

## Roaming or trespassing, the Outdoor Access Code and the Gloag case

Gloag v. Perth & Kinross Council and The Ramblers' Association (12<sup>th</sup> June 2007, Perth Sheriff Court, unreported)

Since time immemorial people have walked the hills and countryside of Scotland without hindrance, not because they were doing so with the owner's permission but because no one minded. Tolerance was the order of the day. Now and again landowners would seek to enforce their rights and there would be the celebrated rights of way cases such as that through Glen Doll (Macpherson v. Scottish Rights of Way and Recreation Preservation Society (1885) 15 R (H.L.) 68). With the increasing pressures of modern living, the numbers taking to the hills and countryside in general increased, bringing greater strain into the always delicate relationship between walker and landowner. Following campaigning by walkers' groups for a right to roam, the Scottish Parliament enacted Part 1 of the Land Reform (Scotland) Act 2003. This restricted landowners' rights and increased walkers' rights – but by how much ?

That was the issue in **Gloag**. Mrs Gloag owned Kinfauns Castle, near Perth, Perth, a property with 52 000 square feet of space set in 11 acres of ground. Surrounding the main building was cultivated garden ground with large areas of closely mown grass, cultivated flower borders and specimen trees and bushes in the nature of a domestic garden but extending to several acres. On the south and west of the property was a substantial area of mature woodland, some of which on steeply sloping ground which obscured any sight of the main building and garden ground for persons in the wood except where one moved closer to the building. The woodland area appeared to have been intended in the design of the castle to provide privacy for the building and garden for the enjoyment of its occupants.

When Mrs Gloag had bought the castle there had been a stob and wire fence or drystone wall in poor repair around part of the property. This she replaced with a 1.8 m high fence topped with barbed wire. The fence was ineffective at preventing determined attempts at theft but could prevent casual intrusion.

Some areas of the woodland were capable of being easily walked following the path and steps which had previously been overgrown. Mrs Gloag's family and visitors used the paths regularly for walking and the riding of quad bikes and bicycles.

She sought a declarator exempting the whole garden ground plus several acres of woodland from the rights to roam under section 1 of the Land Reform (Scotland) Act 2003. Part of the line of exemption followed the 1.8 m high fence. She founded on exclusion of the rights under section 6 (1) (b) (iv) of the Act on

the broad ground of privacy. That exclusion applies where the land comprises, in relation to a house or other place affording a person privacy or shelter, sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house or place and to ensure that their enjoyment of that house or place was not unreasonably disturbed. The local authority and the Ramblers' Association opposed the extent of the exemption sought.

The local authority and Ramblers' Association argued that the Scottish Outdoor Access Code should be used as an aid in relation to the issue of whether the privacy exclusion should apply. Mrs Gloag argued that the Code was entirely irrelevant to that issue.

The local authority also argued that the fact that the line of exclusion sought by the Pursuer had had a fence on it for many years was irrelevant.

Sheriff Fletcher held that -

- the purpose of the Code was not to assist in the issue of whether land is exempted from rights of access, but rather to give help and give guidance to those with such rights over and landowners of unexempted land to act responsibly in exercising rights of access and rights of ownership;
- the approach advocated by the Code in paragraphs 3. 13 to 3. 27 as to the type of land which access takers should avoid is irrelevant in deciding whether the land is exempted from the access rights;
- the test for exemption of land was not that it was necessary for the enjoyment of the house, but that it was sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house and to ensure that their enjoyment of that house was not unreasonably disturbed;
- in considering whether the land in question enabled the residents of the house to have reasonable measures of privacy in the house or to ensure not unreasonable disturbance of their enjoyment of the house, the court –
  - had to consider what a reasonable person living in a property of the type under consideration would require,
  - could consider privacy in or enjoyment of not merely the house itself but also the ground surrounding the house which the reasonable owner would expect to use with the house.
- That judicial knowledge included a general view about what the average person might consider important when choosing whether or not to

purchase a house such as the aspect of the house, whether it faces north or south, whether it is surrounded by other houses, the size of its rooms and generally its accommodation, whether the garden was private or overlooked, large or small, sheltered and whether it afforded privacy for private activities such as sunbathing or picnicking or eating al fresco.

- In considering whether land adjacent to the house enabled reasonable measures of privacy or ensured that residents' enjoyment was not unreasonably disturbed, the court had to consider the location and other characteristics of the house;
- The location of the house included the nature of the land surrounding the house and its topography
- An average reasonable person purchasing a house of this kind would consider that quite a large area of ground would be required to be sufficient for the enjoyment of the house including not merely the lawns and the gardens of the house but also the areas of the woodland immediately surrounding the gardens especially where the woodlands had paths to crisscrossing them and steps to be built in them and were available for play by children.
- The nature of the building as a larger country mansion house and its prominence would point to a larger rather than smaller area of ground being required to be sufficient for the purposes of section 6 of the Act.
- Security of the premises and its ordinary occupants was a factor in relation to the scope of the land necessary to ensure not unreasonable disturbance of the enjoyment of the house and the fence was the most suitable location for a fence from a security point of view;
- The existence of the line of the fence as a historic internal boundary within the land was a factor in relation to what might have been considered by persons occupying the house as reasonably required for the enjoyment of the house.
- The use of the land adjacent to the house for lawns, cultivated flowerbeds and the like and on some of the boundaries for mature trees and woodland allowed inference that this area was intended to provide privacy and enjoyment for the occupants.
- Taking all of the factors into account the exclusion sought by Mrs Gloag encompassed sufficient adjacent ground to enable persons living in the castle to have reasonable measures of privacy in that house and to ensure that their enjoyment of that house is not unreasonably disturbed –

and declarator granted.

Obiter (in passing) the need to read and give effect to section 6 in a way which was compatible with articles 8 and 1 of the First Protocol to the European Convention of Human Rights would only apply if a decision was being made to exempt less ground than that sought by the landowner.

It is important that both landowners, members of the roaming public, and local authorities are not misled as to where rights of access do and do not apply. It seems that this decision will not be appealed. The reasoning of the sheriff in relation to the provisions of the Scottish Outdoor Access Code given to him seems irrefutable. This suggests that Scottish Natural Heritage embark on a suitable modification as soon as possible.