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Core Path Plan Amendment under the Land Reform (Scotland) Act 2003 – *Gartmore House v LLTNPA* (Case Comment)

The right of responsible access that was introduced by Part 1 of the Land Reform (Scotland) Act 2003 is now suitably ensconced in Scots law. Since it came into force in 2005, the 2003 Act – all statutory references are to that statute unless otherwise stated – has afforded outdoor access to those crossing land or seeking recreational, educational and even some commercial opportunities (in accordance with section 1), subject to such activity being undertaken on a responsible basis (section 2) and in a place that is not excluded from the scope of the legislation (section 6). Where land is subject to access rights, owners and other occupiers of land must in turn manage that land in a manner that is responsible; that is to say, sympathetic to the possibility of access (section 3). Local authorities or, where relevant, national park authorities – which can together be termed "access authorities" – have certain duties and powers in relation to access rights in their respective areas, not least to champion them (section 13) and serve enforcement notices on land managers who act in a way that stymies access (section 14).

There has been some litigation relating to the right of responsible access, notably in the context of whether land is excluded from access under section 6 (consider the cases of *Gloag v Perth and Kinross Council* 2007 SCLR 530, *Snowie v Stirling Council* 2008 S.L.T. (Sh Ct) 61, *Creelman v Argyll and Bute Council* 2009 S.L.T. (Sh Ct) 165 and *Manson v Manson v Midlothian Council* 2019 S.C.L.R. 723, all of which featured the exclusion for domestic gardens found in section 6(1)(b)(iv)). Other cases have related to what is acceptable in land management terms at particular sites (*Tuley v Highland Council* 2009 S.L.T. 616; *Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority* [2018] CSIH 22). The new case of *Gartmore House v Loch Lomond and the Trossachs National Park Authority* [2022] CSOH 24 also concerns the right of responsible access, albeit from a slightly different direction to earlier case law.

Gartmore House v LLTNPA is more of an administrative law case, concerning as it does an attempt by a land owner to negate the adoption of a new core paths plan (a concept that will be explained below) by an access authority (on the direction of the Scottish Ministers, who were an interested party in the case). The judicial review brought by the owner of a site near the village of Gartmore in rural Stirlingshire was founded on the relevant statutory test for adoption of a core paths plan in the 2003 Act, and also a separate ground that there had been a failure to comply with the public sector equality duty found in section 149 of the Equality Act 2010. Had this judicial review succeeded, it would have had an impact "on the ground" (subject of course to the usual possibility that the process could have been re-instigated, and conducted properly, by the relevant decision-makers at some point in the future). In the Outer House, Lord Clark did not agree with the land owner's submissions that challenged the process that was adopted, meaning that the new core paths plan stood.

Before analysing Lord Clark's opinion, this case note will explain the statutory provisions around core paths and their implications for owners and occupiers of land. It will then consider the application of those provisions to the particular circumstances and the particular site, which – somewhat unfortunately – saw a charitable organisation that owns and operates a hotel and other accommodation that is often used by groups of children (including vulnerable children) pitched against one of Scotland's two national park authorities. These circumstances no doubt contributed

to press interest in the court's ultimate decision (see Dave Finlay's report in The Times, "Gartmore House fails to keep public paths off country estate", 5 March 2022 https://www.thetimes.co.uk/article/gartmore-house-fails-to-keep-public-paths-off-country-estate-8krdgz5v0).

Core paths

Amongst their many other statutory roles, access authorities also had a role in relation to the new concept of core paths that were introduced by the 2003 Act, such that they had to devise a network of accessible routes "sufficient for the purpose of giving the public reasonable access throughout their area" (section 17(1)). Such a "core paths plan" was then to be implemented, with accompanying local notification and consultation of interested parties. Absent any relevant objections, the plan was to be adopted by the access authority (section 18(1), 18(2)). In the event of objections being received, the Scottish Ministers were drawn into the process such that they would cause a local inquiry to be held under section 265 of the Town and Country Planning (Scotland) Act 1997. Following the publication of the report by the person appointed to hold the inquiry, Ministers were empowered to direct the local authority to adopt the plan (with or without amendments) (per section 18(3)-(7)).

That one-off duty on access authorities was to be acted upon within three years. That was not the end of the matter though. An access authority also has a continuing role, in that it may or, when asked by the Scottish Ministers, must review its core paths plan and then, if appropriate, amend the plan. A similar process to the original scheme applies for such a wholesale review, although there is also a simplified route for a single amendment within a core paths plan (in sections 20C and 20D). The 2003 Act "review and amendment" scheme was itself amended by the Land Reform (Scotland) Act 2016. It was this amended scheme that was engaged in *Gartmore House v LLTNPA*.

There are practical and legal implications of land being designated as a core path. In practical terms, a core path will be publicised by the relevant access authority (normally on its website, even though this is not required by sections 18(8) or 20A(9)), with the associated potential of increased footfall. In legal terms, the existence of a core path means that anyone taking access there can be surefooted about the entitlement to do so. This is because section 6 exclusions to access rights explicitly do not apply to land that is a core path, in terms of section 7(1), save in very particular circumstances. These narrow circumstances are when access is prohibited or restricted owing to an outbreak of animal disease (i.e. a foot and mouth disease outbreak or similar scenario) and where access has been suspended for a particular purpose by an access authority in accordance with section 11. A further legal consequence is that an access authority may do anything which they consider appropriate for the purposes of: maintaining a core path; keeping a core path free from obstruction or encroachment; and providing the public certain information about a core path. This power to maintain, clear and publicise core paths is accompanied by a power of entry that applies more generally when an access authority is engaged with the exercise or proposed exercise of any of its 2003 Act functions (section 26). In short, it is understandable that many land owners would wish to ensure that such implications only arise when the proper process has been followed. This is what was stress-tested by the petitioner in *Gartmore House v LLTNPA*. For clarity, Gartmore House is the name of the land owning charitable company limited by guarantee that raised this court action, and is also the name of a building on the site.

The dispute and the legal framework

The background to this dispute is explained in paragraphs 4-6 of Lord Clark's Opinion. Not much can be usefully added to that, and those wanting a full picture are referred to the ruling itself. A brief synopsis follows.

The access authority adopted its first core paths plan in 2010. The core paths in this plan did not cross the petitioner's land (i.e. Gartmore Estate, where Gartmore House and an accommodation block were to be found). In November 2018 the access authority, of its own motion, began a consultation about changes to its core paths plan. Two new core paths would traverse the petitioner's land ("the Gartmore Paths"), passing close to an accommodation block and land used by visiting groups to the site. Objections were raised by the petitioner to the access authority about the Gartmore Paths, but no amendments were made to the proposed plan. In line with the statutory scheme, the Scottish Ministers were mobilised and the unresolved objection was passed to them. A Reporter was appointed, and representations were made to him on the petitioner's behalf. A site visit took place in July 2020. His Report followed on 10 December 2020.

The Report, including the representations by the petitioner (and another party) about the Gartmore Paths, is available on the website of the Planning and Environmental Appeals Division at https://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=120809. It covered three other fresh core paths within the national park area (all of which were recommended for inclusion in the new core paths plan), and provides some context that was not included in the ultimate court ruling. The Report details that the petitioners also raised an issue of "no evidence of community consultation having identified these proposals as priorities". The access authority disagreed with this, noting as follows:

> The Recreation and Access Adviser for the area attended the Gartmore Community Council meeting on 1 August 2018, outlined the upcoming Core Path Plan Review and asked the Community Council to submit any revisions to the existing Core Path Plan which would then be used as the basis for the formal consultation. We received proposals for a number of additions to the Core Path Plan on 4 August 2018 which included these two paths.

That extract is included to highlight that consideration of the Gartmore Paths actually pre-dated the formal public consultation. This might also go some way to explain why a lack of meaningful consultation – which is a ground for judicial review – was not in fact argued in this case.

To distil the key terms from the Report (which were extracted in Lord Clark's opinion), observations were made that the Gartmore Paths "provide a significant benefit to the sufficiency of the network by giving the public a better opportunity to access the area off-road" (it having been noted that other nearby core paths utilised public roads and thus were "not ideal"). The Reporter also noted the importance of safeguarding the safety and wellbeing of any visitors to the site, particularly children and vulnerable people, although he noted that it would not be unusual to have such groups on-site in a way that could be twinned with suitable public access. After noting the possibility of the access authority helping to alleviate any concerns, he concluded that the difficulties raised by the petitioners did not appear "insurmountable". In March 2021, the Scottish Ministers accepted the Reporter's views and directed the updated core paths plan including the Gartmore Paths be adopted, with a resolution to do so following on 14 June 2021.

The Opinion then sets out "Statutory provisions and guidance" in relation to the two grounds of this judicial review, namely failure to apply the appropriate test under the 2003 Act and failure to meet the public sector equality duty.

In relation to the former (at paragraphs 7-10), Lord Clark set out the statutory provisions for the initial adoption of core path plans and also those that apply for updates, which I will not revisit here. He also highlighted relevant Scottish Government guidance that was issued to access authorities, which (as the Scottish Ministers highlighted in their interested party capacity, at paragraph 25) recognised changing circumstances over time will in turn lead to changing core path needs.

For the latter, subsections (1)-(7) of section 149 of the Equality Act 2010 were narrated, highlighting that which a public authority must have due regard to in the exercise of its functions, namely the need to: (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. The relevant protected characteristics found in subsection (7) are: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

For completeness, it can be noted that in terms of the Court of Session Act 1988, s.27A, the petitioners had three months in which to raise this judicial review action. This is not mentioned in the Opinion, presumably because it was a non-issue.

The rejected petition

There is no denying that aspects of this decision leave an access to land specialist in slightly less than familiar territory, considering case authority about how to read a document produced as part of the statutory process (such as *Moray Council v The Scottish Ministers* 2006 SC 691 and *Abbotskerswell Parish Council v SOSHCLG & others* [2021] EWHC 555 (Admin)) and the relevant legal principles to be applied when considering whether the statutory duty under the Equality Act 2010 had been breached; fortunately parties were in agreement about the law here, it being clarified (at paragraph 36) that the question is "whether, having regard to the substance of the decision and its reasoning, the decision-maker has had due regard to the relevant statutory need" (*R (on the application of Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141). As to the former issue of how to deal with the Report, as explained at paragraph 28 by way of an analogy with the review of planning decisions, this was to be read "(i) fairly and in good faith, and as a whole; (ii) in a straightforward down-to-earth manner, without excessive legalism or criticism; and (iii) as if by a well-informed reader who understands the principal controversial issues in the case", without being "subjected to detailed textual analysis and criticism".

Before considering the more pressing issues, it is worth acknowledging a preliminary point that the access authority had not actually gone through a decision-making process (as they were in fact directed by the Scottish Ministers to adopt the amended plan) did not succeed (paragraph 27). It would be fair to say this was not a strong argument and it was not vigorously pursued, and nothing more will be said of it.

Turning to the substantive matters, much was made by the petitioner that the Gartmore Paths and the subsequent Report went beyond the statutory test (in terms of section 17(1) as applied by section 20A(5)). As noted above, the test is about having a "system of paths… sufficient for the purpose of giving the public reasonable access throughout their area." The petitioner tried to establish that a different test, based on improving local access, had in fact been applied. Another argument was that there was a failure to give proper, adequate and intelligible reasons for the adoption of the new core paths plan. This submission homed in on the Reporter's observation that

the difficulties for the land owner would not be "insurmountable" rather than properly balancing the respective interests (per section 17(3), as applied by section 20(7)).

Lord Clark noted everything that the Reporter had considered and drawn upon (paragraph 29), before addressing how this had been applied. Attention was drawn to the recurring theme that the Gartmore Paths mitigated the need to use public roads, including wording from the Report where the sufficiency of the network was specifically addressed (paragraph 30). In short, Lord Clark felt the Reporter stuck to the statute, the Report reflected and addressed the statutory test, and the petitioner's suggestions that the Reporter had gone beyond the terms of the statute did not find favour. Lord Clark also explained that the fact there was a previous core paths plan did not mean that plan was set in stone even without a change in circumstances arising, there being nothing in the wording of the statute or the related guidance for access authorities to that effect (paragraph 31). This is surely correct. The final point considered by Lord Clark under his heading of "Misinterpretation and misapplication of the statutory test under the 2003 Act" was in relation to the alleged failure to give proper reasons for the adoption of the new core paths plan, an assertion he saw "no real force in" (paragraph 34). This was fortified by cases such as *North Lanarkshire Council v Scottish Ministers* 2017 SC 88 and *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345. With reference to *Taylor v Scottish Ministers* 2019 SLT 681 and *Uprichard v Scottish Ministers* 2013 SC (UKSC) 219, Lord Clark stated, "The fact that he expressed the decision reasonably succinctly is of no moment". Brevity is bliss.

As to the alleged breach of the public sector equality duty, this turned out to be a closer run thing, although the petitioner again failed. After clarifying there was no need to specifically refer to the statutory language or statutory test (which was fortunate for the respondent and the interested party, as the Reporter did not do so) (paragraph 36, drawing on *R (on the application of Garner) v Elmbridge BC* [2011] EWHC 86 (Admin)), matters then turned to whether there had been due regard to the policy objectives in section 149 of the Equality Act 2010. If they had been properly considered, the appropriate weighting was for the decision-maker (*R (on the application of Sophia Sheakh) v London Borough of Lambeth* [2021] EWHC 1745 (Admin)).

Lord Clark was of the view the Reporter had indeed considered the issue (relating to the potential impact of the Gartmore Paths on children and vulnerable groups), allowing him to move on to consider whether the access authority and the Scottish Ministers had fallen short in their (non-delegable) duty to comply with the duty. Notwithstanding a lack of documentation saying expressly that they had had due regard to section 149 of the 2010 Act, the fact that the Scottish Ministers issued a letter stating they had considered the Report and that the access authority had a board meeting subsequent to that when matters were considered provided insulation to them, on the basis that the relevant issues were indeed addressed in the Report (paragraph 40). The Reporter's coverage of the potential issues with children and other vulnerable groups was accordingly crucial, and without that the narrow Equality Impact Assessment conducted by the access authority (which was only about barriers to making representations) would not have been enough to meet the duty (paragraph 41).

That concludes the substantive analysis of the case. A curiosity is perhaps worth highlighting though. In terms of the Opinion, only two cases – in total – were referred to by the respondent and the interested party. One of those was an *esto* argument (to the effect that even if the Scottish Ministers had fallen short in terms of the public sector equality duty it was highly likely that their decision would not have been substantially different: *R (on the application of Danning) v Sedgemoor District Council* [2021] EWHC 1649). The writer is struggling to recall another case where the successful parties were so nonchalant in their approach to the citing of relevant authorities.

Conclusion

Gartmore House v Loch Lomond and the Trossachs National Park Authority is an important case, both in the general context of being a core paths plan dispute that made it to court, and also in terms of the local context, paving the way for the establishment of new core paths that are sufficient for local access in a given locality. Access authorities and indeed the Scottish Ministers would do well to keep it in mind for any future core path amendments, whilst land owners should reflect on it carefully before launching any judicial reviews in reaction to any such amending.

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(Following the submission of this article the author was informed that the *Gartmore House* Decision has been appealed - Editor.)