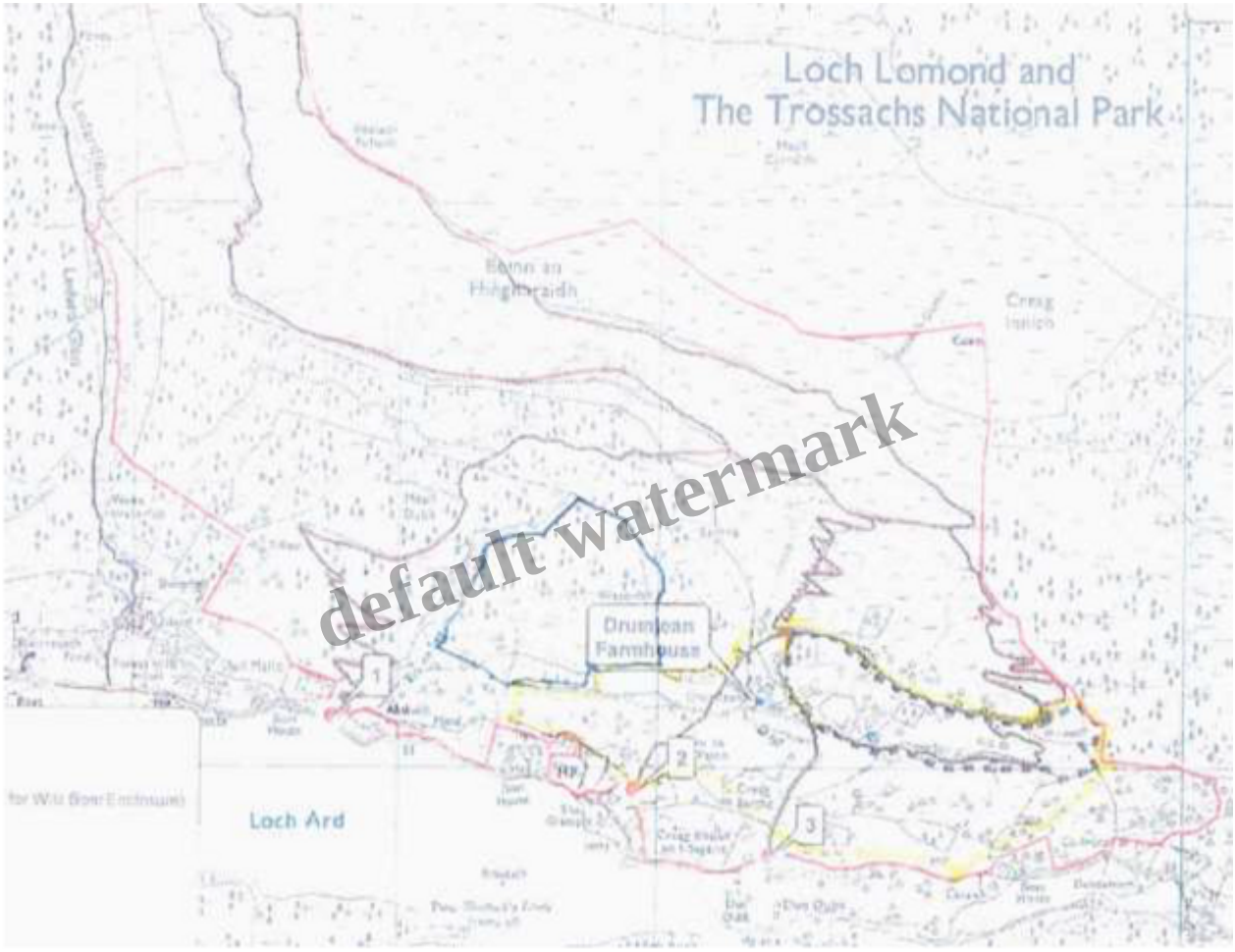
The Drumlean Case (1) – an incredibly important decision for access rights in Scotland

Description



Map appended to Drumlean judgement – the numbers 1,2 and 3 mark the gates while the area in yellow marks the enclosure which which was effectively excluded from access rights.

For the first time, in over two years of campaigning, I can report that the Loch Lomond and Trossachs National Park Authority has done the job it was set up to do and, by pursuing the access problems at the Drumlean estate all the way to the Court of Session, they have done everyone in Scotland a huge favour. The Drumlean judgement (see here) this week has implications far beyond the National Park and should make it much much easier for every access authority to remove obstructions to access. While what's important about the case is what the judges said, and the precedents this sets, the case was heard within a context in which access authorities across Scotland had almost entirely abandoned attempts to defend or promote access rights through the Courts. Its to the credit of the LLTNPA, and their access team in particular, that in this case they have been brave enough to go against the flow and in doing so won an important victory. Its exactly what our National Parks should be doing.

This post takes a closer look at what the judgement means (and leaves for another post questions about the LLTNPA's overall approach to access rights).

Background to the Drumlean case

Access problems at the Drumlean Estate, owned by interests in Liechenstein, in the form of high locked gates and no access signs, were first reported to the Loch Lomond and Trossachs National Park Authority back in 2007. There followed several years of negotiation, during which the LLTNPA suggested solutions such as self-closing gates and even granted planning permission for a new path only for the owner to decided he was having none of it. The LLTNPA then issued an order under Section 14 of the Act to remove the obstructions and the owner appealed the case to the Sheriff Court in 2013.

The LLTNPA then lost the case in the Sheriff Court but, to their credit, they appealed the decision to the Sheriiff Appeal Court which, in 2015, overturned the original decision by the Sheriff. Drumlean Estate then in turn appealed to the Court of Session, which heard the case in February and this week issued their judgement. While this basically upholds the decision of the Sheriff Appeal Court, its signficance is far greater than Drumlean as it clarifies what the law says, overturns decisions in previous cases and should, as a consequence, make it far easier for Access Authorities across Scotland to uphold access rights.

Land covered by access rights

The judgement starts with a clear statement of the law:

Section 1 of the Land Reform (Scotland) Act 2003 provides, inter alia, that everyone has the right to be on land, for recreational purposes or educational activities, and to cross land. The right is exercisable in respect of all land, except that specified in section 6.

While the judges noted that the right is constrained by clause 2, the requirement for people to exercise the right responsibly, interesting they are quite happy to say that colloquially the right of access is a "right to roam" – terminology that SNH and others have run a mile from – and they also clearly referred to the "reciprocal responsibility" of landowners as set out in Clause 3.

Having set out the legal framework, they then dismiss a whole lot of arguments which have been used to deny access, startomg in the case of the Drumlean Estate, that the area where access was excluded (yellow on map above) was only 10% of all land on the estate. The judges clearly said this is irrelevant, if land does not come under one of the exemptions set out in Clause 6, access rights apply. It is therefore all about the actual characteristics of the land to which access is being taken – is it grassland or woodland etc, where access rights apply (as at Drumlean), or is it farmyard or garden ground etc, where access rights do not apply.

The judges go on to dismiss further arguments which had been made by the estate and Scottish Land and Estates – and which the Sheriff Court had accepted – of reasons why access should be restricted which they summarised as *"Protection of animals, of all animals present on the farm. Protection of people and protection of materials on the farm."* The judges said none of this justified excluding land from access rights. Brilliant.

Previous unhelpful judgements overturned

From this sound beginning, the judges overturned the results of two previous cases which had been used to prevent access authorities taking action to remove access obstructions under Section 14 of the Act.

The first of these was *Highland Resort v Cairngorms National Park Authority*, which concerned a fence built across a lane, where the Sheriff Court had decided that because a barrier had existed pre-2003 and the access legislation coming into force, it could not be classed as being intended to block access. They concluded from this that such barriers did not come under Section 14 of the Act which gives powers to Access Authorities to remove access obstructions. The judges at the Court of Session said whether an alleged obstruction preceded or followed the Act was irrelevant and what matters is whether something obstructs access today. The logic is impeccable and worth reading:

The pursuers' [Drumlean's] *argument, which the sheriff accepted, came to be that, if an area of land, which would otherwise be covered by the 2003 Act, was already enclosed before the Act came into force, there was no obligation on the landowner to facilitate access to that land by, for example, unlocking locked gates or providing stiles. Although a fit person may manage to climb these obstacles, and would thereafter be entitled to be on the land enclosed, the pursuers contended that the landowner was under no obligation to facilitate his access, or egress. The court is unable to sustain this contention.*

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 the 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 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."

The second case, *Tuley v Highland Council,* had determined that the intention of the landowner was relevant to whether a locked gate, fence etc should be treated as an access obstruction. In the Drumlean case this had resulted in hundreds of pages of evidence being collected about the intentions of the landowner as a result of which the Sheriff Court had decided that since it could not be shown that the landowner at Drumlean had locked the gates in a deliberate attempt to obstruct access rights, the locked gates should not be treated as an obstruction and therefore the Access Authority had no right to require them to be unlocked. The Judges said the intention of the landowner was irrelevant to the legislation:

In short, the fundamental problem with the approach of both the sheriff and the SAC [Sheriff Appeal Court], 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.

The Judges went on to say whether locked gates or signs were to be judged as an obstruction should be decided objectively by the impact on access rights of what was on the ground before giving a very important message to the Courts, landowners and access authorities:

It is to be hoped that, in the future, an appeal to the sheriff on similar grounds will be dealt with far more expeditiously by what ought to be a relatively simple task of ascertaining the purpose objectively. This ought to be capable of determination by doing little more than understanding the physical characteristics of the land in question (rather than hundreds of pages of evidence).

They then applied this approach to the Drumlean estate, took it as granted there needed to be sufficient access points for people to exercise their rights while determining that the main gate could be kept locked as long as another close by was opened. An incredibly useful precedent for access authorities dealing with other properties surrounded by high fences.

As a non-lawyer, it was incredibly refreshing to realise that the judges not only had their feet on the ground as it were but they also had a sense of humour:
the locked gates was to keep hillwalkers out of "that area", as boar could be very dangerous, as could Highland cattle, when they had young with them. People with dogs could startle deer, who might run into and break down fences enabling them to eat the young tree shoots.

The implications of the judgement

At heart, the judgement was quite simple, with the Court of Session that saying that the gates at Drumlean need to be opened to enable access to be taken to the whole of Drumlean estate where any reasonable person would conclude that access rights apply. Having set out detailed reasons for this conclusion, and overturned the decisions in two previous cases, it sets a welcome precedent for the whole of Scotland.

One consequence of the case is that court proceedings should become much quicker and cheaper in future as Access Authorities should simply be able to refer to the Drumlean Case and tell obstructive landowners that they will take cases to the courts based on the situation on the ground. They should only have to refer to the Drumlean judgement to make the legal advisers to landowners realise their clients are likely to most court battles and this in turn should encourage landowners to remove obstructions to access far more quickly than they have done up to now. While it has taken over over 10 years to resolve the Drumlean case, now the precedent has been set, cases should now be resolvable in a matter of months. In short, the judgement should make it far easier for Local Authorities, including our National Parks, to enforce access rights.

The access officers who remain in Access Authorities after all the cuts should now start dusting down old cases, abandoned because of legal complexities and fear of costs, and ask their legal sections to

initiate action. I would hope that the Loch Lomond and Trossachs National Park Authority would continue to set an example in this regard and now support its access team to threaten legal action, based on the Drumlean judgement, against all the unlawful no access signs and other obstructions in the National Park some of which have featured on parkswatch.

What this judgement should also mean is access campaigners no longer need to worry about trying to get the 2003 Act modified to deal with the difficulty of persuading Access Authorities to use their sec 14 powers to remove access obstructions. The existing law has proved its worth.

Who do we thank for this?

I would re-iterate my comments at the beginning of this post that we should all be thankful to the LLTNPA for pursuing the Drumlean Case all the way to the Court of Session.

I will set aside here questions of whether the current senior management team would have supported this action if it had been up to them – it was initially endorsed and supported by people who have now moved on – and how much credit therefore is due to them. That is best judged within the context of other actions taken by the current senior management team which I will consider in a future post.

What I believe is beyond dispute is that the access team and legal staff who have been involved in this deserve a massive vote of thanks from outdoor recreationists. It is clear from the Court of Session Judgement that the Sheriff who originally heard the Drumlean Case wrongly dismissed the evidence of Kenny Auld. Anyone who has been in Court and been “shredded” by a sheriff will know how difficult an experience that can be. Kenny Auld – whom I don’t know – has stuck this out, is still there, tweeting about the judgement and has been totally vindicated. He is, I suspect, not the only one who deserves our thanks.

I hope the LLTNPA’s Board now enable Kenny and others to spend time spreading the message across Scotland as well as giving them the resources they need to pursue cases within the National Park. The potential of our National Parks is massive if only they would do the right thing.

Category

1. Loch Lomond and Trossachs

Tags

1. access rights
2. landed estates
3. LLTNPA

Date Created
March 29, 2018
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