

Roaming responsibly or damage to property : the effect of erosion

Tuley v. Highland Council (Sheriff MacFadyen, Dingwall Sheriff Court, 9 July 2007)

The rights to roam under section 1 of the Land Reform (Scotland) Act 2003 (and their corresponding burden to allow roaming) exist only if they are “exercised responsibly” (section 2). Thus if the right can not be exercised responsibly it ceases to exist at all. This was bound to give rise to difficult questions of when a right ceases to exist and when a landowner may bar access to someone seeking access. Where the access is likely to cause erosion and damage to the land such as access on a horse, the difficulty becomes more acute.

In **Tuley** the landowners owned woodland with various paths running through it. They encouraged access by pedestrians but became concerned about the use of a particular path by horses. In particular the use by horses damaged the path and made it and its banks become muddy. It was agreed that the presence of 10 horses several times a week (there was a stable nearby) would lead to substantial soil erosion of the path over a period of time. The owner put padlocked barriers on either side of the path with pedestrian gates which had the effect of preventing access by anyone on a horse. The Council served a remediation work notice on the owners under s. 14 (2) of the 2003 Act requiring them to enlarge the pedestrian gates to make them passable for horses. The owners appealed against the notice and sought its recall.

The question was whether there had been contravention of section 14 (1) of the Act which prohibits an owner from taking action the main purpose of which is to prevent or deter any person from exercising his right to roam.

The argument of the owners was that the right to roam on a horse over the path had ceased to exist as it could not be “exercised responsibly”. As the barriers

were not deterring any right to roam, they were entitled to put up them up to prevent horserider access.

This in turn focused the issue on whether even one horserider would cause the degree of erosion feared.

The sheriff decided that –

- the Scottish Outdoor Access Code’s provisions on horse riding were of little assistance in deciding the responsible exercise question
- it could not be said that all horseriding would result in degradation and erosion of the path and there was no evidence to indicate that there would be 10 horses a week or the like in order to cause degradation
- use once or twice a week to lead 4 young children on ponies would be “responsible”
- such use being “responsible” it was an exercise of the right to roam and was prevented by the gate
- the notice should be upheld and the appeal refused.

Unfortunately little attention was given to the statutory test for responsible exercise of roaming rights. That test is in section 2. The structure of section 2 is a little difficult to follow but becomes slightly easier once one starts in subsection (1) and then goes to subsection (3) !

In subsection (1) it is provided that a person has access rights only if they are exercised responsibly. Subsection (3) defines “responsible exercise of access rights” as being “in a way which is lawful and reasonable and takes proper account of the interests of others and the features of the land in respect of which the rights are exercised.”. Thus for the exercise to be “responsible” it must be,

- (i) lawful;
- (ii) reasonable;
- (iii) take proper account of the interests of others, and

(iv) take proper account of the features of the land in respect of which the rights are exercised.

So far so, good. But in order to assist, or perhaps confuse, the draftsman embarked on subsection (2). The drafting of subsection (2) seems to have been devised to give lawyers grey hair ! Rarely can there have been such a clumsy structure.

Subsection (2) begins with a statutory presumption of responsible exercise. It is not apparent why this statutory presumption was required and it is even less clear how it ties in with the definition of responsible exercise in subsection (3) that we have already seen. Thus the statutory presumption operates if rights are exercised, so as not to cause “unreasonable interference with any of the rights (whether access rights, rights associated with ownership of land or any others) of any other person”. Still with me ?

If the presumption is established, it can of course be rebutted. How ? By looking to the definition and showing that the access was unlawful, or unreasonable or failed to take proper account of the interests of others and of the features of the land in respect of which the rights were exercised. Also one can look to see if there has been disregard of the guidance on responsible conduct set out in the Scottish Outdoor Access Code or disregard of any request included or which might reasonably be implied in anything done by Scottish Natural Heritage under section 29 [warning of adverse effect on the natural heritage]. The extent of these factors merely underlines the odd presence and terms of the statutory presumption. If the aim was merely to place on a landowner the burden of disproving a right to roam, why was this not said ?

To add to the picture certain conduct appears to be excluded from responsible exercise automatically.

With such a confusing picture it was hardly surprising that the sheriff refrained from any analysis of the critical section 2. Given that the section is crucial for both access users and landowners it is most unfortunate that it has been drafted in the opaque and confusing way that it has.

The case has probably been rightly decided given that rights to roam accrue to individuals and that if even one rider can responsibly exercise access, he should not be barred. It does however mean that the landowner will have difficulty in taking preventative measures. Presumably he must wait until it can be established that even one rider on entry will cause severe damage to the path. This “straw that breaks the camel’s back” seems a high requirement. How can a landowner establish that even one rider (or pedestrian) taking access will cause damage ?

It is understood that the judgment is to be appealed to the Court of Session. But whatever the Inner House makes of section 2, they will not be able to deal with the fundamental problem of “responsible exercise” namely its impenetrability for the users of the legislation: landowners and members of the public. It is interesting that section 4 of the Act appears to give Scottish Ministers an extraordinary “Henry VIII” power to amend section 2 (and other sections) by ministerial order without an amending Act of the Scottish Parliament. It is suggested that it should not be a moment too soon to exercise it to restore some clarity to the “responsible exercise” of statutory rights to roam for all concerned.

The removal or clarification of a baffling statutory presumption and the exclusion of responsible exercise of access over eroded paths for a limited period of time to allow recovery of the land or upgrade of a path would seem to be a reasonable way forward for both landowner and roamer.