**SHERIFF APPEAL COURT**

**[2017] SAC (Civ) 11**
**STI-B362-13**

Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff P J Braid

OPINION OF THE COURT

in the appeal

by

LOCH LOMOND AND TROSSACHS NATIONAL PARK AUTHORITY, Carrochan, Carrochan Road, Balloch, G83 8EG

Defender and Appellant;

against

RENYANA STAHL ANSTALT, at FL-9490 Vaduz, Austrasse 52, Principality of Liechtenstein

Pursuer and Respondent:

**Appellant: O'Brien, Advocate**
**Respondent: Lindhorst, Advocate**

Edinburgh: 30 March 2017

**Introduction**

[1] This appeal relates to the extent to which access rights are exercisable over land in terms of the Land Reform (Scotland) Act 2003 ("the 2003 Act"). It arises from the decision of the sheriff at Stirling to recall a notice served on the respondent, Renyana Stahl Anstalt, by

the appellant Loch Lomond and Trossachs National Park Authority (LLTNPA) on 5 November 2013 in terms of section 14 of the 2003 Act ("the notice").

[2] The respondent is the owner of Drumlean Estate in the Trossachs which lies between Ben Venue to the north and Loch Ard to the south. Since 2006 the respondent and its representatives have been in discussion (and dispute) with the appellant as to the extent to which it requires to afford access to members of the public over the estate in terms of the 2003 Act. In particular, the appellant took issue with the respondent erecting a sign warning of wild boar (which previously had been on the estate although there were no wild boar remaining by the date of the hearing before the sheriff); and the locking of three gates on the southern perimeter of the estate, which have been referred to throughout these proceedings as, moving from west to east, the Altskeith Gate, the Kennels Gate and the Main Gate. No agreement having been reached, the appellant served the notice on the respondent, requiring the respondent to remove the sign, unlock the gates and undertake not to lock them again. (The undertaking is no longer insisted upon and is not an issue in the appeal).

[3] The respondent appealed to the sheriff against the notice, in terms of section 14(4) of the Act. After an evidential hearing which comprised evidence over seven days, a site visit and a hearing on submissions, the sheriff allowed the appeal. We will revisit his reasons for doing so below, but at this stage it is sufficient to record that the sheriff's principal finding was that as the matters complained of had begun before the 2003 Act came into force the respondent was not the owner of land in respect of which access rights were exercisable as at the date of service of the notice (sheriff's finding in fact and law 2) which he found was a complete defence to the notice. He also held that in any event the respondent had not acted for a purpose prohibited by section 14(1) in that the steps taken had not, in the sheriff's view, been "for the purpose or for the main purpose of preventing or deterring any person entitled

to exercise [access] rights from doing so". These decisions were categorised by the parties as relating respectively to the "timing issue" and the "purpose issue" and we adopt that terminology. In reaching his decision on the purpose issue, the sheriff ruled as inadmissible a substantial body of evidence which had been led regarding the discussions (and certain other events) which had taken place between 2006 and 2013 and accordingly he disregarded that evidence in its entirety in reaching his decision. The appellant challenges the sheriff's decisions on both the timing issue and the purpose issue, as well as his decision on the admissibility of evidence.

**The subjects**

[4] At this stage it is convenient to describe Drumlean Estate in a little detail. Broadly speaking, it comprises the subjects shown as delineated in red on the map which formed document 3 in the appeal appendix (it was accepted that the western boundary may not be entirely accurately shown but nothing turns on that). The subjects extend to some 1500 acres in total. Part of the estate is operated as a farm, with associated farmhouse and other farm buildings, which are accessed from the main road to the south by tracks which enter via the Main Gate and the Kennels Gate. At the date of service of the notice there was, and currently still is, a red deer population of between 120 and 150 which are within a fenced enclosure on the estate being an area which extends to 120 hectares on the open hillside, in by fields and woodlands ("the enclosed area"). The enclosed area is shown roughly delineated in yellow on the plan which forms document number 68 in the appendix. The farm house lies within the enclosed area, and indeed one finds oneself within the enclosed area as soon as entry is taken from the Main or Kennels Gate. Also within the enclosed area is a separate enclosure which was previously used to house the wild boar owned and

farmed by the respondent ("the wild boar pen"). Beyond the wild boar pen is a path which runs up the hillside. There is also a path, shown on the plan which forms document number 3, which runs from the Kennels Gate, through the enclosed area, and past the farmhouse, towards the said hillside path. It was explained to us that part of that path is not currently a physical path but is a desire line in respect of which the respondent applied for and was granted planning permission to construct a path. Further reference is made to the planning permission below. Also within the enclosed area at the time of service of the notice, but not at the time of the proof nor currently, was a small herd of pedigree highland cattle which were kept on the estate for a period of approximately 20 years until 2013. The focus of the dispute is about access rights over the enclosed area. It is not disputed that it amounts to about ten percent of the total area of the estate. We should also observe that it is not contended by the appellant that the public has any right of access to the farmyard itself, nor to the farm buildings or machinery. Returning to our description of the estate, other areas of the estate are covered in woodland. There is a vehicle track from the Altskeith Gate leading up the hill in the general direction of Ben Venue which is located to the north, beyond Drumlean Estate. At present hillwalkers can access the summit of Ben Venue by following an access path by the Ledard Burn at an entrance point to the west of the Altskeith Gate and historically the summit has been accessed by hillwalkers using as a point of access a stile located at the Altskeith Gate. The stile remains in place although is currently in an unusable state being in a dilapidated and dangerous condition (sheriff's finding in fact 19). It was and is common ground that all three gates (or their predecessors) have been in existence since before the passing of the 2003 Act and have been kept locked (albeit unlocked and opened from time to time, in keeping with most gates). It is also common

ground that the Main Gate has been replaced a number of times, most recently about six years ago and that the Kennels Gate was also replaced about six years ago.

**Legislative Framework – Land Reform (Scotland) Act 2003 – "the Act"**

[5] Section 1(1) of the Act provides that everyone has the statutory rights established by Part 1 of the Act, to be called (section 1(2)) access rights which are (a) the right to be on land for specified purposes and (b) the right to cross land. These rights are separate and distinct. The specified purposes are recreational, educational and certain commercial activities: section 1(3). Access rights are exercisable in respect of "all land except that specified in or under section 6": section 1(7).

[6] Section 6(1) then specifies the land in respect of which access rights are *not* exercisable. Insofar as relevant to the present case, this includes:

a) land to the extent that there is on it -

   i. a building or other structure or works, plant or fixed machinery;

b) land which –

   i. forms a curtilage of a building which is not a house;

   ii. forms a compound or other enclosure containing a structure, works, plant or fixed machinery;

c) …

d) land to which public access is excluded or restricted by or under any enactment other than the 2003 Act;

e) …

f) land to which –

i. for not fewer than 90 days in the year ending 31 January 2001, members of the public were admitted only on payment and;

ii. after that date, and for not fewer than 90 days in each year beginning 1 February 2001, members of the public are, or are to be, so admitted;

g) …

h) …

i) land in which crops are being sown or are growing;

The combined effect of sections 1 and 6 is that access rights are exercisable over all land not specified in section 6.

[7] The Act, having bestowed these rights upon everyone, in respect of all land, other than that excepted under section 6, then proceeds to regulate how these rights may be exercised, and where. Section 2, specifies that a person has access rights: "only if they are exercised responsibly" section 2(1). By virtue of section 2(3) the responsible exercise of access means the exercise of access rights in a way which is lawful and reasonable and takes proper account of the interests of others and of the features of the land in respect of which the rights are exercised. Access is presumed to be exercised responsibly if the rights are exercised so as not to cause unreasonable interference with any of the rights of any other person. Section 2(2)(a) specifically disentitles persons these access rights if they engage in certain conduct. In particular, a person who engages in any of the conduct within section 9 (which includes hunting, shooting or fishing: (section 9(c)); and being on or crossing land while responsible for a dog or other animal which is not under proper control: (section 9(d)) is to be taken as not exercising access rights responsibly. In determining whether access rights are exercised responsibly regard is to be had to whether the person exercising or purporting to exercise access rights is at the same time disregarding the guidance on

responsible conduct set out in the Access Code and incumbent on persons exercising access rights (section 2(2)(b)).

[8] Section 3(1) is in effect the counterpart of section 2. As this appeal focuses on the landowners' obligation we set out the terms of that section in full:

> "**3. Reciprocal obligations of owners**
>
> (1) It is the duty of every owner of land in respect of which access rights are exercisable-
>
> (a) to use and manage the land; and
>
> (b) otherwise to conduct the ownership of it,
>
> in a way which, as respects those rights, is responsible.
>
> (2) In determining whether the way in which land is used, managed or the ownership of it is conducted is responsible an owner is to be presumed to be using, managing and conducting the ownership of land in a way which is responsible if it does not cause unreasonable interference with the access rights of any person exercising or seeking to exercise them, but-
>
> (a) an owner who contravenes section 14(1) or (3) or 23(2) of this Act or any byelaw made under section 12(1)(a)(ii) below is to be taken as not using, managing or conducting the ownership of the land in a responsible way;
>
> (b) regard is to be had to whether any act or omission occurring in the use, management or conduct of the ownership of the land disregards the guidance on responsible conduct set out in the Access Code and incumbent on the owners of land.
>
> (3) in this section the references to the use, management and conduct of the ownership of land in a way which is responsible are references to the use, management and conduct of the ownership of it in a way which is lawful and reasonable and takes proper account of the interests of persons exercising or seeking to exercise access rights."

[9] Section 10 of the Act imposes upon Scottish Natural Heritage the duty to draw up and issue a code, to be known as the Scottish Outdoor Access Code ("the Access Code"), setting out guidance as to the circumstances in which (*inter alia*) owners of land in respect of

which those rights are exercisable are to be regarded as using and managing, or otherwise conducting the ownership of it, in a way which is or is not responsible: sec. 10(1)(c). Such a code has been drawn up and is the Access Code referred to in sections 2 and 3.

[10] By section 13 a local authority has a duty to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access may reasonably be exercised. Section 13(3) empowers the local authority, for the purposes set out in subsection 1, to institute and defend legal proceedings and generally take such steps as they think expedient.

[11] The notice with which this summary application is concerned is served by virtue of the power conferred on the local authority in terms of section 14(2). Section 3(2)(a) refers to a contravention of section 14. Section 14 is in the following terms:

> "**14. Prohibition signs, obstructions, dangerous impediments etc.**
>
> (1) The owner of land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so-
>
> (a) put up any sign or notice;
>
> (b) put up any fence or wall, or plant, grow or permit to grow any hedge, tree or other vegetation;
>
> (c) position or leave at large any animal;
>
> (d) carry out any agricultural or other operation on the land; or
>
> (e) take, or fail to take, any other action.
>
> (2) Where the local authority consider that anything has been done in contravention of subsection (1) above they may, by written notice served on the owner of the land, require that such remedial action as is specified in the notice be taken by the owner of the land within such reasonable time as is so specified.
>
> (3) If the owner fails to comply with such a notice, the local authority may-
>
> (a) remove the sign or notice; or, as the case may be,

> (b) take the remedial action specified in the notice served under subsection (2) above,
>
> and, in either case, may recover from the owner such reasonable costs as they have incurred by acting under this subsection.
>
> (4) An owner on whom a notice has been so served may, by summary application made to the sheriff, appeal against it.
>
> (5) Rules of Court shall provide-
>
> (a) for public notice of the making of summary applications for the purposes of this section;
>
> (b) for enabling persons interested in the exercise of access rights over the land to which a summary application relates, and persons or bodies representative of such persons, to be parties to the proceedings;
>
> (c) for limiting the number of persons and bodies who may be such parties."

**The notice**

[12] The notice served by the appellant, which forms document 2 in the appendix, *ex facie* is compliant with section 14. It is significant that the appellant founded not only upon breaches of section 14(1)(a), (in relation to the erection of the wild boar sign); but also upon section 14(1)(e) in respect of the locking of the three specified gates and, separately, the failure to unlock those gates. Insofar as the notice required the respondent to remove the sign and unlock the gates it also complies with section 14. As we pointed out to Counsel for the appellant during the course of the hearing, the remedial action which the appellant stated that they would undertake was the removal of a fence. That appears to be a straightforward error in the notice which does not have any direct bearing on the issues which we have to determine. However, we observe that it may somewhat restrict the appellant's ability to take effective remedial action in the event that the notice is not complied with.

**The Sheriff's Approach**

[13] The sheriff heard evidence from the following witnesses for the respondent: Dr Reiner Brach, the respondent's representative in Scotland; John Gardiner, Farm Manager at Drumlean; Robert Farquhar, former Gamekeeper, retired Police Officer and Civilian Member of Staff of Central Scotland Police dealing with firearm licensing; and Colin McPhail, formerly a Consultant with Scottish Agricultural College and at the time of the proof Farming Manager at a large livestock farm in Balfron. He also heard evidence from the following witnesses for the appellant: Kenny Auld, the appellant's Access and Recreation Adviser; Andrew Vaughan, Forest Management Consultant; and Anne Gray, Policy Officer with Scottish Land and Estates.

[14] After expressing some initial reservations about Dr Brach's credibility and reliability, referred to by the sheriff at paragraph 3.2 of his note, which we discuss more fully below, the sheriff formed the view that Dr Brach was both credible and reliable. He likewise accepted as credible and reliable all of the respondent's other witnesses namely, Messrs Gardiner, Farquhar and McPhail. The sheriff was less impressed by Kenny Auld, who was the appellant's principal witness, whose evidence the sheriff found to be "confusing" (paragraph 3.6). One of the reasons which the sheriff gives for his criticism of Mr Auld is that he had proceeded on the basis that the right "is not to responsible access, rather the right is to access to land over which access rights are created by the 2003 Act, and if such a right exists then the access taker must do so responsibly": (paragraph 3.6, at page 44 of the appeal print). The sheriff went on to comment (at page 45 of the appeal print) that:

> "the most surprising aspect of Mr Auld's evidence was when he maintained in cross-examination that in assessing whether access rights existed he would

> not take into account the fact that a landowner submitted that gates had been locked since before the 2003 Act came into force".

The sheriff found that "such a view plainly ignores any application of the Aviemore test" (being a reference to *Aviemore Highland Resort Limited v Cairngorms National Park Authority* 2009 SLT (Sh Ct) 97 to which we return below). As will be seen below we conclude this reflects a mistaken interpretation of that case by the sheriff. The sheriff went on to discuss the evidence of Andrew Vaughan and Anne Gray, much of which he found to be irrelevant.

[15] The sheriff then considered the respondent's objection to the evidence led (under reservation) by the appellant about the discussions between the parties. The sheriff sustained that objection. Although the respondent's objection had not been on the ground of privilege, rather on the ground that the evidence was not relevant, the sheriff founded on privilege in concluding that the evidence was inadmissible. He stated, at page 48 of the appeal print, paragraph 5.1 of his note:

> "It is well settled that concessions or proposals made in the course of negotiations between parties, including those made prior to proceedings being commenced, are privileged. The aim of that privilege is to encourage parties to reach some form of compromise settlement…. It is perhaps not surprising that the pursuer sought to engage with the defender in attempting to reach a compromise but I cannot see how those attempts can have any relevance to the matter at issue before me. Whatever was discussed between the parties in an attempt to reach a compromise solution to the dispute is privileged and cannot be founded upon in this action".

[16] The sheriff went on to observe:-

> "Further, I do not see that the fact that the pursuer may have received certain 'expert' advice on his responsibilities under the 2003 Act and decided not to follow that advice is relevant. A party is not bound to follow the advice given by his professional advisers. It may choose to ignore that advice at its peril. For a commercial entity such as the pursuer there may be commercial considerations, sound or otherwise, that dictate that the advice should not be followed. In any event professional advisers are not infallible. The advice offered may be wrong in law".

[17] The sheriff then went on to consider the decision of Sheriff Principal Young, QC in *Aviemore Highland Resort Limited v Cairngorms National Park Authority, supra.* He took from that case that because it had been established that the locked gates existed at the three entrances prior to the coming into force of the 2003 Act, it followed that Drumlean Estate "was not land in respect of which access rights existed" (page 53 of the appeal print). He went on to say:

> "I do not accept that the replacement of those gates subsequent to 9 February 2005 changed that. To do so it would in my view have required me to carry out the exercise of reading in additional words to section 14(1) that Sheriff Principal Young was not prepared to do in the Aviemore case. In my view the replacing of an existing gate is no more than to maintain a gate already in situ. The fact that the gate is a new gate in my view is of no moment. As the learned Sheriff Principal commented in Aviemore, the word "maintain" does not appear in section 14(1); nor do the words "renew" or "replace". Whilst it is true to say that in order to renew or replace an existing gate, the new gate has to be "put up", the effect of the replacement gates in the present case "put up" was simply to maintain the position as it was on 9 February 2005. For those reasons I have reached the view that the pursuer's appeal falls to be allowed and the notice issued by the defender quashed".

[18] The sheriff then went on to consider the purpose of the notice. After considering the evidence of Dr Brach, John Gardiner and Robert Farquhar in particular (and of course, not having regard to any extent to the evidence which he had ruled to be inadmissible) the sheriff formed the view that the pursuer had met the test laid down by the Inner House in *Tuley v Highland Council* 2009 SC 456. The effect of that case was that a subjective test had to be applied in assessing the landowner's purpose. The sheriff opined (at page 56 of the appeal print):

> "…the pursuer's main purpose in locking the gates (at least the Main and Kennels gates) was not directed towards preventing the responsible access taker exercising statutory access rights. I am satisfied that the pursuer's main purpose in locking the gate was to maintain the enclosure within which there was a working farm with machinery, and animals which require protection and animals which at times posed a danger to humans".

Later in his note the sheriff opined:-

> "In my view there are two presumptions created by section 3 of the 2003 Act. The first is that a landowner is presumed to be using its land responsibly providing that it does not cause unreasonable interference with access rights. The second presumption is that a landowner who contravenes section 14(1) is presumed to not to be (sic) using its land in a responsible way. In assessing which of those presumptions is to apply one must look at the "purpose or main purpose" of the landowner in carrying out the act which might be said to interfere with access rights. If the act complained of satisfies the Tuley test there cannot be a breach of section 14(1) nor can it be said that there has been an unreasonable interference with access rights and the landowner is therefore presumed to be using its land in a reasonable way. On the other hand a breach of section 14(1) means that the land is not being used in a responsible way".

**Submissions for the appellant**

[19] Counsel for the appellant invited us to allow the appeal and to reinstate the notice or some variant thereof. After referring us to the material provisions of the 2003 Act, he then made submissions in relation to each of the three issues as follows.

*The Timing Issue*

[20] Counsel submitted that it could not be correct that because the locking of the gates and the erection of the notice pre-dated the commencement of the 2003 Act, the respondent was not the owner of land over which access rights existed. The Act's premise was that access was exercisable over all land, coupled with the section 3 duty to manage land responsibly. If there had been an exception in respect of things done before the Act came into force, one would expect to have seen that expressly stated in section 6, as the legislature had provided for in relation to charging arrangements. As that had not been done, Parliament must have intended to impose a requirement on landowners to change existing practices. Sheriff Principal Young's decision in *Aviemore* had to be viewed in the context of

the facts in that case. There, the question was whether a notice could competently be served in respect of works completed before the Act came into force. At paragraph 14, the sheriff principal had expressly noted that:

> "…in serving the notice as they did on the pursuers, the defenders did not assert that the pursuers had, for example, permitted any hedge to grow or had taken, or failed to take, any other action – see sub paras (b) and (e) of section 14(1)."

The *ratio* of the case was simply that a section 14 notice cannot be based on an act which was completed before section 14(1) came into force and so did not contravene section 14(1) at that time. It did not address a notice based on a course of conduct which continued after the Act came into force, nor a failure to make changes to existing arrangements to give effect to the new law.

*The sheriff's decision on admissibility of evidence*

[21] Counsel for the appellant then turned to the purpose issue, but before considering that issue in detail, he addressed the sheriff's decision to exclude a substantial body of the evidence as inadmissible. The averments which the sheriff had ruled as inadmissible, leading to his ruling that the evidence relating thereto was also inadmissible were in answers 6 and 7 of the defences, at page 47 of the Appeal Print. Those averments related to a course of discussions between the parties, including communications between the appellants and persons who bore to be acting on the respondent's behalf. The evidence which had been excluded included evidence of the respondent's application for planning permission to build a path over part of the enclosed area. The respondent's objection had simply been that such material was not competent or relevant. However, where the so-called purpose test clearly involved ascertaining what the respondent's subjective purpose

was, the material was clearly relevant. Answers 6 and 7 plainly put in issue whether the respondent genuinely held the purpose which it now claimed. The respondent's criticism of the material referred to as being selective missed the point of the appellant's argument, which was simply to show that there was a considerable body of relevant evidence which ought to have been taken into account in considering the genuineness of the concerns expressed by the respondent over access. It was further submitted that it must also be relevant to consider whether the respondent's principal, Dr Brach, was acting against advice. While there might be policy considerations in some circumstances, which could lead to the exclusion of certain evidence as privileged, in fact no objection had been taken in the present case on the ground of privilege. Rather it was the sheriff himself who had raised that objection. Further, the respondent had themselves made positive averments seeking to found upon its own discussions with the appellant, which the appellant was entitled to counter. Where the respondent was relying upon Mr Vaughan's report in support of its own position, it had to be permissible for the appellant to challenge that by leading evidence as to what his views actually were. The fact of planning permission having been applied for, and granted, could not possibly be privileged under any circumstances. Privilege had neither been pled nor argued. The sheriff had wrongly confused relevance with privilege. The sheriff's reasoning, referred to at paragraph 16 above was erroneous. To put it in that way might explain why the advice was not followed, but that was a long way from holding it to be inadmissible as irrelevant. The sheriff had therefore erred in his approach to the evidence and in particular to his assessment of Dr Brach's evidence.

*The purpose issue*

[22] The sheriff's decision on the purpose issue, as reflected in finding in fact and law 3

was flawed in several respects. The sheriff had (i) failed to make adequate findings as to the respondent's purpose; (ii) failed to have regard to the Access Code; (iii) failed to appreciate that many of the respondent's professed concerns, even if genuine, were of such general application that they could not properly amount to a legitimate purpose for the purposes of section 14; and (iv) erred in his approach to the evidence. In *Tuley v Highland Council* (*supra*), the Inner House had confirmed that for section 14(1) to be infringed, "the purpose or main purpose has to be directed towards the exercise of the statutory access rights, that is to say, the responsible access-taker": para 40. This was a subjective approach, which ultimately may focus on the *bona fides* of the landowner: para 41. There was a distinction to be drawn between the situation where the impact on access was incidental to something else such as felling timber and the situation where a landowner had identified something which was part and parcel of access rights which he did not like and which he wanted to prevent. It could not have been the intention of the Act or of the Inner House in interpreting the Act to suggest that the main purpose could be something which was an argument against access rights in general, otherwise a person could thwart access by saying in good faith that they thought access rights were not a good idea: that could not be a correct statement of the law.

[23] The sheriff had failed to make a proper finding in fact as to what the respondent's purpose was. In his Note, at page 56 of the Appeal Print, he had made reference to the purpose being to maintain the enclosure within which there was a working farm with machinery, animals which required protection and animals which at times posed a danger to humans. That was tantamount to saying that the purpose of locking the gates was to keep people out. It was not possible to identify from the sheriff's reasoning any purpose which could not be advanced in relation to any farm in Scotland. The sheriff had also erred by failing to make any reference to the Access Code, whereas section 3 required it to be

taken into account. Insofar as protection of the public and protection of the animals was concerned, the reasons given would also be equally applicable in a vast range of situations where cattle and deer were present. That was no more than an argument against access rights in general. Even if that were the respondent's genuine purpose, it would still amount to the purpose or main purpose of preventing or deterring any person entitled to exercise access rights from doing so.

[24] Counsel then turned his attention to the evidence and the sheriff's approach thereto. He accepted, on the authority of *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 41, that the test for disturbing a finding in fact made by a judge at first instance is a high one but submitted that the test was met. The sheriff had left out of account evidence which he ought to have considered. He had considered Mr Farquhar to be an expert and relied on his evidence, but on no view could he be considered as an expert having regard to the test for admissibility of expert evidence laid down in *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6.

**Submissions for the respondent**

[25] Counsel for the respondent submitted that the 2003 Act provided a new framework in relation to access rights as from 9 February 2005, but did not comprehensively redefine existing or future rights. It did not provide for an inalienable right to access over every square foot of ground in Scotland unless excepted under section 6, but simply provided a framework based upon responsible access, as set out in sections 1 to 5. The Act did not strike at historical barriers to access, which were maintained after the Act came into force. *Aviemore* was correct and should be followed. Land which was not to be excepted was merely subject to the possibility of exercise of access rights but that did not mean that there was a strict right of access irrespective of other considerations. The appellant's submission

that the opening of the gates after the coming into force of the 2003 Act meant that the respondent was not entitled to relock them was absurd and failed to take into account the wording of the Act or the obvious distinction between locked and unlocked gates and the position of the landowner as key holder.

[26] Insofar as the sheriff's decision on the admissibility of evidence was concerned, the sheriff had taken account of the evidence regarding this aspect of matters. The sheriff heard the full evidence under reservation as to competency and relevancy, had considered it and had correctly rejected it as irrelevant. It was not in dispute between the parties or their witnesses that no concluded agreement prior to service of the notice was ever reached. The passages of the rejected evidence to which the appellant had referred in its submissions were selective and did not reflect the totality of evidence before the court.

[27] As far as the purpose test was concerned, Counsel submitted that the sheriff was entitled to find that the purpose or main purpose was not to prevent or deter responsible access but to manage and conduct the respondent's land ownership responsibly (against a factual background of irresponsible access having been taken) (finding in fact 21) and the desire to protect the public, animals and the estate from irresponsible access takers and in the interests of the privacy and amenity of the residential and farm buildings and surrounding area. The respondent's principal decision-maker, Dr Brach, whom the sheriff accepted as credible and reliable, was both experienced and well qualified to take the decisions and approach he did to access rights. He had the longest personal experience of the estate and the animals on it. He was responsible for other sizeable estates elsewhere and would listen to advisers and experts (legal and others) before ultimately taking a decision. He did not require slavishly to follow expert advice. There was no basis in the evidence for the appellant's claim that the respondent's professed concerns were inconsistent with

previous behaviour and wholly contrary to advice obtained. On the contrary, the evidence bore out the consistency and legitimate nature of the respondent's concerns on the appropriateness of the measures maintained after the 2003 Act came into force. Insofar as the appellants had criticised aspects of Dr Brach's evidence, those criticisms were not justified. His evidence was inherently consistent. Further, his evidence on certain crucial matters for example in relation to the startling of deer, was confirmed by other witnesses including Mr Gardiner, Mr McPhail, Mr Vaughan and Anne Gray.

[28] As regards the Access Code, although the sheriff did not refer to it in the course of his reasoning at all, Counsel submitted that finding in fact 21 showed that he had had regard to it. It was "inherent in his judgment and the way he set things out". In any event the Access Code set out general propositions but regard had to be had to the particular circumstances of this estate, namely, the wild boar, the free ranging cattle and machinery. Even though there were no wild boar present at the time of the appeal (or now) Dr Brach had said that it was his intention to reintroduce them. In any event, the court had to look at these states of affairs as they existed at the time the notice was served.

[29] As regards other witnesses, it had never been suggested that Mr Farquhar was an expert although he did have expertise regarding deer. His view was that the deer enclosure area was not an area which was suitable for the public to walk through. As regards Mr McPhail he did fulfil the criteria in *Kennedy* v *Cordia Services* so as to entitle him to give evidence as an expert. His clear evidence was that there was an all year round danger from livestock. As regards Mr Gardiner his evidence supported the respondent's position in as much as he gave evidence of having been attacked by cattle. In summary, the sheriff had taken account of all the evidence before him, had taken account of the individual strands of

evidence to come to an overall conclusion. He had set out his reasons adequately and had not erred in law. Accordingly, the appeal should be dismissed.

**Appellant's response**

[30] Counsel for the appellant responded briefly to the foregoing submissions. The fact that no agreement had been reached between the parties during their discussion missed the point which was that the evidence of the discussions tended to show that the respondents had previously made proposals which were inconsistent with the concerns they now professed to have. Insofar as it was suggested that the main purpose of refusing access could be the prevention of irresponsible access, that had not been put forward at the proof as the main reason for refusing access. Accordingly, there had never been previous suggestion by the respondent that irresponsible access or the prevention thereof, was the main concern which the respondent had.

**Discussion**

[31] We begin by making some general observations on the Act. Part 1 of the Act deals with access rights. It is briefly summarised at paragraph 1.1 of the Access Code issued by Scottish Natural Heritage:

> "Part 1 of the Land Reform (Scotland) Act 2003 gives everyone statutory access rights to most land and inland water. People only have these rights if they exercise them responsibly by respecting peoples' privacy, safety and livelihoods, and Scotland's environment. Equally, land managers have to manage their land and water responsibly in relation to access rights".

While we do not suggest that the Code should be referred to in construing the Act, as opposed to examining whether rights are being exercised responsibly, that passage seems to us correctly to summarise the rights and duties conferred and imposed by the Act.

[32] As we have already observed, the Access Code sets out guidance in compliance with section 10 of the Act. The Access Code has statutory effect in the sense that it is expected to be a reference point for determining whether access rights are exercised responsibly and whether land is used managed or the ownership of it is conducted responsibly. The court may – indeed, must, since "regard *is* to be had" to the code – consider whether the guidance in the code on responsible conduct has been disregarded.

[33] As can be seen from the terms of sections 2 and 3, the concept of acting "*responsibly*" is central to the legislation both in respect of the exercise of access rights and also the use and management of land by landowners. That concept is not a familiar test in Scots law but sections 2 and 3 give assistance in determining whether those exercising access rights on the one hand, and owners of land on the other, are acting responsibly. In determining that matter regard is to be had to whether there has been a disregard to the guidance set out in the Access Code, guidance which is incumbent on both the persons exercising access rights and on the owners of land. Sections 2(3) and 3(3) respectively shed light on what is meant by references to responsible exercise of access rights or management of land. Reference must also be made to section 14, the terms of which we have set out above. The inter-relation between sections 2, 3 and 14 was considered by the Inner House in *Tuley*. At paragraph [17] they recognised the importance of acting "responsibly" and that the enactment established certain qualified presumptions in sections 2 and 3:

> "Conversely the landowner is, again subject to some qualifications, presumed to be acting responsibly in his use of management of the land if he does not cause unreasonable interference with the access rights of someone exercising, or seeking to exercise, access rights. The qualifications to that presumption include what is effectively a counter-presumption, that a landowner acting in breach of, *inter alia*, section 14(1) is to be taken as not using, managing or conducting the ownership of the land in a responsible way. That leads to a question of the proper interpretation of section 14(1), in particular the

> reference to the landowners purpose or main purpose in carrying out any of the actions catalogued in heads (a) to (e) of sections 14(1)."

[34] At this stage we would add that although "purpose" is to be assessed subjectively, the question of whether a landowner (or access taker) is acting responsibly is clearly to be assessed objectively having regard to, among other things, the Access Code.

**The Timing Issue**

[35] In his finding in fact and law 2 the sheriff decided that the gates:

> "having been in place and locked and the sign bearing the words 'Danger Wild Boar' having been in place all prior to the coming into force of the Land Reform (Scotland) Act 2003, the pursuer was not the owner of land in respect of which access rights were exercisable as at 5 November 2013"

(being the date when the section 14 notice was served). We set out his reasoning at paragraph 17 above. The sheriff took from *Aviemore* that a contravention of section 14 of the Act can arise only where the act or omission complained of has been initiated since 9 February 2005 being the date when the Act came into force; that it is for the local authority to prove that the act or omission had been initiated since the Act came into force, and that the Act is not retrospective. The sheriff being satisfied on the evidence that locked gates existed at the three entrance gates prior to the coming into force of the Act, held that the Act did not apply to the estate. The replacement of two of the gates since then made no difference to his view, as he was of the view that the act of replacing a gate is no more than maintaining a gate which is already *in situ*. The sheriff did not consider the question of the gates being regularly unlocked and relocked since the Act came into force. As is clear from the sheriff's judgment, he accepted the respondent's argument that he was bound by *Aviemore*, which he took to mean that access rights did not apply to land where impediments to access which existed before the Act came into force remained in place. Because the gates

in the present case were locked before Act came into force, there could be no access rights after the commencement date.

[36] We turn to consider the sheriff principal's decision in *Aviemore*. In that case the National Park Authority had issued a notice in terms of section 14 requiring Aviemore Highland Resort Limited to remove a section of fence and hedge which obstructed access to the resort along a public footpath. The fence had been erected across a lane in 2004 after the Act had received Royal Assent but before it came into force. The notice was issued some years later in January 2008. Thus the notice referred to a breach of the contravention against putting up a fence or wall in terms of section 14(1)(b). The landowner was required to remove a section of the fence and hedge within a period of four weeks. It was a matter of agreement between the parties that the fence had been erected prior to the coming into force of the Act. The point on appeal was a narrow one whether the National Park Authority was entitled to serve a notice in so far as it related to the erection of a fence prior to the coming into force of the Act. The sheriff principal held that they were not entitled to serve a notice as the access rights referred to in the Act and specifically in section 14 did not exist prior to the coming into force of the Act and therefore at the time the fence complained of was erected. The sheriff principal states, at para. [14] of his judgment:

> "So, when they erected the fence, the pursuers were not the owners of land, in respect of which access rights were exercisable, and in any event they could not have erected the fence for the purpose or for the main purpose of preventing or deterring any person entitled to exercise those access rights from doing so since the rights did not then exist."

[37] The sheriff principal goes on to observe that it is not correct to characterise the *erection* (emphasis added) of the fence as a continuing state of affairs. He states, again at para [14]:

> "It was an act which was completed before Pt 1 of the Act, and with it the access rights in question, came into force, and it is nothing to the point that the continuing presence of the fence has the effect now of preventing or deterring any person entitled to exercise access rights under Pt 1 from doing so."

[38] The issue with which *Aviemore* was solely concerned was the act of erecting a fence, an act which was completed prior to the coming into force of the Act. *Aviemore* is correctly decided on its facts. The facts of this case can readily be distinguished from those in *Aviemore.* In the present case, the appellant complains not of the erection of the gates in contravention of section 14(1)(b), nor of their having been locked at any particular time, but upon the continuing failure of the respondent to unlock them under section 14(1)(e). This is, in effect, the antithesis of the *Aviemore* situation where the barrier or fence had been erected completely prior to the coming into force of the Act. Indeed it could be pointed out that a fence is a barrier, whereas a gate by its very nature is capable of allowing passage and may be locked and unlocked. It is not the erection of a barrier which is in issue here, rather the locking and subsequent failure to unlock the gates which is the justification for the section 14 notice. The use of the gate is a continuing state of affairs as adverted to by the sheriff principal in *Aviemore.* In any event, it is accepted that the main gate and kennels gate, had been replaced and with the fitting of the new gates comes a decision to keep the gates locked. The third gate is the Altskeith Gate. The respondent conceded that the Altskeith Gate ought to be opened and their appeal in respect of that gate ought not to have been allowed but for the sheriff's decision on the timing issue.

[39] The sheriff's approach fails to take account of whether the landowner's use of his land is responsible. It fails to recognise that the Act sets out a statutory presumption in favour of access. The access rights are to be exercised in a responsible manner and the Act expects land owners and managers to act in a responsible manner, which anticipates

managing land in a way to facilitate access being taken. Responsible use of land in terms of the Act may well entail allowing access to land to which the public previously did not have access. Applying this to the present case the Act imposed a positive obligation on the respondent when the Act came into force, to consider, among other things, whether gates which had previously been locked, should be unlocked so as to enable the access rights created by the Act, to be exercised. In that context, it is easy to see why section 14(1)(e) refers to an omission to take any action.

[40] A further fallacy in the respondent's approach is that it in effect gives no content to section 6(1)(f), the terms of which we have set out above and which in effect allows a landowner to refuse access to land (except upon payment of a fee), only where for not fewer than 90 days each year prior to the Act coming into force, the public were admitted only on payment. Were the respondent's position correct that provision would be otiose.

[41] Finally, the approach contended for by the respondent would have the bizarre (and surely unintended) effect that if a gate, hitherto locked, was unlocked at a minute to midnight on the day before the Act came into force, the public would have access over the land; but that where a gate which was hitherto unlocked was locked at a minute to midnight, there would be no right of access. That simply cannot be correct.

[42] We therefore find that the sheriff erred in his approach to the timing issue. The respondent's land is land to which the Act applies and over which access rights are exercisable. Subject to the purpose issue, the landowner is not entitled to continue to refuse access to the land by continuing to lock the gates after the Act came into force, or to have a "Wild Boar" sign (particularly where there are in fact no wild boar). It is therefore necessary to turn to consider the purpose issue, and the sheriff's approach to the evidence, including

his decision to exclude the evidence to which objection was taken and which was led under reservation of its competency and relevancy.

**The purpose issue**

[43] In *Tuley*, the Inner House (albeit, in a strictly *obiter* part of its judgment) accepted the substance of the submissions made on behalf of the landowner in that case, namely that the purpose or main purpose as employed within section 14(1) is found by looking at the underlying purpose of the landowner: what did the landowner seek to achieve? Thus for section 14(1) to be infringed, the purpose or main purpose of the landowner performing the act or omission in question must be directed towards the exercise of statutory access rights by the responsible access taker. The Inner House also held that purpose must be ascertained subjectively. It is therefore essential in any case where section 14(1) is in issue to ascertain the purpose or main purpose of the landowner in undertaking any act or omission which impacts on responsible access being taken. Bearing in mind these introductory remarks, we observe that the sheriff's finding-in-fact-and-in-law number three is in the following terms:

> "The pursuer's purpose or main purpose in locking the Main gate, Kennels gate and Altskeith gate and having in place the sign bearing the words 'Danger Wild Boar' is to use, manage, and conduct the ownership of Drumlean estate responsibly and not to prevent or deter responsible access being taken."

[44] In making that finding the sheriff had regard to only part of the evidence which was led at the proof, having excluded a large part of the evidence for the reasons set out at paragraphs 15 and 16 above. The excluded evidence related to events over a period of years prior to the service of the notice and included not only communications between the parties

but also evidence in respect of the grant of planning permission to the pursuer for a public path across part of the enclosed area.

[45] Insofar as the excluded evidence is concerned, we accept the appellant's submissions. Since, following *Tuley*, a landowner's purpose is to be assessed subjectively, that must involve examination of the landowner's *bona fides* and honesty. The appellants were entitled to explore that in the evidence and indeed to lead evidence which might cast doubt upon the evidence given on behalf of the respondent. As such, the excluded averments, and the evidence pertaining thereto, were plainly relevant to one of the key issues which the sheriff had to determine and he fell into error in excluding it. In essence he went off on something of a frolic of his own by founding upon privilege as the reason why the evidence should be excluded, and by stating that evidence about advice was irrelevant because advice need not be accepted. We consider this approach to be erroneous in at least three respects. First, the respondent had not founded upon privilege in objecting to the evidence. As Counsel for the appellant pointed out, it is precisely because privileged material may be relevant that it is often excluded. In the present case, however, it had not been contended that any communications between the parties were in contemplation of litigation and should be excluded on that ground. Second, whether or not the advice ought to have been accepted was nothing to the point; but the fact of advice having been given and not accepted was a factor which was clearly relevant in assessing the *bona fides* of the landowner. Third, the material which the sheriff excluded included evidence about the planning application; and we can see no circumstances in which such evidence could ever be inadmissible on the ground of privilege. On the contrary, if planning permission was applied for to construct a path over the area to which the respondent now claims access cannot safely be taken, that must be relevant in assessing the genuineness of its position as stated in evidence.

[46] For completeness, we do recognise that in some situations policy grounds dictate that discussions between parties should be privileged, to facilitate open and potentially productive discussions between parties to reach an amicable solution. However parties accepted that in the present case the discussions had not reached that stage.

[47] The consequence of this error on the sheriff's part is that he proceeded to decide a crucial aspect of the case – the so-called purpose issue – without having any regard whatsoever to a material chapter of the evidence. Counsel for the respondent submitted that the sheriff must have had regard to it, since he referred to it in his Note but we cannot accept that submission. It is axiomatic that if evidence is rejected as inadmissible, no regard can be had to it for any purpose, including the assessment of credibility and reliability.

[48] The sheriff's approach to his ascertainment of the respondent's purpose is therefore already vitiated, but the matter does not end there. Crucial to the sheriff's findings as to the respondent's purpose was his acceptance of Dr Brach as both a credible, and a reliable, witness. He makes clear that his assessment of Dr Brach was no straightforward matter. Indeed, he observes at paragraph 3.2 of his Note, on the evidence of Dr Brach: *"My initial impression of Dr Brach as a witness was not a favourable one."* However, he goes on to explain that as the evidence progressed his initial impression, that Dr Brach was dismissive of the proceedings, and at one point discourteous to the court, waned. He accepted the submission of Counsel for the respondent that a number of factors, not least difficulties in translation of his evidence (his being a native German speaker and giving evidence through an interpreter) contributed to the way in which his evidence came across, at least initially. Overall, the sheriff concluded that he found Dr Brach both credible and reliable. He does not however explain why this impression changed and in arriving at that conclusion he excluded Dr Brach's evidence about the discussions between the parties, evidence of which

we have found he wrongly ruled to be inadmissible. The sheriff therefore did not take that evidence into account in his assessment of Dr Brach's evidence which formed a substantial part of the appellant's criticism of Dr Brach's evidence.

[49] A further criticism that can be made of the sheriff's approach to assessing Dr Brach's evidence is that he rejected much of Mr Auld's evidence because of what the sheriff perceived to be an error in what might be categorised as Mr Auld's approach to the timing issue. However, as we have made clear above, we broadly support Mr Auld's understanding of the law. In the absence of any other criticism that could be made of Mr Auld's evidence, his evidence ought to have been taken into account in assessing the credibility and reliability of Dr Brach. However, the sheriff failed to do that.

[50] Three further criticisms were made of the sheriff's whole approach to the purpose issue. These may be summarised as: a failure to make any finding in fact as to what the respondent's purpose was; a failure to have regard to the Access Code; and a failure to appreciate that many of the respondent's professed concerns, even if genuine, were of such general application that they could not properly amount to a legitimate purpose for the purposes of section 14, culminating in finding in fact and law three which merely paraphrased what the landowner's duty was, which we have referred above.

[51] We consider those criticisms to be well founded. Dealing with each in turn, the sheriff does not make any finding in fact regarding the respondent's purpose in locking the gates (albeit he does make a finding in relation to the wild boar sign, namely: "to keep persons out of the area near to the wild boar enclosure due to concerns that people could be injured, and to comply with Stirling Council wanting a sign in place for safety reasons"). In fact, the licence did not require a sign and to that extent the finding in fact cannot stand. Within his Note, the sheriff states at page 56 of the Appeal Print that:

> "the pursuer's main purpose in locking the gate was to maintain the enclosure within which there was a working farm with machinery, animals which required protection and animals which at times posed a danger to humans".

However, that is not the equivalent of a finding in fact and in any event, the sheriff's approach to the evidence was, as we have identified above, seriously flawed. Counsel for the appellant further pointed out that the sheriff's findings-in-fact did not explain why locking the gate was thought necessary to achieve this goal.

[52] As regards the Access Code, as narrated above, it is given statutory importance by virtue of sections 2 and 3 of the Act in considering what is and what is not responsible conduct, on the part of both access takers and landowners. While it is perhaps not of direct relevance in relation to section 14 it is clearly of relevance in relation to the broader questions as to whether a landowner is acting responsibly and whether his conduct is directed at the responsible or irresponsible access taker and accordingly should form an important if not essential part of the consideration when an issue is related directly to provisions within the Access Code.

[53] It therefore is of relevance to note that the Access Code at paragraphs 3.29 – 3.34 recognises that access may be taken even where there is livestock and provides guidance to those seeking to take access. The sheriff should at the very least have taken the Code into account in assessing the respondent's purpose, and Dr Brach's credibility, given that it has statutory authority and provides detailed guidance on the responsibilities of those exercising access rights and those managing land and water. If he had had proper regard to the code, he would have recognised a need to test the concerns expressed by Dr Brach for the protection of the public under reference to risks posed by the presence of wild boar and highland cattle generally. Further consideration of the Access Code would have directed the

sheriff to have adopted a more restricted interpretation of the evidence of Mr Gardiner and Mr Vaughan about their view of a more extended need for restrictions on access at particular times. A related point is that section 15 of the Act itself clearly recognises that danger alone need not be an absolute impediment to access rights being exercised, insofar as it empowers a local authority to take such steps as it considers appropriate to warn the public of, and protect the public from, danger on any land in respect of which access rights are exercisable.

[54] As regards the purpose which the sheriff identified in finding in fact and law 3, the sheriff has merely restated the duty imposed upon the respondent as landowner, namely to use, manage and conduct its ownership of the estate responsibly. However, that duty sets out the test by which the landowner's actual use and management of the estate must be assessed. It cannot itself be the purpose. Putting that in a slightly different way, where the Act provides, as it does, that a purpose which contravenes section 14 is to be taken as irresponsible use of land, then one cannot find that that purpose does not contravene section 14 because the land use is responsible, otherwise the argument becomes completely circular. In our view, Counsel for the appellant was correct in submitting that, in order for the respondent not to fall foul of section 14(1), there must be some identifiable legitimate purpose specific to the land in question rather than a broad purpose which could apply to virtually any estate in Scotland. We agree, too, that at least on one interpretation of the evidence, the true purpose of the respondent in the present case could be said to amount to no more than a desire to prevent access rights from being exercised, the very thing which section 14(1) prohibits.

[55] While we are in no doubt that the sheriff erred in his whole approach to the assessment of the evidence, the question then arises as to whether it is open to us, as an

appellate court, to review the evidence for ourselves and to make our own findings in fact, particularly where the sheriff has placed so much weight upon his acceptance of a key witness as credible and reliable. We accept that the sheriff or judge of first instance enjoys the advantage, denied to an appeal court, of seeing the witnesses and of forming a view as to their credibility. The most lively or dramatic moments in a proof are reduced on appeal to the cold print of the evidence. Normally, an appeal court is reluctant to reverse findings on credibility. Authorities such as *Thomas* v *Thomas* 1947 SC (HL) 45, *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and more recently *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 make clear that an appeal court may only reverse findings in fact of a fact finder at first instance in circumstances where the appellate court is satisfied that the original factfinder has reached a conclusion which is plainly wrong.

[56] The issue was put thus by Lord Shaw of Dunfermline in *Clarke* v *Edinburgh and District Tramways Co Ltd* 1914 SC 775 at page 37:-

> "In my opinion, the duty of an appellate court in these circumstances is for each Judge of it to put to himself…..the question, am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong?"

[57] For what "*plainly wrong* "means we must look to *Henderson* v *Foxworth (supra)* and Lord Reed at para 67. For the reasons set out above in paragraph 45 we have no hesitation in concluding that the sheriff was plainly wrong. In addition to the errors we have already identified, it is noteworthy that in assessing Dr Brach as credible and reliable, the sheriff placed at least some weight on his rejection of at least part of Mr Auld's evidence for reasons which were, incorrect. Neither does the sheriff in fact appear to have based his acceptance of Dr Brach's evidence on his demeanour in the witness box. To the extent that he

comments on Dr Brach's demeanour at all, it is to make negative comments. If anything, it appears that the sheriff accepted Dr Brach as credible and reliable *despite*, rather than *because of*, his demeanour. While the sheriff has stated that he found Dr Brach to be credible and reliable, he has not given clear and satisfactory reasons for that finding (*cf Jordan* v *Court Line Limited* 1947 SC 29). Where that is the case, an appeal court can more readily treat the matter as at large before them (*Morrison* v *J Kelly & Sons Limited* 1970 SC 65). While the general rule is that even where a judge at first instance has erred in detail, an appellate court should be slow to interfere in his assessment of the evidence, the matter may become at large for the appellate court if the judge has failed to take proper advantage of being able to observe the witnesses as they gave evidence: *Jordan* v *Jordan* 1983 SC 539 and *Angus* v *Glasgow Corporation* 1977 SLT. 206

[58] While we accept that the bar for interference with the fact finder's findings is accordingly set high, we have concluded that in the present case we are entitled to reject the sheriff's findings on Dr Brach's main purpose in restricting access by locking the gates and displaying the sign warning of wild boar. Firstly, his finding was made without reference to evidence which he excluded. We find the excluded evidence casts considerable doubt on Dr Brach's expressed position. Secondly the sheriff does not give a clear explanation of why he found Dr Brach credible or reliable. Thirdly the sheriff failed to have regard to the terms of the Access Code. We therefore find that the matter is at large for us to consider by reference to the transcript.

**Assessment of the evidence re the purpose issue**

[59] In considering the purpose issue *de novo*, the starting point is Dr Brach's evidence that there were three reasons for seeking to prevent public access through the gates: "first of

all to protect people, secondly, to protect animals, and thirdly, to protect our machinery": Day 1, p39 and again at p59. There is no mention there of a wish to prevent antisocial behaviour, and, the test being a subjective one, any reference to incidents of such behaviour is fundamentally irrelevant. In relation to the alleged risks to people the Access Code and Act, as we have pointed out, envisage both that the public may take access to areas where cattle and deer are present and that there may be a degree of danger inherent in the exercise of access rights. Evidence that the presence of cattle and deer provided no basis for excluding the public was given by Anne Gray, who regularly advises landowners on access rights, Mr Auld, Mr Vaughan, who had 30 years of access experience and who had no concerns about deer or cattle, save where the cattle were in calf, and Mr Gardiner, who was concerned only about keeping the public out of the wild boar enclosure (Day 5, pp 22 and 51). He did give evidence about the dangers posed by cattle, having been attacked on two occasions, one of which occurred when the cow was in calf. Nothing in that passage of evidence (Day 4, pp 100 to 105) persuades us that he was speaking about particular dangers posed by cattle on this particular estate, as opposed to the danger which can be posed by cattle generally. The sheriff preferred the evidence of Dr Brach, Mr McPhail and Mr Farquhar. However, none of those witnesses was in a position to offer expert evidence with the possible exception of Mr McPhail. However, even taken at its highest his evidence was that the risk was largely confined to calving (Day 5, pp 122-123 and 135-136). Dr Brach had no relevant qualifications and accepted that he relied on advice from others as to the practical aspects of estate management. It must also be borne in mind when considering evidence as to the behaviour of animals when enclosed, that, the so-called enclosed area comprised 120 hectares and that the deer and cattle were enclosed only in the sense that there was a limit to the area where they could roam, rather than that they were confined in a

small area. Accordingly, this reason given by Dr Brach does not stand up to scrutiny and we do not consider that he can have been genuinely motivated by a desire to prevent members of the public from being damaged (or, at any rate, that he cannot genuinely have believed that the risks on this estate were greater than on any other).

[60] As regards risk to machinery, the evidence did not establish any particular risk at this estate. Although Dr Brach did give evidence of regular thefts of machinery (Day 1, pp 50 to 51) that was wholly contradicted by Mr Gardiner, who confirmed that nothing had been stolen from the estate during his 10 years working there (Day 4, pp 80-81) and was not supported by the police report (document 30). Dr Brach's evidence on this point was therefore, by any objective standard, at best unreliable. Again, we do not consider that, on the balance of the evidence, he was genuinely motivated by any particular risk to the respondent's machinery.

[61] Moreover, the discussions between the parties, evidence about which was excluded by the sheriff, also tended to give the lie to Dr Brach's assertion that he was genuinely motivated by the concerns he professed to have. In his evidence, he sought to distance himself from those discussions, which had entailed an acceptance by the estate, over a period of years, that some public access could take place through the enclosed area. However, the preponderance of the other evidence was that he was kept informed of the discussions as they were on-going and that at least some direct communication took place between Dr Brach and those on the ground. Mr Gardiner gave evidence that he had kept Dr Brach informed and that he was "pretty sure" that they would have discussed access: Day 4 p 117, Day 5 pp 14-16,40. He specifically remembered having discussed obtaining pedestrian gates to allow access to the enclosure: Day 5, pp 46-47. The latter point was also confirmed by Mr Vaughan's email to Barrie Brandriff of 28 October 2011 (document 21), by

Mr Vaughan (Day 7, p 53) and initially by Dr Brach in cross-examination, although he later changed his position: Day 2, p68). The estate's then solicitors, Levy and McRae, also stated that they had taken instructions from Dr Brach following a meeting; but Dr Brach could offer no explanation as to why they had done so and would not even concede that they were unlikely to have sent such a letter without instructions: Day 2, pp 44-46. He was prepared to concede only that there had been some sort of discussions between Mr Gardiner and the appellants but disclaimed any knowledge of their content: Day 2, pp 22 -23. That was despite the discussions having continued for several years and where he said that he should have been consulted at the time: Day 2, pp 24-25. In re-examination, he conceded that he had discussed the issue from time to time with Mr Gardiner: Day 3, p41. Dr Brach also claimed not to have been instructing Andrew Vaughan but could not explain how Mr Vaughan had nonetheless been involved (Day 2 , pages 49 – 51); see also (Day 2 , pages 26 - 27, 30 and 44 – 46). This was in contrast to Mr Vaughan's evidence which was that Dr Brach had instructed him personally (Day 7 page 29 – 30). For what it is worth, there was also evidence about the application for planning permission, which although it did not run in the name of the respondent, ran in the name of the estate and it is stretching credulity to accept that this was lodged without some form of instruction by Dr Brach.

[62] The foregoing, of course, was evidence which was not considered at all by the sheriff. We find on consideration of that evidence as a whole that there was a considerable body of clear evidence that Dr Brach was well aware of the nature of the proposals being advanced on behalf of the estate, and that no reliance should be placed on Dr Brach's assertions that he was unaware of what was being done in the estate's name. That in itself is sufficient to cast doubt on Dr Brach's evidence as to his purpose in keeping the gates locked. Additionally, it is clear that Dr Brach's avowed concerns were inconsistent with the Access Code (which he

claimed never to have seen. He also failed to answer a question as to whether he had given thought to the terms of the Code) (Day 2 p84) and with advice which he was given, despite the fact that he accepted that he had no relevant qualifications in relation to the practical running of the estate and was reliant on the advice of others.

[63] Accordingly, we do find ourselves able to conclude, on consideration of the whole evidence, that Dr Brach could not genuinely have reached the conclusion that the public should be excluded from the enclosure as a matter of responsible land management. Rather, the respondent continued to lock the gates for the main purpose of deterring persons from taking access, and as such the continued locking of the gates after the commencement of the Act did give rise to a contravention of section 14. We might add, finally, to deal with a point made by Counsel for the respondent, that it matters not that access is available to other parts of the estate, nor that the enclosed area constitutes only some ten percent of the total area of the estate. Bearing in mind that the rights conferred by the Act are not restricted to crossing land, but include the right to be on land, that is nothing to the point. Access rights exist over all land which is not excepted, and are not to be restricted to the majority of all non-excepted land.

[64] We should add that even if the respondent's expressed concerns were to be accepted as genuinely held, the section 14 prohibition would still apply, because the professed concerns are so broadly expressed that they amount to arguments against access rights in general rather than in relation to this particular estate.

[65] For all of these reasons, we propose to allow the appeal. We will quash findings in fact and law two to six, inclusive. We also modify finding in fact 15 as stated in paragraph 51 above by deleting the words "and to comply with Stirling Council wanting a

sign in place for safety reasons". In recognition that the sheriff's findings in fact are deficient, we propose the following additional findings in fact:

"1. The sign bearing the words "Danger Wild Boar" at the Main Gate was reaffixed when the Main Gate was replaced.

2. The Main Gate, Kennels Gate and Altskeith Gate have all remained in use by the pursuer during the time since the 2003 Act came into force.

3. The effect of locking the Main Gate, Kennels Gate and Altskeith Gate was to prevent or deter members of the public from obtaining access to the Drumlean Estate through those gates.

4. The effect of having in place the sign bearing the words "Danger Wild Boar" at the Main Gate was to deter members of the public from taking access to the Estate.

5. Any risks posed by cattle or deer to the members of the public entering the enclosed area, or posed to the cattle or deer by such members of the public, were no greater than the normal level of risk inherent where the public has access to cattle or deer farms.

6. The Scottish Outdoor Access Code envisages that members of the public may take access to areas where cattle and deer are present. It is common practice in Scotland for members of the public to be allowed access to areas where cattle (including Highland cattle) and deer are present.

7. Any risks posed by public access to the pursuer's machinery were no greater than the ordinary level of risk inherent where the public has access to farms.

8. Between 2007 and 2013, there were discussions between the pursuer and the defender regarding public access to the Drumlean Estate.

9. Proposals to create routes by which the public could take access were advanced by the pursuer's estate manager, Mr John Gardiner, in September 2007 and by Mr Barry Brandriff on behalf of the pursuer in November 2008 and March 2009.

10. In his memo of March 2009 (document 7), Mr Brandriff submitted on behalf of the pursuer that the Main Gate should remain closed to the public, primarily on the grounds that the path through that gate led to buildings which were excluded from access rights. He stated that the pursuer's position was that "unrestricted access to specified areas can sometimes not be available".

11. In October 2009, Mr Brandriff on behalf of the pursuer emailed the defender expressing the view that it would be workable to install a separate gate to allow members of the public to access the enclosed area (document 10).

12. In February 2011, the pursuer's solicitors, Levy & McRae, wrote to the defender making a proposal for public access to the Estate by way of a path to run through the enclosed area (document 13).

13. On 11 April 2011, Mr Vaughan met Mr Auld of the defender at the Estate and the parties agreed on a route for public access through the Estate which would have entailed access being taken from the Kennels' Gate, through the enclosed area, and passing around the estate buildings to the north in order to reach the hillside. That route was passable at the time (save for the fact that the Kennels Gate was locked to the public), albeit that part of the diversion around the estate buildings followed a "desire line" rather than an established path.

14. On 15 April 2011, Mr Vaughan submitted to the defender an access and signing strategy reflecting the foregoing agreement.

15. On 14 September 2011, a planning application on behalf of "Drumlean Estate" was granted for the construction of a footpath along the route which had been discussed in April 2011. That footpath was never built.

16. The access route which was discussed by Mr Vaughan and Mr Auld in April 2011 was recommended to the pursuer by Mr Vaughan, and was also approved by Mr Gardiner.

17. In both October and November 2011, Mr Vaughan advised the pursuer that it was in breach of its duties under the access legislation by continuing to keep locked the Main Gate, the Kennels Gate and the Altskeith Gate. The pursuer did not act on that advice.

18. Dr Brach was aware of the nature of the proposals for public access to the Estate which had been made on behalf of the pursuer in its discussions with the defender.

19. During October 2011, Dr Brach was personally involved in steps to source a gate to provide pedestrian access to the Estate for members of the public in furtherance of those proposals.

20. Dr Brach had no qualifications relevant to the farming of cattle or deer and his experience of running estates related to their commercial affairs rather than to practical aspects of farming. He relied on advice from others in relation to the practical running of the estate.

21. Dr Brach's professed view that members of the public ought to be excluded from the enclosed area for the protection of the public and of the animals was not supported by any advice which he had received from Mr Vaughan or Mr Gardiner, by any other expert advice nor by the Access Code.

22. Dr Brach wished to keep the Kennels and Main gates locked in order to prevent members of the public from obtaining access to the Estate."

[66] We also make the following findings in fact and law, in substitution of those which we have quashed:

"2. With the exception of the buildings on the Estate, their curtilage and the area of the wild boar enclosure, the Drumlean Estate was land in respect of which access rights were exercisable under the Land Reform (Scotland) Act 2003.

3. The pursuer's main purpose in locking the Main gate, Kennels gate and Altskeith gate, and in having in place the sign bearing the words "Danger Wild Boar", was to prevent or deter persons entitled to exercise access rights in respect of the Estate from doing so, contrary to section 14(1) of the 2003 Act.

4. The pursuer contravened section 14(1)(a) of the 2003 Act by putting up the sign bearing the words "Danger Wild Boar" at the Main gate.

5. The pursuer breached section 14(1)(e) of the 2003 Act by locking the Main gate, Kennels gate and Altskeith gate.

6. The pursuer breached section 14(1)(e) of the 2003 Act by failing to unlock the Main gate, Kennels gate and Altskeith gate."