CAIRNGORMS LOCAL OUTDOOR ACCESS FORUM

Title: **Paper 1 – Recent Court Cases**

Prepared by: **Fran Pothecary, Outdoor Access Officer**

Purpose **The purpose of the paper is to update the Forum regarding two recent and significant court cases involving Section 14 Notices and to flag up the implications with regard to the future work of access authorities in upholding access rights**

Case 1- Aviemore Highland Resort v. Cairngorms National Park Authority

Background

1. The background to this case was the blocking of access from the Tesco car park in to the resort across Laurel Bank Lane by Aviemore Highland Resort (AHR). CNPA sought to have the fence removed and eventually served a Notice under Section 14 of the Land Reform (Scotland) Act instructing the owners to remove the fence. The Notice was drafted by our lawyers and was based on a template in the Scottish Executive Guidance for Local Authorities.

The Sherriff's decision

2. AHR appealed the Notice to the Sheriff on 3 grounds:

   a) That the fence was erected prior to the legislation coming into effect and therefore the Notice was incompetent ("retrospectivity");

   b) That the fence was within the curtilage of buildings and was therefore on ground exempt from access legislation; and

   c) That the fence was required for management reasons.

3. The Sheriff dismissed the first 2 grounds and indicated that the third ground should be subject of a full hearing. AHR appealed to the Sherriff Principal on the first element of the Sheriff's decision.

The Sherriff Principal's decision

4. The Sherriff Principal decided in favour of AHR largely due to a technicality concerning the way in which the formal Notice had been worded, and quashed the Notice. He said that access rights over the land in question did not exist prior to the date of commencement of the 2003 Act (9th of February 2005) and therefore access rights were not exercisable at the date when the fence was erected. The purpose of erecting

the fence therefore could not have been to prevent people from exercising access rights. He also rejected the argument that the erection of the fence was a continuing state of affairs as it was an act that had been completed before the access legislation, and associated access rights, had come into force. He said it might have been different if the wording of the Act had indicated that 'maintaining' a fence to deter access was a contravention of section 14, but this was not the case. In relation to the hedge, the Sheriff Principal said that the onus was on the CNPA to show that it had been planted after the commencement of the 2003 Act, and they had failed to do so.

5. The Sheriff Principal therefore concluded that the CNPA were not entitled to serve a notice requiring the removal of the fence and hedge, as there had been no contravention of the 2003 Act.

6. The Sheriff Principal also pointed out that he had interpreted the Section 14 Notice on the basis that the breach of the Act was in erecting the fence and hedge (i.e. in relation to section 14(1)(b), not on the basis that there had been a breach because AHR had permitted a hedge to grow (also under section 14(1)(b)), or had failed to take any other action (section 14(1)(e)). As the Notice did not include specific wording relating to these sub-clauses, the Sheriff Principal did not have to consider whether CNPA might have succeeded on these other grounds.

Whether to appeal or not?

7. The CNPA decided not to appeal on the following grounds:

   a) **Outcome on the ground -** since the Notice was served, CNPA has granted full planning permission for re-development of the Resort and there is a planning condition requiring submission of more detailed plans for the upgrading and enhancement of the access at this specific site, to the approval of CNPA as planning authority. Therefore, it is likely that the same outcome (i.e. removal of the fence and hedge) will be achieved on the ground in the near future.

   b) **Legal precedent -** having taken further legal advice our QC has advised that no significant precedent is set by the decision, on the basis that the Act can deal with obstructions in place before it became law (see main lessons learned).

   c) **Likely chance of success and cost implications –** pursuing an appeal would result in further legal costs and, having taken further advice it is clear that we would have a less than 50% chance of winning the case.

Main lessons learned

8. We have met with our legal advisers to review the situation and identified some important learning points arising from this judgement:

   a) The case has reinforced the need to work cooperatively with land managers, as far as possible, reserving use of our formal powers to situations of last resort. This is our normal working practice.

b) The Land Reform (Scotland) Act **can** deal effectively with obstructions or signs put in place before the Land Reform Act came into force in Feb 2005, but careful consideration is needed as to which subsection of Section 14(1) is used as the test that access rights have been obstructed. In particular the sub-clause (e) "taking or failing to take any other action" could be used where a land manager has not taken steps to remove a barrier which blocks access, even if that barrier precedes access legislation. Therefore there is an important principle in being very specific in the wording of a Section 14 Notice and closely following the wording from the legislation is advantageous in this regard.

Case 2 - Tuley v Highland Council

Background

9. This was an appeal to the Court of Session by Mr and Mrs Tuley against a decision of the Sheriff in Dingwall Sheriff Court in July 2007.

10. The Tuleys are owners of some woodland, Feddanhill Wood, near Fortrose. They had appealed to the Sheriff against a Section 14 Notice issued by Highland Council requiring them to remove barriers which prevented access by horse riders along a track in part of the wood ('the red track/path').

The Sheriff's decision

11. The Sheriff had upheld the Section 14 Notice. He considered that the Tuleys' action in erecting the barriers was premature. The Tuleys had not been able to assess what would happen in the future when they put the barriers in place. If in practice the path degraded rapidly under light horse traffic, then all horse use would be seen to be irresponsible. The Tuleys had been unable to establish that all horse riding would be irresponsible because barriers had been put in place before damage was done, but all horse riders would be prevented from using the route – responsible riders legitimately exercising access rights as well as the irresponsible. The barriers were therefore contrary to section 14 of the Act.

12. The Tuleys appealed to the Court of Session against the Sheriff's decision.

The Court of Session's decision

13. The Court of Session overturned the Sheriff's decision. The judges in the Court of Session set out the grounds for their decision under two headings: firstly a review of the expert evidence and a discussion about whether the landowners had acted responsibly in placing barriers preventing horse access along the red track; and secondly whether (under section 14(1) of the 2003 Act) the landowners' *purpose*, or *main purpose*, in erecting the barriers had been to prevent or deter access.

Q.1 *Was it responsible to prevent access?*

14. In the first part of the judgement the court reviewed the evidence that had been given by an expert witness for the landowners about the soil damage that would occur on the red track as a result of horse use, and examined whether the landowners had acted responsibly in closing the path in the light of that expert evidence. The expert evidence had not been disputed by Highland Council but they had argued that horse riders should not be prevented from using the route unless/until it could be shown that damage was actually being caused as a result. Witnesses for the Council had also indicated that they thought that it was reasonable to expect a path in woodlands to be muddy. The Court of Session said that the expert evidence had indicated that, in all probability, horse use *would* damage the track, and the Court found as fact that horse riders had damaged the path in 2005. The Tuleys were therefore acting responsibly in preventing horse access to the part of the wood that was intended for pedestrian use.

Q.2 *What was the purpose, or main purpose of preventing access?*

15. This sub-section of the Act prohibits landowners from putting up any obstructions if the 'purpose, or main purpose', is to prevent or deter people from exercising their access rights. The appeal judges said that assessment of the landowner's purpose is not wholly objective and 'purpose or main purpose' should be given a flexible interpretation. In this case the purpose, and particularly the main purpose, was what the landowner wished to achieve, i.e. to prevent damage to the red track and routes leading off it. In the present case they said it was recognised and accepted that the Tuleys encouraged public access, and were only seeking, in good faith, to regulate different uses of access. The 'main purpose' of the barrier to horses was the landowners' genuine concern to prevent damage by horses to the track and the paths leading off it. The Tuleys were therefore not in breach of section 14(1).

Main lessons learned

16. The CNPA feel that this case is more likely to set as precedent with regard to what the purpose or main purpose of an obstruction is. It may be harder to ascertain this unless it has been explicitly stated (rather than inferred) by the land-manager that an obstruction has been erected to stop access. It also legitimises "preventative" action, if the land manager feels it necessary, and shifts the onus onto the land manager's decision in this regard, rather than the user's decision as to whether the access they take is responsible or not.

Fran Pothecary
Outdoor Access Officer
franpothecary@cairngorms.co.uk