

The logo for Anderson Strathern, featuring a stylized 'AS' monogram in red and the company name 'Anderson Strathern' in white serif font.

AS Anderson
Strathern

The background features a dark grey field with large, flowing, organic shapes in a vibrant red color. These shapes create a sense of movement and depth, framing the text.

Legal Implications of Drumlean **BHS Annual Conference**

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David Blair,
Solicitor, Anderson Strathern LLP

Land Reform (Scotland) Act 2003 – General Scheme

- s 1(1) - Everyone has the statutory rights established by this Part of this Act.
- s 1 (2) - Those rights (in this Part of this Act called “access rights”) are—
 - (a) the right to be, for any of the purposes set out in subsection (3) below, on land; and
 - (b) the right to cross land.
- s 2 (1) - A person has access rights only if they are exercised responsibly.
- s 3(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.
- s 6 - Land over which access rights not exercisable

Land Reform (Scotland) Act 2014 section 14

- 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.

Tuley v Highland Council 2009 SC 456

- Feddanhill Wood, Fortrose
- Barriers preventing equestrian access
- Soil erosion expert
- What was the “purpose or main purpose” of the barriers?



“The Purpose or Main Purpose” in Tuley

- *“It was clear from Mr Dickson's report and the other evidence that allowing horse traffic would in all probability produce damage to the red track... The essence of the argument advanced by counsel for the defenders appeared to be that notwithstanding the predictability of damage the pursuers were acting irresponsibly in not waiting until the actual damage had occurred. Since in the circumstances of this case we are unable to accept the proposition that the pursuers were acting prematurely in seeking to prevent the damage to the red track (and the other paths) it follows, in our view, that the pursuers were acting responsibly in preventing equestrian access (and also, incidentally, motorised access by motorcycles or ‘quad bikes’) to the northern sector which they intended for the enjoyment of their pedestrian visitors.*
- *We would add the observation that, on any broad view of matters, what the pursuers were doing appears to be a responsible exercise of land management.”*

Tuley and the Approach to section 14

- *“We would comment that the scheme of the Act, and its reliance on the very protean concepts of acting ‘responsibly’ if anything endorses that subjective approach, which ultimately may focus on the bona fides of the landowner.”*

Implications of Tuley

- Subjective approach to section 14 “purpose or main purpose”.
- If someone believes they are acting in order to pursue responsible land management, that is enough.
- Very expensive evidential hearings to test *bona fides*.
- Chilling effect on local authority enforcement.

Anstalt v Loch Lomond and the Trossachs 2018 SLT 331

- Sign warning of wild boar.
- Three gates at the perimeter of the estate.
- What was the “purpose or main purpose” of the barriers?



“Purpose or Main Purpose” in Anstalt

- *“What is envisaged is a national scheme involving access to land for certain purposes. These have to be judged objectively; that is, for example, according to what the reasonable person would regard as a recreation and not what an individual considers to be his or her, perhaps unique, form of play. Responsibility and the concept of duty also have in mind objective standards, including reasonableness.”*
- *“Section 14 does not refer to the landowners’ purpose as such but to the landowners’ acts which are what have to be looked at, if necessary by the court, objectively to see what their purpose or main purpose is. By purpose is meant their aim objectively ascertained and not the particular landlords’ intention or motive. Were it otherwise, identical factual situations could result in different, and inconsistent, applications of the Act according to the mental processes, maybe flawed, of the individual, perhaps eccentric, landowner.”*
- *“If an objective approach is taken, the honesty, “bona fide” or, perhaps more accurately, the credibility of the landowner in relation to his stated motive cease to be material in the solution to the question; even if the expression of that motive may set the parameters for the court’s objective determination by defining the alternative purpose to the prevention or deterrence of access.”*

Manson v Midlothian Council [2018] SC 50

- Path leading to Penicuik Estate
- Barrier raised to prevent access
- Accusations of antisocial behaviour
- *Anstalt* decided in the middle of the case
- What was the “purpose or main purpose”?



“Purpose or Main Purpose” in Manson

- *“In my view, on the basis of what I have set out so far, when looking at the pursuers’ acts, it is plain that the purpose, or at least the main purpose, of putting up the fence/gate (and associated signs) was to prevent or deter persons from exercising their rights of access under section 1 of the Act. Whatever motive, intention and/or reasons may have been proffered by the pursuers (and Mrs Manson in particular) for doing so, and even if they had been genuinely held, the fence/gate was put up and locked for the purpose of preventing or deterring access to and from the Penicuik Estate by the public, that being land on which they have a right to be on or to cross.”*
- *“In my view, that was an entirely reasonable assumption in the circumstances in the absence of any alternative explanation. There was also no evidence that the pursuers had made any attempt to facilitate access by responsible access-takers.”*
- *“I think it more likely than not that the proportion of those taking access irresponsibly was at a low level. In my opinion, the presence of irresponsible access takers at a low level cannot objectively be a reason for preventing all members of the public from taking access.”*

Implications for Access Authorities

- Less restrictive approach than *Tuley*
- Cannot rely on subjective viewpoint – judged by landowner's actions
- Can still prevent antisocial access takers
- Cheaper to defend section 14 cases

Continued Obstacles to Access Takers

- Access must still be responsible
- Higher levels of antisocial behaviour may allow landowners to prevent access
- Battleground over land excluded by section 6
 - *Gloag, Snowie, Creelman, Manson*

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