

KINFAUNS JUDGEMENT

STATEMENT BY ALISON MITCHELL, CONVENER, RAMBLERS' ASSOCIATION SCOTLAND

4 JULY 2007

1. “We remain disappointed by the judgement of the sheriff, Michael Fletcher, in the Kinfauns case. We believe it is incompatible with the provisions of the land reform legislation and does not reflect the intentions of the Scottish Parliament when it passed this legislation. We are advised that a case could be made to challenge this judgement in a higher court.
2. Nevertheless, following discussion by the Ramblers' Scottish Executive Committee, we have concluded that the best way forward is not to appeal the judgement but to bring issues raised by the Kinfauns case to the attention of the Scottish Parliament and others. To prolong the Kinfauns dispute through appeals, perhaps eventually leading to the House of Lords or European Court of Human Rights, would take several years. We think that, from the point of view of protecting access rights across Scotland as a whole, it is better to raise the relevant issues now, both from the Kinfauns case and other recent disputes, with the Parliament and others. Early action can then be taken to prevent any further undermining of the application of the land reform legislation to Scotland's land and water.
3. Of greatest concern in the Kinfauns judgement is the relatively limited significance which the Sheriff appears to have attached to the role of the Scottish Outdoor Access Code, despite the Code being approved by the Scottish Parliament and section 1.4 of the Code stating that “the Code may be said to have evidential status” where “ a dispute cannot be resolved and is referred to the Sheriff for determination”.
4. In our view the Code is of critical importance in the interpretation of privacy issues in relation to large houses in the countryside. The Sheriff accepted that the 11 acres that Mrs Gloag sought declarator over contained both garden ground, including extensive lawns, and approximately 4 acres of woodland, much of which he recognised as being remote and out of sight of the house. The Ramblers and Perth and Kinross Council agreed with Mrs Gloag that statutory access rights did not apply to the garden ground. Both the Council and ourselves were agreed that statutory access rights applied to the woodland area, based on section 3.16 of the Code. This refers to large houses surrounded by quite large areas of land usually referred to as the “policies” of the house and states that “the wider less intensively managed parts of the policies, such as grassland and woodlands,

whether enclosed or not, would not be classed as a garden and so access rights can be exercised". Elsewhere section 3.16 indicates that access rights do not apply to the lawns, flowerbeds etc which are intensively managed for the domestic enjoyment of the house. We regret that the Sheriff did not appear to make this distinction between the garden and woodland ground at Kinfauns when reaching his judgement.

5. This judgement from Perth Sheriff court is not binding on other courts so, if the Kinfauns case is concluded at this stage, no precedent is set for cases involving other courts where landowners seek declarators. Nevertheless the Kinfauns judgement may encourage other landowners to enclose large tracts of woodland behind high fences, claiming such areas are needed for their privacy needs. This possibility needs to be addressed by the Scottish Parliament and others.
6. The Kinfauns case points to a need for Sheriffs to have a better understanding of the relationship between the Land Reform (Scotland) Act 2003 and the Scottish Outdoor Access Code, which is an integral part of the legislation, as defined by section 10 of the Act. The land reform legislation is innovative, based as it is on the type of access arrangements usually found within other European countries, notably the Scandinavian countries, rather than in the rest of the UK. In this respect the Land Reform (Scotland) Act is different from the traditional legislative structures which legal professionals and Sheriffs are more used to dealing with. There is a need for a clearer understanding of the importance of the Code in helping both landowners and access takers manage their responsibilities.
7. To put the matter beyond doubt, however, there may be a need to modify section 10 of the Act to make it clear that the Code has the role of explaining not only the principles of responsible behaviour under the land reform legislation but also in helping to define the areas of land and water to which access rights do or do not apply.
8. We regret that Mrs Gloag did not choose to resolve this dispute through negotiation, including use of the Local Access Forum, as recommended in the Scottish Outdoor Access Code. We have always maintained that the needs of her family and the wider public interest could have been met satisfactorily at Kinfauns without moving the security fence and by appropriate application of the full range of powers contained within the land reform legislation, including section 11 (exemption orders) and section 12 (byelaws), as well as the application of the Code provisions (section 10), as necessary.
9. We also regret that Mrs Gloag erected the mile long security fence without first obtaining the necessary planning approval. The process by which she obtained retrospective planning approval was unusual, notably in the way in which approval was granted before the end of the consultation period and without the Council adequately taking into account the representations made to them about the planning application. We have noted the very critical remarks made by

Historic Scotland when they finally learnt of this retrospective approval and we hope that Perth and Kinross Council and other local authorities will take due note of the need to avoid such mistakes in the future.

10. Neither do we understand how the development control section of Perth and Kinross Council could have considered it sensible to grant this planning approval without reference to elected members and knowing that their own access officials were making it clear that access rights applied inside the fence. The Council's decision to give retrospective approval for this fence, while at the same time providing no arrangement whereby the statutory access rights could be exercised within the fence, provided the starting point for this conflict. Local Authorities in future must not grant planning permission without first ensuring that such permission is compatible with the land reform legislation.
11. In drawing a line under the Kinfauns case we are also conscious of the desire of Mrs Gloag to construct a swimming pool complex in the grounds of Kinfauns and understand that progress with this development is held up until the court action is resolved. We recognise that such delay is undesirable.
12. We have noted some critical remarks made by the Sheriff as regards the actions of the Director of Ramblers' Association Scotland, Dave Morris, during a visit to Kinfauns in January 2006, nearly six months before Mrs Gloag launched her court action for a declarator. We wholly reject this criticism which does not reflect in any way the evidence given in court by Mr Morris, his cross examination or any comments made or questions asked by the sheriff. Our understanding of the situation that day is that the police officers who were called to investigate the Ramblers' visit to Kinfauns were perfectly satisfied with the explanation given by Mr Morris and raised no objection to the walk continuing through the Kinfauns grounds.
13. We welcome the excellent financial support provided by RA members in Scotland who responded to our appeal for funds to engage in the Kinfauns court action. If additional, unexpected costs arise as a result of this case the Ramblers may wish to consider a much wider appeal for funds, extending to the public as a whole.
14. In conclusion we regard the Kinfauns case as having provided an excellent opportunity to examine the effectiveness of the land reform legislation. The case has led to the loss of access rights over just 4 acres of woodland near Perth. On the other hand this court case, along with others recently concluded or in progress, is almost certain to bring about improvements to the land reform legislation or better understanding of how it is supposed to be applied. We are very pleased at the public and political reaction to the Kinfauns decision and are confident that the Scottish Parliament and Scottish Executive will act sooner rather than later to ensure that the loss of access rights at Kinfauns will not extend to similar situations elsewhere in Scotland.

15. The Land Reform (Scotland) Act 2003 remains a superb achievement of the first Scottish Parliament. We will continue to work with land managers, local authorities and other interests to ensure that it provides the people of Scotland with world class opportunities to enjoy our magnificent countryside.”
