



Briefing Note

Mr & Mrs Tuley v The Highland Council [2009] CSIH 3A (21st April 2009)

Mr & Mrs Tuley have successfully appealed the decision of Sheriff MacFadyen in terms of the proper interpretation of section 14 of the Land Reform (Scotland) Act 2003. The Inner House's decision, was published on 21st April.

A landowner can invoke section 14(4) of the 2003 Act to appeal a notice served on him by the local authority requiring remedial action in the event that the owner has taken action for the purpose or for the main purpose of preventing or deterring any person entitled to exercise access rights from doing so.

Mr & Mrs Tuley had created a number of pathways specifically for the public's use and did not generally seek to discourage access to their land by members of the public. Mr Tuley erected padlocked barriers in order to exclude access by horses, and any vehicular traffic to one particular path because in his view damage would be caused to that path in particular because of the nature of the soil, if it were used on a regular basis by horses or vehicles. Mr & Mrs Tuley did however encourage use of the path by pedestrians.

The Highland Council served notice under section 14(2) requiring Mr & Mrs Tuley to enlarge the width of the gap between the barriers or alternatively to remove the padlocks in order to allow access by horses. Mr & Mrs Tuley exercised the right of appeal to the Sheriff Court under section 14 (4).

In terms of section 2 of the 2003 Act access rights must be exercised responsibly and the test for establishing this provides that an access taker must not cause unreasonable interference with any of the rights of any person (including those of the landowner). Mr & Mrs Tuley sought to prove that access to the path by horse riders was unreasonable, because it would cause damage. Sheriff McFadyen decided that the action raised by Mr & Mrs Tuley was premature, because it had been raised before any damage had actually been caused and at a time when it could not be said with certainty that the use of the path by horse riders would in fact cause damage. Accordingly, the Sheriff found that the erection of the barriers was "an intended unreasonable interference with the exercise of responsible access rights...."

This decision has been overturned on appeal.

The Inner House rejected the Sheriff's view that Mr & Mrs Tuley had acted prematurely and that they required to await the occurrence of actual damage before they could successfully appeal against the Council's notice in terms of section 14 (4). They accepted the expert's view that damage would in all probability occur if the track was used by horse riders at all. Accordingly, riding horses on the path would not be a responsible exercise of access rights. The Inner House further noted that the Tuleys had in fact practised responsible land management by dedicating particular paths to particular recreational activities.

The Inner House overturned the Sheriff's decision that Mr & Mrs Tuley's "main purpose" in erecting the barriers was to prevent or deter access rights, in contravention of section 14 (1) of the 2003 Act. They also rejected the Sheriff's interpretation that assessment of the landowner's purpose in erecting a notice (or in this case a barrier) to prevent public access in terms of section 14(1) of the 2003 Act was a matter solely for the Court viewed objectively.

The Inner House accepted Mr Tuley's evidence that he erected the barriers because of a genuine concern about the damage that would otherwise be caused to the path. They found that the main purpose of excluding access was to prevent damage, such intention being backed up both by the Tuleys' land management and by their expert's report. The Court also noted that the concept of acting "responsibly" required by the 2003 Act by its very nature endorses a subjective approach and that the Tuleys' bona fides in respect of their reasons for the erection of the barriers was not in question. Mr & Mrs Tuley could not therefore be said to be in breach of section 14(1) of the 2003 Act.

Comment

The Inner House's decision on appeal is to be welcomed. The interpretation of section 14 is of particular importance to landowners in respect of what could be said to be an "unreasonable interference" with access rights.

It is to be hoped that the Inner House's comments will rein in the enthusiasm of local authority access officers for issuing section 14 notices against legitimate land management activities.

It is noteworthy that the Inner House appear to have been influenced by the fact that Mr & Mrs Tuley in general welcomed the public onto their land and had a land management scheme which may have exceeded their obligations in terms of the 2003 Act. This appears to have been good evidence in their favour when the Court came to decide upon the intentions of the Tuleys in restricting access, and in particular whether they were acting in good faith. The message to landowners appears to be that if a sensible approach to access rights is taken, and there are good reasons for restricting access rights (the specific example of tree felling is given) which can be supported by evidence, objection to the restriction will not be upheld by the Courts.

This note is intended as a brief summary of the Regulations relating to Energy Performance Certificates. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. Turcan Connell is happy to provide such advice.

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