SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 50

B164/17

JUDGMENT OF SHERIFF FIONA LENNOX REITH, QC

in the cause

STEWART AND GEMMA MANSON

Pursuers

against

MIDLOTHIAN COUNCIL

Defender

Pursuers: McKinlay; Brodies LLP
Defender: Evans; Anderson Strathern LLP

Edinburgh, 6 September 2018

The sheriff, having resumed consideration of the cause, finds in fact:

(1) The pursuers are spouses. They live together at 21 Cairnbank Road, Penicuik, Midlothian ("the property"). They are joint heritable proprietors of the property. Their title to the property is registered in the Land Register, title number MID142671.

(2) Number 5/1 of process is a copy of a land certificate ("the land certificate") title number MID142671 relating to the property. The land certificate *inter alia* sets out the nature and extent of the pursuers' title. The extent of the property is shown edged in red on the title plan annexed to the land certificate.

(3) The defender is a local authority constituted under the Local Government (Scotland) Act 1994. The defender has its principal office at Midlothian House, Buccleuch Street, Dalkeith.

(4) The pursuers purchased the property on or about 20 September 2012. The pursuers applied for and obtained planning permission under registration number 11/00648/DPP on 21 February 2012 to erect a dwelling house. The pursuers subsequently built a house on the property. The pursuers occupy the house constructed on the property as their only home. They live there together with their two children, now aged 12 and 8 years old respectively. The property is situated in a suburban area of Penicuik which has a semi-rural character. The property now comprises a modest single-storey house of three bedrooms, an enclosed area of garden ground, a driveway, a path to the south and west and an area of mature and uncultivated sloping woodland to the west bounded on the south by the path referred to below. The property is bounded by, and overlooked by, houses in St James's Gardens to the north. The pursuers have lived at the property since August 2013. Number 5/2 of process is an illustrative plan (not to scale) showing *inter alia* the property edged in red, the pursuers' house marked "21", the pursuers' enclosed garden and the location of the fence/gate referred to below indicated in dark blue. The total area of the property is approximately 0.21 hectares and the footprint area of the house is about 109 square metres. The house is 13.8 metres long by 7.8 metres wide.

(5) Number 6/4 of process comprises Planning Application Delegated Worksheet 11/00648/DPP, Planning Permission 11/00648/DPP dated 21 February 2012 together with attached Location Plan PL06 1:10 dated 3 October 2011, Site Plan D01 REWVC 1:200 dated 17 February 2012, Proposed Floor Plan D03 1:50 dated 3 October 2011, Proposed Elevation Plan D04 1:100 dated 3 October 2011, Elevations and Cross Sections plan D05 Rev C 1:200, 1:100 dated 17 February 2012, Proposed Cross Section

plan D06, 1:100 17 February 2012, Landscaping plan, D02 1:200, Design and Access Statement dated 13 September 2011 and the report from TD Tree Services dated 8 September 2011.

(6) The sole vehicular access route to the property is along Cairnbank Road. It begins at a junction with the public road at Bridge Street. The relevant part of Cairnbank Road is a private road ("the road") serving seven residential properties, namely numbers 15,15A, 15B, 19, 19A and 21 Cairnbank Road (the property). Cairnbank Road is about 250 metres in length, including the private section. The pursuer's house is situated about 140 to 160 metres along the road to the west from the point at which Cairnback Road becomes a private road. The road is shown coloured yellow on the title plan for the property. The road is a cul-de-sac. Entry to the road is taken from a T-junction with the public highway part of Cairnbank Road. The first section of the road is formed of tarmac and is maintained by all the residents. It later develops into a stone and soil track maintained by the residents only of 19 and 19A Cairnbank Road and the property. The road has not been adopted and is not maintained by the defender. There is no street lighting on the road. The solum of the road is owned by the proprietor of 19 Cairnbank Road. The pursuers have a servitude right of vehicular access over the road and joint maintenance obligations with neighbouring proprietors in respect of its upkeep. "The drive" is the name by which the private part of Cairnbank Road is known by residents.

(7) The said stone and soil track part of the road passes the pursuers' house. Approximately 20 metres to the west beyond the pursuers' house the said stone and soil track part of the road forms into a path ("the path"). The path is also shown on the title plan for MID142671; marked in light blue on the plan, number 5/2 of process;

and in photographs, numbers 5/3/5, 6/5/10, 6/5/8 and 6/5/9 of process. The path is unlit and unpaved. The path is of stone construction, which has gathered soil. The path is broadly flat and level. It is approximately 85 metres in length and just over about three metres in width until it reaches the fence/gate referred to below, at which point its width becomes about four and a half metres. The path runs to the west through the unenclosed portion of the property, on land owned by the pursuers, along the southern edge of the property adjacent to the said area of woodland. The woodland area is also about 85 metres in length between the west end of the pursuers' enclosed garden area and the boundary with the Penicuik Estate to the east. There is a tree preservation order over the trees in the woodland area. The southern edge of the path is bounded by a beech hedge, mature trees and fencing.

(8) The pursuers' house and enclosed garden area are bounded on the south by a two metre wall and wooden fencing. The said stone and soil track part of the road passes the pursuers' house at the other side of the wall and fencing. The pursuers' house and enclosed garden area are adjacent to the road. The path runs through the part of the pursuers' property which is not fully enclosed by fencing. The public cannot see into the pursuers' house or enclosed garden area from the path. The public cannot see into the pursuers' house from the road. It would only be possible for a member of the public to see very slightly through the slatting of the fence into the enclosed garden area if stationary.

(9) There is a servitude right of vehicular access over the path and the road in favour of the proprietors of the Penicuik Estate. The fence/gate can be opened to facilitate this.

(10) The road and the path are clear and well-defined. They are not overgrown. The road and the path were until 4 June 2016 frequented by walkers and cyclists on a daily

basis. Access was taken by the public for recreational purposes. Until 4 June 2016 the road and the path were used daily by individuals including walking groups and families for recreational purposes. On the other side of the fence/gate the path continues onto a path owned by the Penicuik Estate. That path leads into a network of paths frequented by the public within Penicuik Estate

(11) The pursuers caused a barrier to be erected across the path at the western boundary of the property with the Penicuik Estate on or about 4 June 2016. The barrier takes the form of an eight foot (2.438 metres) high solid wooden fence with an integrated wooden padlocked gate ("the fence/gate"). The fence/gate is about three metres in width. The fence/gate at the end of the path as viewed from the pursuers' property is shown in in photographs, numbers 5/3/5, 5/3/10, 6/5/0, 6/5/1, 6/5/8, 6/5/9 and 6/5/18 of process. The fence/gate as viewed from the Penicuik Estate on the other side is shown in photographs, numbers 5/3/1, 6/5/24, 6/5/25 and 6/5/26 of process.

(12) A fence runs adjacent to the fence/gate along the full length of the boundary of the property with the Penicuik Estate and up towards adjoining properties at St James's Gardens, Penicuik. This fence is shown in the photographs, numbers 6/5/1, 6/5/7, 6/5/6 and 6/5/30 of process. The fence/gate prevents access being taken from the path into the Penicuik Estate and vice versa.

(13) The fence/gate sits within the boundary of the property on land owned by the pursuers. The fence/gate forms a solid barrier between the property and Penicuik Estate. The fence/gate is approximately 100 metres to the west of the pursuers' house. It is painted with anti-climb non-drying paint. The pursuers have placed yellow warning signs on both sides of the fence/gate to warn members of the public of the existence of CCTV cameras. The pursuers have installed an artificial CCTV camera

close to the fence/gate. The pursuers have also placed a sign on the western (Penicuik Estate) side of the fence/gate reading "Private Property. No Unauthorised Entry". They have placed a further sign headed "Polite Notice to Walkers" on the western side of the fence/gate directing members of the public to the paths at Broomhill and Alderbank hereafter referred to. The signs are shown in photographs, numbers 6/5/17, 6/5/19 and numbers 6/5/25 through to 6/5/29 of process. There is a weir/waterfall on the Penicuik Estate about 120 metres to the west of the fence/gate and, accordingly, about 220 metres to the west of the pursuers' house.

(14) The effect of erecting the fence/gate and of having in place the said signs on the fence/gate was to prevent or deter all members of the public from obtaining access to and from the Penicuik Estate by means of the path.

(15) Prior to the construction of the fence/gate, there was an old 'kissing gate' and a three metre wide metal five-bar gate marking the boundary of the property and the entrance to the Penicuik Estate. These are shown in photographs numbers 5/3/1, 6/5/24 to 6/5/26, 6/5/31 and 6/5/32 of process. The kissing gate had been present on the land for over 30 years and the original metal five-bar gate had been present on the land for over 40 years. There was at some point a sign attached to the metal five-bar gate which read: "No access through to Penicuik". It was removed in about 2016 by the defender. That sign is now attached to a six-foot high metal heras fence erected along the southern boundary of the property next to the path, along the boundary with 19 Cairnbank Road (shown in photograph 6/5/20 of process).

(16) Prior to the fence/gate being erected, members of the public took access over the path into and out of the Penicuik Estate for recreational purposes.

(17) Access to the Penicuik Estate is possible via paths known as Broomhill and Alderbank. These paths form part of the defender's core paths network. The path is not part of the said core path network.

(18) Number 6/14 of process comprises emails dated 14 to 17 June 2016 between the second named pursuer and Richard Moffat.

(19) Number 6/28 of process is a report of the defender's Corporate Management Team dated 19 October 2016.

(20) Number 6/29 of process is a minute of the defender's Corporate Management Team dated 9 January 2017.

(21) Numbers 5/21 and 6/25 of process are copies of a letter dated 6 December 2007 from James Kinch to David Davies.

(22) The Scottish Outdoor Access Code contains statutory guidance on the responsibilities of those exercising access rights under the Land Reform (Scotland) Act 2003 ("the 2003 Act") and of those managing land and water.

(23) The erection of the fence/gate on the westernmost boundary of the property where it meets the boundary with Penicuik Estate does not prevent access being taken by the public from the public highway at Cairnbank Road down the road past the pursuers' house and onto the path. The road and the path are in very close proximity to the pursuers' house.

(24) Number 5/3 of process comprises a series of photographs of the road, the path, the outside of the pursuers' house, the three metre wide five-bar metal gate and the fence/gate.

(25) Number 6/5 of process comprises a series of photographs of the fence/gate and adjacent fencing, the path, the road, the outside of the pursuers' house, the said

signs, parts of the Broomhill path, the path on the Penicuik Estate side of the fence/gate, the three metre wide five-bar metal gate and the said kissing gate. Photographs numbers 6/5/12 to 6/5/16 of process show parts of the Broomhill path.

(26) The pursuers' eight year old son ("H") is severely autistic. He has had and continues to have sleep problems associated with this condition. It is likely that he will continue to have such sleep problems.

(27) Number 5/7 of process is a letter from Dr Jennifer Kerr.

(28) Number 5/8 of process is a letter from Saltersgate School.

(29) Numbers 5/19, 5/10, 5/11, 5/13, 5/15, 5/16 and 5/17 of process comprise correspondence between the defender and the pursuers and/or their solicitors dated 14 June 2016, 27 June 2016, 4 July 2016, 23 September 2016, 25 October 2016, 1 November 2016 and 8 November 2016.

(30) A meeting took place between the pursuers and the defender on 22 August 2016 in an attempt to resolve issues between them. At the meeting, the pursuers proposed the creation of byelaws by the defender to control and regulate access to the path. The pursuers proposed that the fence/gate be opened between 9am – 3pm on weekdays only, excluding weekends and holidays. The defender proposed that the path be open between 9am – 6pm seven days a week. The defender also proposed the option of alternative dispute resolution. No agreement was reached.

(31) Number 5/18 of process is an Integrated Impact Assessment Form dated 3 January 2017 carried out by the defender in respect of the decision to issue a notice under section 14 of the 2003 Act.

(32) On 14 January 2017, the defender served a notice, number 5/4 of process, on the pursuers under section 14(2) of the 2003 Act. The notice stated that it appeared to the

defender that the pursuers had contravened section 14(1) of the 2003 Act at the property. It referred to a fence with signs on it which were said to be deterring access which had been erected across an area of known public access thereby blocking that access. The notice required the pursuers to remove the barrier in order to allow pedestrian access along the path. The notice was said to take effect on 6 February 2017, with the timescale for compliance being 27 February 2017. The fence/gate remains in place to date.

(33) Number 5/19 of process is a letter from Police Scotland dated 27 June 2017. It records the complaints made to the police by the pursuers in 2014, 2015, 2016 and 2017.

(34) The proportion of people not using the path and road responsibly prior to the erection of the fence/gate was at a low level.

(35) There were some instances of littering and dog-fouling on the path and road prior to the erection of the fence/gate.

(36) The property, excluding the path, gives sufficient adjacent land to enable persons living in the house there to have reasonable measures of privacy in that house and to ensure that their enjoyment of that house is not unreasonably disturbed.

(37) The purpose or main purpose of erecting the fence/gate and of having in place said signs was to prevent or deter all members of the public, including persons entitled to exercise access rights in terms of the 2003 Act, from obtaining access to and from the Penicuik Estate by means of the path.

Finds in fact and law:

1. The path was land in respect of which access rights were exercisable under the 2003 Act.

2. The notice was lawful and compatible with the pursuers' rights under Article 8 and Article 1 of Protocol 1 of the European Convention on Human Rights.
3. The purpose or main purpose of erecting the fence/gate and of having in place said signs was to prevent or deter all members of the public, including persons entitled to exercise access rights in respect of the path in terms of the 2003 Act, from doing so, contrary to section 14(1) of the 2003 Act.
4. The pursuers contravened section 14(1)(a) of the 2003 Act by having in place said signs.
5. The pursuers contravened section 14(1)(b) of the 2003 Act by erecting the fence/gate.
6. The pursuers contravened section 14(1)(e) of the 2003 Act by failing to remove the fence/gate and signs.

Therefore, sustains the second, third, fourth and fifth pleas-in-law for the defender; repels the first, second and third pleas-in-law for the pursuers; repels the fourth and fifth pleas-in-law for the pursuer and the first plea-in-law for the defender as being not insisted upon; dismisses the application; reserves meantime all questions of expenses and appoints parties to be heard thereon on 4th October 2018 at 2:00 pm within the Sheriff Court House, 27 Chambers Street, Edinburgh.

NOTE

Introduction

[1] This is a summary application under the Land Reform (Scotland) Act 2003 ("the 2003 Act") in which the pursuers seek, first, by way of an appeal in terms of section 14(4) of the 2003 Act, to recall or vary a notice dated 14 January 2017 served on them by the defender and, second, declarator in terms of section 28 of the 2003 Act that the land to which the notice relates is not land in respect of which access rights are exercisable. In practical terms, this case is about whether members of the public do or do not have access rights (sometimes called "the right to roam") in relation to a path on the outskirts of Penicuik into and out of the Penicuik Estate.

[2] In relation to the section 28 declarator, the pursuers rely upon the application of section 6(1)(b)(iv) of the 2003 Act. Read short, this sub-section excludes access rights in relation to a person's house and such adjacent land as is sufficient to afford a reasonable measure of privacy and protection against unreasonable disturbance. The question was whether this exemption applied to the path which commenced about 20 metres to the west of the pursuers' house.

[3] The appeal under section 14(4) is presented on two distinct bases. The first is that it is contended in article 6 of condescendence that the notice does not contravene section 14(1) because the pursuers' main (referred to in article 6 of condescendence as "principal") purpose was "to prevent or deter access along the path by persons who had hitherto exercised their rights of access in an irresponsible manner" and that "given that irresponsible access and antisocial behaviour was not confined to particular times of day or specific days of the week, the gate has remained closed and locked permanently since its construction". The second basis for seeking recall of the notice under section 14(4) is that it

is contended in article 8 of condescendence that the notice is incompatible with the pursuers' rights under Article 8 of and Article 1 of Protocol 1 to the European Convention on Human Rights.

[4] The defender's position is to the effect that the vast majority of the public taking access did so responsibly and that, viewed objectively, the main purpose of putting up the fence/gate and signs was to prevent all public access. The defender suggests that this was to enable the pursuers to develop a woodland area to provide a larger garden. The defender also contended that, having regard to the location and other characteristics of the house, the pursuers have sufficient adjacent land to enable them to have reasonable measures of privacy in their house and to ensure that their enjoyment of the house is not unreasonably disturbed and, therefore, that the case for exclusion of the path from access rights is not made out. The defender also maintains that the notice was not incompatible with the rights of the pursuers under Article 8 of and Article 1 of Protocol 1 to the European Convention on Human Rights.

[5] If the argument under section 28 is upheld, it would follow that the appeal against the issue of the notice under section 14(4) would succeed because the land is not subject to the 2003 Act. After analysing aspects of the evidence, I will, therefore, deal with the section 28 case first of all. I will then deal with the section 14(4) appeal on the question of the "main purpose" of putting up the fence/gate and signs, followed by the section 14(4) appeal on the basis of the pursuers' human rights arguments.

[6] The proof in this case commenced on 6 November 2017 with a helpful site visit on the first day. This included walking the two possible "alternative routes" referred to on record and known as Broomhill and Alderbank. The proof then continued over various days until 22 June 2018. Parties entered into a detailed joint minute, number 15 of process.

The matters agreed in the joint minute are included in the findings-in-fact so far as it is appropriate to do so. Both parties helpfully suggested certain findings-in-fact. However, the findings-in-fact I have made are limited to findings in relation to matters which I have considered relevant to the issues requiring to be resolved in this case.

[7] After the conclusion of the evidence but before submissions on the evidence the opinion of the Inner House in *Anstalt* v *Loch Lomond and the Trossachs National Park Authority* [2018] CSIH 22 was issued. Detailed and careful written submissions were lodged on behalf of both parties in advance of the hearing on submissions. They form numbers 16, 18, 20, 21 and 22 of process. The court is indebted to the agents for both parties for the care and commitment with which both presented their respective cases.

The land

[8] The land concerned is a small area of land on the outskirts of Penicuik. It takes the form of a path which is about 85 metres in length by about three metres in width. The path is part of an area of land ("the property") purchased by the pursuers in February 2012. After obtaining planning permission to do so, they built a house on part of the property with an adjoining enclosed garden area. The remaining area of the property comprises an area of mature and uncultivated sloping woodland to the west of the house and a path running along the southern edge of the length of the woodland area up to the boundary with the Penicuik Estate ("the path"). I did not understand it to be a matter of dispute that there is a tree preservation order over the trees in the woodland area.

[9] The pursuers' house is at 21 Cairnbank Road, Penicuik. The part of Cairnbank Road on which the house is situated is private. It serves six other residential properties nearby. The private part of Cairnbank Road ("the road") is tarmac to begin with but, by the time it

passes the pursuers' house and enclosed garden area, it has become a stone and soil track. It was a matter of agreement between parties in the joint minute that the pursuers' house and garden is bounded on the south by a two metre high wall and wooden fencing. This is, therefore, between the pursuers' house and enclosed garden area on the one hand and the stone and soil track on the other hand. About 20 metres further along to the west of the pursuers' house the track part of the road forms into the path at issue. The path is shown marked in light blue on the plan, number 5/2 of process. This is an illustrative plan which was prepared by the second pursuer's father, David Hope, and is not to scale. It also shows the property edged in red, the pursuers' house marked "21", the pursuers' enclosed garden area and the location of the fence/gate referred to below indicated in dark blue. It was agreed in the joint minute that it is situated in a suburban area of Penicuik. This area has a semi-rural character.

[10] The pursuers moved into the house in August 2013. They live there with their two sons. Their youngest son was diagnosed with autism when he was three years of age. The second pursuers' parents, David and Muriel Hope, live nearby, at 19A Cairnbank Road.

[11] On 4 June 2016 a barrier taking the form of a fence with an integrated wooden padlocked gate ("the fence/gate") and associated signs was erected by or on behalf of the pursuers across the path at the boundary with the Penicuik Estate. The fence/gate is capable of being unlocked and opened.

[12] It is a matter of agreement that, until 4 June 2016, the road and the path were frequented by walkers and cyclists on a daily basis and that access was taken by the public for recreational purposes. Once through the fence/gate the path continues into the Penicuik Estate and a network of paths there which are frequented by members of the public.

[13] It is agreed between the parties that the fence/gate prevents access being taken from the path into the Penicuik Estate. It is also agreed that, prior to the fence/gate being erected, members of the public took access over the path and into the Penicuik Estate for recreational purposes and *vice versa*.

[14] After the fence/gate was erected, and following discussions which failed to lead to agreement between the parties, the defender served the notice dated 14 January 2017 on the pursuers requiring them to remove the fence and signs in order to allow pedestrian access.

The statutory framework

[15] In summary, section 1 of the 2003 Act provides, *inter alia*, that everyone has the right to be on land for recreational purposes and to cross land for such purposes. This right is exercisable in respect of all land, except that specified in section 6. The main exception relevant to the present case is that specified in section 6(1)(b)(iv) in terms of which land "which …(iv) comprises, in relation to a house or any of the places mentioned in (a)(ii) above, sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house or place and to ensure that their enjoyment of that house or place is not unreasonably disturbed". Section 7(5) provides that included in the factors which go to determine what extent of land is sufficient for the purposes in section 6(1)(b)(iv) are "the location and other characteristics of the house or other place". In this case, I did not understand it to be suggested that, for the purposes of sections 6(1)(b)(iv) or 7(5), any place other than the house (as mentioned in section 6(a)(ii)) was concerned in this case.

[16] Section 2(1) of the 2003 Act provides that a person has access rights only if they are exercised responsibly. Section 2(2) then provides that, in determining whether access rights are exercised responsibly, a person is presumed to be exercising such rights responsibly if

they are exercised so as not to cause unreasonable interference with any of the rights of any other person, including landowners. In assessing whether access rights are being exercised responsibly, regard is to be had to the guidance set out in the Scottish Outdoor Access Code. Section 3 then provides that there is a corresponding duty imposed on the owner of land in respect of which access rights are exercisable to use and manage the land and otherwise to conduct the ownership of it in a way which, as respects those access rights, is responsible. This reciprocal responsibility is not to use land in such a manner as would cause unreasonable interference with the access rights of others. Again, regard is to be had to the Scottish Outdoor Access Code.

[17] Section 10 of the 2003 Act imposed a duty on Scottish Natural Heritage to draw up and issue a code (now the Scottish Outdoor Access Code) setting out guidance in relation to access rights. This includes guidance as to what will constitute responsible and irresponsible exercise of those rights and responsible and irresponsible use and management of land in respect of which rights are exercisable, or otherwise conducting the ownership of it. Paragraph 2.12 of the code states: "Access rights must be exercised in ways that are lawful and reasonable." Paragraph 2.13 then refers to a list of statutory offences relating to people's behaviour which includes "not clearing up after your dog has fouled in a public place" and "dropping litter". Paragraph 2.14 states that the 2003 Act excludes certain conduct from access rights, an example of which is "being or crossing land while responsible for a dog that is not under proper control."

[18] Section 13 of the 2003 Act provides that it is the duty of the local authority to keep open and free from obstruction any routes by which "access rights may reasonably be exercised", and section 13(3) provides that the local authority may institute and defend legal

proceedings. Section 13(2) provides that a local authority is not required to do anything inconsistent with the carrying on of any of the authority's other functions.

[19] Section 14 of the 2003 Act prohibits owners from doing certain things "for the purpose or main purpose of preventing or deterring" any person entitled to exercise access rights from doing so. These include (a) putting up any sign or notice and (b) putting up any fence. In terms of section 14(2), where the local authority consider that anything of that nature "has been done", it may require that remedial action, specified in the 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.

[20] By virtue of section 28 of the 2003 Act, the sheriff is given a general jurisdiction, upon an action of declarator initiated by summary application, to determine the extent of access rights. Section 14(4) also gives the sheriff a special jurisdiction to hear "appeals" against any notices served under section 14. In the present case, the pursuers have sought remedies under both section 14(4) and section 28.

[21] Section 3 of the Human Rights Act 1998 ("the 1998 Act") provides that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. As an act of the Scottish Parliament, the 2003 Act is subordinate legislation.

[22] Section 6 of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. "Public authority" includes a local authority. It also includes a court.

[23] Section 7 of the 1998 Act provides that a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may bring proceedings against the authority under the 1998 Act in the appropriate court or tribunal, or may rely on the

Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act. Section 7(7) provides that, for the purposes of section 7, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

[24] Section 8(1) of the 1998 Act provides that in relation to any act of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

[25] Article 8 to the Convention reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[26] Article 34 to the Convention reads:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

[27] Article 35 to the Convention, as amended by Protocol 14, then reads:

> "…3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: …(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

[28] Article 1 of Protocol 1 to the Convention reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Evidence

[29] On behalf of the pursuers, I heard evidence from Mrs Manson, the second-named pursuer; David Hope, the father of the second-named pursuer and resident at 19A Cairnbank Road; Kathleen McKinnon, resident at 17 Cairnbank Road; Fiona Parkinson, resident at 15 Cairnbank Road; David Davies, resident at 19 Cairnbank Road; Dr Roger Spearman, resident at 15A Cairnbank Road; Dr Jennifer Kerr, community paediatrician; Janette Mathieson, community learning disability nurse; Stephen Buggy, deputy head teacher, and PC David Shirley.

[30] For the defender, I heard evidence from James Kinch, Land Resources Manager, Midlothian Council; Richard Moffat, Head of Commercial Operations, Midlothian Council; Mhairi-Anne Cowie, planning officer, Midlothian Council; Dr John Pope, 6 Seafield Road, Bilston; Penny Wooding, 23 Bridge Street, Penicuik; Professor Anthony Trewavas, 27 Croft Street, Penicuik; Derek Storey, 14 Inkerman Court, Penicuik, and James Connal, 42 St James's View, Penicuik.

[31] Much evidence about the location, extent and layout of the property and the surrounding area (including the road, the path and the woodland area to the west of the pursuers' house) was not in dispute. The same applies to the description of the fence/gate, the signs, the old five-bar gate and kissing gate (although there was some dispute about the

extent to which it was or was not locked before the fence/gate was put up), that before the fence/gate was put up on 4 June 2016 the public took access over the path into and out of the Penicuik Estate for recreational purposes (although the nature, period and extent of access taken was a matter of dispute), and that the pursuers' eight year old son is severely autistic. These matters are dealt with in the findings-in-fact.

[32] However, there were areas of dispute about certain aspects of the case and the question of inferences to be drawn from some of the facts. The principal areas of dispute were as follows: (1) the historic use of the path for public access; (2) the pursuers' knowledge of the use of the path when they bought the property to build the house on it and when they applied for and were granted planning permission in relation to the property; (3) the nature and extent of any anti-social behaviour and any changes in such behaviour over the years; (4) the level of privacy afforded at the house; (5) the extent to which alternative routes may be comparable, and (6) whether the defender sufficiently considered the pursuers' human rights. This final issue is addressed below in the section entitled "The section 14 declarator 'human rights' case".

Historic use of the path for public access

[33] **Mrs Manson** gave evidence about how she and her husband had come to buy the property in September 2012. At that point, there was an old garage and a stable block next to her parents' house at 19A Cairnbank Road. The property was then owned by David Davies, 19 Cairnbank Road. Before that, it had been owned by a Mr John Dick. Mrs Manson had lived on Cairnbank Road, first at 15B and latterly at 19A, since she was about six years of age. In about 2010 she went to live at another address about five minutes' walk from Cairnbank Road for about three years. These background details were not in

dispute. Mrs Manson went on to describe there having been two gates chained at either end of the private part of Cairnbank when the property was owned by John Dick and said that he had "two massive rottweilers who patrolled the area". As a result, she had not accessed the path to the boundary with the Penicuik Estate at that time even although residents had had a right of access. Mr Dick had then sold his house and the property to David Davies about 18 or 19 years ago. Mr Davies was the person from whom Mrs Manson and her husband had then bought the property in 2012. According to Mrs Manson, the then five-bar metal gate and kissing gate at the boundary with the Penicuik Estate (where there was then also a barbed wire fence) had "remained locked" and, although Mr Davies worked away a lot, he would tell people trying to take access that it was private property and/or would turn them back. However, the locks would be vandalised. People taking access to the Penicuik Estate would have climbed over the gate or the barbed wire fence. She also spoke of a second gate nearer the public end the road "always" being closed when Mr Dick was the owner, but her evidence about this was at variance with evidence from both Professor Anthony Trewavas and Dr Derek Storey, to which I make reference below.

[34] Mrs Manson accepted in cross-examination that, at the time the house was built, she had been aware that some people used the path and she agreed that, at that time, this had not constituted a difficulty for her. However, she did not accept the description in the Planning Application Delegated Worksheet (number 6/4 of process) of this being an "informal public footpath". She also maintained that, before the house was built, the path had been "almost completely impassable and overgrown". This statement was difficult to reconcile with her acceptance that some people used the path, and was at odds with ample evidence from other witnesses (which I accepted and preferred) of their actual use of the path. I also noted that it was a matter of agreement in the joint minute at paragraph 20 that,

until 4 June 2016, the road and the path were used daily by individuals including walking groups and families for recreational purposes. I formed the view that Mrs Manson's description of the condition of the path at that point was significantly exaggerated, and I did not accept it as being accurate.

[35] **Mr David Hope**, Mrs Manson's father, gave evidence in his affidavit to the effect that there had been no pattern of public access through the drive and down the path towards the Penicuik Estate in the 32 years he had lived on Cairnbank Road. He initially confirmed this in cross-examination without qualification but then, when pressed further, went on to give quite a combative response (quarrelling about the use of the word "pattern" which was a word which had in fact been introduced by him) which culminated in him giving evidence to the effect that people had obtained access by cutting the padlock at the kissing gate (which he described as having been padlocked the whole of the time) or climbing over it. He seemed to regard the path as being part of what he described as "garden ground". It was evident that this was what others referred to as the woodland area and which had also been agreed in the joint minute as being a woodland area.

[36] **Fiona Parkinson** had lived on Cairnbank Road since 2009, first at 17 Cairnbank Road and then, since about 2013, at 15 Cairnbank Road. She had understood that the kissing gate had been locked until 2009, but she did not have personal knowledge of this. She understood that the kissing gate had been unlocked in 2009 to allow temporary access into the Penicuik Estate along Cairnbank Road while a landslip was being repaired on the Alderbank route. At paragraph 10 of her affidavit, she described the path (at the point when she gave her affidavit in October 2017) as "very muddy and overgrown and …not an accessible route". This description was not confirmed by anyone else. By contrast, Mr Kinch gave evidence to the effect that, before the fence was erected, it was a very

well-worn path and was of suitable construction for a path and possibly for emergency vehicle access as well and that, since the barrier had been erected, the path was still in surprisingly good condition. He described the surface of the path as being flat and the gradient as being level and told the court that before the barrier was erected the path was very accessible by the public "for walking, for people for a range of abilities" and "almost an all-abilities path". He also described the path as being far more convenient and flatter (than the Alderbank and Broomhill routes) and said that it "gives a much better access from Penicuik than the other two routes". It was not suggested to him in cross-examination that his description of the path was incorrect. The path is shown in number 5/3/10 of process and, having also been on a site visit, I accepted and preferred Mr Kinch's evidence describing the path. In my view, Ms Parkinson's description was a significant exaggeration and I did not accept it as being accurate.

[37] **Mrs Kathleen McKinnon,** Fiona Parkinson's mother, has lived at 17 Cairnbank Road since 1995. Her address is not on the private part of Cairnbank Road, but her property backs on to it. At paragraph 10 of her affidavit, she said that what she called "the access route" (but which it became evident in her evidence-in-chief was the path) was used in 1995 when she moved to the area. She confirmed that the public had taken access along the road and path to the Penicuik Estate and that, although she thought that the five-bar gate had been locked, the kissing gate had been unlocked.

[38] **Dr David Davies** told the court that he had lived on Cairnbank Road since 1997. He had understood that there had been no public access at all when he bought the land (which included the property which the pursuers bought from him in 2012) from Mr Dick. He also understood that Mr Dick had had large, aggressive dogs and, therefore, that no-one had come down Cairnbank Road. He, Dr Davies, had not seen anyone taking access along the

path in the early years after he had bought the property. There was only one period when the gate was opened. That was for a counting exercise for a three month period in connection with what had then been a possible new bridge across a river in the Penicuik Estate. At one point, he said that this had happened in 2009 but, at other points, he said that this had been in 2004. Whenever this was, this was the only period when the kissing gate had been open with permission. This period apart, the locks were cut and he would replace the locks. However, this was not all the time because he was away from Penicuik for several months of the year travelling. People could have climbed over the gate anyway.

[39] **Dr Roger Spearman** has lived at 15A Cairnbank Road since 1998 and, before that, for about 10 years at St James's View nearby. He bought this house from Mrs Manson's parents, Mr and Mrs Hope. At that point, Cairnbank Road had been closed to public access. However, his recollection was that, when he had been walking into the Penicuik Estate, he had not had a key and so the kissing gate must have been unlocked. There had always been signs on the Penicuik Estate side of the gate saying "No access to Penicuik. Private". He regarded Cairnbank Road as a private road. However, when asked if he accepted that the public have a right of access along the road into the Penicuik Estate, he replied: "Only in terms of the right to roam legislation". His experience of having lived in the area for 30 years was that the public did not take access over Cairnbank Road. My impression was that he meant by this that he did not think that there had been a public right of way as such.

[40] **Mr James Kinch**, Land Resources Manager at Midlothian Council, confirmed that his duties included being the main officer for the 2003 Act within the council. I have recorded at paragraph [36] above his evidence describing the path, which I accepted. Mr Kinch confirmed that he had written the letter dated 6 December 2007, number 5/21 of process, to Dr Davies in response to a letter dated 22 October 2007, number 5/20 of process, from then

residents at Cairnbank Road (which included Dr and Mrs Davies, Mr and Mrs Hope, Mr and Mrs McKinnon and Dr and Mrs Spearman) about whether Cairnbank Road should be designated as a core path in the draft plan for core paths in Midlothian, to which they had objected. Mr Kinch had confirmed in his reply that Cairnbank Road had been removed from this draft plan but added that, by taking this step, consultees might perceive that as indicating that the council did not accept this route as being one that the public may access under the 2003 Act and "having witnessed the public using this path on several occasions I cannot accept the route as one that the public do not have a right to use." He had also been told by members of the public that the path had been recognised as being used. He accepted that this was anecdotal, but added that there had also been about 100 complaints and that a number of people had contacted the council about using the path over a number of years. He had never known the kissing gate to be locked and did not know anyone who had. That was in contrast to the five-bar gate which had virtually always been locked. He had walked through Cairnbank Road several times and he had never seen the kissing gate locked.

[41] **Dr John Pope** was the chairman of the Midlothian Access Forum and is a member of Scotways (the Scottish Rights of Way and Access Society). He had lived in Bilston, about four miles from Penicuik, for about 40 years and first walked along Cairnbank Road in about 2012 and went along it about 12 times until 2015. The five-bar gate was padlocked, but the kissing gate was not. There was no evidence of it having been vandalised and he had not seen any evidence that it had previously been padlocked. After the barrier was put up, people complained to Scotways. They were advised to complain to the access officer at the council. Quite a few complaints were coming in on a daily basis.

[42] **Professor Trewavas**, who had lived in Penicuik for 48 years, told the court that he went running and had made his way along the path thousands of times in that time,

including through the kissing gate, on a regular basis until about 2010 when he had had to have a knee operation and started to cycle instead. Until about 2004 this was just at weekends due to work commitments but, after he retired in 2004, he ran on the path every day without fail for about six years until he had his knee operation in 2010. Although the five-bar gate was always locked, he at no time found the kissing gate locked and he was never challenged about his use of the path. In 2016 he went along Cairnbank Road and the path into the Penicuik Estate twice. The kissing gate had been unlocked and open. During his time running along the path, although he had heard dogs barking from behind a fence, he had never seen any rottweilers. He had not regarded the barking dogs as being any deterrent to taking access along the path. He also firmly disputed that there had been a second gate in the position described by Mrs Manson. He insisted that he had known every inch of his run along Cairnbank Road and into the Penicuik Estate and that there had been no such gate. There had, however, been a second gate at a point at the boundary between the public part of Cairnbank Road and the private part, but this second gate had always been open in his experience.

[43] **Dr Derek Storey** has lived in Penicuik for 25 years and had been accessing the Penicuik Estate about three or four times a month along Cairnbank Road since about 1988 until the fence/gate was erected in 2016. He has also been a Nordic Walking instructor since 2012 when he retired. In that capacity he would take about four to six people along Cairnbank Road into the Penicuik Estate about four or five times a year. He had never been challenged about his use of this route. The five-bar gate was usually locked, but the kissing gate was always unlocked. He had never seen it padlocked or seen evidence that any padlocks had been removed. He had never been aware of rottweilers or other aggressive dogs having been kept by a previous owner of the land. He was asked in cross-examination

about whether there had been another locked gate about half-way between the five-bar gate at the boundary with the Penicuik Estate and the public part of Cairnbank Road. He did not recall there having been such a second gate and said that, if there had been one which had been padlocked, he would certainly have remembered having to climb over it, which he had never done.

[44] **Ms Penny Wooding** has lived at 23 Bridge Street, Penicuik since 2003. Her house is a short distance from the start of the public part of Cairnbank Road which leads off Bridge Street. She used the path virtually every day to walk her dog from 2003 onwards until the fence/gate was put up in 2016. Quite soon after she moved to Penicuik, she had been given to understand by one of the then residents of Cairnbank Road that it was a public footpath. She had referred to the walk along Cairnbank Road into the Penicuik Estate in her book about trees on the Penicuik Estate entitled "These Great Trees are Prayers", number 6/6 of process. It was written in 2014 or 2015 and was published in 2016. She had never been challenged by anyone about using this route. Mr and Mrs Hope had in fact let her know when the path was going to be closed for a day or two when the house for Mr and Mrs Manson was being built. In her experience, the kissing gate had never been padlocked. She started using walking poles in about 2012 or 2013. She had had no difficulty walking along the path. She did not think that there had been any increase or decrease in the volume of people using Cairnbank Road between 2003 and when the fence/gate was put up in 2016. She also said that it was not her experience that this route had become busier since the pursuers' house was built in 2013.

[45] **Mr James Connal** has lived in St James's Gardens since 1994. The back of his house overlooks Cairnbank Road. Before the fence/gate was put up he would access the Penicuik Estate by going out of his back gate and down the side of a wire fence to the kissing gate. It

had been locked temporarily for a short time, but it was then opened up again. He had never been challenged. He regularly saw other people using this access. Since the fence/gate was put up, he has had an arrangement with a neighbour that he can go through their back garden to get to the Penicuik Estate.

[46] **Ms Mhairi-Anne Cowie**, a planning officer with the defender, dealt with the planning application for the pursuers' house. In the Planning Application Delegated Worksheet, number 6/4 of process, she had acknowledged that members of the public would walk along the track at the other side of the wall proposed for the pursuers' house to divide the site from the existing access to a nearby house and the "informal public footpath". Her view was that this was clearly a track that was used by members of the public to the side of the site of the proposed house. She added: "From the planning side of things, when we are taking assessment for new things when there's existing uses or features like this in the surrounding area, anybody moving into a house or a unit beside an existing track or a noisy type use would be aware that there was such a track there, and so therefore it wouldn't make such an impact on this assessment. What we try to do is almost protect existing uses and take into account the impact the proposed uses may have on existing uses in an area. So, in this case because it was clear there was a track there, we felt it was evident for anybody moving into the proposed house or as approved that they would be aware that there was some sort of members of the public going past there." She thought it was clear that it was a pathway that was used by "a fair few people" as the middle section of the grass had been worn through. She did not think that the woodland area (to which there is no access from the pursuers' enclosed garden area) or the path would currently be regarded as private garden ground from a planning perspective.

[47] Although the evidence from Mr Hope and Dr Davies was consistent with that of Mrs Manson about the kissing gate having been locked, their evidence about this was at variance with a significant number of other witnesses who had actually used the path over many years and who would plainly have noticed if it had indeed been locked. I had no reason to think that all the witnesses who spoke of obtaining access to and from the Penicuik Estate over many years were other than truthful in their evidence. Professor Trewavas, Penny Wooding and Dr Storey were particularly impressive and straightforward witnesses. The evidence of each of them was clear, careful and detailed. I accepted and preferred their recollections of what their own actual experiences were to the accounts given by Mrs Manson, Mr Hope and Dr Davies. They were, as a matter of fact, able to and did obtain access to and from the Penicuik Estate along the path and through the (unlocked) kissing gate.

[48] In the light of the evidence of numerous witnesses about their use of the path over many years undeterred by dogs, including the clear evidence of Professor Trewavas about never having seen rottweilers, and not having regarded dogs barking from behind a fence as any deterrent to taking access along the path, I concluded that Mrs Manson's evidence that there had been "two massive rottweilers who patrolled the area" was an exaggeration. I also preferred the evidence of Professor Trewavas and Dr Storey, both of whom were careful and straightforward in their evidence, to that of Mrs Manson in relation to the "second gate"; I am satisfied that, if there had been a padlocked second gate as described by Mrs Manson, Professor Trewavas and Dr Storey would have remembered it.

[49] It is not necessary for me to determine definitively the extent to which there may have been public use of the path over an extended period of time. However, I am satisfied on the evidence that, from the point of view of the rights conferred by the 2003 Act (which

came into force on 9 February 2005), as a matter of fact, members of the public have for recreational purposes used the path to get to and from the Penicuik Estate since at least the coming into force of the 2003 Act in early 2005 (but probably from well before that according to Professor Trewavas) and that this continued until the fence/gate was put up on 4 June 2016.

The pursuers' knowledge of the use of the path

[50] Mrs Manson's evidence bearing on this was inconsistent. As recorded above, she maintained at one point in cross-examination that, before the house was built, the path had been "almost completely impassable and overgrown", but I have not accepted her evidence about this as being accurate. Mrs Manson also accepted in cross-examination that at the time the house was built she had been aware that some people used the path and she agreed that, at that time, this had not constituted a difficulty for her. However, despite this and for reasons which were not clear to me, she determinedly refused to accept the description in the Planning Application Delegated Worksheet (number 6/4 of process) of this being an "informal public footpath". My impression was that she was anxious not to make any apparent concession which she perceived might not assist her case. Mr Hope told the court that, from when the right to roam legislation was introduced in 2005, this had allowed some people to think that they could behave how they wanted to on anybody's property and that the antisocial nature of that behaviour "increased up to 2012, it was almost just bearable". If this is correct, it does rather beg the question of why in 2012 the pursuers nevertheless proceeded with the planning application lodged on their behalf by Mr Hope and the purchase of the property on which to build a house next to the road and in close proximity to the path. Dr Davies told the court that he did not specifically tell the pursuers about the

antisocial behaviour about which he had told the court when they were buying the property from him in 2012. He said that this was because Mrs Manson, having lived on Cairnbank Road most of the time he had been there, would have been fully aware of it. I also note that in article 7 of condescendence it is averred that "when the pursuers purchased the property in 2012, they were aware that there was some antisocial behaviour, but the level of antisocial behaviour has increased dramatically since the construction of the pursuers' house". In cross-examination, Mr Kinch commented: "I think it would be a massive error for us to believe that they weren't aware that there were people along this drive." He explained that this was against the background of a letter from Brodies dated 27 June 2016, on behalf of the pursuers, indicating that there were about 100 people a day using the path and it now being said that there was "all this antisocial behaviour going on there in theory". This letter is referred to in more detail in paragraph [60] below.

[51] In my opinion and assessment in the light of the evidence as a whole, I am satisfied that the description of this being an "informal public footpath" at the point when the application for planning permission was made was an appropriate one and that it is likely that the pursuers were well aware of the informal use of the path by members of the public to go to and from the Penicuik Estate at that point and when they bought the property.

The nature and extent of any anti-social behaviour

[52] **Mrs Manson** repeatedly described antisocial behaviour in the area of the path as having become "intolerable" over the last few years. She said that this had been happening on a daily basis. In cross-examination she said: "The antisocial behaviour happened all the time, every single day…" and "antisocial behaviour happened every single day at all times in the day". She confirmed that she had reported some of her concerns to the police, but

described these complaints as having been a small proportion of the times things had been happening: "generally the ones that I would only deem to be serious or almost sort of worthy of their time". She said that she would never have been off the phone to the police if she had phoned in relation to every incident such as dog-fouling or littering.

[53] It was a matter of agreement that number 5/19 of process was a letter dated 27 June 2017 from Police Scotland. This was spoken to by PC Shirley. It recorded the complaints made to the police by Mrs Manson from 21 April 2014 until 5 May 2017. From 21 April 2014 until 4 June 2016 (when the fence/gate was put up) a total of nine complaints were recorded. These included two reports about motor bikes, a report about a car, a report of an attempted break-in, three reports of removal of or damage to a sign, one report about a large drunken group of youths coming up the road to get to the Penicuik Estate and one report about youths gathering at the waterfall on the Penicuik Estate. On Mrs Manson's approach, these were, therefore, the only ones she had deemed serious enough to report to the police.

[54] The letter included an entry for 3 June 2016. In evidence-in-chief, Mrs Manson explained that, by this time, the fence/gate had been put up (it had been built on 2 June and it was then locked on 4 June). A large group of about 40 youths had gone to the waterfall area at about 7pm. The noise they were making was "deafening". The police had not been able to come that evening. She told the court that PC Shirley had visited a few days later and that they had had a discussion "about how it was a private road, the land did belong to myself, and he encouraged myself to block it off, to put a fence up if I was indeed the owner of that land." However, PC Shirley's evidence included what was recorded in the letter of 27 June 2017 for the incident on 3 June 2016 where it recorded: "PC Shirley …suggested that further discussions should take place with both Midlothian Council (to whom many walkers and cyclists complain about restricted access along Cairnbank Road) and Penicuik

Estate…PC Shirley further requested that we have sight or preferably a copy of the document from Midlothian Council stating that theirs (the pursuers) is a private road, that the signage which they have in place is correct and appropriate, and that there is neither a right of way nor public access through Cairnbank Road. Provided we have confirmation of these facts, it will be easier to enforce…Mrs Manson is happy with this outcome, and will proceed with these suggestions if possible…" PC Shirley confirmed in his evidence-in-chief that he had understood that there had been conflicting views about whether the signage was correct and whether locking the gate was in order (it was locked by the time of his visit a few days after 3 June) and so the purpose of his suggestion as recorded in the letter was to suggest that all sides should get together to discuss the way forward. This was very different to the impression created by the account of the meeting given by Mrs Manson. In the light of the terms of the letter and PC Shirley's evidence about the advice he had in fact given, I accepted and preferred PC Shirley's account and so did not accept Mrs Manson's evidence to the effect that PC Shirley had encouraged her to block off the road and put a fence up. In relation to PC Shirley's advice to Mrs Manson about having discussions with Midlothian Council, there was no evidence that this happened until well after the fence/gate had been locked and the notice had been served.

[55] Mrs Manson did not dispute that a letter from her solicitors, Brodies, number 5/10 of process, to the defender dated 27 June 2016 had recorded that the pursuers had six police incident numbers for complaints made between January 2016 and June 2016 but that the letter from the police dated 27 June 2017 only included reference to two such complaints. She denied that she had exaggerated the position to her solicitor. She said that she had not been mistaken, but then said that she might have been mistaken about how many times she had phoned the police. If this had been an isolated example, it might have been easier to

accept that Mrs Manson had not exaggerated the position to her solicitor but, unfortunately, it was not an isolated example. I concluded that it is likely that she had exaggerated the position to her solicitor.

[56] Mrs Manson agreed in cross-examination that, before the fence/gate was put up, she had never had cause to complain to the police with regard to anybody directing derogatory comments towards her son, H. However, she told the court that there had been three occasions when derogatory comments had been made towards H before the fence/gate was put up. She had not reported any of these incidents to the police as she had not then appreciated that they would be termed as a "hate crime", and she had not understood the severity of the incidents. She had not realised how seriously the police did take this. This included what she described as having been the "worst" one which was in May 2016 when H was on his tricycle on the road and a large group of youths went past with one making a derogatory comment towards him. She had, however, included a complaint about H being called names in a complaint she made to the police on 13 June 2016, a few days after the fence/gate had been put up. When Stephen Buggy, headmaster of H's school, came to give evidence, he was asked if he would be surprised if Mrs Manson had only made one report to the police – on 13 June 2016 – about abuse directed at H, he replied "Yes and no". He said that in his experience parents often found it difficult to know how to advocate on behalf of their children and so it was not uncommon for many of his parents to almost suffer in silence. However, my assessment of Mrs Manson is that she would not fall into the category of parent who would find it difficult to know how to advocate on behalf of H; in my view she would be likely to advocate robustly on his behalf. In particular, I formed the impression that she would be well able to, and likely to, complain should the need arise. She struck me as someone who could be quite forceful and determined if need be. There

also appeared to me to be a puzzling inconsistency in Mrs Manson's approach. On the one hand, she was saying that she was generally only reporting to the police things she had deemed serious enough to be worthy of their time but, on the other hand, some of the things she reported were relatively minor and yet no complaint was made to the police about any incident involving H until after the fence/gate was put up. I was, therefore, left with a real question-mark in my mind about these allegations and, at the very least, how serious any such alleged episodes involving H might really have been. In all the circumstances, I think it likely that these were further examples of exaggeration by Mrs Manson, as I have found in relation to other matters about which she gave evidence.

[57] Mrs Manson also confirmed, under reference to the letter dated 27 June 2017 from Police Scotland, that, in the period after the fence/gate was put up, 26 complaints were made to the police by her or her mother, Mrs Hope. About 12 of these were in relation to issues with a neighbour. Others related to abuse – in person and online – and vandalism apparently as a result of the fence/gate having been put up, youths mocking H in the street and someone using a neighbour's garden as a short-cut to the Penicuik Estate. However, she said in re-examination that only three of these incidents had been antisocial behaviour and that it was a complete contrast to what she had experienced before the fence/gate was put up, adding "It's like night and day". There had been hardly any problems with antisocial behaviour since then.

[58] Mrs Manson also referred to the Scottish Outdoor Access Code which covered things like dog fouling, dogs off the lead, littering, excessive noise and verbal abuse. She described such behaviour as having "escalated massively in the last three to four years…in the last few years it has just reached an intolerable level". She described experiencing such behaviour "daily". On one occasion a few months after the house had been built she and her father

counted 47 bags of dog excrement in the bucket of a digger. Young people also go to a place on the Penicuik Estate where there is a waterfall and, if something is going on there, "on occasion and at night I can hear all the noise in my living room...you could hear it during the day as well, if people were up there during the day…but especially if it's younger people, it does tend to be in the evenings. They would access there by going past my house very, very noisily earlier on in the day…" and then they would come back down at night with noise and shouting and would wake H up. There would also be older gentlemen with fishing gear and a carry-out and there could be large groups of adults with a lot of children that decided to go to the waterfall area "for the day, night, type thing…" In other words, Mrs Manson was again emphasising that all such things were happening both day and night. In cross-examination, she confirmed that gatherings of young people at the waterfall area (of the Penicuik Estate) took place almost every Saturday during the summer months from early afternoon until the early hours of the morning, especially if the weather was good and that this led to serious antisocial behaviour. However, it was then put to Mrs Manson that there had been only two reports to the police of antisocial behaviour from the waterfall area. Mrs Manson responded that that was not to say that there hadn't been antisocial behaviour on other occasions, and she complained that the police do not come out immediately. She had apparently been warned by the police about speaking back to people and that she ran the risk of being charged with breach of the peace herself. Mr Moffat, Head of Commercial Operations at Midlothian Council, later gave evidence to the effect that, because it had been suggested that, particularly at weekends, large groups of young people would come along Cairnbank Road and create a disturbance and result in noise, littering, vandalism in the Penicuik Estate, he had met with Sir Robert Clerk at Penicuik House in 2016 to ask him about his knowledge and experience of these issues and that Sir Robert had

expressed the view that, so far as he was concerned, there was no significant issue within the estate. Mrs Manson's account did not sit comfortably with this.

[59] Mrs Manson complained at one point in examination-in-chief that "people would walk back and forth all the time". She added: "It was never a particular time of day…it got to the stage where it could be any time". She was asked about this in cross-examination: "But walking past your house isn't antisocial behaviour?" and she replied: "People walking by just quietly isn't".

[60] By letter dated 27 June 2016 Brodies, solicitors acting on behalf of the pursuers, wrote to Mr Moffat of the defender. Their letter (number 5/10 of process) included a passage saying: "In the experience of our clients, and a number of their neighbours, a large proportion of those who take access along Cairnbank Road do not do so in a responsible manner…We are aware that Mr John Sheldon, one of our clients' neighbours, has set out his estimate in an email to you of 7 June that only 50% of people using the route do so responsibly. Our clients estimate that there can be up to 100 users of the path a day, particularly at weekends and in periods of good weather." Mrs Manson was asked about this passage in cross-examination. She said: "It can definitely vary in …all different weathers. If you have a good sunny summer day, the place can be busier" (by which I understood her to mean even busier than 100 people a day). She was then asked: "…on what is being suggested there…is that if you have 100 people using the path in any one day, approximately 50 of those users will be antisocial? She replied: "If you take into account dog fouling, littering, dogs off the lead, etc., then most definitely." However, when the logical conclusion of this was put to her, namely that 100 users a day meant 700 users a week or 2,800 users a month, she seemed to me to equivocate and attempt to backtrack by saying that she did not agree with the figure of 2,800 and said "Maybe the same people who are

frequenting the path on different days. Numbers can vary widely. That perhaps maybe has been too high. Numbers can be completely – you know, different things like that…" She then changed the subject, and I think it likely that this was because she perceived that the logical conclusion of the picture presented in the letter from Brodies might be a potentially difficult one for her case. However, before this attempt to backtrack, Mrs Manson had in effect adopted what was being represented in the letter written on behalf of the pursuers to the defender about both numbers of people using the path – and, in fact, in her evidence she appeared to suggest that numbers might be even higher on a sunny day – and the proportion of those users doing so irresponsibly, namely about 50% of users.

[61] According to Mrs Manson, a neighbour, Penny Wooding, who lives on the main road at the end of Cairnbank Road used to carry "poly bags" and pick up litter on her way and would come down the road on occasions with "full poly bags with cans and all sorts." Then in cross-examination, in relation to dog-fouling, dogs being off the lead, littering and noise and the principles of the Scottish Outdoor Access Code, Mrs Manson told the court that the code "was breached every single day, nearly every hour" and that, "nine times out of ten", dogs would not be on a lead and that, "nine times out of ten", people would let their dogs foul. However, Penny Wooding gave evidence to the effect that she used to pick up litter she found along the track and "it rarely filled more than my pockets…the odd crisp packet and the odd bottle, nothing very much". And in relation to dog excrement, she told the court that some dog walkers used to leave dog bags at the kissing gate and then go through the Estate and pick them up on the way back, but that if she ever saw those she picked them up. There was usually one bag that might be left at the kissing gate; occasionally two but rarely more than that. She did not remember seeing dog bags along the path or road; most people took them as far as the kissing gate. There was virtually never any excrement that

was not in a bag. In her experience, therefore, most dog walkers were clearing up after their dogs. She used to use the path virtually every day to walk her dog until the path was closed. Ms Wooding was a most impressive witness who was entirely straightforward, measured and careful in her evidence. I accepted and preferred her evidence to the more exaggerated impression I had gained from Mrs Manson about what Ms Wooding used to do.

[62] Mrs Manson was asked in evidence-in-chief what had prompted her to put up the gate/fence and replied: "Things had just reached an intolerable level. It was a living hell being in your own home, it had just become so incredibly difficult in a place where we should be happy and safe, and relaxed. We had engaged dog wardens, we had contacted the council, we had really tried. We felt like there was no other option."

[63] Mrs Manson was asked if she had discussed her concerns about antisocial behaviour with the council and confirmed that she had spoken to a Mr John Park who had worked for the council at that point. She was given advice by him about signage. However, she did not elaborate about any specific concerns she may have raised with Mr Park, or when this might have been.

[64] Mrs Manson confirmed that, before putting up the fence/gate, she had approached all her neighbours on Cairnbank Road to discuss this and that they had all been supportive. She accepted that the defender had not been told about this in advance. She confirmed that the fence/gate is permanently locked.

[65] As I have recorded at paragraph [50], **Mr Hope** told the court that the antisocial nature of that behaviour "increased up to 2012, it was almost just bearable". In addition, in his affidavit, Mr Hope maintained that since 2012 people using the path had become much more aggressive and antisocial. He referred to groups of youths coming up and down the

path to the Penicuik Estate and behaving in an antisocial way "every day" in the summer and again described large groups of youths "passing up and down the path all night, littering and shouting and swearing and leaving en masse in the early hours". In his affidavit, Mr Hope had spoken of things having got increasingly tense and unbearable in the spring and summer of 2016, which was why the fence had been put up. He added at paragraph 16: "we were scared of what might happen next in terms of people's violence and aggression towards us". However, in cross-examination, he accepted that there had in fact been no instances of violence. This, therefore, appeared to have been a rather unsatisfactory over-statement of the position in his affidavit. In addition, although he referred to a number of incidents, it became apparent that he had not seen many of these for himself, saying in cross-examination: "I work away from home a lot, so many of the challenges and incidents I may not see for myself, but obviously I get told about them…" An example was what he had said at paragraph 11 of his affidavit in relation to H as apparent fact without making it clear that he had not seen this himself. He confirmed that he had not himself reported any incidents to the police. This was because his view was that it would have served no purpose.

[66] In relation to the question of dog fouling, Mr Hope maintained that this happened every day and that it was sometimes so bad with bags of dog faeces left hanging on hedges or the gate that it "looked as if it is covered in Christmas decorations". It was instructive to compare Mr Hope's description of the nature and extent of dog fouling with evidence of others such as that from Penny Wooding to which I have already referred in paragraph [61] above, at that point as compared with the evidence of Mrs Manson. Again, I accepted and preferred Ms Wooding's evidence to the much more exaggerated picture I felt had been painted by Mr Hope. I also noted that no tangible or hard evidence such as photographs or

videos were available to provide some independent verification of the vivid pictures painted by Mrs Manson and Mr Hope in relation to this type, or indeed any, of the antisocial behaviour alleged.

[67] Mr Hope's evidence was that the council's dog warden service had refused to help, allegedly saying that it was private property. However, Mrs Manson told the court that she had engaged dog wardens, and Mr Moffat confirmed that he had spoken to the council's dog warden who told him that he had only had one complaint and had gone to Cairnbank Road and had acted upon it and that, so far as the dog warden was aware, dog fouling was a low level issue there. Mr Moffat insisted that the dog warden certainly would have given Cairnbank Road, including the private part of the road, attention "because it was a known route for walkers". I accepted Mr Moffat's evidence on this matter.

[68] **PC Shirley** spoke to the police report, number 5/19 of process, to which reference has already been made. He was based in Penicuik from 2004 to 2009. He was then based in Bonnyrigg from October 2015 until March 2016 before returning to Penicuik in March 2016. He told the court that between 2004 and 2009 Cairnbank Road was a known route of access, along with two others, into Penicuik Estate for various groups of people. This had resulted in complaints, mainly about youths going camping overnight or having parties but including litter left and bonfires being set in the woods on the estate. He had been aware of problems caused by these groups for both residents and the estate. He confirmed that such activities tended to be more prevalent in the spring and early summer. He confirmed that, before the fence/gate was put up on 4 June 2016, there had been some complaints of littering, abuse and urination. During a period of over two years, from 21 April 2014 until 4 June 2016 (when the fence/gate was put up) a total of nine complaints were recorded. These included two reports about motor bikes, a report about a car, a report of an attempted break-in, three

reports of removal of or damage to a sign, one report about a large group of drunken youths coming up the road to get to the Penicuik Estate and one report about youths gathering at the waterfall on the Penicuik Estate. Reference has already been made (at paragraph [54]) to what Mrs Manson said she had been advised to do by PC Shirley following the alleged incident on 3 June 2016, compared with PC Shirley's record of what he told her and advised her to do. The police response is dependent on how busy the police are and the seriousness of the complaint. A call in relation to antisocial behaviour is responded to as soon as possible bearing in mind other concerns. The police tend to look for "hot spots, i. e. somewhere where the problems happen on a regular basis, or at least frequently." If it is a regular thing in terms of particular days of the week or evenings or whatever times of day, they would target patrols. Cairnbank Road and Broomhill had been hot spots and were identified for regular patrols between 2004 and 2009 for youths using them as routes into the Penicuik Estate in the early hours of the morning, but they have not been since then. They were either going into the estate in the evening or returning in the early hours of the morning. Antisocial behaviour is taken seriously by the police but the priority given to a complaint is dependent on what else is happening at the time. He maintained in cross-examination that there are courses of action that the police can take if people are causing damage or disturbing the peace. He confirmed in re-examination that once the police are aware of an area and a problem they pay attention to it and, once it is identified as a potential issue, they will patrol it and it was to be hoped that a lot of the perpetrators would be evident to the police when patrolling the area. PC Shirley's evidence, therefore, contradicted the suggestion that antisocial behaviour had increased since 2012. During the period of about two years before the fence/gate was put up and during which time, according to Mrs Manson, things were becoming intolerable and with an estimate of

approximately 100 users a day, about 50% of whom were, according to her, exercising access irresponsibly, there were, therefore, only nine complaints to the police and one discussion with Mr Park at the council, apparently about signage at some point.

[69] **Fiona Parkinson** also gave evidence. In her affidavit she said that she had known Mrs Manson for about 20 years and that they, including Mr Manson, know each other as neighbours. Before the fence/gate was put up there was antisocial behaviour all year round but which was much worse "during daylight saving months". She said that she would find dog faeces in her garden every day, but she made no comment about the path in this respect. On most sunny Saturdays there would be drunk and foul-mouthed youths using the road. She commented about what she would find on her front lawn overnight. She estimated that, before the fence/gate was put up, about 10 to 20 people an hour would use the road on a nice day, about 40% of whom she classed as responsible users (meaning, of course, that about 60% of users were according to her irresponsible). In evidence-in-chief she complained that she "could hear people going to and fro and I could hear people at night". This sounded similar to Mrs Manson's comment (noted at paragraph [59] above) that "people would walk back and forth all the time". Mrs Parkinson told the court that it had never occurred to her to complain to the council. She said that the things she had described in her affidavit had been "irritating and unpleasant and infuriating at times, none of it specifically criminal behaviour", so it had not occurred to her to call the police. She had indicated at paragraph 3 of her affidavit that "the trouble had begun" in 2009. In her oral evidence, she said that the antisocial behaviour had "absolutely escalated" after the kissing gate had been unlocked in 2009 to allow temporary access into the Penicuik Estate along Cairnbank Road while a landslip was being repaired on the Alderbank route. She explained that she had nevertheless moved from 17 to 15 Cairnbank Road in 2013, mainly to be close to her mother.

Ms Parkinson also confirmed that she "adopted into" her evidence a letter, number 5/14/6 of process, she had sent to the pursuers' solicitors "to support the Mansons". In that letter she made particular complaints about her garden. She also said in her letter that "hoards (sic) of youths" would "pour up and down" the drive in the summer, "alcohol-fuelled, urinating and swearing". This could be mid-afternoon on a Saturday or 3am on a weekend morning. Since the erection of the fence/gate she had seen a significant and welcome decrease in the antisocial behaviour.

[70] **Mrs Kathleen McKinnon's** house backs on to the road. She said in her affidavit that she is the mother of Ms Parkinson, that she had known the Hope family since she moved into her house in 1995 and that she used to tutor Mrs Manson when she was a schoolgirl. Before the fence/gate was put up there was a lot of noise, including shouting and bad language, coming from the road late at night and that this happened "on a number of occasions" – she thought two or three times a week – particularly in the summer months. It had been noticeably less noisy since the fence/gate went up. Before this, she also saw evidence of dogs fouling the road on a regular basis. She said in evidence-in-chief that she had not reported any incidents to the police because the incidents were "just a nuisance and an inconvenience". She confirmed that number 5/14/1 of process was an email she had sent to her daughter, Fiona Parkinson, and which had then been forwarded to Mrs Manson and confirmed that she would be "content to adopt" this into her evidence. A copy of this email was then sent to the defender with a letter dated 23 September 2016 by Brodies, number 5/13 of process, in support of the pursuers' position about antisocial behaviour on Cairnbank Road. In that email Mrs McKinnon had said that, earlier in 2016, before the fence/gate had been put up, a large group of youths had urinated at the top of her driveway and added in that email: "I was not prepared to go out and confront such an intimidating group". This

passage can only be read as meaning that she was there at the time. However, it became evident from her oral evidence that she had not even been home at the time and so had not seen this personally. She told the court that she had heard about this from neighbours. She explained that she had that known that there was concern about Cairnbank Road and so that was why she had prepared the email. I regarded this as a wholly unsatisfactory explanation for this misleading statement in her email. This left me with a real doubt about the extent to which I could have any confidence in her credibility and reliability. I also noted that Mrs McKinnon had said in this email: "In the summer months, the noise is almost constant from large groups of walkers and youths passing back and forth along the driveway". Her evidence in court appeared to be a bit more measured than this passage in her email but, as I say, I was in any event left with a real doubt about her credibility and reliability.

[71] **Dr Davies** has lived at 19 Cairnbank Road since 1997. He confirmed in his affidavit that he had known Mrs Manson since then. Dr Davies sold the plot of land on which her parents, Mr and Mrs Hope, built their current house on Cairnbank Road, and he also sold the land which is now "the property" to the pursuers and on which their house has now been built. He therefore confirmed that he has had a financial relationship with the pursuers and with Mr and Mrs Hope. Dr Davies told the court that the frequency of antisocial behaviour had increased after 2009, but that it had occurred for several years before that too. He had had problems with young people throwing stones at his house and garden. This has stopped since the fence/gate was put up. He did not report any incidents to the police as his view was that they would not do anything. He used to see youths using Cairnbank Road to get to the Penicuik Estate to drink and party. The noise of parties from the estate would keep him awake at night. There was also regularly litter in his driveway. He had prepared a document, number 5/14 of process, summarising incidents over a period of 19 ½ years

residence. However, it was not clear when many of the things listed had happened. He also said in his affidavit at paragraph 18 that he was away from Penicuik for several months in the year**.** His house also does not directly front the road. The antisocial behaviour has largely ceased since the fence/gate was put up.

[72] **Dr Spearman** lives at 15A Cairnbank Road. In his affidavit he said that had lived there since 1998, that he has been friends of the pursuers since before their marriage and that he bought his house from Mr and Mrs Hope. The use of the road by members of the public had increased dramatically over the four or five years before his affidavit (signed in October 2017). This had been particularly notable in the summer. Most dog walkers did not pose a problem although the quantity of dog dirt left behind was an issue. Groups of youths wanting to party on the Penicuik Estate was a regular feature of summer evenings, but he also referred to groups of raucous youths passing his house in the later afternoon and early evenings in the summer who had often clearly been drinking. He understood that this was getting reported to the police and that the police had attended on several occasions. Pedestrians and other road users were also frequently abused by cyclists. There was a significantly higher usage of the Cairnbank Road in the summer of 2016 which led to increased litter on the road. It was very noticeable that, since the fence/gate was put up, these problems had ceased. Dr Spearman's evidence about the position in the summer of 2016 was a rather confusing one. On the one hand he told the court that there was significantly higher usage of Cairnbank Road in the summer of 2016 but, on the other hand, he was saying that the problems had ceased after the fence/gate was put up. But it was put up on 4 June 2016, at the very start of summer.

[73] **Mrs Janette Mathieson,** H's Community Learning Disability Nurse since March 2015, gave evidence to the effect that she understood that H's sleep was never good but that

there were spells where it could be much more difficult. She had last seen H in the summer of 2017. She said that his sleep fluctuates and she thought that was partly just because of H and maybe the pursuers were not carrying out strategies to assist sleep. So far as she was aware, he was still getting woken up by noise in the neighbourhood and so this was something which was an ongoing issue which she thought contributed to his sleep problems. This was despite the erection of the fence/gate. Mrs Mathieson confirmed that the sleep problems are associated with H's autism and that, when there are strategies in place, he sleeps better but he still, even when he sleeps, wakes at night and so she thought that this was something that was part of H and that is going to continue. Mrs Mathieson also gave evidence to the effect that H was still having behavioural problems. He needs a safe place to play, preferably a closed garden, and requires continuous supervision. She confirmed that the enclosed garden area was a "good-sized fenced garden" which allowed him to move around to play on his trike and to play ball games.

[74] **Dr Jennifer Kerr,** Associate Specialist in community child health, confirmed that she had been H's community paediatrician from September 2012 until January 2016, when she had last seen him. She confirmed that H needs somewhere safe to play with adequate supervision. A safe space outdoors at the pursuers' house was therefore essential. She had understood from Mrs Manson that the pursuers could not allow H to be outside the space adjacent to the house. She confirmed in cross-examination that she had not been aware that H had been playing on his trike outside (Mrs Manson having confirmed in cross-examination that she had allowed H to play on the road with his trike in May 2016 under her supervision). Dr Kerr said that she would be delighted if he had been.

[75] **Mr Stephen Buggy** is head teacher at Saltersgate School. H is one of his primary age pupils. There seemed to be a consistent pattern of disruption at home that meant that H was

finding his home environment more challenging and distressing. It was difficult to say what one factor contributed. He had been given to understand that H had been finding it difficult being outside in his garden and that there were external noises affecting him. He confirmed in cross-examination that H had also been finding it difficult to understand his environment at his local primary school and that he had been becoming more and more distressed there. That placement stopped in about June 2016. H had also had issues with school transport between January and June 2016. In cross-examination, Mr Buggy confirmed that sleep is something particularly in autism that is not a surprise that it is not consistent. When asked if he would be surprised if Mrs Manson had only made one report to the police – on 13 June 2016 – about abuse directed at H, he replied "Yes and no". He said that in his experience parents often found it difficult to advocate on behalf of their children and find it difficult to know how to do that and so it was not uncommon for many of his parents to almost suffer in silence. I have already commented on this at paragraph [56] above.

[76] **Dr John Pope** was led in evidence on behalf of the defender. He had never seen any evidence of antisocial behaviour of any sort – including litter, vandalism, fire-raising, drug use, alcohol use or dog dirt – on the twelve or so occasions when he had walked along Cairnbank Road. This included a site visit with the Midlothian Access Forum, of which he was then the chairman, on 1 July 2016 which included viewing the fence/gate which had by then been put up. Complaints about this had been made by members of the public. He saw houses on the right hand side which were long-established and on the left hand side there were high hedges and drives and he had felt comfortable when walking there that he was not invading the residents' privacy on either side. The fencing of the pursuers' house (on the right hand side of the road) was such that once could not see through it. When he visited Cairnbank Road he thought it was remarkable how well tended the place was. He

confirmed that his visits had been during the day; he had not been there at night and so would not have heard if youths were making a noise in the early hours of the morning. However, he thought that, if things had been happening when he was not there, there would have been some debris left. He also gave evidence about what he described as having been a "most unfortunate incident" in the autumn of 2015 when he was walking along the path from Penicuik with his wife and grandchildren. There was a JCB in the area of the path just before the kissing gate. A man who appeared to be a workman in his late fifties was there. Dr Pope had asked the man if it was safe to pass, and then asked if he was taking down a notice which had been causing people to complain. The man very suddenly became really angry, red in the face and shouted at Dr Pope. The man wanted to know what Dr Pope was doing and that the path was a private road. He jabbed his finger at Dr Pope and said that he would take out an injunction (sic) against Dr Pope using the route and asked for Dr Pope's name. Dr Pope asked the man for his name too and the man said Hope. The man had then let them go on that occasion. This had been the most aggressive occasion Dr Pope had ever encountered. His grandchildren had been terrified. He realised that he should not have mentioned the sign, but the reaction from the man had been a gross over-reaction. In relation to the fence/gate which was then put up in June 2016 which Dr Pope referred to as "the barrier", it seemed to him to be impregnable. In cross-examination, he said that he thought that this was a factual description as it was painted with anti-vandal paint, really quite high and there were CCTV cameras. Having considered the whole of the evidence and seen the fence/gate structure and arrangements at the site visit, Dr Pope's description was in my view not an unreasonable one in the circumstances.

[77] **Professor Trewavas**' garden gate opens out onto the public part of Cairnbank Road. He had never had any issues with teenage groups causing a disturbance or any other antisocial behaviour. He did not recall ever having seen evidence of dog excrement or vandalism along Cairnbank Road on his visits there. He also had not seen anything that struck him as serious littering. However, he had little knowledge of the position after he had stopped running this route in 2010, apart from his two visits in 2016. He confirmed that he had sent the emails, numbers 6/15 and 6/16 of process, to John Park, the access officer at the defender, on 20 and 22 June 2016 after the fence/gate had been put up asking that his name be added to the list of objectors to the blocking of the path and advising Mr Park that the person who had erected the fence/gate had been "a builder named Hope…He has redone the last building on Cairnbank access from Penicuik …and he has left huge amounts of rubble by the right side of the path so litter can hardly be a problem."

[78] **Dr Derek Storey** has lived in Penicuik for 25 years and has been accessing the Penicuik Estate about three or four times a month along Cairnbank Road since about 1988. He had seen some litter there, but not an exceptional amount. He had never seen any evidence of fire-raising, drug-use, alcohol abuse or vandalism. However, he had occasionally seen dog excrement at the side of the path and the odd dog bag at the gate. He would go there in day-light hours. He had sent the email dated 8 July 2016, number 6/18 of process, to Mr Park to complain about the fence/gate having been erected. He explained that he had sent it because he felt that this had denied access to Penicuik House for those who were infirm and it was a desirable place to go to. In his email he had recorded that Cairnbank Road had been the main access into the Penicuik Estate from Penicuik and that it had been "a very popular route with walkers for many years". In cross-examination, he confirmed that his visits had been during the day and that, if youths had been making a

noise late at night and causing disruption in the early hours of the morning, he would not have been aware of that.

[79] **Ms Penny Wooding** lives nearby at 23 Bridge Street, Penicuik and used the path virtually every day to walk her dog from 2003 onwards until the fence/gate was put up in 2016. Ms Wooding gave the evidence referred to above at paragraph [61] about picking up a small amount of litter and about dog bags occasionally being left at the kissing gate but, in her experience, most dog walkers cleared up after their dogs. Ms Wooding's front door opens straight onto Bridge Street. She had never encountered any disturbances from youths passing by to go into and out of the Penicuik Estate using Cairnbank Road. She thought that she would have heard gangs of youths being rowdy because, if people going past her house are talking loudly, she can hear them. She felt very safe living in Penicuik. She used to walk into the Penicuik Estate in either the morning or the afternoon and had sometimes gone there at about 6pm. She had occasionally come across young teenagers swimming at the weir in the estate and having a good time but not making a lot of noise. She was asked how she felt about the Cairnbank route being closed and replied: "I feel devastated and shocked. It meant a lot to me, that route." She had never seen any signs of fire-raising, drug-taking or alcohol abuse. In cross-examination, she confirmed that she had never been there late at night but that she might have been aware of young people making a lot of noise and causing a disruption if they had been passing her house on the way to Cairnbank Road.

[80] **Mr James Connal** had occasionally seen litter around the kissing gate or along Cairnbank Road, but not much. He had not seen any signs of dog excrement or vandalism. Any signs of fire-raising or alcohol abuse had been into the Penicuik Estate. He heard young people shouting, more often in the spring and summer, and confirmed that in the summertime you would hear young people shouting and swearing when playing down at

the weir (on the Penicuik Estate) but, as he put it, "it seemed like young folk just enjoying themselves to me". This noise was not antisocial for him, but he accepted in cross-examination that he was 90 metres further away and that it might be a bit louder if people were passing right in front of your house.

[81] **Mr James Kinch**, Land Resources Manager at Midlothian Council, told the court that he had not been aware that the pursuers had been intending to erect the fence/gate, and there had been no correspondence to say that it was being erected for a particular reason. It was pretty obvious that it was to stop public access, and that was the only assumption he could make. It had come to John Park's attention first of all following a complaint. This was after the fence/gate had been put up. The council has received about 100 complaints about it and over 350 people had added their names to a petition objecting to the closure of the route. Mr Park, who has now left the council, was the then Access and Woodland Officer at the council. Mr Kinch was referred to a letter, number 6/12 of process, dated 7 June 2016 from Penny Wooding to John Park in which she had told Mr Park about the building of a new large gate (the fence/gate) across the path by an adjacent landowner (the pursuers) and that access was now impossible. She had added "I've only had amiable conversations with the house owners and was totally shocked when the new gate appeared on 4th June." Mr Kinch also confirmed that this was the first time that he had been aware that something was amiss at Cairnbank Road. He told the court that this complaint was typical of complaints that the council then received. He and Mr Park had then visited. His impression of what he saw was that "it was a very thorough job that had been carried out – concreted in very thoroughly…in a construction type way…it was a very well-constructed job…seeing it close up, it was quite a formidable structure". Under reference to the letter dated 27 June 2016, number 5/10 of process, from Brodies on behalf of the pursuers, he had understood that

what was being put to him was that approximately 100 people a day were using the route – which was 700 people a week – and that, of those, approximately 350 people would not be using the path responsibly. However, the only evidence he had was that, according to the police and the council's community safety team, there was no suggestion of undue antisocial behaviour; the information the community safety team had from the police was that it was low level, namely relatively low compared with estimates of half of the numbers estimated in Brodies' letter (namely, half of about 100 people a day) as using the path. If 50% of the people using the path were being antisocial on the route, the council would have heard about it by then. He was not saying that there had been no antisocial behaviour, but the police reports of incidents had been a very small fraction of the numbers estimated. He did not see any evidence of antisocial behaviour at the site visit with the Local Access Forum on 1 July 2016. The police should be called in future. In cross-examination, he explained that the council had balanced the number of people who had complained about the closure of the route against the number of complaints lodged with the police or other body. All of the residents could phone up and make complaints, "but they need to be somehow evidenced…we have evidence of people using the route who have complained set against the number of complaints it is estimated that one or two people using the route are causing antisocial behaviour". He went on to say that, in August 2014, John Park had received a phone call from either Mr Hope or Mr Sheldon (another then resident of Cairnbank Road) and that Mr Park had advised the caller that they needed to keep a record of all the incidents along the route. Mr Kinch therefore posed the question: "What records were taken of these incidents?...When 100 different complainants phone up and tell us that a route has been blocked, set against what appears…to be very few incidents or complaints that we can evidence…the decision I think that we needed to take was a balanced approach…".

Mr Kinch confirmed that the caller, Mr Hope or Mr Sheldon, had been expressing significant dissatisfaction with antisocial behaviour. The council had therefore asked at that time (August 2014) that the information about antisocial behaviour be recorded and taken note of. It was a straightforward issue to call the police if there is a problem. He had visited the route informally about five times between 2007 and 2016. He did not see any signs of antisocial behaviour on those visits, just people and families walking through peaceably. This was at weekends. The information the council had been getting from residents had been inconsistent. For example, Mr Hope had repeatedly maintained that there had never been access down the route. If that was correct, Mr Kinch questioned how could there be such antisocial behaviour as alleged? The information from residents had also been inconsistent with police reports and the community safety team. He had therefore had to have a degree of scepticism and inquiry. He did not know how well the residents knew each other and what level of interest there was for residents. Antisocial behaviour needs to be reported to the police so that there is at least a record of it and the police can have the option to investigate and the council could look more objectively. There had just been the phone call to Mr Park in 2014 when the council had asked for antisocial behaviour to be recorded but, without that information, there had been no justification for the council taking a different view.

[82] **Mr Richard Moffat** is the Head of Commercial Operations at Midlothian Council. His responsibilities include matters relating to land and countryside. Mr Kinch had asked him to become involved in the issue concerning Cairnbank Road when the fence/gate was put up. The police had expressed the view that any issues in relation to antisocial behaviour were "minimal, very low significance, and indeed it would not be their intention to put in any …particular resource into that area. That's how they expressed their view." "When I

talked to the police they talked about a very low level and they were talking about perhaps a handful of incidents across a whole kind of 12-month period on average". The council had been trying to "strike a balance". Because it had also been suggested that, particularly at weekends, large groups of young people would come along Cairnbank Road and create a disturbance and result in noise, littering, vandalism in the Penicuik Estate, he had met with Sir Robert Clerk at Penicuik House in 2016 to ask him about his knowledge and experience of these issues and that Sir Robert had expressed the view that, so far as he was concerned, there was no significant issue within the estate. In cross-examination, Mr Moffat confirmed that he had seen the statements provided by the pursuers' neighbours (in number 5/14 of process), but explained that the difficulty had been what weight to attach to the information available and that he had been trying to get a balanced approach and to get some kind of third party evidence in relation to the extent of antisocial behaviour. That was when he contacted the police, and their view was that there was not a significant issue. The police did speak about antisocial issues; it was more about the scale of it that was the problem. He had, therefore, been faced with "polar opposites". He had produced a balanced picture of the information that was available, and it was ultimately the Corporate Management Team of the council that then took a decision to issue a section 14 notice. The police had told him that when an issue was raised with them they will respond appropriately and they were more than willing to become involved. The police sergeant he met at a meeting with residents (after the fence/gate had been put up) had been quite clear that the police would respond and they would put in resources commensurate with the issues that were involved. He had also spoken to the council's dog warden. The dog warden told him that he had only had one complaint about dog fouling at Cairnbank Road and that he had acted upon it. So far as the dog warden was aware, it was a low level issue there. Mr Moffat confirmed that

the dog warden would certainly have attended Cairnbank Road, including the private part of it, because it was a known route for walkers.

[83] As I have already pointed out, in my opinion, Mrs Manson had in effect adopted what was being represented in the letter from Brodies written on behalf of the pursuers to the defender about both numbers of people using the path and the proportion of those users doing so irresponsibly, namely about 50% of users. On this approach, this might be thought to amount to a very large number of irresponsible users a day, let alone taken over a week, a month or a year if multiplied by 7, 30 or 365. If 50% of users at such a level were to be an accurate estimate, descriptions such as "intolerable" might well have been appropriate and justified. However, I am not satisfied that such an estimate of the proportion of people using the path irresponsibly has been proved to be accurate. PC Shirley's evidence contradicted the suggestion that antisocial behaviour had increased since 2012. During the period of about two years before the fence/gate was put up and during which time, according to Mrs Manson, things were becoming "intolerable" and with an estimate of approximately 100 users a day, about 50% of whom were exercising access irresponsibly, there were, nevertheless, only nine complaints to the police and one discussion with Mr Park at the council, apparently about signage, at some point. The dog warden had also only been called out once. At another point in her evidence, Mrs Manson described such behaviour (having referred to examples of antisocial behaviour) as having "escalated massively in the last three to four years…in the last few years it has just reached an intolerable level." However, neither Professor Trewavas nor Penny Wooding (both of whom I accepted as being credible and reliable witnesses) had been aware of such issues despite living close by. I am, therefore, not satisfied that Mrs Manson's description was an accurate one.

[84] In relation to reports to the police, on the one hand Mrs Manson said that she was generally only reporting to the police things she had deemed serious enough to be worthy of their time but, on the other hand, some of the things she reported were relatively minor, and did not include any mention of alleged derogatory comments directed towards H until after the fence/gate had been put up. And despite the fact that it had been said in the letter from Brodies, number 5/10 of process, that youths had been gathering at the waterfall on the Penicuik Estate almost every Saturday, there had been only two reports to the police in relation to such gatherings between 21 April 2014 and 4 June 2016 when the fence/gate was put up. In addition, according to Mr Moffat, Sir Robert Clerk had expressed the view that, so far as he was concerned, there was no significant issue within the estate. This was also in marked contrast to the picture painted by Mrs Manson and Mr Hope in particular (to which I have already referred at paragraphs [58] and [65] above). Mr Moffat aptly described the situation as being an example of "polar opposites".

[85] In a situation such as this, in my view, it was in my view not in the least bit surprising that the council was looking to see if there was any independently verifiable evidence to support the anecdotal accounts coming from the pursuers and a number of neighbours in, and with an interest in, Cairnbank Road who had provided the pursuers with supportive letters and emails, particularly where the path was a known access route by members of the public to the Penicuik Estate. However, the neighbours cannot in my view be regarded as independent and impartial because Cairnbank Road is also their road and they clearly have an interest in what happens on it and in relation to it. More than once, Mrs Manson gave the impression that she saw herself as having put up the fence/gate at least in part on behalf of all the Cairnbank Road residents. For example, the first question Mrs Manson was asked in cross-examination was what she was hoping to achieve by being

allowed to keep the fence/gate up. She responded that she would like to keep the same relaxed, safe home environment for her family "and actually for all the residents who are on the driveway…". Mrs Manson was then later asked in cross-examination: "What you have done, though, Mrs Manson, you have effectively cut off a pathway that was used on a daily basis by members of the public so this is not just about H, is it?" And she replied: "It is about all the residents on the driveway and about the people who live on the driveway, and about the path, and about the fact that the path has unbelievably high levels of antisocial behaviour." The residents on the driveway included the neighbours who have supported the pursuers by submitting letters of support for forwarding to the defender and then the court, and then giving affidavits and evidence in support of the action and steps taken by the pursuers.

[86] Mr Kinch explained that it was because of the conflicting accounts that, in 2014, Mr Park had asked a caller from Cairnbank Road for a record to be made of all incidents. An irony is that Cairnbank Road had been a hot-spot between 2004 and 2009, but has not been since then. Explanations were given by witnesses as to why, despite the very large scale of the antisocial behaviour alleged to be occurring, only a very small fraction of instances of them had been reported to or brought to the attention of the police, the council's community safety team and the dog warden by the pursuers, Mr Hope or their neighbours in Cairnbank Road who, it might be thought, would also have had an interest in making such complaints in the event of issues arising on Cairnbank Road. However, I did not find the explanations convincing. PC Shirley explained that the police tend to look for "hot spots". Indeed, Cairnbank Road used to be such a "hot spot", but has not been in recent years. He told the court that if it is a regular thing, in terms of days of the week or evenings or whatever times of day, they will target patrols. The police sergeant with whom

Mr Moffat met at a meeting with residents (after the fence/gate had been put up) had similarly been quite clear that the police would respond and they would put in resources commensurate with the issues that were involved. In this case, of course, the level of complaints had been such that the police view as expressed to Mr Moffat was that any issues in relation to antisocial behaviour were "minimal, very low significance".

[87] There was, therefore, a marked mismatch between the sometimes dramatic nature of the anecdotal accounts from the witnesses led on behalf of the pursuers, including their neighbours (which included the implication of Fiona Parkinson's evidence that about 60% of users of the path were irresponsible) on the one hand as compared, on the other hand, with the low level of complaints to the police and others, confirmation by Sir Robert Clerk to Mr Moffat that there was no significant issue within the Penicuik Estate and the descriptions given by other regular users of the path (and road), such as Penny Wooding, Professor Trewavas and Dr Storey, which were likewise consistent with irresponsible use of the path (and road) at a low level. I have already recorded an example at paragraph [66] in relation to the question of dog fouling where Mr Hope maintained that it was sometimes so bad with bags of dog faeces left hanging on hedges or the gate that it looked as if it was covered in Christmas decorations. Apart from the fact that this account was completely contradicted by Penny Wooding, whose measured and straightforward evidence I accepted and preferred to that of Mr Hope, I found it surprising that there was no tangible or verifiable record to support the vivid picture painted of such an extreme state of affairs, such in the form of photos or videos. I did not form the impression that either Mr Hope or Mrs Manson would be likely to be reticent about complaining should the need genuinely arise. Having seen and heard them both in evidence, both struck me as people who could be quite forceful and determined if they wanted to be.

[88] In a situation of such polar opposites, independently verifiable evidence (which can sometimes include hard evidence such as photographs and video evidence) is indispensable to point to where the truth lies. In this case, the evidence from the police is not consistent with the picture which the pursuers sought to paint. It is instead consistent with the descriptions given by those who had been regular users of the path from whom I heard evidence, including Penny Wooding, Professor Trewevas and Dr Storey. In the light of the evidence as a whole, including the police evidence, the low level of complaints to the council and the dog warden and confirmation of Sir Robert Clerk's position, I have concluded that the picture painted by witnesses led by and on behalf of the pursuers, including the neighbours, was significantly exaggerated and, therefore, that the pursuers have not proved essential averments which they were offering to prove.

[89] In my assessment, Mrs Manson's and Mr Hope's evidence was particularly unsatisfactory. Both gave evidence which variously contained inconsistencies, was significantly exaggerated or over-stated in material respects – including in relation to the alleged nature and extent of antisocial behaviour – or was otherwise unsatisfactory. I have already referred to some examples and further examples follow (such as recorded at paragraphs [93], [98] and [181]). So far as Mrs Manson is concerned, it is possible that she is more sensitive or intolerant than most people stemming from an understandable desire to support and protect H. However, that certainly would not fully account for all of the instances of exaggeration and sometimes inconsistent and otherwise unsatisfactory evidence she gave (such as referred to at paragraph [54] above as compared with the evidence of PC Shirley). In view of the cumulative effect of the inconsistencies, exaggerations and over-statements and otherwise unsatisfactory nature of material aspects of their evidence, I

did not feel that I could regard either Mrs Manson or Mr Hope as being credible or reliable witnesses in whom the court could have confidence.

[90] In relation to the witnesses led by the defender, my impression was that all were credible and reliable witnesses in all material respects in relation to the points which actually mattered. I was particularly impressed by Penny Wooding, Professor Trewavas and Dr Storey. They were knowledgeable and each gave their evidence in a straightforward and measured manner without exaggeration. Mr Kinch and Mr Moffat were also impressive witnesses, and both were careful, detailed and measured in their evidence on behalf of the council. Where their evidence differed to that of Mrs Manson and Mr Hope, I preferred the evidence of Mr Kinch and Mr Moffat.

[91] The defender did not suggest that there has been no antisocial behaviour, but their position is that the circumstances are not anywhere near as serious as, by their averments, the pursuers offered to prove was the case. In particular, it was averred (1) in article 6 of condescendence that a significant proportion of people using the path have not done so responsibly and (2) in article 7 of condescendence that the level of antisocial behaviour has increased dramatically since the construction of the pursuers' house. In all the circumstances, I am not satisfied that these averments have been proved by the pursuers. To the contrary, in my assessment, the proportion of people not using the path and road responsibly prior to the erection of the fence/gate was at a low level.

The level of privacy afforded at the house when it was built

[92] **Mrs Manson** told the court that the reason for buying the property and building what she described as an accessible bungalow where it is was so that they could be close to Mrs Manson's parents for support. Their youngest son, H, now aged eight years of age was

diagnosed with autism when he was about three years of age. As a result, he has serious problems with communication and displays challenging behaviour. He needs one-to-one supervision at all times. He also has long-standing problems with sleeping. Her father, Mr Hope, dealt with the application for planning permission, but he discussed it with her. There is steep banking behind the house running up to St James's Gardens. The site had to be excavated in order to provide a flat surface on which to build the house. An area of ground to the west of the house was fenced off to provide an area of enclosed garden. Mrs Manson confirmed that the enclosed garden is overlooked by neighbours at St James's Gardens to the north. The track part of Cairnbank Road runs past the house and enclosed garden area at the other side of a brickwork wall which comprises pillars of brick with wooden slatted fence posts which runs along the length of the house and the enclosed garden area. The property includes further land to the west of the enclosed garden area. Mrs Manson repeatedly referred to this area as the "woodland" area. It extends up to the boundary with the Penicuik Estate. She explained that they can only access the flatter parts of this area (of which I did not understand there to be many) at present and that, apart from H occasionally going "bug-hunting" there, they do not use this woodland at the moment. There is a mono-block driveway on the east side of the house. None of this was in dispute. In examination-in-chief, she maintained that it was possible for someone to see slightly through the slats in the fence to the enclosed garden area, but she accepted in cross-examination that in a photograph of the fence, number 5/3 of process, one could not see through the fence. You could always hear the "continuous noise of people accessing going up and sort of down". Mrs Manson agreed in cross-examination that, although someone passing along the road (not the path) would be able to see the top part of the children's bedroom windows, they would not be able to see in the windows. She confirmed

that she would like to be able to use the woodland area a lot more for H, such as for putting in beds and planters, a rope swing and a "mud kitchen" where he could enjoy being outside. Some areas would need to be flattened down to make it accessible, but trees would not be removed. Her father, Mr Hope, had built a couple of houses before and he is very good at trying to make things more accessible. Mrs Manson described the enclosed garden area as being a small back garden. She agreed that this was a small proportion of the total area of the property. She was asked about the planning permission granted, number 6/4/9 of process, in relation to the extent of garden ground for which planning permission had been granted; she maintained that she did not know what the position was about whether or not planning permission had been granted for a larger area than that ultimately developed, saying that her father would know about that. She confirmed, however, that her father had discussed things with her before the application for planning permission was submitted, that she had been happy with her understanding of what was being proposed by him and that she had thought that what was being proposed was suitable. This included the garden. Mrs Manson also told the court that, although the planning permission included permission for the erection of gates at the entrance to the driveway to the east of the house, it had been impractical to put up gates because they would not have been able to get cars in and out.

[93] **Mr Hope's** evidence on the question of privacy was confusing and inconsistent. He confirmed at one point in cross-examination that he had felt that the pursuers' house had been suitable, including because it was a place which provided privacy. However, at another point, he indicated that when he (the application having been submitted by him on behalf of the pursuers) applied for and obtained planning permission for the house and garden as it currently exists he did not consider that the garden size was suitable for the family. He also accepted that planning permission had been granted for a larger area of

garden ground than that actually enclosed. He agreed that there was a shortfall of about five to six metres between the fenced area of the enclosed garden and the plan boundary. He explained that the garden ground could only be extended with some serious civil engineering work because of the sloping topography of the area which became almost semi-vertical. He agreed that the distance from the western end of the house to the western boundary of the property was about 25 ½ metres. He also agreed that, working with the council, he had been able to secure planning permission for the house with sufficient amenity space. Despite Mr Hope's evidence, it was clear from the fact that he proceeded with the application that he must have been content to do so on that basis.

[94] **Mr James Kinch** confirmed that he had taken the photographs, number 6/5 of process, that the pursuers' house, driveway, and fencing were shown in the photographs and that the properties to the rear in St James's Gardens overlooked the pursuers' house, driveway and part of their garden. The type of fencing between the house and the road had been specifically designed to reduce the amount of visibility into a property. Somebody passing by was not going to be able to see in. His view was that the fencing around the garden area was sufficient to give a high degree of privacy. He assumed that in view of the fact that planning permission had been accepted the pursuers had been quite happy with the size of the property and the garden. He accepted that there was a distinction between having enough privacy and being free to enjoy your home without antisocial behaviour. Mr Kinch was asked in cross-examination whether someone who bought a property in a rural location might be expecting a higher degree of privacy than someone buying a house on a modern housing estate. He replied: "What I also have to consider is the number of people who have been using that route and that suddenly, because someone builds a house there, all their rights are gone". It was put to him that that must happen all the time when

new houses are built, and he responded to the effect that the Council tried to protect access rights wherever possible when there was new development and quite often ask for developments to be "permeable" so that paths can still get through to the other side of a development. I refer to his evidence about this in a bit more detail at paragraph [134] below. Mr Kinch thought that the 2003 Act stated that people had a right across all land unless it was excluded from access rights and, therefore, that the character of the site did not seem to be a big factor. He described the property as being in a "peri-urban setting. It's an urban fringe…"

[95] **Mr Moffat** told the court that when the Equality Impact Assessment (number 6/18 of process) was completed the council had taken a number of things into account. These included the fact that the house was built on what was a known public access route – and there was a degree that this had been accepted – and that measures had been put in place as part of the building and planning process to afford privacy. There was also the boundary screening as a result of all of which it was felt that privacy had been protected.

[96] **Ms Cowie**, the planning officer, confirmed that the drawing with the application for planning permission had showed two of the three bedrooms on the south side of the house. This had not been a concern to the council at this site. She also confirmed that a wall had originally been proposed in the planning application for the front of the pursuers' house to run along the adjacent road, and the approval granted had included this. The application had been submitted in October 2011. She had no recollection of any suggestion that this wall should be reduced in height. What had been built instead was the wall and fence shown in the photographs. However, Ms Cowie's view was that, looking at what had been built, it afforded quite a lot of the level of privacy that the council would have approved at the application site as part of the approved plans. She, therefore, confirmed that it had been

decided that it would not have been in the public interest to try to rectify this discrepancy between what had been approved and what is now on site. She thought that what was now on site looked higher than what had been approved and that this afforded more privacy. She also confirmed that, in looking at amenity land, this included both garden space and hard standing areas. The area of enclosed garden shown on number 5/2 of process did not extend to the whole area for which planning permission had been granted as shown on the approved plans, number 6/4/9 of process. Ms Cowie was referred to the Planning Application Delegated Worksheet (number 6/4 of process). This had included a passage referring to the layout proposed resulted in there being limited amenity space, but it noted that exceptions could be made where necessary and justified. The document referred to the application site as being located within an area which had a "countryside" character, being surrounded by trees and landscaping, and being within close proximity to the countryside and local walks. It also noted that there was some amenity space within the application site and that, due to the character of the area and the benefits this gave in terms of the rural feel, it was considered that a reduced area of private garden space would be acceptable. Ms Cowie confirmed that, on balance, taking into account everything that was there, the council had felt that the reduced area of private garden space would be acceptable. In cross-examination, she said that, given that it was already a limited amount of amenity space, she would have been very surprised if she had recommended to the applicants that they should show a smaller portion of amenity garden ground on the plans submitted. The plans as submitted were simply approved.

[97] **Janette Mathieson** described the enclosed garden area as a good-sized fenced garden which allowed H to use his adapted trike and to play ball games.

[98] I am satisfied that the pursuers knew that the path was used by members of the public when they applied for planning permission and purchased the property. Mr Hope applied for planning permission on their behalf to build a house, with associated amenity land, beside the road which formed into the path 20 metres to the west of the then proposed house. Ms Cowie confirmed that the plans as submitted were simply approved. The amenity land comprised the garden space and the hard-standing areas. The woodland and path were not included as garden ground. The house is on a site which means that it is overlooked to the north by houses in St James's Gardens, and it is private to the west and south on the boundary with the road. They have decided not to erect gates at the entrance to the driveway to the east of the house. There are reasonable measures of privacy in the form of what was agreed in the joint minute to be a two metre high fence and pillared wall between the house and road, the path then forming some 20 metres to the west of the house. The pursuers and Mr Hope clearly accepted the proposals (which were their own) as approved as being acceptable as they then proceeded to build the house on the property. I also note that in article 7 of condescendence it is averred that "when the pursuers purchased the property in 2012, they were aware that there was some antisocial behaviour…", albeit that their position is that the level of antisocial behaviour has "increased dramatically since the construction of the pursuers' house". As explained by Ms Cowie, due to being within an area which had a "countryside" character, being surrounded by trees and landscaping and within close proximity to the countryside and local walks, and the benefits this gave in terms of the rural feel, it was considered that a reduced area of private garden space would be acceptable. I did not think that it was credible for Mr Hope to maintain that, when he applied for and obtained planning permission for the house and garden as it currently exists, he did not consider that the garden size proposed (by him) was suitable for the

family. For the reason she gave, I think it is unlikely that Ms Cowie would have recommended to the applicants that they should show a smaller portion of amenity garden ground on the plans submitted. In the event, in relation to the pursuers' enclosed garden area, they have not used the full extent of the planning permission granted. Mr Hope explained that some serious civil engineering work would be required to enable the enclosed garden to be extended. However, that would be a choice to be made by the pursuers.

Alternative routes

[99] **Mrs Manson** confirmed that there are two other access routes into the Penicuik Estate, namely Broomhill and Alderbank, which she described as being in very close proximity. She accepted that the Broomhill path was covered in tree roots and mud from the bottom end going up to a stile at the top of the slope. However, she said that she did not feel that it was for her to comment on whether Broomhill was really an alternative. She said that the Alderbank route was hilly in some parts. **Mr Hope** described the Broomhill route as being accessible, but that it was a sloping path and that the ground there was not even. He described the Alderbank route as being fairly or very accessible, although there were some gradients in it which could be quite long. **Mr Connal** described the Broomhill route as being steep, slippery and dangerous, although he did not think that that would bother younger people. His view was that more elderly people or people with mobility issues would not be able to come down the Broomhill path. The Cairnbank route was totally different. He described it as being a flat straightforward road where one has no problem walking right through the gate and into the estate; one can stay flat all the way. **Dr Storey** told the court that, although he was 69 and could manage the Broomhill route, he was very fit for his age

and he knew a lot of people who would find that route very dangerous going down the embankment and slippery in the wet and with tree roots. He would never take his Nordic walkers down there. **Penny Wooding** told the court that she would not use the Broomhill route now as it is very steep and very slippery. As she put it: "you need to be very able-bodied to go down that slope". **Professor Trewavas** told the court that if he was going to walk through the Penicuik Estate the Cairnbank Road access was the obvious route to take. The other access points were not suitable for him with his knee problem because they required one to go down very steep slopes. **Mr Kinch** told the court that Penicuik was a notoriously wet area and that, once over the stile at the top of the Broomhill slope, the slope gets notoriously wet as well and that you needed to be relatively able-bodied to get down it. It is a steep slope with a lot of tree roots coming through and it is slippy and quite treacherous. He added: "Even able-bodied people feel it's quite difficult." In relation to the Alderbank route, Mr Kinch said that there were quite steep gradients on which made it a lot less suitable and accessible from Penicuik and that it was a very long way round to get into the estate. He also described the path (Cairnbank) as being far more convenient and flatter (than the Alderbank and Broomhill routes) and said that it "gives a much better access from Penicuik than the other two routes".

[100] By contrast, in her affidavit at paragraph 18, **Fiona Parkinson** said: "…it only takes few more minutes to access the estate via the other two routes in close vicinity to Cairnbank Road. It does not seem too much of an imposition to ask people to use those other two access routes rather than [the Cairnbank Road one]." Her mother, **Mrs McKinnon**, described the other two routes as "pretty similar. The one going up past the church is more on a slope [the Broomhill route], but it's not difficult."

[101] In my opinion, the evidence of both Ms Parkinson and Mrs McKinnon significantly underplayed the real extent of contrast between the accessibility of the path at Cairnbank Road on the one hand and both Broomhill and Alderbank on the other hand. I accepted and preferred the evidence of those who had actually walked the routes on a regular basis, namely Ms Wooding, Professor Trewavas, Mr Connal and Dr Storey, in addition to Mr Kinch. In my view, therefore, to the extent to which this may be relevant, neither the Broomhill route nor the Alderbank route would be comparable alternatives to the Cairnbank Road route.

The section 28 exclusion case

Submissions

Pursuers

[102] The pursuers maintained that they did not understand it to be a point of dispute between parties that both the path and the adjacent woodland area were "adjacent land" in relation to the pursuers' house for the purposes of section 6(1)(b)(iv). However, this assumption was not entirely correct.

[103] Guiding principles could be identified from the main authorities, namely, the test was an objective one to be considered from the perspective of what a reasonable person living in the property in question would require to ensure reasonable measures of privacy in the property; the court should take account of the location and specific features of the house and the land in question; the extent of garden ground in relation to the house will be a factor; there should be no arbitrary distinction between cultivated and uncultivated land; the nature of access taken across the land to date is relevant, with any material change in the

exercise of access rights perhaps changing an earlier determination on reasonableness, and the use or proposed use of the path should be taken into account.

[104] An average person buying a house of the nature of the pursuers' house would expect to have quite a large area of ground for the enjoyment of the house. The planning status or degree of cultivation of the enclosed garden compared with the woodland area is not relevant. The court should take account of the relatively small area of enclosed garden, the proximity of the path to the pursuers' house and the "semi-rural" nature of the area. Persons living there would expect more privacy than if living in an urban location. The starting point is the house itself; the enclosed garden is smaller than would be expected for a newly built house.

[105] The court should take account of the evidence of Mrs Manson, Mr Hope and the other residents of Cairnbank Road as to how access was exercised before the fence/gate was put up and should find that the behaviour of people using the path was frequently unreasonable and that the degree of unreasonable behaviour by users of the path necessitated a larger area and was a basis for excluding the path from access rights. Their concerns were genuine even if some of the evidence was considered to be less reliable due to their wish to restrict access. None was wholly unreliable; they were simply anxious to assert their position; the instinctive tendency of Mrs Manson and Mr Hope to characterise the majority of access takers as irresponsible did not make their concerns about antisocial behaviour any less credible or genuine. The pursuers had taken reasonable measures to protect their privacy, such as constructing a fence around their garden which is designed to reduce visibility, but these have been insufficient to protect their privacy and enjoyment.

[106] The lack of privacy in this case was also a product of the high volume of users which, on the evidence of several witnesses, had increased since the house was built. The pursuers

accept that the path has existed for some time and that, if they are granted the remedy they seek, the result will be extinction of access rights in their entirety or, at the very least, it will mean that members of the public are no longer able to access over the path as a matter of practicality. Nevertheless, they maintain that is justified due to the change in nature and volume of usage of the path since their house was built. Even proceeding on the hypothesis of reasonable use, the increased volume of usage and the close proximity of the pursuers' house to the path meant that the conditions of section 6(1)(b)(iv) were satisfied. The court would be entitled to find that Mrs Manson intended the woodland to be used by herself and her family as a suitable place for recreation and play. The enclosed garden does not give sufficient adjacent land to enable the pursuers to have reasonable measures of privacy in the house and to ensure that their enjoyment of the house is not unreasonably disturbed.

[107] The fact that there was public access over the path before the house was built was not a relevant factor (although this did not appear to me to sit comfortably with the pursuers' arguments noted above to the effect (1) that the nature of access taken across the land to date was relevant, with any material change in the exercise of access rights perhaps changing an earlier determination on reasonableness, and (2) the acceptance that the path had existed for some time and that, if the pursuers were granted the remedy they seek, the result would be extinction of access rights in their entirety but that this was justified). This argument was developed to the effect that the purchase by the pursuers of the property and building of the house there had "changed the nature of the property, including the path. It was no longer overgrown, unused land with a rural character. It became private land containing a private house and garden ground. In the same way that a former field developed as a housing estate would lose its status under the 2003 Act, so did this land to the extent that it is necessary to allow the pursuers a reasonable degree of privacy in their own home." I was told that the

pursuers accepted in principle that the path was not excluded land prior to their arrival and that it was on this basis that submissions had been made about access rights not being fixed in time but which can change.

[108] If the land in question fits the circumstances set out in section 6, the court has no discretion. Section 6 does not involve any balancing of the rights of the access takers against the rights of the landowner. Although it was accepted that, in all likelihood, responsible access takers would have had a right to use the path after the 2003 Act came into force on 9 February 2005, the rights that such former access takers might previously have enjoyed was not a relevant factor. The issue of alternative routes are not a relevant factor for section 7(5).

[109] Authorities cited in support of the pursuers' submissions were *Snowie* v *Stirling Council* 2008 SLT (Sh Ct) 61, *Gloag* v *Perth and Kinross Council* 2007 SCLR 530, *Creelman* v *Argyll and Bute Council* 2009 SLT (Sh Ct) 165 and *Forbes* v *Fife Council* 2009 SLT (Sh Ct) 71.

Defender

[110] The defender drew attention to averments made on behalf of the pursuers in article 7 of condescendence. It was a matter of admission that the path was in close proximity to the pursuers' house. In terms of the joint minute at paragraph 8, the path forms some 20 metres beyond the pursuers' house and runs through the property adjacent to the woodland. In the joint minute at paragraph 21 it is agreed that (1) the erection of the fence/gate does not prevent access on the road past the pursuers' house, (2) the pursuers' house and garden are bounded by a two metre wall and fencing to the south and (3) the path runs through part of the property which is not fully enclosed by fencing. The property is overlooked by St James's Gardens. The woodland area is not "garden ground".

[111] The path has been used by the public since at least 1980 and should not be excluded from public access rights; the pursuers knew that the path was used by members of the public when they applied for planning permission and purchased the property; they applied for and were granted planning permission without any amendments to erect the house on the boundary with the road and to develop a garden on a site on the property which did not include the path or the wooded area as garden ground; the path is not part of the pursuer's garden; this was clearly a site they had been happy with then and had had no cause to complain about alleged lack of amenity space; the pursuers have sufficient adjacent land to enable persons living in the house to have reasonable measures of privacy and to ensure that their enjoyment is not unreasonably disturbed, and they have not used the full extent of the planning permission granted.

[112] In relation to the averments alleging antisocial behaviour in article 7 of condescendence, Mrs Manson was intolerant of noise from youths playing on the Penicuik Estate; she had a high level of expectation that people would use the path without making any noise at all; the suggestion of constant disturbance was indicative of over-sensitivity and intolerance of all members of the public using the path in any way; ordinary noise from people walking on gravel along the road onto and from the path should not be a cause for complaint for any reasonable person; Mrs Manson's evidence was exaggerated and confused and she had tried to paint a bleak picture to support her position; her evidence had not been credible. Her evidence about failing to report some incidents, such as abuse of H, was at odds with her evidence that she would report serious incidents. Her evidence had also been at odds with the police report, number 5/19 of process, which had included things such as a motor bike being on Cairnbank Road and damage to signs. The percentage of people who on occasion took irresponsible access compared with the level of public use is so negligible

that it would not be viewed by a reasonable person living in the house to be an unreasonable disturbance.

[113] The court would be entitled to find that the path had been subject to public access for decades. However, even if such historic access had been stopped prior to the coming into force of the 2003 Act, this would have no bearing on whether access rights can be exercised over land and consequently whether the defender had been entitled to issue the section 14 notice on the basis that the erection of the fence/gate had been unlawful.

[114] There are reasonable measures of privacy in the form of a two metre high fence and pillared wall with the public not being able to see into the house or the garden at all from the path. I was reminded that the fence forms a barrier with the road and that the path does not form for another 20 metres along the road, beyond the line of the fenced garden to the west of the house. The pursuers had planning permission to build a wall at the front of the house, but they chose not to do so because the fence as built was the only way – by removing fence panels – they could get furniture and equipment into the house.

[115] The defender accepts that the amount of amenity space in planning terms was less than would normally have been acceptable to planners, but that they had taken account of the closeness of the countryside and local walks which enabled planning permission to be granted. Even although some careful works may be required, the pursuers have not used the full extent of their planning permission to develop their private garden ground. Taking into account the location and characteristics of the house, they have more than sufficient adjacent land. The pursuers also have planning permission for the erection of gates at the entrance to their driveway on the east side of the house from the road but they have chosen not to erect them. Despite Mr Hope's evidence, it was clear from the fact that he proceeded with the application that he was content to do so on that basis. The pursuers cannot now

complain about the size of their garden when they have been granted permission in line with what they sought, and they have not used all the garden ground for which they have permission.

[116] The joint minute agrees features of the location and the property. The property extends to 0.21 hectares with the footprint of the house, a small bungalow, being 109 square metres (namely 13.8 metres long by 7.8 metres wide) with a large amount of garden ground retained. The house is modest in character. There is a tree preservation order over the remaining trees in the woodland area. The property is overlooked by St James's Gardens. On applying for and being granted planning permission the amenity area comprising both the garden and the hard-standing areas was considered by both Mr Hope and Ms Cowie, the planning officer, to be sufficient taking into account the closeness and accessibility of the countryside and local walks. The path does not surround the pursuers' house but sits to the west; the path could not be used as a natural extension to the enclosed garden area; to get to the path, access would still need to be taken by the pursuers onto and along the road (which they do not own) to the path and the woodland area; neighbours and the public would still have the right to have access along the road and the Penicuik Estate would still have a servitude right of access over the path. The pursuers' house will never be surrounded by excluded land because they do not own the road adjacent to the south side of the house. Whilst it is a matter of agreement that the path is in close proximity to the pursuers' house, the house looks out onto the road – not the path – and the public cannot see into the house or the enclosed garden from the path.

[117] The path is level and flat and is a well-known and well-used means of direct access between Penicuik and the Penicuik Estate. The pursuers knew that the public took such access before building the house and they have until now accepted that it is not part of their

private garden ground. It is irrelevant whether there are alternative routes into the Penicuik Estate (averred on behalf of the pursuers in article 5 of condescendence). However, with regard to section 7(5) and the location and other characteristics of the house, the court might wish to consider whether there are alternative routes. If so, neither Alderbank nor Broomhill are suitable alternatives.

[118] The test is an objective one. The legislature could not have intended that the courts ascertain the needs of an individual owner for the time being of a particular property and make individual provision for them. The focus in the present case had largely centred on the pursuers' autistic son, but it would be wrong to base any decision on reasonable privacy on the very personal and individual circumstances of the pursuers' family.

[119] The path in this case was not created for enjoyment but for access in and out of the Penicuik Estate with a servitude right of vehicular access. There is no credible evidence that the path was ever used as private garden ground. In so far as the pursuers might maintain that the path is part of their garden ground, this is not accepted by the defender. In any event, what is relevant is not whether the path is part of the pursuers' garden ground but whether there is sufficient adjacent land. In contrast to section 6(1)(c), section 6(1)(b)(iv) does not make any mention of garden ground.

[120] Authorities cited in support of the defender's submissions were *Anstalt* v *Loch Lomond and the Trossachs National Park Authority* 2018 SLT 331; *Snowie* v *Stirling Council* (supra), *Gloag* v *Perth and Kinross Council* (supra), and *Creelman* v *Argyll and Bute Council* (supra).

Decision on section 28 exclusion case

[121] Although the pursuers maintained that they did not understand it to be a point of dispute between parties that both the path and the adjacent woodland area were "adjacent land" in relation to the pursuers' house for the purposes of section 6(1)(b)(iv), that was not correct. It was agreed in the joint minute between parties that the path and the road are in very close proximity to the pursuers' home. However, it was also agreed in the joint minute that the path is adjacent to the woodland area of the property. There was no agreement that the path was adjacent to the house. I was on a number of occasions reminded by the defender in submissions of the location of the path as being adjacent to the woodland area and that the start of the path was about 20 metres to the west of the pursuers' house. On a strict reading of section 6(1)(b)(iv), it, therefore, does not appear to me that the path can truly be said to be "adjacent" land for the purposes of section 6. That alone means that the path cannot fulfil the requirements of section 6.

[122] However, if I am wrong about that and if the path can be regarded as being sufficiently adjacent to amount to "adjacent" land, parties were agreed that, in determining areas of land to be excepted under section 6(1)(b)(iv), this has to be judged objectively using the standard of the reasonable person. I also accept the pursuers' submission that the court has no discretion if the circumstances fulfil the requirements of section 6 and that section 6 does not involve any balancing of the rights of access takers as against the rights of the landowner. I did not understand either proposition to be disputed by the defender.

[123] In *Snowie* (supra), Sheriff Cubie said the following:

> "[51]…It seems to me that the court is obliged, in interpreting this part of s 6, to determine what a reasonable person living in a property of the type under consideration would require to have to enjoy reasonable measures of privacy and to ensure enjoyment of the house was not unreasonably disturbed. That is an objective test.
>
> [52] At para 45 of the judgment in Gloag Sheriff Fletcher said:

> '[Section 6] … makes reference to sufficient adjacent land to enable "persons living there" rather than "the person living there" which implies to me that the legislators had in mind not that the Courts would take into account the individual proprietor for the time being but would have in mind generally the persons living there.'
>
> [53] I agree with that observation. In my opinion, if the test were subjective, that would lead to the possibility of repeated applications being made depending on the particular views, concerns, family circumstances and even prejudices of any particular proprietor, which cannot be the purpose of the Act. I regard the test as an objective one, which factors in the particular characteristics of the property.
>
> [54] In this case the only relevant provision is s 6(1)(b)(iv). The factors in determining the extent of land is sufficient include the location and other characteristics of the house."

[124] I agree with and adopt Sheriff Cubie's helpful analysis. As to the factors which should be taken into consideration, this is a reference to section 7(5): *Gloag* at paragraph [31], *Forbes* at paragraph [26]. I did not understand this to be a matter of dispute in the present case.

[125] In support of the proposition that all the circumstances have to be looked at objectively, I also note that *Anstalt* (supra) included the following at paragraph [63], under reference to sections 1, 2, 10 and 14 of the 2003 Act:

> "…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 s.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 2008 S.L.T. (Sh Ct), p.68; 2008 Hous. L.R., p.53, para.51)."

The Inner House then, at paragraph [64], referred to section 14 and observed:

> "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… 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 my opinion, precisely the same could be said in relation to the application of section 6. To adopt the formulation used in *Anstalt,* were it otherwise (than looking objectively at all the circumstances), 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. This is in effect what Sheriff Cubie said in *Snowie* at paragraph [53].

[126] In this case, I did not understand it to be suggested that, for the purposes of section 6(1)(b)(iv), any place other than the house (as mentioned in section 6(a)(ii)) was concerned in this case. If that had been suggested, I would have agreed with the observations made by Sheriff Holligan in *Forbes* at paragraph [29] where he said:

> "It does seem to me that the statutory provision has been drafted so as to focus attention upon the house. Section 6(1)(b)(iv) refers on two separate occasions to 'that house'. It does not say garden. The distinction between house and garden is something to which the draftsman was alert. Section 6(1)(c) makes express reference to a 'private garden'. The qualifications as to 'reasonable measures of privacy' and 'enjoyment … not unreasonably disturbed' both refer to the house."

I, therefore, agree with the pursuers' submission that the starting point is the house itself: *Forbes* at paragraph [28] and [29].

[127] Similarly, so far as section 7(5) was concerned, I did not understand it to be suggested that the court should be considering "the location and other characteristics" of any place other than the "the location and other characteristics of the house."

[128] The house, its location and its characteristics are set out in findings-in-fact 4, 6, 7, 8, 9, 10, 12 and 13. In brief, it is a modest single storey house in a suburban area of Penicuik

which has a semi-rural character. This is despite the fact that the house was proposed to be, and now is, sited immediately adjacent to the road and that it is overlooked by properties in St James's Gardens. The road is not in the ownership of the pursuers. It is a matter of agreement that the erection of the fence/gate does not prevent access on the road past the pursuers' house. Neighbours and the public would still have the right to have access along the road, and the Penicuik Estate would still have a servitude right of access over the path. It was recorded by Ms Cowie in relation to the planning application that this was an informal public footpath, and I am satisfied that it is likely that the pursuers were well aware of this informal use of the footpath by members of the public at that point. I accept that the size of the enclosed garden area is smaller than would be usual for the size of house concerned, but Ms Cowie explained why, in the particular circumstances of the planning application for this house, the reduced area proposed by Mr Hope on behalf of the pursuers was regarded as being acceptable. The planning permission granted also included permission for the construction of a wall between the house (and enclosed garden area) on the one hand and the road on the other hand. The pursuers elected to build a two metre high fence and pillared wall between the house and the road rather than the wall originally proposed and for which planning permission was granted. The amenity land also included both garden space and hard-standing areas. The pursuers accepted all of this and proceeded with the construction of the house. I do not believe that they would have accepted this and proceeded if there had truly been an issue about privacy or if they had felt that their enjoyment of the house would have been unreasonably disturbed. In the event, they have not used the full extent of the planning permission granted. The property also extends to more than the house and the enclosed garden area; it also includes the driveway to the east of the house, the woodland area to the west, and the path which bounds the south edge of

the woodland area. I have no reason to doubt that, as Mr Hope put it, some serious civil engineering work would be required to enable the enclosed garden to be extended (as was required to enable the house to be built). However, this would be a choice for the pursuers.

[129] In relation to the two metre high fence and pillared wall between the house and the road which the pursuers elected to erect rather than the wall for which planning permission was granted, I am satisfied that somebody passing by on the road would not be able to see through the fence and I do not think that it was seriously suggested otherwise. It may be that if someone was really determined they could stop and attempt to peer through the slatting of the fence, but even then, I think it most unlikely that they would actually be able to see anything much at all in relation to the enclosed garden. Although I am sure that it is fair to say that the two metre fence beside the house would not prevent the sound of people walking up or down the road from being heard in the enclosed garden, that is a different matter from the extent to which any such sound could be heard from within the house. Mrs Manson seemed to complain about the very fact of hearing people just walking up or down the road (the road being adjacent to the house and enclosed garden), but it was not clear from her evidence whether she was complaining about this from the house or from the enclosed garden. In any event, in my opinion, the defender's submissions to the effect that Mrs Manson is over-sensitive, tended to exaggerate and that this would not be a cause for complaint by a reasonable person, were well-founded. She may be over-sensitive for understandable reasons due to her concerns in relation to H (and that may explain some – but by no means all – of the examples of exaggeration), but such an approach would be to invite the court to take into account what the individual proprietor for the time being considers he or she requires as amounting to reasonable measures of privacy in that house and to ensure that his or her enjoyment of that house is not unreasonably disturbed. This is

precisely the sort of situation in which, to adopt the formulation in *Anstalt,* identical factual situations could then result in different, and inconsistent, applications of the Act according to the mental processes, maybe flawed, of the individual, perhaps eccentric, landowner. I, therefore, agree with the defender's submissions to the effect that that it would be wrong to base any decision on reasonable privacy on the very personal and individual circumstances of the pursuers' family in the present case. Looking objectively at all the circumstances, I am not satisfied that it has been established that a reasonable person living in a house of the type under consideration in the present case would regard the sound of people walking up or down the road on the other side of the two metre fence as unacceptable from the point of view of privacy in that house or their enjoyment of that house without unreasonable disturbance.

[130] As to the path itself which is really what is at issue here, the start of this is about 20 metres to the west of the house and it then makes its way away from the direction of the house and towards the Penicuik Estate. I would have thought it most unlikely that anyone in the house would be able to hear anyone at all simply walking along any part of the path. I would also observe that the restriction in section 6(1)(b)(iv) is not that an owner's enjoyment is not to be entirely undisturbed, but only that it should not be unreasonably disturbed. Again, this requires to be judged by the standard of the reasonable person. I did not regard Mrs Manson as matching that description.

[131] The path itself is, of course, just a small strip of land as described in finding-in-fact (7). If the path can properly fall to be regarded as being "adjacent land" for the purposes of section 6, it seems to me that, on the basis of what I have set out so far, I could conclude (certainly viewed at the point when the pursuers proceeded with the

construction of the house) that the terms of section 6(1)(b)(iv) are satisfied in that, in my opinion, the rest of the property – excluding the path – gives sufficient adjacent land.

[132] However, the argument does not end there. The pursuers accept that the path has existed for some time and that, in all likelihood, responsible access takers would have had a right to use the path after the 2003 Act came into force on 9 February 2005. The pursuers also accept in principle that the path was not excluded land prior to their arrival, and it was on this basis that submissions were made about access rights not being fixed in time but that could then change. The pursuers also accept that, if granted, the result would be extinction of access rights in their entirety, but they say that this would be justified due to what they say has been the change in nature and volume of usage of the path since the house was built. In this connection, in answer 7, the defender avers that the pursuers were satisfied in 2012 that the house had sufficient adjacent garden for its size and location to afford the pursuers sufficient privacy and to ensure that their enjoyment of the house was not unreasonably disturbed and that the pursuers chose to build the house and garden adjacent to the road and path in the knowledge that the public have access from Penicuik into Penicuik Estate. This was reiterated in submissions. In response to this, in article 7 of condescendence the pursuers aver "when the pursuers purchased the property in 2012, they were aware that there was some antisocial behaviour, but the level of antisocial behaviour has increased dramatically since the construction of the pursuers' house". This argument was also advanced by the pursuers in submissions. However, as I have already said, I am not satisfied that the second part of that averment has been proved. I am, therefore, not satisfied that the change in nature and volume of usage of the path contended for has been proved.

[133] It was also argued that, even proceeding on the basis of "reasonable use" as it was put (but which I understood to be a shorthand way of referring to responsible exercise of

access rights), simply what was said to be the increased volume of usage **a**nd close proximity of the path to the house meant that the conditions of section 6(1)(b)(iv) were satisfied. Indeed, Sheriff Holligan in *Forbes* (at paragraph [29]) expressed the view that the exercise of judgment in section 28 assumes the responsible exercise of access rights. This is on the basis that those exercising the rights under the 2003 Act irresponsibly do not have the rights. However, as I have already indicated, I am not satisfied that it has been proved that there has been the increase alleged. In addition, proceeding on the basis of an assumption of responsible exercise of access rights, this would appear in effect to go back to the point about whether people simply walking up or down the path would itself mean that the conditions of section 6(1)(b)(iv) were satisfied. As I have already indicated, I am not satisfied that it has been established that a reasonable person living in a house of the type under consideration in the present case would regard the sound of people walking up or down the road on the other side of the two metre fence as unacceptable from the point of view of privacy in that house or their enjoyment of that house without unreasonable disturbance.

[134] I turn now to the pursuers' argument to the effect that the purchase by them of the property and building of the house there changed the nature of the property, including the path. It became private land containing a private house and garden ground and that "In the same way that a former field developed as a housing estate would lose its status under the 2003 Act, so did this land to extent that it is necessary to allow the pursuers a reasonable degree of privacy in their own home." I was told that the pursuers accepted in principle that the path was not excluded land prior to their arrival and that it was on this basis that submissions were made about access rights not being fixed in time but which could change. This reminded me of evidence from both Ms Cowie and Mr Kinch. Ms Cowie said: "From the planning side of things, when we are taking assessment for new things when there's

existing uses or features like this in the surrounding area, anybody moving into a house or a unit beside an existing track or a noisy type use would be aware that there was such a track there, and so therefore it wouldn't make such an impact on this assessment. What we try to do is almost protect existing uses and take into account the impact the proposed uses may have on existing uses in an area. So, in this case because it was clear there was a track there, we felt it was evident for anybody moving into the proposed house or as approved that they would be aware that there was some sort of members of the public going past there."

Mr Kinch had also been asked in cross-examination whether someone who bought a property in a rural location might be expecting a higher degree of privacy than someone buying a house on a modern housing estate. He replied: "What I also have to consider is the number of people who have been using that route and that suddenly, because someone builds a house there, all their rights are gone". It was put to him that that must happen all the time when new houses are built and he replied: "…we try and protect access rights wherever possible when there's new development. We would not wish to sacrifice access rights because of new development, so we quite often ask for developments to be permeable these days so that paths …can still get through to the other side of a development." I accepted the evidence of both Ms Cowie and Mr Kinch. I am, therefore, not persuaded that the pursuers' blunt assertion that "a former field developed as a housing estate would lose its status under the 2003 Act" was correct. In my view, it is simply a question of whether or not the conditions set out in section 6(1)(b)(iv) are met so far as the path is concerned.

[135] However, this submission about the purchase by the pursuers of the property and building of the house there changing the nature of the property, including the path, struck me as being perhaps a revealing one. If the pursuers indeed think that, because they have decided to build a house beside the road which leads to the path, the path "loses its status

under the 2003 Act" (in other words, public access rights along the path are lost) and the pursuers say that they now want this for their privacy, this might suggest and be consistent with a lack of proper appreciation of the rights conferred by the 2003 Act unless land is excepted under section 6 which, when they put the fence/gate up, it had not been. As the Inner House put it in *Anstalt* at paragraph [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 ownership of it, in a way which, as respects those rights, is responsible. In this case, where there is a right to cross and 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".

In this case, the pursuers did the opposite. Such a way of thinking would certainly fit with and explain the formidable nature of the fence/gate which was erected coupled with the lack of any forewarning or prior explanation to the defender of their plan to do this even although they were well aware that the path was used by many members of the public to go to and from the Penicuik Estate, and they must have been aware that it was likely that they would complain about the sudden blocking up of the path. In my view, the pursuers did not act in a manner which was consistent with respecting the rights of those entitled to exercise access rights under the 2003 Act.

[136] I understood both parties to accept that the question of alternative routes was not relevant to the determination to be made in terms of section 6(1)(b)(iv). I agree. However, even if this had been relevant, I have concluded that neither the Broomhill route nor the Alderbank route is comparable to the Cairnbank route into and out of the Penicuik Estate.

[137] I note, incidentally, that it is averred in article 7 of condescendence that "the path runs through part of the pursuers' garden ground which is not fully enclosed by fencing…The path…forms part of the pursuers' garden…". This would appear to be a

reference to the woodland area because the path certainly does not form part of the enclosed garden area. It was agreed at paragraphs 5 and 8 of the joint minute between the parties that the woodland area is bounded to the south by the path and that it runs along this unenclosed portion of the pursuers' property adjacent to this woodland area. Although this may well be a long-term aim on the part of the pursuers, I am not satisfied that it was proved that, as matters stand at present, this woodland area could properly be described as "garden ground" as averred and, in the event, I did not understand the pursuers to have invited the court to do so.

[138] In the result, in all the circumstances, viewed objectively using the standard of a reasonable person, I am satisfied that the rest of the property – excluding the path – gives sufficient adjacent land for the purposes of section 6(1)(b)(iv) and, therefore, that the path does not fall within this. I, therefore, do not consider that the pursuers have established the application of section 28.

The section 14 declarator "purpose" case

Submissions

Pursuers

[139] When these proceedings were first raised the highest authority on section 14 was the decision of an Extra Division in *Tuley* v *Highland Council* 2009 SC 456. The pursuers had intended to rely on passages in *Tuley* in relation to the ascertainment of the purpose or main purpose of the erection of the fence/gate as being a subjective one. However, between the conclusion of the evidence and the submissions on the evidence, the opinion of the Inner House in *Anstalt* (supra) was issued. The assessment of the purpose or main purpose had

now been re-formulated as an objective test according to the standard of the reasonable person rather than a subjective one.

[140] It is irrelevant whether access was taken prior to the coming into force of the 2003 Act. The question is whether the land was land over which access rights under the 2003 Act were exercisable. (However, I noted that, in the context of the submissions relating to the section 6 exclusion case, the pursuers accepted that the path had existed for some time and that, in all likelihood, responsible access takers would have had a right to use the path after the 2003 Act came into force on 9 February 2005. The pursuers also accepted in principle that the path was not excluded land prior to their arrival).

[141] Even if the pursuers' credibility or good faith are no longer determinative, the question of their motive is still relevant to the exercise of objectively ascertaining what the pursuers' aim was**.** It is still necessary to establish what their aim was. To do that, the court is entitled to take account of the wider background circumstances, rather than simply the act of erecting the gate. The court can then consider whether it can reasonably and objectively be concluded that the erection of the gate in that context was done with an aim other than preventing lawful access.

[142] At paragraph [65] in *Anstalt* the Inner House had itself confirmed that the pursuers' evidence of their motive may set the parameters of the objective determination of the purpose or aim by the court. If the court accepts the evidence of the pursuers and their neighbours about the level and degree of antisocial behaviour, this will be a relevant factor when applying the objective test. The nature of access taken over the land must also be of relevance to that test. This was not considered in *Anstalt* because there had been no evidence led of antisocial behaviour and so that had not been a reason advanced for seeking to prevent public access in that case.

[143] There had been closely comparable circumstances in *Forbes* (supra). Sheriff Holligan held that section 14 was directed at preventing landowners from obstructing the exercise of access rights by those entitled to exercise them; it did not prevent a landowner from stopping somebody exercising access rights where they were doing so irresponsibly. This characterisation of section 14 had not been changed as a result of *Anstalt*; it was simply the means of working out what the purpose or main purpose was of erecting any barrier which had changed.

[144] There were several striking similarities between the evidence led in *Forbes* and the evidence led in the present case. On the basis of the evidence in that case, the sheriff had concluded that the use of path had been "mixed" in the sense that there was both responsible and irresponsible use. He then applied a (at that point correct) subjective assessment of the pursuers' purpose or main purpose in locking the gates and was satisfied that their main purpose had been to stop antisocial behaviour at night time. The evidence in that case led Sheriff Holligan to conclude that there was antisocial behaviour and that it took place during hours of darkness rather than during the day time. In the present case, the consistent evidence of Mrs Manson and neighbours was to the effect that antisocial behaviour could occur at all times of day and night. The pursuers were asking the court to make a stark choice between upholding or refusing the appeal.

[145] However, if the court was minded to do something short of allowing permanent closure of the gates, the pursuers would welcome the opportunity to make further submissions on the terms of the final interlocutor. For example, the court could reject the evidence of the pursuers' witnesses in relation to general antisocial behaviour and litter but nonetheless find that antisocial behaviour was a problem at particular times of day, or perhaps also at weekends. The primary submission was still that the notice should be

recalled, but the court could make findings of particularly serious antisocial behaviour starting in the late afternoons and early evenings, continuing into the early hours of the morning and at weekends and instead make an order for variation of the notice to restrict access during those times. Alternatively or in addition, the court could also make a finding that the notice should be varied to allow the gate to remain closed at all times other than during (unspecified) normal school hours in (unspecified) term time, so as to restrict the particularly adverse impact of antisocial behaviour (both day time and night time) on H.

[146] The defender's own views on whether or not section 14(1) was engaged are irrelevant. Section 14 needs to be read in conjunction with the provisions of section 13. The duty to uphold access rights is not absolute: *Forbes* at paragraph [34].

[147] A notice in terms of section 14(2) may be served where the local authority considers that something has been done in contravention of section 14(1). It was clear that the defender failed to direct its mind to the question of the purpose or main purpose of the pursuers in erecting the gate. However, the appeal under section 14 is not a review of the defender's actions; it is a fresh decision on the merits by the sheriff based on the evidence led before the court. Section 14 does not set out grounds of appeal or restrict the court's powers on appeal. The sheriff may recall, vary or confirm the notice. The court was invited to recall the notice.

[148] In the event, section 9 of the written submissions for the pursuers – which was the section dealing with submissions on the section 14 declarator ("purpose") case – did not in fact set out what, on an objective assessment, the pursuers were inviting the court to find as having been the purpose or main purpose of putting up the fence/gate. However, I noted from an earlier submission in section 5 about conflicts in the evidence generally (at paragraph 5.14) that I had been told that this action was "not about the pursuers wanting a

bigger garden. It is about having a home they can feel safe in. That is what had motivated the gate being put up."

[149] Authorities cited in support of the pursuers' submissions were *Anstalt* v *Loch Lomond and the Trossachs National Park Authority* (supra) and *Forbes* v *Fife Council* (supra).

Defender

[150] The pursuers had made no averments as to what any variation would comprise, such as in terms of times and days of the week when the public could take access along the path. The way the case had been pled and the evidence led was an all or nothing position for the pursuers as far as the section 14 notice is concerned.

[151] The court was reminded of averments made by the pursuers in article 6 of condescendence, being the matters they had offered to prove. These included averments to the effect that between October 2012 and June 2016 the pursuers experienced frequent incidents of antisocial behaviour by users of the path, including vandalism, fire-raising, drug use, drunkenness and shouting and swearing; that between January and June 2016 the pursuers made six complaints to the police; that gatherings of youths at a waterfall about 200 metres from the property took place almost every other night during the summer months from early afternoon until the early hours of the morning; that antisocial behaviour has not been confined to particular times of day or specific days of the week; that a significant proportion of people using the path have not done so responsibly, and that the pursuers were not motivated by a desire to prevent the exercise of responsible access rights under the Act.

[152] The evidence of Mrs Manson and her neighbours was exaggerated, confused and contradicted by the evidence from PC Shirley. It was also contradicted by evidence from the

defender's witnesses who had used the path. For example, Mrs Manson had told her solicitors that between January and June 2016 the pursuers made six complaints to the police, but the evidence showed that she had in fact made only two such complaints. She had not reported any of the alleged instances of abuse of H to the police. She was trying to paint a bleak picture to support her position for recall of the notice. The police report, number 5/19 of process, showed that there had been only nine incidents of antisocial behaviour reported to the police between 21 April 2014 and 3 June 2016. These, therefore, were the "serious" incidents Mrs Manson said she had reported to the police. Only one of them (on 5 June 2015, a year before the fence/gate was put up) related to a group of youths coming up the road to get to the Penicuik Estate. On 3 June 2016 the report by Mrs Manson to the police recorded her as having told them that youths had not yet encroached on the property but that it sounded as if they were gathered in the area of the waterfall. In the 17 months since the fence/gate had been put up, 26 calls had been made to the police, although it was accepted that half of these related to a dispute with a former neighbour. In the letter from Brodies (number 5/10 of process) at page 5 it had been maintained that H had been verbally abused four times in the two or three months before the fence/gate was put up. In evidence, Mrs Manson said that there had been three such incidents rather than four, and none had been reported to the police. This was at odds with her evidence that she would report serious incidents of antisocial behaviour. It was incredible that she had reported something such as damage to a sign (27/12/15), shouting in the woods (3/6/16) and a car driving up the road (21/8/14) but not report alleged abuse of H. She also accepted in cross-examination that before the fence was put up she had "never had cause to complain, call the police with regard to anybody directing derogatory comments towards H", but she later said that several comments had been made to H. Her evidence was therefore confusing.

On balance, the court should find that there were no incidents of abuse directed towards H before the fence/gate was put up. Mrs Manson's position was not credible. If there had been such incidents, Mrs Manson would have reported them as she did (on 13/6/16) immediately after the fence/gate was erected. The pursuers' actions in blocking off the public right of access were disproportionate to the minute level of irresponsible access.

[153] Evidence of alleged gatherings at the waterfall on the Penicuik Estate is irrelevant as any behaviour that takes place there is not a matter for the court in this case. It was, however, indicative that Mrs Manson is ultra-sensitive to any noise coming from the Penicuik Estate. The pursuers built the house knowing that there was public access along the path to the Penicuik Estate. The fact that the fence/gate has been put up does not prevent such gatherings as there are other routes youths can use to access the Penicuik Estate. The pursuers have in any event not proved that such gatherings were frequent or caused an issue for the family. There is no evidence to support the assertion in the letter from Brodies (number 5/10 of process) that such gatherings happened almost every Saturday. In any event, there had only been mention of gatherings at the waterfall in two of the reports to the police before the fence/gate was put up. Presumably, any other gatherings there were not causing disturbance to the pursuers. There was only one other occasion on 21 August 2014 when some young people had been carrying out a charitable fund-raising event in the woods in the Penicuik Estate called the "Ice Bucket challenge". The police report recorded that the young people had apologised to Mrs Manson for the noise they had made. This episode demonstrated Mrs Manson's high level of intolerance. Her reaction was a huge over-reaction and not the action of a reasonable person.

[154] In relation to the Scottish Outdoor Access Code, littering and dog-fouling, Mrs Manson claimed that the code "was breached every single day, nearly every hour" and

that, nine times out of ten, dogs would not be on a lead and that, nine times out of ten, people would let their dogs foul. The defender does not dispute that there were some instances of littering and dog-fouling. However, the level of this as portrayed by Mrs Manson was contradicted by the evidence from witnesses led by the defender – who had used the path on a regular basis and had not seen the issues described – and PC Shirley. It had also been anecdotal and unspecific. Any such behaviour was minimal if about 100 people a day were using the path. The evidence of Mrs Parkinson had also been anecdotal and exaggerated. She had never called the police. Mrs McKinnon's evidence had been variously unsatisfactory, for example in relation to what she had said on an earlier occasion in an email and her affidavit, anecdotal and based on hearsay. She too had never called the police. The evidence from Dr Davies about alleged incidents of antisocial behaviour had been largely historical and lacking clarity about when they were said to have happened. Dr Spearman's evidence was anecdotal and he had not reported any incidents to the police.

[155] Evidence from the defender's witnesses should be preferred. For example, Professor Trewavas had not had any issue with groups of youths even although his house backs onto Cairnbank Road. Similarly, Ms Wooding is an elderly, single female who lived round the corner from Cairnbank Road and who had used the path on a daily basis. She would not have described herself as feeling very safe living in Penicuik if the level of antisocial behaviour had been as described by Mrs Manson and other residents of Cairnbank Road. Where the evidence of Mr Kinch and Mr Moffat differed from that of the pursuers or their witnesses, the evidence of Mr Kinch and Mr Moffat should be preferred as being more reasoned, balanced and professional.

[156] There was no evidence as to when the behaviour complained about took place apart from evidence giving the impression that it was frequent and daily and at all times of day and night. There was no evidence to support the averment that gatherings took place "almost every other night", and certainly not to the scale averred in article 6 of condescendence.

[157] There was similarly no evidence of a "significant proportion" of people using the path doing so irresponsibly. The evidence is that only a very small, infinitesimal minority of the public who used the path did not take responsible access. The court was reminded of the letter from Brodies on behalf of the pursuers, number 5/10 of process and the numbers and percentages referred to in that letter and in relation to which Mrs Manson then gave evidence. She had presented a case to her solicitors who then presented it to the defender and to the court. However, in cross-examination, when it became clear to Mrs Manson in the course of her evidence that the position she had represented to her solicitors was not to her advantage, she attempted to backtrack and her position had changed, namely that the figures were too high. With that concession, it was not clear how the pursuers expected the court to determine the level of irresponsible access in seeking recall or variation of the notice.

[158] Mrs Parkinson's evidence to the effect that only 40% of people took access responsibly meant that her position was that 60% did so irresponsibly. Her evidence was exaggerated.

[159] There is no evidence that shows that there was anywhere near what could be termed as a "significant proportion" of the public taking access irresponsibly. On the hypothesis of approximately 2,800 users a month (or approximately 16,800 over a period of six months) yet there were only two reports to the police in the six months before the fence/gate was put

up. Two reports to the police in the six months before the fence/gate was put up does not represent a "significant proportion" of the public taking access irresponsibly. There was no evidence of an escalation in antisocial behaviour unless you start at a base of nothing. If this is the escalation the pursuers aver, one would seriously have to question what level, if any, there was before that. By implication, there would be very little and certainly no level that could ever merit the pursuers blocking off a public right of access. The pursuers have not proved that there was any "significant proportion" of irresponsible access to justify the pursuers' actions.

[160] In so far as the pursuers seek to rely on *Forbes* in relation to "mixed use" of the path, the decision in that case is of limited assistance to the pursuers. First, in this case, there is no temporal distinction between responsible and irresponsible access. The pursuers' position is that irresponsible access and antisocial behaviour took place both during the day and night, and at all hours of the day every day. Second, the level and severity of antisocial behaviour is significantly less than in *Forbes.* The path in that case was used by persons making their way home after a night out at a public house. The pursuers in the present case have not demonstrated frequent, noisy antisocial behaviour of that type, having only reported nine incidents to the police in the 26 months leading up to the erection of the fence/gate. To allow the path to be closed up at any time, even taking account of what the defender accepts will have been an infinitesimal minority of the public who took irresponsible access compared to the number of users as a whole, would be a wholly disproportionate infringement of the access rights of responsible users. Third, there are no relevant averments on record to support a variation of the type ordered in *Forbes.* Offers were made by the defender to allow the fence/gate to be closed at night, but these offers have not been acceptable to the pursuers. The pursuers' case has been developed on the basis of an "all or nothing" approach.

[161] In relation to the pursuers' averment to the effect that those taking access irresponsibly have caused unreasonable interference with the rights of the pursuers and the issue of H's sleep, Mrs Manson had given evidence to the effect that H would be woken up at night with the noise of people going past the house noisily. However, Mrs Mathieson, H's Community Learning Disability Nurse since March 2015, gave evidence to the effect that she understood that H's sleep was never good but that there were spells where it can be much more difficult. She said that his sleep fluctuates and she thought that partly just because of H and maybe the pursuers were not carrying out strategies to assist sleep. So far as she was aware, he was still getting woken up by noise in the neighbourhood and so this was something which was an ongoing issue. This was despite the erection of the fence/gate. By contrast, however, Mrs Manson gave evidence to the effect that there had been hardly any problems with antisocial behaviour since then. The pursuers cannot have it both ways. There was no evidence that H's sleep issues were a result of any noise there may have been from the path.

[162] In relation to H's behavioural issues, Mrs Mathieson gave evidence to the effect that H was still having such problems. He needs a safe place to play, preferably a closed garden. She confirmed that the enclosed garden area was a "good-sized fenced garden" which allowed him to move around to play on his trike and to play ball games. Dr Kerr confirmed that she had understood from Mrs Manson that the pursuers could not allow H to be outside the space adjacent to the house. She would have been delighted if H had been playing on his trike outside. Mrs Manson confirmed in cross-examination that she had allowed H to play on the road with his trike in May 2016. Stephen Buggy had been given to understand that H had been finding it difficult being outside in his garden and that there were external noises affecting him. He confirmed in cross-examination that H had been finding it difficult

to understand his environment at his local primary school and had been becoming more and more distressed there. That placement stopped in about June 2016. H had also had issues with school transport between January and June 2016.

[163] The defender submitted that, on balance, it was clear that there were a number of factors unrelated to the public use of the path that were causing H and the family upset. No criticism of the pursuers was intended, but they had perhaps been looking for easy answers and were sensitive to any possible triggers for his behaviour and sleep difficulties. However, the sleep issues are as a result of his autism, are continuing and are not linked to any antisocial behaviour on the path.

[164] In relation to the pursuers' averments in article 6 of condescendence as to their principal purpose and motivation in erecting the fence/gate, the principal purpose in erecting it had been to prevent all public access. This had been to allow the pursuers to develop a larger garden. An assessment of the purpose of blocking access must be made on an objective basis: *Anstalt* (supra). On the basis of the evidence led it was not plausible to maintain that the purpose or even main purpose of this was purely to prevent irresponsible access being taken. A total ban on all access along the path had the clear objective of preventing any access, responsible or otherwise. If the purpose or main purpose had truly been to prevent only irresponsible access, it would have been expected that the pursuers' acts before it was put up would have been consistent with that. For example, it would be expected that they would have requested ongoing assistance in managing irresponsible access or complained with some regularity to the police, the defender (including the community safety team, the dog warden or the Land Resources Team), the Penicuik Estate Ranger Service, the Access Forum or their local councillor. Only two complaints were made to the police between January and June 2016.

[165] Both Mrs Manson and Mr Hope gave a substantial body of evidence about garden development. Both viewed the woodland area and the path as being part of the garden. Detailed submissions were made about the evidence given by both. Mrs Manson complained that the woodland area was not safe for H as it was not completely fenced off. It needed to be safe for him. Areas could be flattened. She wants to give him a bigger garden now, but awaits the outcome of this case. Mrs Manson told Dr Kerr that they wanted to develop the path as garden area. Mr Hope had confirmed that it had not been possible to carry out their plans for the woodland area whilst the path was being used by the public. They would now like to take forward their plans. The extended play area would include the path. Mr Hope gave confused evidence, such as in relation to the extent of work that would be required and whether the plans included the path or not.

[166] The pursuers' evidence showed that they have always contemplated developing the path and woodland area. This reveals the true purpose in blocking off access by the public along the path. Their plans cannot be achieved unless the public are excluded from the path. The court should reject the pursuers' position that their motive was only to stop antisocial behaviour; it was to prevent all public access. This would then allow them to take their plans forward.

[167] Authorities cited in support of the defender's submissions were *Anstalt* v *Loch Lomond and the Trossachs National Park Authority* (supra) and *Forbes* v *Fife Council* (supra).

Decision on section 14 "purpose" case

[168] The pursuers submitted that an appeal under section 14 is not a review of the defender's action; rather it is a fresh decision on the merits by the sheriff based on the evidence led before the court. Section 14 does not set out grounds of appeal or restrict the

court's powers on appeal. The sheriff may recall, vary or confirm the notice. The defender did not suggest otherwise. I agree. This was also the approach taken by Sheriff Holligan in *Forbes* (supra).

[169] Parties were also at one that, in the light of the decision of the Inner House in *Anstalt,* it is:

> "the landowners' acts which are what have to be looked at objectively to see what their purpose or main purpose was. By purpose is meant their aim objectively ascertained and not the particular (landowners') intention or motive…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." (*Anstalt* (supra) at paragraph [64]).

This, therefore, is the approach which requires to be taken in the present case.

[170] The pursuers submitted that "the pursuers' evidence of their motive" was still relevant though, founding on a passage in *Anstalt* at paragraph [65]. The Inner House said there:

> "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."

However, the limits to this might seem evident from what the Inner House went on to say at paragraph [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 s.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 Council* (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."

And then at paragraph [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 s.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."

[171] The pursuers argued that in the present case the wider background circumstances should be taken into account. In particular, the nature of access taken, including the nature and degree of antisocial behaviour about which evidence had been led, should be taken into account as a relevant factor when making the objective determination. This had not been an issue in *Anstalt.* I also understood the pursuers to be maintaining that "the pursuers' evidence of their motive" was still relevant as part of these whole circumstances.

[172] In the present case, there was an averment in article 6 of condescendence to the effect that the pursuers' principal purpose was to prevent or deter access along the path by people who had hitherto exercised their rights of access in an irresponsible manner. However, the pursuers' submissions did not set out what they suggested the court should find had been proved as being the "expression" of the pursuers' motive that should "set the parameters for the court's objective determination by defining the alternative purpose to the prevention or deterrence of access." It may be that it was felt that it should be implied that "the expression" should be taken to be what was averred, namely that "the principal purpose" was only to prevent or deter access by those who had exercised access rights irresponsibly. As to the pursuers' averments in article 6 of condescendence about their "principal purpose" and motivation in erecting the fence/gate, the defender's position was that the court should

conclude that the principal purpose in erecting the fence/gate had been to prevent all public access, responsible or otherwise. It was not plausible to maintain that the purpose or even main purpose of this was purely to prevent irresponsible access being taken.

[173] As in *Anstalt,* the central question, which falls to be resolved by looking at the pursuers' acts and deciding, in all the circumstances and applying an objective test, is whether they prevented or deterred access to or over the path which, as I have already decided, was not excepted from that referred to in section 1 of the 2003 Act. In my view, on the basis of what I have set out so far, when looking at the pursuers' acts, it is plain that the purpose, or at least the main purpose, of putting up the fence/gate (and associated signs) was to prevent or deter persons from exercising their rights of access under section 1 of the Act. Whatever motive, intention and/or reasons may have been proffered by the pursuers (and Mrs Manson in particular) for doing so, and even if they had been genuinely held, the fence/gate was put up and locked for the purpose of preventing or deterring access to and from the Penicuik Estate by the public, that being land on which they have a right to be on or to cross. The fence/gate is a robust, formidable and well-constructed structure. As Mr Kinch put it, "it was a very thorough job". It is eight-feet high, forms a solid barrier between the property and the Penicuik Estate, is painted with anti-climb paint and is accompanied by signs to direct persons away from the fence/gate and an artificial CCTV camera. The effect of this over-all construction is, as a matter of fact, plainly to prevent or deter all members of the public from taking access.

[174] The pursuers accepted that the path had existed for some time and that, in all likelihood, responsible access takers would have had a right to use the path after the 2003 Act came into force on 9 February 2005. The pursuers also accepted in principle that the

path was not excluded land prior to their arrival. In *Anstalt,* at paragraph [59], the Inner House said:

> "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 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 those 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."

[175] In the present case, the pursuers did not take this course of action; they did the opposite. This is also against the background of the circumstances in which they put up the fence/gate. In particular, in addition to the relative paucity of complaints to, for example, the police, the pursuers did not warn or contact the defender in advance even to give notice that this is what they were going to do and why, still less to discuss it. The evidence of Mrs Manson, Mr Hope and Dr Spearman was also inconsistent with the confirmation by Sir Robert Clerk to Mr Moffat that there was no significant issue within the Penicuik Estate. The only people contacted in advance in relation to the plan to close the path were the residents of Cairnbank Road who also had an interest in the road. It is true to say that the pursuers were under no obligation to contact the defender in advance but, if this had been a genuine attempt only to prevent or deter access being taken by those taking access irresponsibly, I would have expected the pursuers' actions before the fence/gate was put up to have been consistent with that - including, as an act of responsible land management, an attempt to discuss the issue with the defender (as had been suggested to Mrs Manson by PC Shirley) in an attempt to find a solution seeking to achieve such a more limited objective. The pursuers' actions were not consistent with that. According to Mrs Manson (and the letter from Brodies dated 27 June 2016 on behalf of the pursuers), a large number of people took access to and from the Penicuik Estate. The pursuers must, therefore, have been aware

that such people would be likely to be unhappy to find that this access had suddenly been blocked up and complain. This included Penny Wooding who, as the pursuers were aware, used the path and had indeed been in the habit of picking up small amounts of litter and the occasional dog bag, and who spoke of having felt devastated and shocked at the sudden blocking off of the path. She had been warned by Mr and Mrs Hope of a temporary closure of the route when the pursuers' house was being built, but she was not afforded the same courtesy when the fence/gate was put up in June 2016. The first that the defender heard about the fence/gate was when they received the letter dated 7 June 2016 from Penny Wooding saying that she had been "totally shocked" when the new gate appeared on 4 June. Mr Kinch said that there had been no correspondence to say that it was being erected for a particular reason. The only assumption he could make was that it had been erected to stop access. In my view, that was an entirely reasonable assumption in the circumstances in the absence of any alternative explanation. There was also no evidence that the pursuers had made any attempt to facilitate access by responsible access-takers. In fact, there was no evidence that the pursuers appreciated or had any regard for the rights of members of the public exercising access responsibly. This did not suggest a positive attitude towards the rights of such people. Even on the pursuers' own estimate, 50% of the public were responsible. I do not recall Mrs Manson at any point in her evidence acknowledging that such responsible access takers had had rights and that the action of putting up the fence/gate had in effect served to deprive them of their rights. At the very least, the whole circumstances did not suggest an awareness on the part of the pursuers of the fact that, by virtue of section 1 of the 2003 Act, everyone has the right to be on and to cross over all land (including the path), unless and until excepted under section 6.

[176] There was also the pursuers' earlier argument to the effect that the purchase by the pursuers of the property and building of the house there had changed the nature of the property, including the path, and that "In the same way that a former field developed as a housing estate would lose its status under the 2003 Act, so did this land to the extent that it is necessary to allow the pursuers a reasonable degree of privacy in their own home." As I mentioned earlier at paragraph [135] above in the context of the exclusion case, this submission about the purchase by the pursuers of the property and building of the house there changing the nature of the property, including the path, struck me as being perhaps a revealing one. This approach would be consistent with a lack of proper appreciation by the pursuers of the rights conferred by the 2003 Act, unless land is excepted under section 6 (which, when they put the fence/gate up, it had not been) and, for example, the formidable nature of the fence/gate coupled with the lack of any forewarning or prior explanation to the defender of their plan to do this.

[177] In relation to the nature of access taken, including the nature and degree of antisocial behaviour, it is correct to say that this had not been an issue in *Anstalt*. However, I have found that the position advanced by and on behalf of the pursuers in this case in that regard has been exaggerated and that the principal averments on behalf of the pursuers on this matter have not been proved. The defender did not suggest that there has been no antisocial behaviour, but their position is that the circumstances are not as serious as, by their averments, the pursuers offered to prove was the case. For example, the pursuers averred and offered to prove (1) in article 6 of condescendence that a significant proportion of people using the path have not done so responsibly and (2) in article 7 of condescendence that the level of antisocial behaviour has increased dramatically since the construction of the pursuers' house. However, I am not satisfied that these averments have been proved by the

pursuers. Viewed objectively using the standard of the reasonable person, in all the circumstances – including the evidence of the police (which was consistent with the evidence of those who had used the road and path on a regular basis, including Penny Wooding, Professor Trewavas and Dr Storey), the evidence of Sir Robert Clerk's position in relation to the lack of issues on the Penicuik Estate, the low level of complaints to the council and the dog warden – I think it more likely than not that the proportion of those taking access irresponsibly was at a low level. In my opinion, the presence of irresponsible access takers at a low level cannot objectively be a reason for preventing all members of the public from taking access. And, indeed, that had not been the pursuers' case.

[178] As to the argument that "the pursuers' evidence of their motive" was still relevant, the way this was presented seemed to me to be getting very close to trying to persuade the court to take what would in effect be a subjective approach by, in practical terms, ascertaining the motive of the pursuers themselves. As I say, the implication seemed to be that the court was being asked to accept that the "alternative purpose to the prevention or deterrence of access" was to stop not all persons from taking access along the path but only irresponsible access takers. However, having regard to all the circumstances of this case as summarised in paragraph [175] above, I am not persuaded that, viewed objectively, this argument succeeds. I agree with the defender's submission that, on the basis of the evidence, this is not plausible and that the purpose or main purpose was, bluntly, to prevent all access by members of the public.

[179] It may not be strictly necessary for the court to determine what might lie behind that. However, the defender reminded me of the substantial body of evidence from Mrs Manson and Mr Hope about garden development. The defender's submission was that this was the

true purpose in blocking off the access by the public along the path as it would allow the pursuers to take their plans forward.

[180] Turning to Mrs Manson's evidence, she initially referred to the woodland area as "the rest of our garden land". Her position was that, apart from going bug-hunting, they do not use this area at the moment. It is not a completely safe area at the moment as it is not completely fenced in. Previously with people accessing the path with bikes and antisocial behaviour it would never have been a safe environment for H to be in. She confirmed that she would love to be able to use this area a lot more, such as for a mud kitchen for H and putting in beds and planters because H likes sensory things. They might need to flatten down a couple of areas to make it more accessible but nothing major in terms of removing trees. She later confirmed in cross-examination that they had always planned on extending the area to the west and making a bigger space for H. But if they were to put planters and things in for H there it would be subject to vandalism. They had also been short of money. In relation to a lot of the area, bits could be flattened and soil could be brought in to reinforce bits to a certain level. Her father had built a couple of houses before and he is very good at making things more accessible. The first question Mrs Manson was asked in cross-examination was what she was hoping to achieve by being allowed to keep the fence/gate up. She responded that she would like to keep the same relaxed, safe home environment for her family "and actually for all the residents who are on the driveway, and I would also like to be able to use the space that I described earlier as an outdoor place (the unfenced woodland area) that H will be able to access." Mrs Manson was asked: "Where in your landholding, if we can refer to it as your landholding, which is the whole area of your land, are you proposing to make this quiet, safe environment for the plants and the smells, and the mud kitchen, etc?" And she replied: "Just further up near the fence and the gate on

an area that we could possibly cultivate, and make into sort of a good, flatter ground and area, somewhere where you could go up and visit, and spend time in. With less levels of antisocial behaviour and people frequenting that area you would be confident that the things that you might put in, like a mud kitchen and wee bits and bobs, would not be vandalised, destroyed, etc." She confirmed that plans for the extension of the garden would depend on the outcome of the present proceedings. Her father is better qualified about what they could adapt and do on the land while keeping in mind the tree preservation orders. She said that they had been talking about using the lower level bits and making it into a flatter ground area and "with lesser levels of antisocial behaviour and people frequenting that area you would be confident that the things you might put in would not be vandalised, destroyed".

[181] Mr Hope had referred in his evidence to "the garden ground which the track is on" which was owned by the pursuers. This was plainly a reference to the path, but he seemed to regard it as being part of the garden ground. He said in his affidavit that the enclosed garden area was "really too small for him (H). He will need a bigger garden as his size increases. We planned to create an expanded play area for him by creating paths and sensory areas in the woodland area of Gemma and Stewart [Manson]'s land. These plans had to be put on hold due to Stewart's illness, but we would now like to take them forward. That just wasn't possible when the path was being used by other people. It wasn't safe for H to play outside the fenced area of garden. Adults and children were mocking him." However, in relation to this last point, he confirmed that he had not seen all such incidents. In cross-examination, he confirmed that the plans to create an expanded play area for H by creating paths and sensory areas in the woodland area had had to be put on hold due to Mr Manson's illness but that they would now like to take them forward. At one point, he

said that this would include the flat area of the path, but at another point he said that it would not. The plan would be to use as much as they possibly could of that area and that would include the flat area of the path. In evidence-in-chief, he had said that to create the access from the enclosed garden area to the rest of the property to the west (the woodland area) a series of small steps would be put in and, other than that, just general clearing would be required. However, he later said in cross-examination that some serious civil engineering work would be required in relation to the slope in the woodland area and that the enclosed garden area could not be extended to the west. His evidence was, therefore, confusing and inconsistent in relation to the nature and extent of plans to extend the enclosed garden area and to develop the woodland area and the path.

[182] Dr Jennifer Kerr sent the letter dated 21 June 2016, number 5/7 of process, in support of the pursuers' wish to close the path. This letter included a passage, at page two, saying: "[H's] parents had hoped to develop a safe sensory garden adjacent to the home to give him more outdoor experiences but this has been put on hold as they feel that it would be vulnerable to damage by the public".

[183] In all the circumstances, I think it more likely than not that what lies behind the prevention of all public access to the path is the pursuers' desire to provide what would in effect be a bigger garden for H. According to Mrs Manson, these plans have been put on hold pending the outcome of the present proceedings, which perhaps rather makes the point.

[184] However, in my view, it remains plain that, when looking at the pursuers' acts taking into account the wider background circumstances, the purpose, or at least the main purpose, of putting up the fence/gate (and associated signs) was to prevent or deter persons from exercising their rights of access under section 1 of the Act. Whatever motive, intention

and/or reasons may have been proffered by the pursuers for doing so, and even if they had been genuinely held, the fence/gate was put up and locked for the purpose of preventing or deterring access to and from the Penicuik Estate by the public, that being land on which they have a right to be on or to cross. In my view, any suggestion that it was erected to prevent or deter only access by those who were exercising access irresponsibly is wholly implausible. The path is land over which access rights under the 2003 Act were exercisable. There is, therefore, no basis for recall of the section 14 notice served in this case.

[185] Turning to the pursuers' submissions that the circumstances of the present case are closely comparable to those in *Forbes* and that this would provide a basis for an alternative argument that the section 14 notice should be varied, I preferred the submissions advanced by the defender. I have to say that I found the pursuers' submissions on this difficult to follow. The background is that it is averred in article 6 of condescendence that "irresponsible access and antisocial behaviour was not confined to particular times of day or specific days of the week". This, therefore, is what the pursuers are offering to prove. That is the precise opposite of averments which would be apt to support a variation of any of the (effectively three) types suggested in submissions in this case. I am not satisfied that that averment has been proved, but there are no other averments to support – or give notice of – a contrary position. In addition to that problem, unlike the position in *Forbes*, I have not accepted the picture presented by the pursuers and I have not found any clear alternative position similar to that which Sheriff Holligan found to be proved in *Forbes.* This was also on the basis of his acceptance of the evidence of the pursuers in that case as to their motive as being genuine. The decision was, therefore, approached on a (then understood to be correct) subjective basis rather than looking at the landowners' acts objectively to ascertain their purpose or main purpose. Be that as it may, this meant that Sheriff Holligan was

satisfied that the appeal against the section 14 notice succeeded, and it was then a question of remedy. In the present case, I am not satisfied that the appeal against the section 14 notice succeeds on the "purpose" basis advanced by the pursuers and so the question of remedy does not arise.

[186] In relation to the defender's submissions about alleged gatherings at the waterfall on the Penicuik Estate, I have already commented on this at paragraph [84] above. There is an averment in article 6 of condescendence that such gatherings took place. In the event, there had been only two reports to the police in relation to such gatherings between 21 April 2014 and 4 June 2016 when the fence/gate was put up and, according to Mr Moffat,

Sir Robert Clerk had expressed the view that, so far as he was concerned, there was no significant issue within the estate. If there really had been the problems of the significance alleged, I find it surprising that there were so few complaints to the police. In any event, I am not persuaded that complaints about noise coming from the Penicuik Estate are relevant. As pointed out by the defender, youths can also get to the Penicuik Estate by other routes.

[187] However, if it is relevant, I think it likely that the explanation for this mismatch between the pursuers' evidence and the low number of complaints to the police is that, as in relation to other matters, the picture painted about this has been exaggerated. Again, it is possible that this may in part be down to heightened sensitivity or intolerance on the part, in particular, of Mrs Manson associated with her concerns about H. However, that in turn raises the issue referred to by the Inner House in *Anstalt,* namely that it is:

> "the landowners' acts which are what have to be looked at objectively to see what their purpose or main purpose was. By purpose is meant their aim objectively ascertained and not the particular (landowners') intention or motive…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."

I have, therefore, had to keep in mind that this is the approach which requires to be taken in the present case. However sympathetic the circumstances might be (in this case frequently focussing on concerns about H as a result of his condition), in my view, that would involve taking a contrary – subjective – approach according to the mental processes of the pursuers as the owners of the property for the time being. In the light of *Anstalt,* that is not the correct approach.

[188] If I am wrong about that, and if the issue of H's sleep and his behavioural issues are relevant, I think that there was some force in the defender's submissions to the effect that there have been a number of factors unrelated to the use of the path which have caused him upset. For example, I am satisfied that sleep issues are continuing; unfortunately, this appears to be a problem which is associated with autism. That said, I can well see that if he is woken up at night by something such as noise coming from the road outside the house, his condition is such that it is then more difficult for him to get back to sleep and that this could impact not just on him but, potentially, other members of the family. However, Mrs Manson did not give evidence that, instead of taking the extreme step of blocking up all public access along the path, there might have been possible alternative ways to stop or even reduce any noises reaching H's ears.

[189] In conclusion, in my view, it remains plain that, when looking at the pursuers' acts taking into account the wider background circumstances, the purpose, or at least the main purpose, of putting up the fence/gate (and associated signs) was to prevent or deter persons from exercising their rights of access under section 1 of the Act. Whatever motive, intention and/or reasons may have been proffered by the pursuers for doing so, the fence/gate was put up and locked for the purpose of preventing or deterring access to and from the Penicuik Estate by the public, that being land on which they have a right to be on or to cross.

The path is land over which access rights under the 2003 Act were exercisable. On the basis of what I have set out, I conclude that the defender was entitled to take action as respects those rights under section 14(1) and, in my opinion, the pursuers' argument to the contrary falls to be rejected.

The section 14 declarator "human rights" case

Submissions

Pursuers

[190] The pursuers do not seek any declaration of incompatibility in these proceedings. There is no suggestion that the 2003 Act itself is incompatible with the pursuers' rights; it is the manner in which the defender interpreted, exercised and applied its powers and duties under the Act that is at issue.

[191] It is unlawful for the defender as a public authority to act in a way which is incompatible with a Convention right. The defender exercised its functions and made decisions in a manner which infringed the pursuers' Convention rights under Article 8 and Article 1 of Protocol 1 to the Convention. The pursuers, therefore, rely on section 7 in invoking their rights in these proceedings.

[192] This was not an attempt to seek the exercise of the supervisory jurisdiction of the Court of Session. The pursuers in this case are seeking "just satisfaction" for the breach of their rights, albeit that they are seeking a remedy other than damages. This can include a remedy which in effect reverses a decision of a local authority. The complaint is of a procedural failure to give effect to the pursuers' rights. There was discussion about Convention rights in *Forbes*, albeit concerning Article 6 rather than either Article 8 or Article 1 of Protocol 1 to the Convention. It had not been doubted in that case that the statutory

appeal process under the 2003 Act (section 14(4)) was a suitable forum within which Convention rights might be raised.

[193] Section 8 of the 1998 Act provides that the court may make such order within its powers as it considers just and appropriate. The pursuers seek recall of the section 14 notice under reference to the power conferred on the court by virtue of section 14(4) of the 2003 Act which provides that such a notice may be appealed against.

[194] The pursuers have victim status in their own right within the meaning of section 7(7) of the 1998 Act. They would be victims for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights (ECHR). They are also indirect victims as parents of H, whose rights have been infringed. Article 35 is not relevant to proceedings before the domestic courts. Article 34 applies to individual applications. By contrast, Article 35 deals with the admissibility of applications to the ECHR. It is only relevant where the jurisdiction of the ECHR is invoked. It would be wrong for domestic courts to restrict admissibility in the same manner. It would, therefore, not be right for this court to apply any additional test of "significant disadvantage" when determining whether the pursuers have victim status.

[195] The pursuers' right to a family life is *prima facie* engaged in this case by service of the section 14 notice. Service of this notice was also an act capable of engaging the pursuers' Article 1 of Protocol 1 rights. If that is so, the onus is on the defender to show that interference with these Convention rights was lawful. The same issues were involved, namely (1) whether there was a lawful basis for interfering with the pursuers' rights, (2) whether this was proportionate in relation to the legitimate aim or public interest pursued and (3) whether it was necessary to interfere with the pursuers' rights for some legitimate purpose in the public interest.

[196] The court's duty is itself to act compatibly with the pursuers' Convention rights. The exercise of assessing the Convention compatibility of the section 14 notice requires review of both the substantive merits and also the procedural approach in serving that notice. The 1998 Act accords a higher standard of protection than the 2003 Act because it requires consideration of the proportionality and necessity of the acts of a public authority. The court requires to apply that higher test where it is invoked in any proceedings brought under the 1998 Act. Section 13 of the 2003 Act recognises that there will be other duties incumbent on the defender as a local authority. The "other functions" referred to in section 13 include the requirement to act compatibly with the Convention rights of individuals.

[197] Assuming that there was a legal basis for interfering with the pursuers' Convention rights, the question then is whether the interference was proportionate. That essentially involves a review by the sheriff of the substantive merits of the defender's decision. It is for the sheriff to determine whether the actions of the defender in issuing the notice were both necessary and proportionate. Significant weight attaches to the pursuers' rights in this case due to their unique family circumstances**.** The high level of irresponsible access tips the balance of proportionality in the pursuers' favour. I reminded the pursuers of the submission made in relation to the section 14 "purpose" case where they had submitted that the appeal under section 14 was not a review of the defender's actions and that it was a fresh decision on the merits by the sheriff based on the evidence led before the court. At this point, the pursuers' submitted that, where the appeal under section 14 was on the basis of alleged violations of Convention rights, the opposite approach applied, namely that in such (human rights) cases the proper approach was a review of the defender's actions and not a fresh decision on the merits by the sheriff based on the evidence led before the court.

[198] In assessing whether there had been a violation of Article 8 and Article 1 of Protocol 1, the court also had to scrutinise the decision-making process to ensure that due weight has been given to the interests of the individual. The decision-making process in this case was defective and hence materially unfair. There was insufficient consideration of their rights by the defender. The human rights impact assessment was defective. There was no real engagement with human rights issues by the council officers tasked with reporting these issues to decision-makers. The defender thought that human rights could be left to the sheriff. The impact assessment document was merely a tick-box exercise as, essentially, the decision had already been made. It therefore acted incompatibly with the pursuers' Convention rights and its decision to serve the section 14 notice was unlawful. It should therefore be recalled.

[199] Authorities cited in support of the pursuers' submissions were *Forbes* v *Fife Council* 2009 (supra); *Ruddy* v *Chief Constable Strathclyde Police* 2013 SC (UKSC) 126*; Wishart Arch Defenders Loyal Orange Lodge 404* v *Angus Council* 2002 SLT (Sh Ct) 43; *Connors* v *UK* (2005) 40 EHRR 9, *Giacomelli* v *Italy* (2007) 45 EHRR 38, and *James* v *UK* (1986) 8 EHRR 123.

Defender

[200] The defender has complied with all duties incumbent on them under the 1998 Act. Neither Article 8 nor Article 1 of Protocol 1 have been engaged but, if they are, the defender has not interfered with either. Even if the requirement to remove the fence/gate is an interference with Article 8, that interference is in accordance with the law and is necessary to preserve public access rights under section 1 of the 2003 Act. And even if it amounts to a deprivation of the pursuers' right to peaceful enjoyment under Article 1 of Protocol 1, that deprivation is in the public interest and is lawful.

[201] In so far as there was any criticism of Mr Kinch's initial letter dated 14 June 2016 when he had first become aware that the fence/gate had been put up, it was no more than an initial letter after the pursuers had taken matters into their own hands and had put up the fence/gate without any prior consultation with the defender. There was a rigorous process in the council for assessing human rights which were fully considered. The defender had not known about these concerns until after the fence/gate had been put up. Mr Hope had initially not accepted that the defender had been presented with a *fait accompli*, but he later accepted that Mrs Manson had not contacted the defender in advance to advise them that she was considering erecting it.

[202] The draft minutes of the meeting on 22 August 2016 were not agreed or approved. The recollections of Mr Kinch and Mr Moffat should be preferred to those of Mrs Manson and Mr Hope. The defender had been willing to meet to discuss matters even although the fence/gate had been erected without their knowledge. Mr Kinch's position had been that, if matters could not be resolved between parties, it would be a matter for the sheriff to decide.

[203] The process of whether a section 14 notice should be served was suspended until there had been an integrated impact assessment. This included consideration of human rights. As explained by Mr Moffat, this had been led by the equalities and diversity officer. A raft of information was considered by the defender before it was completed. The defender took account of the pursuers' human rights, including their right to a family life. The defender also considered the pursuers' son. It was a fair and proper assessment. It was not fair to describe it as a tick-box exercise. The council had done its best to achieve a fair balance of the rights of the pursuers and the community as a whole. Mr Moffat explained that the council had information from the pursuers (including extensive correspondence with the pursuers' solicitors) and other residents on Cairnbank Road, but also opposing

information from the police, the community safety team, Sir Robert Clerk from the Penicuik Estate and his staff, and a hundred or so people who had written to the council.

[204] The decision to issue the section 14 notice was taken on 9 January 2017 by the Corporate Management Team (CMT) of the council. Mr Moffat had presented an amended report and the integrated impact assessment to the CMT for consideration at that meeting.

[205] The exercise of the powers of a local authority under section 14 of the 2003 Act does not constitute a breach of human rights. Such a notice meets the requirements of the 1998 Act: *Gloag* (supra) at paragraph [65]. Provided that a decision has been correctly made in terms of the provisions of the 2003 Act there is no *prima facie* breach of Convention rights requiring separate investigation. If land is not excepted under section 6 of the 2003 Act, there is no separate human rights case to answer. The human rights concerns are deemed to have been considered by virtue of the balances within the 2003 Act itself.

[206] To make a claim under the 1998 Act, section 7(1) requires that the person making the claim must be a victim in terms of Article 34 of the ECHR. If an application could not be made to the ECHR on the basis of Article 34, then that case is inadmissible in the domestic courts. Article 35 restricts applications made by an alleged victim unless they can demonstrate that they have suffered a "significant disadvantage" as a result of the alleged breach. The alleged interference does not reach this minimum level of severity.

[207] If there has been infringement of Article 8, this was justified and in accordance with the law and necessary to preserve public access rights. The defender was pursuing its statutory duty in terms of section 13 of the 2003 Act to keep potential access routes open to the public and allow effective exercise of their rights. The defender sought to negotiate some kind of solution which interfered with the pursuers' rights as little as possible whilst protecting the public's access rights.

[208] Similarly, if there has been an infringement of Article 1 of Protocol 1, this was justified and proportionate in the circumstances.

[209] In relation to the integrated impact assessment, it is not accurate to say that the defender did not consider the pursuers' Convention rights. Even if it did fail to do so, the relevant test would not be whether procedurally the pursuers' rights were considered but whether substantively they have actually been interfered with. There was no evidence that, as a result of the delay in obtaining the integrated impact assessment, there was any substantive injustice or that a different decision would have been reached. The ultimate decision to issue the section 14 notice was not pre-determined. Even if the defender had failed to consider the pursuers' Convention rights, that would not have been fatal to the decision. The test is a substantive one and not a procedural one. If the pursuers' averred that the defender's decision was procedurally defective or contrary to natural justice, they could have sought reduction through judicial review.

[210] Authorities cited in support of the defender's submissions were: *Gloag* v *Perth and Kinross Council* (supra), *J A Pye (Oxford) Limited* v *United Kingdom* (2008) 46 EHRR 45, *R(SB)* v *Governors of Denbigh High School* [2007] 1 AC 100, and *Belfast City Council* v *Miss Behavin' Limited* [2007] 1 WLR 1420.

Decision on the section 14 declarator "human rights" case

[211] The pursuers did not suggest that the 2003 Act is incompatible with the pursuers' Convention rights. The 2003 Act is subordinate legislation to which section 3 of the 1998 Act applies. Consequently, so far as it is possible to do so, the 2003 Act requires to be read and given effect in a way which is compatible with the Convention rights.

[212] I do not read what Sheriff Holligan said in *Forbes* at paragraph [32] as saying that the statutory appeal process under the 2003 Act (section 14(4)) was a suitable forum within which Convention rights might be raised. He was simply saying that article 6 had been engaged in the hearing before him and that led him to conclude, at paragraph [33], that in a section 14(4) appeal the function of the sheriff is judicial rather than administrative. I agree with this conclusion. And, in my opinion, this is relevant to the approach urged by the pursuers in this branch of the section 14 appeal. In the submissions made in relation to the section 14 "purpose" case, and in my view correctly, the pursuers submitted that the appeal under section 14 is not a review of the defender's actions; it is a fresh decision on the merits by the sheriff based on the evidence led before the court. This was consistent with the approach taken by Sheriff Holligan in *Forbes* and by Sheriff Fletcher in *Gloag.* However, the pursuers submitted that, where the appeal under section 14 was on the basis of alleged violations of Convention rights, the opposite approach applied, namely that in such (human rights) cases the proper approach was a review of the defender's actions and not a fresh decision on the merits by the sheriff based on the evidence led before the court. This seemed to be coupled with an argument that the court requires to apply a higher test and a higher standard of protection where human rights under the 1998 Act are involved. No authority for either proposition was cited and I not persuaded that there is any sound basis for taking such a divergent approach in exercising the court's powers under the same appeal provision.

[213] I also agree with, and gratefully adopt, the analysis by Sheriff Fletcher in *Gloag* at paragraph [65]:

> "… Standing that it is accepted that the Act is not incompatible with the Convention, these rights come into play only when a decision is being made about how much ground is sufficient for the purposes of the exemption and only if a decision was

> being made which denied the pursuer sufficient ground for the purposes of the exemption. In other words it would only apply if a decision was being made to find the amount of ground less than sufficient for these purposes. The decision is one which might be wrong because the court might have found insufficient land for the purposes set out in the Act to be appropriate but that would not be a contravention of the Convention because it would already be a contravention of the Act itself. If the ground found by the court to be sufficient was correct there would be no contravention either of the Act or of the Convention. I appreciate that that has turned into a circular argument but it does seem to me that once it is accepted that the Act is not incompatible with Convention rights and assuming that the court makes a decision which was correct in relation to sufficiency there would be no contravention of the Convention and on the other hand if the court were wrong about sufficiency that decision can be put right without reference to the Convention because it would be a contravention of the 2003 Act."

[214] In my opinion, therefore, having regard to the fact that the 2003 Act is not said to be incompatible with the pursuers' Convention rights, one can see that the careful wording of the Act setting out a balanced framework of rights, duties and obligations on all parties involved in the exercise of access rights is itself designed to be Convention-compliant.

[215] If I am wrong about my conclusions thus far, it is appropriate that I express a view in relation to the arguments further advanced. In the first place, I would agree with and prefer the pursuers' submissions on the question of "victim status". The admissibility restriction in article 35 does not apply unless the jurisdiction of the ECHR is sought to be invoked.

[216] In relation to the integrated impact assessment, having carefully considered the evidence, I do not accept that it is fair to say that there was no real engagement with human rights issues by the council officers and that it was merely a tick-box exercise in relation to a decision which had, essentially, already been made. The final decision to serve the section 14 notice was taken on 9 January 2017 by the Corporate Management Team of the council. I am satisfied that this was not pre-determined and that it was correctly made in terms of the provisions of the 2003 Act. I am also satisfied that the pursuers' Convention rights were properly taken into account. The council officers particularly criticised were Mr Kinch and

Mr Moffat. Mrs Manson attended a meeting with them on 22 August 2016. The council had proposed that the gate be open from 9am until 6pm every day, whereas Mrs Manson said "we experienced antisocial behaviour at all times of the day every day". According to her, Mr Kinch had said at the meeting that "human rights were not an issue for the council, any decision should be taken by a sheriff". In evidence-in-chief she was referred to draft minutes of that meeting (5/12 of process) and was simply asked if she "adopted" the entire draft of the minutes into her evidence, which she confirmed that she did. Mr Kinch told the court that he had not said at the meeting that human rights was a question for the sheriff. What he had said was that, ultimately, if this could not get resolved, a sheriff would be deciding on human rights and not the council. His position was that the council took human rights into account but that, "if it got pushed on", it was not for the council to decide. In relation to completion of the integrated impact assessment, he had needed extensive advice from the council's equalities officer on how to prepare this. Earlier procedure in October 2016 had been suspended to enable this assessment to be undertaken. This assessment included the pursuers' human rights. It had not been a tick-box exercise. It was taken extremely seriously, and there had been quite heated discussions between him and the diversities officer. Mr Moffat likewise did not accept that the outcome had been pre-determined. The diversity officer had been very thorough and very challenging at every point. The decision to issue the section 14 notice in January 2017 was taken once human rights had been considered and trumped the previous decision in October 2016.

[217] Both Mr Kinch and Mr Moffat were very careful and measured in their evidence and I was impressed by both of them and their professional approach. I formed the view that both were both credible and reliable and that, where their evidence differed from that of Mrs Manson, their evidence should be preferred.

[218] This also applies to evidence given by Mrs Manson to the effect that Mr Kinch had been "offhand" and "aggressive" at the meeting on 22 August. Both Mr Kinch and Mr Moffat firmly denied this. Mr Moffat said that he would certainly have pulled up Mr Kinch at the meeting if that had happened, but there had been nothing that had caused him concern. Mr Kinch added that the allegations made against him and his staff by the residents of Cairnbank Road had been "ferocious throughout this", including letters from Mr Hope suggesting collusion with the Penicuik Estate over removal of the fence/gate. Having seen and heard Mrs Manson, Mr Kinch and Mr Moffat in evidence, I think it most unlikely that Mr Kinch would have conducted himself in such an unprofessional way at the meeting or that Mr Moffat would have allowed this to happen. I am, therefore, not persuaded that Mr Kinch acted in the manner alleged at the meeting.

[219] Mr Moffat also told the court that the draft minutes of the meeting on 22 August 1016 had not been agreed and approved. I was not persuaded that it would be appropriate for the court in effect to "approve" the minutes now in the absence of agreement between the parties.

[220] In the result, I am not persuaded that the section 14 notice served on 14 January 2017 contravened the pursuers' Convention rights.

Effect

[221] In all the circumstances, I am satisfied that the path was land in respect of which access rights were exercisable under the 2003 Act; that the section 14 notice was lawful and compatible with the pursuers' rights under Article 8 and Article 1 of Protocol 1 of the European Convention on Human Rights; that the purpose or main purpose of erecting the fence/gate and of having in place the signs was to prevent or deter all members of the public,

including persons entitled to exercise access rights in respect of the path in terms of the 2003 Act from doing so, contrary to section 14(1) of the 2003 Act; that, therefore, the pursuers contravened section 14(1)(a) and (b) of the 2003 Act by having in place the signs and by erecting the fence/gate and that they contravened section 14(1)(e) of the 2003 Act by failing to remove the fence/gate and signs. I have, therefore, dismissed craves 1 and 2 as sought by the defender. At the request of the pursuers, I am assigning a hearing on expenses.