff said that he had found the testimony of Dr Brach to be credible and reliable, despite creating a poor impression initially. The sheriff did not state what this testimony actually was. It is therefore necessary to have recourse to the transcription of the testimony in order to make sense of the reasoning in the sheriff's Note. The transcript reveals that Dr Brach, who was a steel trader by profession, said that he took the important decisions concerning the estate. The purpose of the sign and the locked gates was to keep hillwalkers out of "that area", as boar could be very dangerous, as could Highland cattle, when they had young with them. People with dogs could startle deer, who might run into and break down fences enabling them to eat the young tree shoots. It was to prevent incidents such as those which had occurred prior to the gates being locked in the mid-1990s. In summary, Dr Brach said that the reasons for keeping the two gates to the farm locked (he was not concerned with Altskeith) was: "Protection of animals, of all animals present on the farm. Protection of people and protection of materials on the farm." The animal protection related to loose dogs and their effect on the deer. "People" referred to those arriving without notice. The concern about materials related to the potential for theft; Dr Brach having given an example of such criminality involving five aluminium ladders.

[16] In passages in cross-examination which may have involved difficulties in translation and were peppered with frequent interruptions on the pursuers' behalf, Dr Brach denied knowledge of the negotiations (*infra*). He denied that Barrie Brandriff (*infra*) had any authority from the pursuers, despite his involvement in planning an access route through

the farm. He did not accept that he had discussed access matters with Mr Brandriff or John Gardiner (*infra*), although the latter had mentioned ongoing talks. He did not accept that he had instructed solicitors, who purported to be acting on the pursuers' behalf, or Mr Gardiner or Andrew Vaughan (*infra*). Perhaps, he surmised, Mr Vaughan had been instructed by Mr Brandriff or Mr Gardiner. He was unaware that planning permission for a path in the farm area (*infra*) had been granted.

[17] The sheriff recorded that he found support for Dr Brach's approach in the testimony of Colin McPhail, a farming manager at Balfron, to the effect that "you would not want the general public walking through that more heavily stocked area". Beyond that statement and a note that Mr McPhail's evidence was very helpful on the issues of the dangers posed by cattle and what the responsible landowner "could and should do" to manage livestock, there is no record by the sheriff of what Mr McPhail actually said. If recourse is had to the transcript, Mr McPhail said that he had extensive experience with cattle and sheep farming. He had advised the pursuers to "move on" their existing Highland cattle, which were replaced with a new "very quiet" group. Mr McPhail spoke of the dangers which cows with calves could pose, but he described the danger to the public as "not particularly great" unless there was a dog present. He did make the comment (*supra*) attributed to him by the sheriff about the more heavily stocked area. He said that a farmer would not want the general public walking "through the middle of that area or through the farm buildings or any area where there is likely to be cattle grazing or being handled". This seems to have been in the context of questioning about a "small area like that fenced off". He said that, in certain circumstances, the public should be kept away from Highland cattle; that is when they are kept in an enclosed in-bye area and at calving, which can be at any time of the year. The public should not be exposed to the danger of being "in a field" with any cattle.

[18] The sheriff also found support for Dr Brach's position in the evidence of John Gardiner, the pursuers' farm manager, who spoke to the incidents involving the public and his confrontations with the Highland cattle. Although Mr Gardiner's evidence extends to some 240 pages of transcript, much of it attempting to describe, in three dimensions, features marked on the estate plan, the sheriff says almost nothing more about it other than to state that Mr Gardiner had explained the workings of the farm. Mr Gardiner described the land enclosed by the deer fencing as the "farm". He spoke to the ability of people to "spook" deer and to cattle being dangerous when they were protecting their young. The same applied to the boar, but only when they were cornered. It did not apply to deer, which were only dangerous when the stags were in rut.

[19] Mr Gardiner referred to almost reaching an agreement with the defenders on the construction of an access path through the estate when Mr Brandriff was acting for the pursuers. Temporary signage had been put up to indicate the route, but these were later taken down. Mr Gardiner's main concern about letting the public into the farm area would have been to prevent them from entering the boar enclosure. People did come down off the hill and tried to exit via the Main or Kennels Gates. It had been an employee of Stirling Council who had said that it would be better if there were signs telling people about the presence of boar. The sheriff found limited support for Mr Gardiner's testimony concerning the dangers of animals from another witness, namely Robert Farquhar, a retired police officer, but he did not elaborate on this.

[20] The sheriff explained that he did not find the defenders' access and recreation advisor, namely Kenneth Auld, helpful; partly because he did not think that Mr Auld's avowed balanced approach to access had been evident in his dealings with the pursuers. The sheriff did not accept Mr Auld's view that "The right is to responsible access, and it is

up to those taking access to decide what is reasonable and what is not". According to the sheriff, the right was not to responsible access but to access land over which rights had been created by the 2003 Act. If such rights existed, they had to be exercised responsibly.

[21] The sheriff continued:

> "The most surprising aspect of Mr Auld's evidence was when he maintained in cross-examination that in assessing whether access rights existed he would not take into account the fact that a landowner submitted that gates had been locked since before the 2003 Act came into force."

This ignored the "*Aviemore* test". There was, according to the sheriff, force in the submission that Mr Auld had showed a desire to have open access to the estate regardless of the estate's needs.

[22] Once again, the sheriff makes very little reference to what Mr Auld's evidence of fact actually was. It is necessary once more to mention the salient points in the transcript in order to give content to the sheriff's reasoning. Mr Auld described his first contact with the pursuers, following a complaint about one of the locked gates from a member of the public. In 2007 and 2008 he had discussed the route of a compromise path from the Main Gate, through the farm and to the east of the boar enclosure, with the pursuers' advisor, Mr Brandriff. In terms of an email in October 2009, Mr Brandriff had said that, if the Main Gate could remain locked, access could be given to a proposed signed route through the farm via a "side entrance". The idea was to put a self-closing pedestrian gate next to the Main Gate. By 2011, an alternative suggestion, which was discussed by the parties, was access by the Kennels Gate and along a signed route towards the farm buildings but diverting to the west of the buildings and the boar enclosure and later joining up with the hillside tracks. Planning permission for 270 metres of new path, skirting the enclosure, had been granted in September 2011. Email correspondence suggested that Dr Brach had

approved this plan but had then suddenly, and disregarding the advice of the pursuers' forestry adviser, Mr Vaughan, changed his mind and proposed access routes which did not involve the farm area at all.

[23] Mr Auld dealt with the issue of cattle by explaining that there were cattle all along the West Highland Way. The Access Code set out how the public and landowners were to behave. There was specific mention of the need to avoid bringing dogs into fields where there were young animals. There were estates across the whole country where there was extensive public access and deer on open hills, forests and lower fields. The mixed presence of people and animals was commonplace.

[24] Mr Vaughan had been engaged by the pursuers in 2010 and became involved in the access issue during the following year. He was cited to the proof by the defenders. He testified that the presence of the boar presented a "fundamental health and safety" issue. The deer had been trapped for decorative purposes, but Mr Gardiner had been concerned about the dangers they might pose during the rut. He did not want the public coming into the farm area. The four or five Highland cattle had come in about 2011. There were only 15 to 20 deer (cf the sheriff's finding *supra*). Mr Vaughan described identifying, with Mr Auld, a route for the public along the road from the Kennels Gate and then along what would be a new path up to the tracks leading to Ben Venue.

[25] Mr Vaughan disagreed with Mr Auld's desire to remove the wild boar sign. The placing of the sign at the Main Gate had been to deter persons taking access to an area where there might be boar. At that time, the Main Gate had not been locked all of the time. Mr Gardiner did not want the public coming through the Main Gate because it would lead them to the "curtilage of the farm" with no option but to walk past the farmhouse and

buildings. Mr Vaughan's view was that the sign should remain to discourage that happening.

[26] Mr Gardiner had accepted the proposal, which Mr Vaughan recommended, of permitting access at the Kennels Gate. Planning permission had been granted for the new path on this route, for which a £3,000 grant was available. Mr Brandriff had agreed to this route and it had been approved by Dr Brach. Mr Vaughan considered that, at this time, the estate had been in breach of the 2003 Act, having removed a stile at the Kennels Gate and the temporary signage which had been put up. That plan had then been changed and the pursuers' approach, with which Mr Vaughan felt uncomfortable, was that all three gates would remain locked. Mr Vaughan's evidence satisfied the sheriff that the pursuers had addressed:

> "the duty incumbent upon [them] in terms of section 3 of the 2003 Act and applied a legitimate subjective test envisaged in *Tuley* [v *Highland Council* (*supra*)] in coming to the decision ... not to open the gates or remove the wild boar sign."

[27] The sheriff made reference to the testimony of Anne Gray, which he did not find helpful, because she had no experience of the pursuers' livestock. Again, he does not describe this evidence. She had been employed as a policy officer by Scottish Land and Estates, a landowners and managers' organisation, which had produced guidance on access. She advised the membership on access issues. She was also a member of other relevant outdoor bodies. She had a farming background, primarily with sheep, beef and some pigs. Ms Gray considered that the description "right to roam" was inaccurate in so far as it might be seen as absolute. She referred to various methods, such as warning notices, which could be used where there was a danger to the public as a result of cattle with calves being in the vicinity of a public access area. She gave evidence about how estates with deer could also

use signage during the rut. She accepted that enclosed deer could become aggressive if they felt threatened.

[28] The pursuers had objected to the relevance of the evidence (*supra*), and the underlying averments in the answers to paragraphs 6 and 7 of the Summary Application, concerning the pursuers' offers to build alternative paths and their disregard of Mr Vaughan's advice. The defenders had countered that this evidence was relevant to the issue of "how genuine" the pursuers were about their stated purpose for the locked gates and sign. The sheriff sustained the objection partly on a ground, which had not been advanced, that the averments were part of pre-litigation negotiations, which were privileged. He also stated that he could not see how attempts to resolve the dispute were relevant. Any advice given to the pursuers was equally irrelevant.

[29] In his assessment of Dr Brach, the sheriff did not therefore take into account the pursuers' proposals (ie essentially those which had either been agreed to by Dr Brach or of which he must have been aware) to resolve the dispute or their reaction to the defenders' counter suggestions, although he does appear to have had regard to the defenders' approach when analysing Mr Auld's testimony. The sheriff did not take into account the advice tendered by Mr Vaughan to the pursuers to resolve the matter.

[30] The sheriff explained that he had reached the conclusion that:

> "the pursuer's main purpose in locking the gates (at least the Main and Kettles (*sic*) gates) was not directed towards preventing the responsible access-taker exercising statutory access rights … [but] to maintain the enclosure within which there was a working farm with machinery, animals which required protection and animals which at times posed a danger to humans … In particular ... the historical incidents spoken to by the witnesses for the pursuer took place and formed the background to the pursuer taking the decision to lock the gates. [The] pursuer's main concern was in keeping the Main gate and Kettles (*sic*) gate locked. That is because the access points at these gates lead directly to the deer enclosure; once through the gates the access-taker is within the enclosure itself. The access road from both gates leads directly to Drumlean Farm and its curtilage. From the Main gate the access-taker

> requires to pass the wild boar enclosure and out-buildings in which farm machinery is stored."

The sheriff added that there had been two other matters of significance which persuaded him that the pursuers' main purpose was not to prevent responsible access. The first was that what he described as 120 acres was only 10% of the total estate. Secondly, access through the Altskeith gate was "not a real issue" for the pursuers as it did not lead into the "enclosure". Both factors added "credence" to the pursuers' position about the main purpose of locking the other two gates. The reason for putting the boar sign up was because it was what the local council had wanted.

[31] It had been submitted at the conclusion of the proof that, in addition to the residential and farm buildings and the boar enclosure, the whole of the farm land within the deer fence fell to be excluded from land over which access could be taken, because of the operation of the reasonable privacy and unreasonable disturbance elements of section 6(1)(b) of the 2003 Act. This contention, which had not formed part of the summary application, was rejected by the sheriff.

The Sheriff Appeal Court (2017 SLT (Sh Ct) 138)

[32] The Sheriff Appeal Court observed (at paras [33] and [34]) that, although "purpose" was, following *Tuley* v *Highland Council* (*supra*) to be assessed subjectively, whether an owner was acting responsibly was to be assessed objectively, having regard to, amongst other things, the Scottish Outdoor Access Code.

[33] The SAC dealt first with the issue of timing; that is whether the fact, that an action to enclose land had been completed before the coming into force of the Act, meant that there were no access rights exercisable in respect of that land. The SAC determined that *Aviemore*

Highland Resort v *Cairngorms National Park Authority* (*supra*) had been correctly decided on its facts, but the issue there had been concerned only with the removal of a fence constructed before the Act. That was not the position here. The defenders were complaining, not about the erection of the gates in contravention of sub-section 14(1)(b), but upon a continuing failure to unlock the gates, contrary to sub-section 14(1)(e). In any event, the Main and Kennels Gates had been both replaced and unlocked since the coming into force of the Act. The Altskeith Gate, it had been accepted, ought to be opened.

[34] The SAC reached the view (para [39]) that the sheriff's approach had failed to take into account whether the pursuers' use of the land had been responsible. There was a positive obligation to consider whether gates, which had previously been locked, ought to be unlocked. The farm area was land to which the Act applied (para [42]) and over which access rights were exercisable. Subject to the "purpose issue", the pursuers were not entitled to continue to refuse access to that area by locking the gates or displaying a wild boar sign.

[35] On the issue of purpose, the SAC proceeded (para [45]) on the basis that the *dictum* in *Tuley* v *Highland Council* (*supra*) had been correct and that a subjective assessment of the pursuers' "*bona fides* and honesty" was required. On this analysis, the defenders were entitled to explore the evidence about the prior negotiations and the advice tendered. The sheriff had accordingly erred in that regard. He had indulged in a frolic of his own by founding upon privilege, which had not been argued. The SAC did not accept the sheriff's assessment of Dr Brach's testimony, given that he had excluded from his consideration the evidence about the negotiations. The sheriff had rejected much of Mr Auld's testimony because of Mr Auld's approach to the timing issue. The SAC, however, broadly accepted that approach. The sheriff had not based his acceptance of Dr Brach on demeanour. The SAC held (para [50]-[51]) that the sheriff had failed: to make a finding on what the pursuers'

purpose was; to have regard to the Access Code; and to appreciate that many of the pursuers' concerns, even if genuine, were of such general application that they could not properly amount to a legitimate purpose under section 14. The licensing requirements of Stirling Council had not required a wild boar sign.

[36] The SAC had regard (paras [55]-[57]) to the strictures in *Clarke* v *Edinburgh and District Tramways Co* 1919 SC (HL) 35 (at 37), *Thomas* v *Thomas* 1947 SC (HL) 45, *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 (at para 67). They considered that the sheriff had been "plainly wrong" in his assessment of Dr Brach because he had not taken into account the excluded material on negotiations and advice. He had erred in rejecting Mr Auld because of his (correct) approach to access rights. The sheriff had given no clear and satisfactory reasons for accepting Dr Brach (cf *Jordan* v *Court Line* 1947 SC 29). In these circumstances, the appellate court could treat the matter as being at large for them to re-determine (*Morrison* v *J Kelly & Sons* 1970 SC 65; *Jordan* v *Jordan* 1983 SLT 539; and *Angus* v *Glasgow Corporation* 1977 SLT 206).

[37] The SAC took (para [59]), as a starting point, Dr Brach's testimony that there were reasons for preventing public access, *viz*. the protection of people, animals and machinery. He had not mentioned a desire to prevent antisocial behaviour, and the references to such incidences were thereby irrelevant. On the dangers to people, both the Act and the Access Code envisaged access over land where cattle and deer were present. Evidence, that their presence provided no basis for excluding the public, had been given by Ms Gray, Mr Auld, Mr Vaughan and Mr Gardiner. Neither Dr Brach, Mr McPhail or Mr Farquhar were in a position to give expert evidence on this, other than perhaps Mr McPhail, whose evidence of danger was confined to calving cattle. In considering the dangers of "enclosed" animals, the size of the farm area had to be taken into account.

[38] Similar considerations applied to the protection of machinery, where there had been conflicting evidence. The excluded material on the negotiations "tended to give the lie" to Dr Brach's assertion that he was motivated by the concerns which he professed to have. There was (para [62]) a clear body of evidence that Dr Brach had been aware of the proposals being advanced on behalf of the pursuers. His avowed concerns were inconsistent with the Access Code. The SAC, having considered the whole of the evidence (para [63]), reached the view that Dr Brach could not genuinely have reached a conclusion that the public should be excluded from the farm as a matter of responsible land management. The pursuers' main purpose in locking the gates had been to deter persons from taking access. The facts that access was available over other parts of the estate, and that the dispute concerned only 10% of the total, "mattered" not. Even if the pursuers' concerns had been genuinely held, the prohibition contained in section 14 would still have applied, because the concerns were so broad as to amount to an argument against access rights in general, rather than to anything particular to this part of the pursuers' estate.

[39] The SAC made certain additional findings in fact. These included that the sign had been re-affixed when the Main Gate had been replaced. All three gates had been used since the coming into force of the 2003 Act. The effect of locking them and erecting the sign had been to prevent or deter members of the public from obtaining access to the estate. Any risks posed by cattle or deer were no greater than normal. The Access Code had envisaged that members of the public could take access in the circumstances. Any risks to the pursuers' machinery were no greater than those applicable to farms generally.

[40] The SAC made detailed findings on the negotiations between the parties, including that proposals to create routes through the farm had been advanced by the pursuers, notably by Mr Brandriff and Mr Gardiner. Mr Vaughan had agreed a route with Mr Auld

for public access through the Kennels Gate and around the buildings and wild boar enclosure towards the tracks leading to Ben Venue. Planning permission had been granted for this. Dr Brach had been aware of the nature of the proposals for public access. His view that the public should be excluded in order to protect the public and the animals was not informed by any expert advice or the Access Code. The pursuers had failed to act on Mr Vaughan's advice that keeping the gates locked was in breach of their duties under the 2003 Act.

[41] The SAC quashed the sheriff's operative findings in fact and law and substituted the following:

> "2. With the exception of the buildings on the estate, their curtilage and the area of the wild boar enclosure, the Drumlean Estate was land in respect of which access rights were exercisable under the Land Reform (Scotland) Act 2003.
>
> 3. The pursuer's main purpose in locking the Main Gate, Kennels Gate and Altskeith Gate, and in having in place the sign bearing the words 'Danger Wild Boar', was to prevent or deter persons entitled to exercise access rights in respect of the Estate from doing so, contrary to section 14(1) of the 2003 Act.
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> 4. The pursuer contravened section 14(1)(a) of the 2003 Act by putting up the sign bearing the words 'Danger Wild Boar' at the Main Gate.
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> 5. The pursuer breached section 14(1)(e) of the 2003 Act by locking the Main gate, Kennels gate and Altskeith gate.
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> 6. The pursuer breached section 14(1)(e) of the 2003 Act by failing to unlock the Main gate, Kennels gate and Altskeith gate."

Submissions

Pursuers

[42] The pursuers maintained that the SAC had erred in distinguishing *Aviemore Highland Resort* v *Cairngorms National Park Authority* (*supra*). The same considerations applied to a locked gate, which had been installed prior to the coming into force of the Act, as they did to a fence. The 2003 Act did not grant a power to order the unlocking of gates which had been

locked prior to the Act. A landowner was not obliged to take active steps to provide access to his land. The SAC's decision had effectively overruled *Aviemore Highland Resort*.

[43] The subjective approach in *Tuley* v *Highland Council* (*supra*) had been correct. A landowner was entitled to take appropriate action to prevent what might otherwise be lawful access as part of responsible land management. This was contrary to the approach of the SAC; that access rights were exercisable over all land, unless it fell within the exceptions in section 6. The reasons for the pursuers' actions had been the subject of uncontradicted evidence about the conduct of previous access takers. The SAC had erred in holding that: (1) the sheriff should have had regard to irrelevant evidence, namely the discussions between the parties, in determining the credibility of Dr Brach; (2) the assessment of purpose "must" involve an examination of the landowner's *bona fides* and honesty. *Tuley* v *Highland Council* had stated only that the assessment may include *bona fides*. There was a distinction between that and credibility. If *mala fides* were put in issue, it had to be averred; and (3) it was open to the SAC to consider matters *de novo*. They had failed to take into account the sheriff's advantage of having seen the witnesses (*Clarke* v *Edinburgh & District Tramways Co* (*supra* at 36-37); *Thomas* v *Thomas* (*supra*); *McGraddie* v *McGraddie* (*supra*) at para [2]; *Piglowska* v *Piglowski* [1999] 1 WLR 1360 at 1369). The SAC had erred in having regard to the Access Code and thereby recasting the purpose test as an objective, rather than a subjective, one. They had erred in failing to have regard to the small percentage (10%) of the estate over which the pursuers sought to restrict access. The rest of the estate was open to the public.

[44] If the sheriff had been in error in excluding the irrelevant evidence from consideration, the SAC ought to have remitted the case for reconsideration by the sheriff

(Courts Reform (Scotland) Act 2014, s 111(1)(a)(iv)). They had given no reasons for rejecting the pursuers' motion to do so.

[45] The SAC had erred in concluding that Dr Brach could not genuinely have reached his conclusion that the public ought to be excluded as a matter of responsible land management. Such a conclusion was unreasonable on the evidence. The SAC had directed themselves solely to Dr Brach's testimony. In assessing whether the sheriff had erred, it was not enough simply to say that it should be disregarded. They required to determine whether the sheriff had been "plainly wrong". They had not done that. There was unchallenged evidence that both the Main and Kennels Gates led directly and only to the farm buildings. The route to Ben Venue was by using the Altskeith Gate. The "wild deer enclosure" contained a working farm, with machinery, deer and cattle requiring protection. The livestock could pose dangers to humans. The SAC had misstated the position that the evidence had been that the presence of cattle and deer provided no basis for excluding the public. Neither Ms Gray, Mr Vaughan or Mr Gardiner had given evidence to that effect.

[46] The SAC had failed to set out adequate reasons for rejecting the submissions of the pursuers, or the evidence of the pursuers' witnesses. They had looked at the evidence on an item by item basis, rather than as a whole. They had disregarded vast tracts of testimony about the historical incidents. They did not explain why they rejected the evidence from Mr Vaughan that the wild boar sign had been put up because Stirling Council had requested this. They had failed to set out the basis upon which they had made findings of fact in relation to Mr Brandriff, who had not given evidence. They had erred in failing to dismiss the appeal as academic, given that the remedial measures in the notice specified the removal of a fence, rather than the unlocking of gates.

[47] The hearing before the SAC had not provided a sufficient guarantee of the pursuers' Article 6(1) Convention rights, given that they had: not heard the evidence; failed to have regard to the whole evidence; and not provided reasons for their conclusion. This all amounted to an incompatible interference with the pursuers' right to property under Article 1 of the First Protocol. There had to be a very clear intention to alter the rights of landowners. The Act had to be compliant with the Human Rights Act 1998 and a clear statement that the 2003 Act had intended to affect the rights of landowners was needed (cf *Wilson* v *First County Trust (no. 2)* [2004] 1 AC 816 at paras 90, 94-99, 153, 179-197 and 219).

Defenders

[48] The defenders submitted that the SAC's approach to *Aviemore Highland Resort* v *Cairngorms National Park Authority* (*supra*) had been correct. That case did not involve a course of conduct after the Act had come into force or a failure to make changes required by the Act. The defenders' notice was based on the pursuers' continuing conduct by locking, or failing to unlock, gates and to remove a sign. All three gates had been in use since the coming into force of the Act. There had been no retrospectivity (cf *Wilson* v *First County Trust* (*supra*)).

[49] The remarks on purpose in *Tuley* v *Highland Council* (*supra*) were expressly *obiter*. There was a logic in adopting an objective approach. If a subjective one were taken, that would conflict with the other sections of the 2003 Act, including those on responsibility and the need to have regard to the Access Code. It would be strange if a landowner could rely upon his own opinion to escape from the consequences of a section 14 notice. A subjective approach would conflict with the objective approach in section 1 relative to the purposes for which access could be taken. What the pursuers had done here was exclude the public from

land which had no special features. All that they were saying was that it was not appropriate for the public to access this type of farm, when the 2003 Act dictated otherwise.

[50] A landowner could not escape from the requirements of the Act simply by claiming that his purpose was to avoid a risk inherent in access rights generally. That would not be a purpose, but a motive or reason for disagreeing with the existence of these rights. There was no evidence that the pursuers had excluded the public because of past events. Dr Brach said that it was to protect people, animals and machinery. There was no evidence that the risks to the public entering the deer fenced area were any greater than the norm when public entered areas with cattle, deer or boar. There were no findings of any particular risk specific to the pursuers' estate.

[51] The evidence about the discussions regarding access had been relevant to the question of whether the pursuers genuinely held the concerns which they founded upon. The same applied to the pursuers' failure to act on their expert's advice. The putting forward of proposals for public access was inconsistent with a contention that the public required to be excluded as a matter of good estate management. Dr Brach had sought to distance himself from the discussions and only latterly accepted that he had discussed the issue with his staff. The pursuers had themselves averred that they had sought to engage constructively in relation to access. The evidence which the sheriff had excluded had tended to show that this was not the case. There had been no argument supporting a case of privilege.

[52] The SAC had given ample reasons for its decision. They were correct to say that the percentage of the area relative to the total estate did not matter. The absence of Mr Brandriff did not prevent the SAC from making findings based on the documents proved. The SAC had not reversed the sheriff's findings on credibility and reliability, based on demeanour.

They had re-evaluated the case because the sheriff had disregarded an entire chapter of relevant evidence in reaching his view. The sheriff had rejected Mr Auld's evidence because he had erroneously considered that Mr Auld had misunderstood access rights. He had failed: to make a finding on what the pursuers' purpose had been, beyond a general one about its legitimacy in farming terms; to take account of the provisions of the Access Code concerning the public in areas containing livestock; and to consider whether any of the concerns advanced were specific to the pursuers' estate. He had erred in his whole approach to the evidence. There had been no need for the SAC to hold that the sheriff had been plainly wrong when there was a material error of law, findings in fact without an evidential basis and a failure to consider relevant evidence (*Henderson* v *Foxworth Investments* (*supra*)).

[53] The SAC had been entitled to reject the sheriff's finding on the pursuers' purpose because: (i) it was made without reference to the excluded material; (ii) there was no explanation as to why Dr Brach was to be regarded as credible and reliable; and (iii) it was made without reference to the Access Code. The sheriff ought not to have derived support from Mr Farquhar or Mr McPhail, as they had no relevant expertise or experience. The SAC had approached the case on the basis that the *obiter dictum* in *Tuley* v *Highland Council* (*supra*) had been correct. Even on a subjective view, the SAC had been correct to hold that the purpose was not a legitimate one. Once the matter had come to be at large for the SAC, it was possible to infer that the purpose was to create an obstacle to access and Dr Brach's evidence fell to be rejected.

[54] The Human Rights grounds should be refused as vague and lacking in specification. It was not suggested to the SAC that it had not complied with Article 6. There was no basis for considering that the pursuers' Article 1 Protocol 1 rights were infringed. This had not

been submitted to the sheriff or the SAC. The case was not academic because the court could vary the notice or the defenders could take remedial action by unlocking the gate. The court should not remit the cause to the sheriff given that it could reconsider the case on the basis of the transcription of the proof (*MacLeod's Legal Representatives* v *Highland Health Board* 2016 SC 647).

Decision

[55] Section 1 of the Land Reform (Scotland) Act 2003 specifies that everyone has the right to be on and to cross over all land, other than that excepted under section 6, for recreational purposes or educational activities. Section 6 excludes, in practical terms, access rights in relation to a person's residence and such adjoining land as is sufficient to afford a reasonable measure of privacy and protection against unreasonable disturbance (ie usually, any garden ground). In this case, therefore, such of the farm buildings as are lived in by persons, and a reasonable amount of land around them, would be excepted from the land covered by the Act. Section 6 also excludes non-residential buildings, their curtilages and compounds or enclosures containing a structure of some kind. Therefore, an area, as yet undefined, around the farm buildings could also be excepted from land over which the 2003 Act rights exist. It may be that the limited amount of enclosed land, which housed the wild boar, might be excepted too, at least if it contained a structure. However, other than the belated attempt at the end of the proof, which was noted and rejected by the sheriff, it was not contended that any of the section 6 exemptions could apply to the entire farm area (the 120 hectares) or to the specific areas of land, some 100s of metres away from the farmhouse and buildings, upon which the locked gates and boar notice were situated.

[56] The sheriff was correct to reject the contention concerning the possible exemption of the farm area, including the locations of the gates and sign, because such a case was not included in the summary application. In any event, such a proposition would have been bound to fail, standing the extent of the area under consideration. The contention was not revived on appeal.

[57] On the face of the legislation, everyone has the right to be on or to cross the pursuers' estate, including the extensive wooded, pasture and hillside parts of the farm. It is tolerably clear from the maps, and despite an absence of specific findings from the sheriff, that the Kennels and Main Gates (as well as the Altskeith Gate) did once permit access across the farm area to the paths leading up to the attractive hillside slopes over which routes to Ben Venue are marked. However, the right would permit a person to be on the farm even if he or she did not wish to climb the hill, but only sought to stand and admire the deer, cattle or boar. All of this is entirely without prejudice to the pursuers' right as landowners to erect such fences or walls in the vicinity of the farmhouse and other buildings sufficient to protect the privacy and safety of persons living and working there and the security of items, such as machinery, kept there. If there were a dispute about what expanse of land this might cover, the pursuers could seek a declarator, under section 28 of the 2003 Act, seeking to exclude specific areas from those over which access could be taken (eg *Snowie* v *Stirling Council* 2008 SLT (Sh Ct) 61; *Gloag* v *Perth and Kinross Council* 2007 SCLR 530).

[58] The first question is whether the SAC were correct, and the sheriff wrong, in understanding the *ratio* of *Aviemore Highland Resort* v *Cairngorms National Park Authority* 2009 SLT (Sh Ct) 97. The pursuers' argument, which the sheriff accepted, came to be that, if an area of land, which would otherwise be covered by the 2003 Act, was already enclosed before the Act came into force, there was no obligation on the landowner to facilitate access

to that land by, for example, unlocking locked gates or providing stiles. Although a fit person may manage to climb these obstacles, and would thereafter be entitled to be on the land enclosed, the pursuers contended that the landowner was under no obligation to facilitate his access, or egress. The court is unable to sustain this contention.

[59] Unless the land is excepted under section 6, it is land to which the rights attach. It then becomes the duty of the landowner under section 3 to use and manage it, and otherwise conduct the ownership of it, in a way which, as respects those rights, is responsible. In this case, where there is a right to cross and to be on the farm area, the only responsible action is to permit the rights to be exercised by allowing access to the area. This must involve unlocking any gate or gates and removing any signs which prevent or deter such access.

[60] *Aviemore Highland Resort* v *Cairngorms National Park Authority* (*supra*) concerned a notice under section 14(2) concerning an act (putting up a fence) said to have been in contravention of sub-section 14(1)(b) of the 2003 Act. It sought removal of the fence on that basis. The problem was that the fence had been put up before the Act had come into force. There was thus, as the Sheriff Principal (Young QC) held, no breach of section 14(2) which specifies that the conduct had to have "been done in contravention of sub-section (1)". In so far as it so decides in relation to a positive act under sub-section 14(1)(a), it may have been correct. That is not, however, to say that the defenders in that case could not have, as the defenders have done here, proceeded under section 14(1)(e) (take, or fail to take, any other action), which is what would be involved, at least in a situation where gates have been replaced or are periodically unlocked. It is true that the Sheriff Principal expressed a general view (at 100) that "the submissions for the pursuers are to be preferred". These submissions had included (at 99) a statement that no notice under section 14 could competently be served

in respect of works, actions or omissions prior to the coming into force of the Act. That proposition is too broadly stated. In so far as the Sheriff Principal may be understood as having sustained that submission, he was in error. If a particular action prevents the exercise of the general right, the landowner may, under sub-sections 14(1)(e) and (2), be required to take remedial steps to undo any action, including the locking of a gate, or to remove a sign or unlock a gate which he has "failed" to remove or unlock as part of his duty of responsible management of his land, having regard to the right under section 1.

[61] The court agrees with the SAC on this point. The land in question was land over which access rights under the 2003 Act were exercisable. The defenders were, as a generality, entitled to take action in respect of these rights under section 14(1). The pursuers' contention to the contrary accordingly falls to be rejected.

[62] The second issue is whether the SAC and the sheriff were correct to follow the *obiter dictum* in *Tuley* v *Highland Council* 2009 SC 456 (Lord Eassie, delivering the Opinion of the Court, at para [41]) to the effect that, when the court is determining the purpose of the action complained of, it ought to be looking into the mind of the landowner in order to ascertain, subjectively, his honesty or "*bona fides*" in maintaining that the act was not to prevent or deter exercise of the public's 2003 Act rights. In determining this issue, the court must search for the meaning of the words used in section 14(1) of the 2003 Act. It must ascertain the intention of Parliament expressed in the statutory language in its particular context (*MacMillan* v *T Leith Developments* 2017 SC 642, LP (Carloway) at para 54, citing *R (on the application of Spath Holme)* v *Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349, Lord Nicholls at 396-7, citing in turn *Black-Clawson International* v *Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, Lord Reid at 613). An appropriate starting

point is that the language is to be taken to bear its ordinary meaning in the general context of the statute (*ibid*).

[63] Section 14 provides that the landowner cannot do certain acts "for the purpose or for the main purpose of preventing or deterring any person" from exercising his or her access rights under the Act. The context of this prohibition is a regime in which persons can access rights for recreational purposes or educational activities (s 1), with both parties having an obligation to act responsibly (ss 2 and 3), having regard to the Scottish Outdoor Access Code (s 10). What is envisaged is a national scheme involving access to land for certain purposes. These have to be judged objectively; that is, for example, according to what the reasonable person would regard as a recreation and not what an individual considers to be his or her, perhaps unique, form of play. Responsibility and the concept of duty also have in mind objective standards, including reasonableness. Similar considerations apply to determining areas of land to be excepted under section 6 as affording a reasonable measure of privacy. This has to be done using the standard of the reasonable person (*Snowie* v *Stirling Council* (*supra*), Sheriff Cubie at para [51]).

[64] Section 14 does not refer to the landowners' purpose as such but to the landowners' acts which are what have to be looked at, if necessary by the court, objectively to see what their purpose or main purpose is. By purpose is meant their aim objectively ascertained and not the particular landlords' intention or motive (see the distinction in *Cheshire West and Chester Council* v *P* [2012] PTSR 1447, Munby LJ at para 75, reversed on other grounds at [2014] AC 896). Were it otherwise, identical factual situations could result in different, and inconsistent, applications of the Act according to the mental processes, maybe flawed, of the individual, perhaps eccentric, landowner. Rather, the court has to decide, looking objectively at all the circumstances, what the purpose or main purpose of locking the gates

and putting up the notice is. In this respect, both the sheriff and the SAC were in error, albeit understandably so, in following the *obiter dictum* to the contrary effect in *Tuley* v *Highland Council* (*supra*).

[65] If an objective approach is taken, the honesty, "*bona fide*" or, perhaps more accurately, the credibility of the landowner in relation to his stated motive cease to be material in the solution to the question; even if the expression of that motive may set the parameters for the court's objective determination by defining the alternative purpose to the prevention or deterrence of access. Evidence of what was proposed by the pursuers' agents in negotiations, or what the landowners were advised to do, is also immaterial in this particular exercise. It may be that a landowner proposed a compromise at one point, but ultimately decided not to proceed with it. Both are legitimate acts. They may have some bearing on whether the original proposal was made *bona fide* and may shed light on the thinking of the landowner. However, they do not affect the legality of the landowner's actions, judged objectively, in taking, or failing to take, the action required in the notice. The same consideration applies to the advice given but rejected. The views of, for example, Mr Vaughan, on what ought or ought not to be done in order to comply with the access rights defined by the 2003 Act are irrelevant. The extent of the rights, and what is to be done to comply with them, are all matters for the court. The views expressed in both the negotiations and the advice may nevertheless have some bearing, however, on what can be done, as an act of responsible land management, to facilitate access on the one hand and to minimise unnecessary intrusion or disturbance to stock on the other. In that limited sphere, they may have some relevance.

[66] Both the sheriff and the SAC were in error in proceeding on the basis that the issue of purpose fell to be resolved by a determination of Dr Brach's honesty, *bona fides* or credibility.

A finding on Dr Brach's "genuineness", or lack of it, could not produce an answer to the central question, which fell to be resolved by looking at the pursuers' acts and deciding, in all the circumstances and applying an objective test, whether they prevented or deterred access to or over this area of land, which, for reasons already set out, was not excepted from that referred to in section 1 of the 2003 Act. In short, the fundamental problem with the approach of both the sheriff and the SAC, understandably formed in light of the *obiter dictum* in *Tuley* v *Highland Counci*l (*supra*), is that it regards the honesty, *bona fides* or credibility of the individual landlord as, in effect, determinative. For the reasons given above, that is an error of law. Since it permeates the whole reasoning of both the sheriff and the SAC on the issue of purpose, that matter requires to be re-appraised by this court.

[67] When the merits are reconsidered in light of this approach, the inevitable conclusion is that the main purpose of locking the gates was to deter persons from exercising their rights of access and transit under section 1 of the 2003 Act. Whatever motive, intention or reasons may have been proffered by Dr Brach for doing so, and whether they are genuinely held, the gates were and are locked for the purpose of preventing or deterring access to the farm by the public; that being land on which they have a right to be or to cross. As this is a matter of law, it does not involve trespassing on ground usually reserved to the court of first instance. It can proceed on an acceptance that Dr Brach's views on farm management, and the need to exclude the public from areas in which deer roam and cattle graze, may be genuinely held.

[68] It follows from what has been said that much of the testimony led before the sheriff had, and has, little bearing on the central issue to be determined. Although some evidence about land management may be useful, the arguments in relation to the propensities of cattle and deer are unsustainable in the context of an area of 120 hectares (300 acres). Such

an area cannot reasonably be described as an "enclosure", as if it were a single field or similar rural feature. It is a farm extending a considerable distance along the Milton to Kinlochard road. Preventing access into and through this area presents a substantial obstacle for persons on the road seeking to access the woodland and fields of the farm, the open hillside above them and ultimately, should members of the public choose to use them, to the various tracks on the slopes leading to Ben Venue. The presence of Highland cattle, even in numbers much greater than those which were kept at the time of the notice, cannot objectively be a responsible reason for preventing the public from doing this. The same applies to the deer.

[69] It does not take an expert to explain to a court that cattle can pose a danger to persons entering a field, especially with a dog, when there are calves present. Equally, it does not require expert evidence to hold that any danger is routinely managed satisfactorily in rural areas throughout the country by following, what happens to be written in the Access Code, but what should be well known to any responsible person seeking access to the countryside for recreation or education. Expert testimony is not needed in order to find that stags can be dangerous during the rut, but that they are otherwise relatively shy creatures who, again throughout the rural counties, create no material risk to those traipsing over their territory. There was no evidence to suggest that the cattle and deer on the farm were any different from those on farms throughout the country. Similar considerations in relation to access apply with greater force to the Altskeith Gate, where there is no issue there concerning the livestock. In all of this, responsible land management can accommodate public access, by the creation of paths and the use of signage, effectively encouraging access to defined parts of the land.

[70] The boar were kept in a separate, relatively small, enclosure. The defenders did not seek to take action against the pursuers from prohibiting access to this enclosure, which, when operating, was surrounded by an electric fence. In a situation where the licensing authority have requested that a warning sign be put up (even if it is not a formal requirement of the licence under the Wild Animals Act 1976) it can hardly be objectionable to do so. Here, the uncontradicted evidence was that the sign had been put up because of that request.

[71] The SAC were correct in holding that the percentage area over which access was sought, relative to the total estate owned by the pursuers, was irrelevant. The considerations to be taken into account would be the same, whether the pursuers' estate had been confined to the farm area or extended to the whole of the Trossachs. The locking of the gates prevented or deterred access not only to the farm area but also through it from the public road up to the slopes of Ben Venue, even if an alternative route to the summit was available.

[72] It was not necessary for Mr Brandriff to testify before the SAC could make findings about what he had proposed. This was proved by documents, notably emails, either agreed by joint minute as being what they bore to be and/or spoken to by other witnesses, notably Mr Auld.

[73] The failure to unlock the Altskeith and Kennels Gates amounts to a breach of section 14(1)(e) of the 2003 Act. To that extent, the appeal from the SAC fails. However, once access were to be available through the Kennels Gate, the public would have access into and through the farm and onto the hillside and beyond. In these circumstances, keeping the Main Gate locked would not breach the section, since it would not then prevent or deter access. The SAC erred in finding that the erection of the wild boar sign on the Main

Gate was not "wanted" by Stirling Council, in terms of the sheriff's findings in fact (15), even if it was not a condition of the licence. On the evidence, the sign was erected at the request of the local authority.

[74] Although the SAC had the power to remit the cause to the sheriff in terms of section 111(1)(a)(iv) of the Courts Reform (Scotland) Act 2014, such a course of action would have been highly unusual in the circumstances, where the remit would be for a re-determination of the merits of a cause to a sheriff who had already decided these merits. The power in that section reflects the terms of section 32(2) of the Court of Session Act 1988, which formerly permitted a remit to the sheriff or sheriff principal "with instructions" and now contains the same power in relation to the SAC. Where it is determined that a sheriff (or Lord Ordinary) has erred in his or her assessment of the facts, by failing to take into account material, relevant and competent evidence, or otherwise misdirecting himself or herself on the law, the usual consequence is that his or her decision is vitiated. The appellate court must then reassess the evidence, on the printed page, and make a new determination (*Scottish Ministers* v *Stirton and Anderson* 2014 SC 218, LJC (Carloway) at para [87], distinguishing *T* v *T* 2001 SC 337 (remit to a different sheriff), followed in *MacLeod's Legal Representatives* v *Highland Health Board* 2016 SC 647, Lord Brodie, delivering the Opinion of the Court, at para [158]). The power to remit often requires to be used where an appeal does not challenge a final determination, and that determination is yet to take place at first instance. It will almost always be engaged where what was involved was a procedural issue or if a decision to dismiss a case has been reversed. It should not be used to allow a reconsideration of the merits by a judge or sheriff who has necessarily prejudged the case.

[75] The appeal to the SAC was not academic. It may be that the notice erroneously refers to the removal of the "fence" instead of unlocking the gates. However, the decision of

the court in relation to the merits of the appeal would be *res judicata* between the parties in the event that the defenders were to serve a new notice confined to unlocking the Altskeith and Kennels Gates.

[76] The pursuers' Article 6 right to a fair and public hearing have been adequately protected. The pursuers have been able to challenge the defenders' notice by making a summary application to the sheriff. Notwithstanding the "summary" element of the statutory mode of appeal, the hearing before the sheriff took the form almost of an ordinary action. Several days were spent exploring the facts and law, culminating in a written judgment of the sheriff setting out his findings in fact and law and providing a note explaining these findings. It may be understandable that, following the *obiter dictum* in *Tuley* v *Highland Council* (*supra*), the proof should have ranged so widely in order to ascertain the true nature of Dr Brach's thinking. It is to be hoped that, in the future, an appeal to the sheriff on similar grounds will be dealt with far more expeditiously by what ought to be a relatively simple task of ascertaining the purpose objectively. This ought to be capable of determination by doing little more than understanding the physical characteristics of the land in question.

[77] The SAC did not adhere to the sheriff's interlocutor. They determined that the sheriff had erred in a number of material respects and reconsidered the evidence, in its printed form, and the statute. Although this court has disagreed with the SAC on a matter of law, and has itself reconsidered the evidence on purpose and made its own determination, the SAC's opinion adequately explained its own reasoning. There is no merit in the pursuers' submissions that the SAC's reasoning was inadequate in Convention or domestic terms or that the SAC had failed to consider the evidence as a whole or had disregarded parts of it (other than in relation to the reason for the sign).

[78] The pursuers' other human rights challenge under Article 1 of the First Protocol was not directed towards the compatibility of the rights under the 2003 Act with the Protocol as a generality. The contention was that, if the court were to agree with the SAC that the ratio of *Aviemore Highland Resort* v *Cairngorms National Park Authority* (*supra*) is confined to its facts and that the defenders were entitled to require remedial action in respect of matters extant as at the coming into force of the Act, the Act would thereby have retrospective effect. For the reasons already given, where the gates have been both replaced and frequently unlocked since the 2003 Act was introduced, this matter does not arise. Even if the gates had been permanently locked since prior to the 2003 Act, the enforcement of remedial requirements under section 14(1)(e) does not involve any retrospective effect. Even assuming that the 2003 Act created new rights, as distinct from re-enacting those thought by some to arise at common law, they were rights which have a prospective nature. They may be protected by requiring action to be taken by landowners in the future to permit their exercise. That does not involve any retrospectivity.

Effect

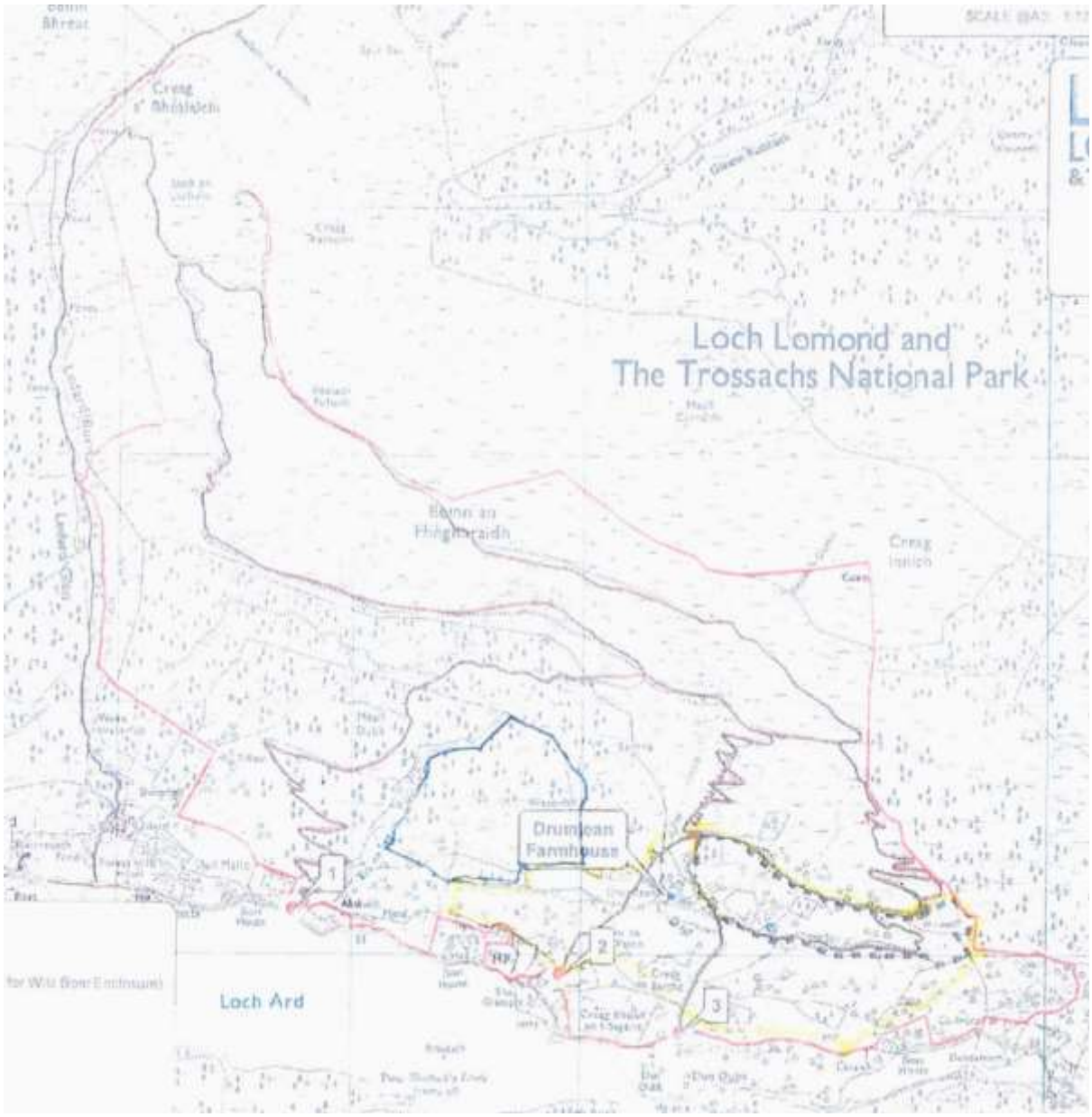
[79] The appeal from the SAC fails on the central issues in dispute. However, for reasons already explored, the court does not consider that failing to unlock the Main Gate would contravene section 14(1) if the Kennels and Altskeith Gates were unlocked. It does not consider that erecting the wild boar sign contravened section 14(1). In relation to the SAC's findings in fact and law, it will delete the words "contrary to section 14(1) of the 2003 Act" from finding 3. It will delete finding 4 and delete "Main gate" from findings 5 and 6. Otherwise the findings in fact and law of the sheriff, as substituted by the SAC, are endorsed.

[80] The court will delete "been locked since being installed" in the sheriff's finding in fact 5 and substitute therefor:

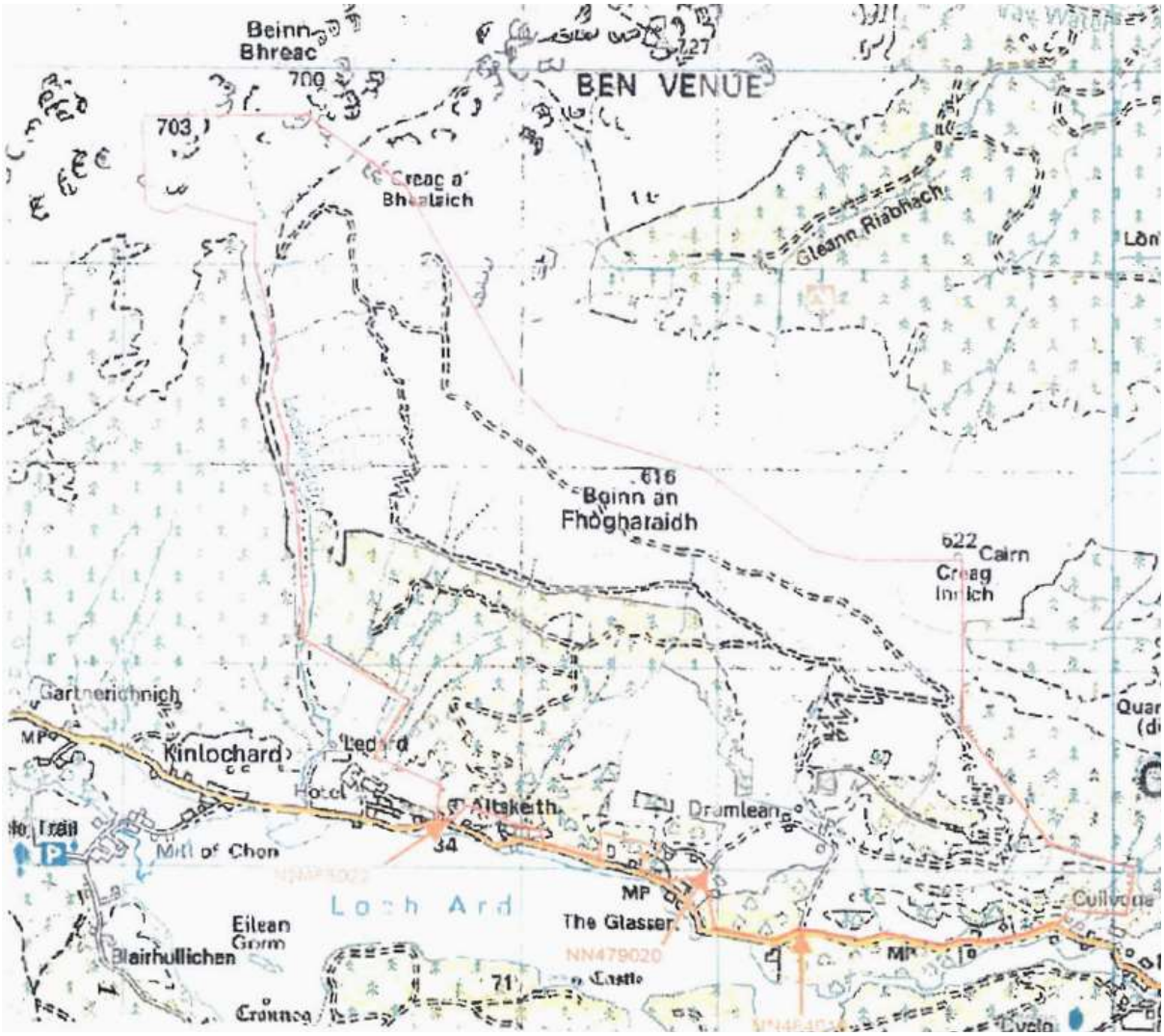
> "been kept generally locked since prior to the 2003 Act. They are designed to prevent pedestrian and vehicular access. They have been unlocked periodically to allow such access."

It will delete "acres" from the sheriff's finding in fact 7 and substitute "hectares". It will restore the deleted words from the sheriff's finding in fact 15. It will delete the SAC's new finding in fact 26. Although the SAC's new findings on the negotiations and the advice has a more peripheral significance than that attributed to them by the SAC, they are relevant in the context of what responsible land management might secure and can remain as stated. Otherwise, the findings in fact of the sheriff and the new findings in fact by the SAC are endorsed.

ANNEX A


Loch Lomond and
The Trossachs National Park
Drumlean
Farmhouse
Loch Ard
1
2
3

ANNEX B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Gleann Riabhach
616
Beinn an Fhògharaidh
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Gartnerichnich
Kinlochard
Hotel
Altaketh
Dramlean
Mill of Chon
Loch Ard
MP
The Glasser
Eilean Gorm
Blairhullichen
Castle
Cruinnog
34
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