This is a pre-copyedited, author-produced version of an article by Malcolm M. Combe of the University of Strathclyde accepted for publication in the 2025 Edinburgh Law Review

The local authority duty to uphold access rights under the Land Reform (Scotland) Act 2003 - *Brown v Glasgow City Council* [2024] CSOH 76

A. INTRODUCTION

The Land Reform (Scotland) Act 2003 introduced new public rights of access to the outdoors. These rights to cross and to be on land for a permitted activity apply in many circumstances and in many locations, both rural and urban. The legislative scheme for these statutory access rights confers a special role on local authorities in terms of enforcing and upholding them where they apply, and this duty proved to be decisive in the case of *Gregory Brown (Petitioner)*.[1]

This litigation was sparked by the decision of a local authority, Glasgow City Council, to allow a fence to be erected by the occupier of land around the perimeter of a football pitch within a public park. The Glaswegian petitioner took issue with various aspects of the permission that was granted by Glasgow City Council in its planning law capacity. Two of the grounds of challenge brought by the petitioner related to: 1) the local authority's decision being predicated on an error of fact (in relation to the impact of the approved development on public access to the pitch); and 2) a failure to have regard to the relevant development plan. Neither of these arguments proved to be decisive. Instead, as we shall see, and as shall be the focus of this note, Lord Sandison's decision turned on the local authority's failure to comply with its aforementioned duty to uphold the access rights conferred by the Land Reform (Scotland) Act 2003.

B. BACKGROUND AND CONTEXT

As explained in the judgment,[2] Cathkin Park is a municipal park on Florida Avenue in southeast Glasgow, and the site was formerly the home of the second Hampden Park, where Queen's Park and subsequently Third Lanark football clubs played home games (the former club still exists, whereas the latter went out of business in the 1960s). The site is now home to the operations of the Jimmy Johnstone Charitable Trust, a registered Scottish Charitable Incorporated Organisation) registered, with a view to teaching children how to play football there. The Trust leases the football pitch in the park from Glasgow City Council, with the terms of that agreement requiring that public access to the pitch is maintained for local community sport groups when the Trust is not using it.

Not mentioned in the judgment, but as alluded to in some press coverage,[3] the petitioner also had a crowdfunder on the CrowdJustice platform, entitled "Save Cathkin Park".[4] The "About the case" section on that website explains the petitioner is a man called Greg who lives in Mount Florida, "a neighbourhood in the Southside of Glasgow home to a unique footballing heritage".

---

[1] *The Petition of Gregory Brown for Judicial Review of a decision of Glasgow City Council* [2024] CSOH 76 (hereafter *Brown, Petitioner*, but also known *Brown v Glasgow City Council*).
[2] *Brown, Petitioner*, Paragraph [2].
[3] "Football pitch fence plan declared unlawful" (BBC News, 6 August 2024) *https://www.bbc.co.uk/news/articles/c2l11y9zyg1o* and Calum Loudon, "Plans to fence off football pitch at popular park deemed 'unlawful'" (STV News, 6 August 2024) *https://news.stv.tv/west-central/plans-to-fence-off-football-pitch-at-glasgows-cathkin-park-deemed-unlawful*.
[4] *https://www.crowdjustice.com/case/save-cathkin-park/*.

The crowdfunder also touches on some of the petitioner's motivations, which were shared by many people (who signed an online petition accordingly).

What the petitioner and his supporters objected to was a development and interim steps towards that development (in the form of temporary fencing around the pitch) that restricted access to what was previously an area that was "frequently used by local residents for various recreational purposes, in particular by residents of the Myrtle Park social housing estate which neighbours the park."[5] From press coverage, it appears those pushing for a barrier were worried about antisocial behaviour damaging or affecting the use of the football pitch.[6] The organisation that submitted the planning application to Glasgow City Council was the Jimmy Johnstone Charitable Trust, a registered Scottish Charitable Incorporated Organisation.[7] Reference was made in the case to a statement submitted by the Trust during the planning process about concerns around dog fouling, damage caused by barbecues and other social gatherings, golfing, and the potential for damage by bicycles, quad bikes and cars.[8] Overall, the Trust hoped to *construct a new fencing system to prevent "unauthorised use and non-permitted activities" and to "restrict unauthorised use" and "unnecessary footfall on the grass", with access to the existing sports pitch then being regulated by way of a lockable gate controlled by the Trust*.[9]

C. THE LOCAL AUTHORITY DUTY TO UPHOLD ACCESS RIGHTS

Access authorities (that is to say, the relevant local authority or national park authority)[10] have a statutory duty to champion access rights, in terms of section 13 of the Land Reform (Scotland) Act 2003 (the 2003 Act). This overarching duty on access authorities is rarely manifested in case law, and does not appear to have been decisive in any earlier litigation.[11]

Of course, access rights only come into play where the land is not excluded in terms of section 6 of the 2003 Act. Accordingly, the first thing Lord Sandison had to decide in this case was "*whether members of the public presently have a right of access for recreational purposes [or indeed for passage] over the football pitch in issue*".[12] As he noted, absent such access rights, Glasgow City Council's section 13 duty to "assert, protect and keep open and free from obstruction or encroachment" any means by which access rights might reasonably be exercised would not arise. A second point to note about the duty is that section 13(2) clarifies a local

---

[5] *Brown, Petitioner*, paragraph [3].
[6] Megan Bonar, "Football pitch fence plan faces local backlash" (BBC News, 14 March 2024) *https://www.bbc.co.uk/news/articles/crg36d31ev6o*.
[7] See *https://www.oscr.org.uk/*.
[8] *Brown, Petitioner*, paragraph [29].
[9] *Brown, Petitioner*, paragraph [3].
[10] Per the definition in section 32 of the Land Reform (Scotland) Act 2003. All statutory references are to the legislation, unless otherwise stated.
[11] It was mentioned in *Aviemore Highland Resort Ltd v Cairngorms National Park Authority* and *Gartmore House v Loch Lomond and The Trossachs National Park Authority* [2022] CSIH 56, but nothing turned on the duty in those cases. It may nevertheless have been influential in terms of steering decision making before any issues got near a court: for example, the duty was mentioned in a meeting of Angus Council relating to the blockage of a disputed access route in Monifieth, discussed in Malcolm Combe, "When access rights stop [new] public rights of way – some thoughts on an access dispute at Monifieth" (3 March 2022) *https://basedrones.wordpress.com/2022/03/03/when-access-rights-stop-new-public-rights-of-way/*. It has recently been reported that the path in question there has been reopened: Graham Brown, "Monifieth path finally re-opens after 4-year planning row" (The Courier, 16 October 2024) *https://www.thecourier.co.uk/fp/news/angus-mearns/5103108/monifieth-path-reopens-after-four-years/*.
[12] *Brown, Petitioner*, paragraph [33].

authority's duty does not require it to do anything which would be inconsistent with the carrying on of any of its other functions, which will be discussed further below.

Whether the Cathkin Park pitch is subject to access rights can be answered through the application of section 6(1)(e) together with section 7(7) of the 2003 Act. The exclusion from access rights established by section 6(1)(e) relates to land which has been developed or set out: (i) as a sports or playing field; or (ii) for a particular recreational purpose. To adapt the wording used in the *ScotWays Guide to the Law of Access to Land in Scotland*,[13] that might seem like an absolute exclusion of such land, but the exclusion is decidedly less absolute when considered (as it must be) alongside section 7(7).

Section 7(7) explains that the 6(1)(e) exclusion is only absolute if: (in the case of sports or playing fields) the surface of the field is synthetic; or the area is one of particularly manicured and sensitive grass. For the latter category, there are four given examples of golf (putting) greens, bowling greens, cricket squares and lawn tennis courts, plus a residuary category of a "similar area on which grass is grown and prepared for a particular recreational purpose". Otherwise, the exclusion only applies when the land is being used for the purpose it has been dedicated for. In the *ScotWays Guide* this is explained this as follows: "This means access rights could not be used to cross a grass football pitch or for a game of rounders when it is being used for a football match."

Happily for the author of that *ScotWays Guide*, Lord Sandison has not contradicted any of this. He did so notwithstanding the arguments led for the local authority to the effect it was "at least dubious"[14] whether access rights existed at the pitch. The first argument that was deployed in this vein was that the pitch had been developed or set out as a sports or playing field and was in fact being used for that purpose *as a whole* (as opposed to *from time to time*): this view was pressed despite it being contrary to relevant Guidance published by the then Scottish Executive in 2005,[15] the contents of Gordon and Wortley's monograph, *Scottish Land Law*,[16] and the language used in the Explanatory Notes to the statute. The alternative argument was the pitch was an area similar to a "golf green, bowling green, cricket square or lawn tennis court". Lord Sandison's analysis of this is set out towards the end of paragraph [33] of his judgment (emphasis added).

> *While I accept that there is no public right of access to the football pitch while it is actually being used as such (**preferring the narrower available construction of the exemption in section 7(7)(a) as more consistent with the overall purpose of the 2003 Act to preserve and enhance public access to land in general**), I do not consider that a pitch used for amateur football is sufficiently analogous to a golf green, cricket square or lawn tennis court to qualify for the further protection of section 7(7)(b). That subsection plainly directs itself to playing areas where a very high degree of groundsmanship is required for the purposes of the sport in question, public access to which could reasonably be expected to cause damage to such an extent as to render the area unplayable. An amateur football pitch… is in my view more analogous to the fairway*

[13] Malcolm M Combe, *The ScotWays Guide to the Law of Public Access to Land in Scotland* (2018).
[14] *Brown, Petitioner*, paragraph [33].
[15] Scottish Executive, "Part 1 Land Reform (Scotland) Act 2003 - Guidance for Local Authorities and National Park Authorities" (February 2005), available at https://www.gov.scot/publications/part-1-land-reform-scotland-act-2003-guidance-local-authorities-national-park-authorities/.
[16] W. M. Gordon and S. Wortley, *Scottish Land Law*, 3rd edn (2020), Vol.2, para 27-05.

> *of a golf course or the outfield of a cricket ground – areas which clearly are not protected by section 7(7)(b).*

By being subject to access rights, the section 13 duty was in play. That was the key point of interest for this matter, but a separate point of interest arises. It is noteworthy that Lord Sandison approached this statutory interpretation in such a way as to tend towards protecting and liberalising access, that being the goal of the 2003 Act (per the emboldened text above).

One other point referred to in the judgment is a submission on behalf of the council that, "Irrespective of the development, the surrounding parkland would remain accessible, whether by walking around the football pitch or otherwise."[17] This was not endorsed by the court. The owner of a large estate does not get to unilaterally decide which bits of it are accessible or not, as can be seen in the case of *Renyana Stahl Anstalt v Loch Lomond and the Trossachs National Park Authority*.[18] It might be possible for a landowner to undertake degree of land management such that some land is rendered practically inaccessible for all or certain purposes (in accordance with section 14),[19] but that was not the case here. By analogy, this principle stands for an access authority's section 13 duty, unless they want to go so far as to make actual byelaws regulating the activities that can take place at any given spot (a point that I will return to in the conclusion).[20]

The next question for Lord Sandison was the possible exclusion of the duty to champion access rights by section 13(2). He framed the question in this situation as follows: "*Would the furtherance of the subsection (1) duty be inconsistent with the discharge of the respondent's duties as local planning authority?*"[21] This inevitably brings the regime around access rights into contact with the planning regime. On the latter, Lord Sandison explained that section 25(1) of the Town and Country Planning (Scotland) Act 1997 provides a planning determination is to have regard to the development plan (as the decision complained of in this case did) and is to be made in accordance with that plan unless material considerations indicate otherwise, and also that section 37(2) of the 1997 Act requires the planning authority to have regard to the provisions of the development plan and to any other material considerations. He continued (emphasis added):

> *Section 13 of the 2003 Act is one of a growing number of "general, almost abstract, duties on public bodies to behave in a particular manner" (*NLEI Ltd v Scottish Ministers *[2022] CSIH 39, 2023 SLT 149 at [60]). Many of those duties are unlikely to impinge very directly on the field of planning law… Others have a more foreseeably direct potential impact on planning decisions (such as, for example, section 1(1) of the Nature Conservation (Scotland) Act 2004, or section 44 of the Climate Change (Scotland) Act 2009, to select only provisions which have recently come to the attention of the courts). The duty imposed on the respondent by section 13 of the 2003 Act falls into that latter category and is, at least potentially, a material consideration capable of affecting a determination falling to be made by the respondent in the exercise of its functions as*

---

[17] *Brown, Petitioner*, paragraph [24].
[18] [2018] CSIH 22, discussed in Malcolm M Combe, "Revisiting access to land under the Land Reform (Scotland) Act 2003: Renyana Stahl Anstalt v LLTNPA" 2018 SLT (News) 51-54.
[19] Consider case law such as *Tuley v Highland Council* 2009 SLT 616 and Malcolm M Combe, "Access to land and to landownership" (2010) 14(1) EdinLR 106.
[20] If byelaws were made by (under section 12 of the 2003 Act) in such a way as to render access rights not exercisable at any given site, then such land becomes excluded in terms of section 6(1)(j).
[21] *Brown, Petitioner*, paragraph [34].

> *local planning authority* ***in accordance, rather than in conflict, with the terms of sections 25(1) and 37(2) of the 1997 Act***.

All of this meant section 13(2) did not negative Glasgow City Council's duty. Over and above that important point for this case, it is perhaps worth reflecting on how "general, almost abstract" section 13 is. This is because section 13 is a duty not just to assert and protect (which could be described as "general" or "almost abstract"), but also to "keep open and free from obstruction and encroachment". The latter moves away from the abstract, and could even go beyond something that is simply a material consideration.

A further important point that can be teased out of this case is that someone who contends an access authority has failed in its section 13 duty does not need to make a section 28 application to the sheriff to determine whether or not any land that may have triggered the dispute is land in respect of which access rights are exercisable. There was a submission for the local authority that section 28 was a suitable alternative remedy, and in turn that any recourse to the supervisory jurisdiction of the Court of Session was incompetent. Lord Sandison rejected that submission, explaining the petitioner's quest to ascertain whether a grant of planning permission was lawful is not a matter in respect of which the Sheriff has jurisdiction, and also that the petitioner was not in fact seeking a determination of the nature and extent of any public access rights at the pitch as and when the planning permission was implemented. The competency of an application to the Sheriff for a declaration as to the incidence of access rights at the pitch did not operate as a general exclusion of the Court of Session's jurisdiction to determine that matter as part of a judicial review case.[22]

The final access rights point related to whether it might be premature or otherwise inappropriate for Glasgow City Council to have formed a view about the potential effect of it making a planning decision on public access to the football pitch when considering the relevant application. To this, Lord Sandison observed the "difficulty" with this argument was there was no indication of any consideration at all of the potential impact of the section 13 duty on the decision-making process, or any suggestion it had nonetheless actually been taken into account. If the potential application of that duty had been considered and relevant conclusions noted, then those considerations and conclusions could have been examined in order to determine the probity of the process. Lord Sandison continued:

> *…the apparent failure of [Glasgow City Council] to give any thought to the matter at all inevitably involves the conclusion that it failed to take account of a consideration of at least potential materiality to the decision which it was called upon to take. It is not possible to conclude that, had it considered the potential impact of the section 13 duty on that decision, there would have been no real possibility of a different decision – perhaps involving conditions calculated to produce a more even balance amongst the various community interests engaged in the park and the pitch – being made.*

This was enough to tip the case in the petitioner's favour and to have the action of the local authority reduced.

[22] *Brown, Petitioner*, paragraph [35].

D. WHAT ELSE WAS ARGUED?

For completeness, it is worth setting out the other grounds of challenge that were rejected by Lord Sandison. These were (to adopt his headings) "Material error of fact"[23] and "Development plan".[24]

Whilst Lord Sandison implicitly accepted that he *could* have reduced Glasgow City Council's decision on the material error point, he did not do so. Essentially, this was because the planning authority knew what was being proposed in terms of any access restriction, and all of this was recognised by the Council.

As for the development plan point, Lord Sandison accepted the submissions that it was for the planning authority to decide whether to focus on one National Planning Framework[25] policy (about play, recreation and sport) to the exclusion of another (on blue and green infrastructure), and that its treatment of relevant policies could not be classed as irrational.

E. CONCLUSION

This is an important case for access practitioners, being the first clear ruling on the section 13 duty that applies on access authorities. It also shows that the duty matters, so much so that ignoring it when making a relevant decision can vitiate that decision.

As for the pitch at Cathkin Park, judicial review can often produce a situation of winning a battle without winning a war, as any vitiated decision can be – properly – remade in the future. Meanwhile, an alternative response in this field might even involve an access authority implementing activity-regulating byelaws in a given area (where the relevant process for the creation of such byelaws is followed). Should any of this happen though, the local authority's section 13 duty will need to be considered. That is something that this judgment puts beyond doubt.

---

[23] *Brown, Petitioner*, paragraphs [27]-[29].
[24] *Brown, Petitioner*, paragraphs [30]-[32].
[25] *https://www.gov.scot/publications/national-planning-framework-4/*.