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# Core Path Plan Amendment under the Land Reform (Scotland) Act 2003 revisited

***Gartmore House v Loch Lomond & The Trossachs National Park Authority***

**[2022] CSIH 56**

In an earlier article (see, (2022) 210 SPEL 35) I considered the decision in *Gartmore House v Loch Lomond and the Trossachs National Park Authority* [2022] CSOH 24. There, Lord Clark was faced with a dispute that had the right to roam (found in Part 1 of the Land Reform (Scotland) Act 2003 ('the 2003 Act')) at its heart, but in actuality was more of an administrative law matter relating to the adoption of an updated plan under that statute and a separate issue of whether there was a failure to comply with the public sector equality duty found in s 149 of the Equality Act 2010. In March 2022, Lord Clark rebuffed a judicial review petition brought by a land owner who was affected by that plan.

The owner appealed, and on 20 December 2022, the Inner House of the Court of Session refused the reclaiming motion, leaving Lord Clark's earlier interlocutor and indeed the plan in place. This note considers points of interest which arise from the most recent opinion, which was delivered by Lord Carloway (sitting with Lord Woolman and Lord Pentland).

**The law and context**

A more complete overview of Part 1 of the 2003 Act – which affords outdoor access to those crossing land or in some cases using land for an authorised purpose, subject to that being on a responsible basis and in a place that is not excluded from the scope of the legislation – and the factual circumstances of this case can be found in my earlier article. A summary is also provided here.

Local authorities or, where relevant, national park authorities – which can together be termed 'access authorities' – have a role in relation to access rights in their respective areas. One such role relates to core paths, which are a feature of the 2003 Act. Core paths, and the related core path plan that shows where they can be found, offer members of the public a degree of certainty that the land is subject to access rights. In terms of s 7(1) of the 2003 Act, the exclusions to access rights found in s 6 do not apply to land that is a core path, save in very particular circumstances (namely when access is prohibited or restricted owing to an outbreak of animal disease, or where access has been suspended for a particular purpose by an access authority in accordance with s 11). In terms of the 2003 Act, access authorities have certain powers in relation to core paths, and whilst land owners are allowed to plough or otherwise disturb a core path in accordance with good husbandry, they must reinstate the path within fourteen days in accordance with s 23.

Core path plans were to be introduced by all access authorities in the early years of the 2003 Act, in terms of its s 17 and related provisions. The 2003 Act and related guidance to access authorities (published in 2005) envisaged that original plans may need to be updated. Section 20 of the 2003 Act and related provisions are to the effect that an access authority may or, when asked by the Scottish Ministers, must review its core paths plan and then, if appropriate, amend the plan.

In the case at hand, the proprietor of a rural site featuring hotel and other accommodation near the village of Gartmore had sought to object to the creation of new core paths there. These two new paths were introduced as part of a wider review of the network of core paths in the local area, having not featured in the initial core paths plan adopted by the access authority. It was accordingly the 'review and amendment' process beginning in s 20 of the 2003 Act that the access authority tried to deploy here of its own motion. This process involves public consultation, a chance to object to the new plan, and referral of any unresolved objections to a reporter appointed by the Scottish Ministers to consider the matter.

After the plan was ultimately adopted, notwithstanding objections being made by the land owner, the land owner raised a judicial review action. The land owner submitted that the relevant process was not followed correctly, with a separate point to do with a failure to properly consider the interests of vulnerable groups who might be using the site. Both the access authority and the Scottish Ministers sought to counter these arguments. The petitioners were not successful at first instance. They were not successful on appeal either, having failed to establish to the appeal court that the original judge erred in law.

**On roaming and maps**

Two quick asides might be worth making before considering the substance of the Inner House decision.

First, a note on language, and the right terminology. From this judgment, it is apparent that Lord Carloway is a fan of describing the access rights introduced by the Land Reform (Scotland) Act 2003 as the trisyllabic 'right to roam' rather than the less catchy 'right of responsible access'. The latter term might seem preferable given that it immediately captures the qualified nature of the entitlement (that is to say, a person has access rights only if they are exercised responsibly, in the words of s 2(1) of the 2003 Act). Be that as it may, the judge at the apex of the Scottish judicial system (UK Supreme Court justices excepted) is obviously content to use 'right to roam' – he did so in the case of *Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority* ([2018] CSIH 22; 2018 SC 406) and did so again here. (Incidentally, that earlier case involved the same access authority as the dispute under discussion, but there is no factual connection between the two matters.) 'Right to roam' was also used by Sheriff Reith to introduce access rights in her decision in *Manson v Midlothian Council* 2019 S.C.L.R. 723. The 2003 Act itself speaks of 'access rights' (s 1(2)). Neither 'right to roam' nor 'roam' actually appear in the statute itself. For completeness, it can be noted that while the concept of the responsible exercise of access rights permeates the 2003 Act (see, for instance, ss 2(3) and 12(1)), the formulation 'right of responsible access' does not appear in that Act either.

The second aside is a cartographical one, namely to highlight the helpful inclusion of a map in the opinion. A picture is said to be worth a thousand words. Having a two-dimensional representation of the site featuring the pre-existing and new core paths is certainly worthwhile here. The Outer House decision did not feature a map. Anyone trying to picture the scene was accordingly obliged to do so through words in a judgment, or those who knew where to look and how to rummage could go to the website of the Scottish Government's Planning and Environmental Appeals Division (file ref CPP-002-1). Maps were also included in the Inner House opinion in the aforementioned *Renyana Stahl Anstalt* decision. This is all to be applauded.

**The Inner House decision**

To be successful on appeal, the petitioners had the not insignificant task of trying to convince the Inner House that Lord Clark had interpreted the law incorrectly.

***The statutory test***

The first line of critique related to the statutory test for the adoption of a new core paths plan (including the two new core paths on the petitioners' land). The petitioners tried to argue that the core path plan review exercise 'should have been about whether the original network [from the original core paths plan] *continued* to provide sufficiency; not whether that network could be improved" (at para [21], emphasis in original).

Section 17 of the 2003 Act – the home of the original core paths duty – conferred a duty on access authorities to draw up a 'system of paths... sufficient for the purpose of giving the public reasonable access throughout their area.' Section 20 of the 2003 Act then allows for review to ensure 'that the core paths plan continues to give the public reasonable access throughout their area'; no reference to sufficiency is made there. Relevant guidance to access authorities (quoted at para [6] of the opinion) envisages that a plan should not be a 'finite document'. This and more was submitted to the court by

the access authority and on behalf of the Scottish Ministers (who were responsible for the 2005 guidance) to counter the petitioners' argument.

Lord Carloway did not find in favour of the petitioners. Rather than paraphrasing, it is worth setting out paras [32]-[33] of the opinion.

> 'The 2003 Act imposed an obligation on the respondents to draw up a plan for core paths "sufficient for the purpose of giving the public reasonable access throughout their area" (s 17(1)). The respondents did this. The adoption of the plan did not carry with it an assumption, or a presumption, that there was thereby a sufficient core paths network in the area; merely that the identified core paths contributed to the statutory purpose of giving reasonable access and balanced the factors, including the interests of land owners, required by section 17(3). A plan which was put forward for adoption as contributing to the statutory purpose could hardly have been rejected because it did not create a sufficient or saturation level of core paths.
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> In due course, an adopted plan might be improved; whether by the addition of other paths or the substitution of different routes, provided that the plan, as amended, also contributes to the sufficiency of the network. That is the objective of the provision for review (s 20(1)). The use of the phrase "continues to give… reasonable access" does not carry with it an implication that any previously adopted plan demonstrates the existence of a sufficiency which can never be improved. It would make no practical sense for a core paths plan to be set in aspic. The reporter asked the correct question of whether, under section 17(1), the new plan with the additional paths created a system which again contributed positively to the overall purpose of giving the public reasonable access; balancing in that equation the land owner's interest. It was not necessary for the reporter to carry out a comparison of the existing network with the proposed new one or to examine whether the network in place was already sufficient. That would be an unduly narrow and artificial exercise; it would run counter to the statutory policy of conferring on authorities a wide discretionary power to review, when they consider it appropriate, whether improvements are desirable in the interests of furthering the objective of promoting reasonable public access. The review exercise involves a consideration of whether the amended plan continues to provide reasonable access, not whether the existing plan was of itself sufficient. The latter might be an argument which a land owner might advance, and it is no doubt a factor to be considered, but that is all.

Lord Carloway concluded his consideration of this point by highlighting that the reporter had suitably explained the deficiencies in the existing plan and the improvements the new paths would bring. He further noted that the reporter's reasoning on this point could be understood without difficulty and, with reference to *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, that an informed reader would be in no real and substantial doubt about that reasoning or the material considerations which were taken into account.

***Equality***

On the second substantive issue around equality, as explained in the earlier article, there was discussion around potential issues for children and other vulnerable groups who might be guests at the site, in the context of the need to consider protected characteristics in terms of s 149 of the Equality Act 2010. The petitioners' challenge (as distilled in para [23]) was not so much about whether equality duties had been followed, but rather in relation to how steps that had been taken were recorded, and could it be established that the duty had been considered rigorously.

In relation to this ground of challenge (and indeed the earlier ground of challenge), the access authority argued that this sought to prioritise form over substance. For his part, Lord Carloway was happy the reporter had acted in an appropriate way, in a process that allowed relevant issues (including those pertaining to protected characteristics) to be aired, and with a result that had indeed considered the matters that had been raised and how best to deal with them (in this case, that there would be limited interference anyway, and what interference there was could be mitigated by taking temporary measures around the new core paths). Lord Carloway also noted that the reporter's failure

to make a specific reference to the Equality Act 2010 after undertaking the substance of the required exercise did not undermine anything. The reclaiming motion was accordingly refused.

**Conclusion**

As has been acknowledged previously, and indeed in this note, there are practical and legal implications of land being designated as a core path. The land owner's vigorous stress-testing of these two new core paths is at least understandable in those terms.

With all that said, the land owner is still entitled to manage land at or around core paths in terms of s 14 of the 2003 Act (where such management is not for the sole or main purpose of restricting access). Further, although not explored in either judgment it will be recalled that s 11 of the 2003 Act allows a local authority to suspend access rights (including for land that is a core path), meaning that the land owner could apply for a time-limited suspension if a particularly sensitive group of people was to visit the site. Having failed with this latest court challenge to the very existence of the new core paths, the land owner is now left to consider measures such as these to live with them.

More generally, this case clarifies what access authorities and others need to consider when new core paths are introduced. Given the approach of Lord Carloway here, and subject of course to proper processes being followed as and when required, it is difficult to envisage a glut of judicial reviews relating to the adoption of new core paths in the future.

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