SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT STIRLING

JUDGMENT

by

SHERIFF A M CUBIE

in the cause

EUAN AND CLAIRE SNOWIE

Pursuers;

against

STIRLING COUNCIL and THE RAMBLERS ASSOCIATION

Defenders:

_____

Stirling 23rd April 2008

The Sheriff having resumed consideration of the cause finds the following facts admitted or proved:-

1. The Pursuers in this application are *Euan Fenwick Snowie* and *Claire Snowie*, Spouses, residing at Boquhan House, Kippen, Stirlingshire, FK8 3HY.

2. The Snowies are the heritable proprietors of the property at Boquhan Estate ("the estate") which is registered in the Land Register under title number STG 37564, first registered on the 17th September 2001. They

are also proprietors of Boquhan Mains, an estate on the north side of the A811.

3. The First Defenders are the Local Authority for the area in which the estate is situated and are the relevant local authority in terms of the Land Reform (Scotland) Act 2003. The second defenders are the Ramblers' Assocaition. This Court has jurisdiction.

4. The Snowies are married and have two school age children.

5. The estate has considerable grounds extending to 70 acres or thereby

6. The estate is bounded to the south by the public footpath between Kippen and Gargunnock, to the north by the A811 Drymen to Stirling road, to the west by the B822 Kippen Station to Kippen road and to the east by farmland. The property has at the north, west and east sides, fields belonging to Boquhan home Farm; these fields contain a pedigree milking herd of cattle which are milked twice a day and in respect of which access is required to and from Boquhan Farm over parts of both driveways through the estate.

7. The estate includes *inter alia* 7 dwelling-houses including Boquhan House owned by the Snowies ("the house") and West lodge ("the lodge") owned by the Rosses, each dwelling-house, apart from Boquhan House, has a well defined garden area. In addition, the property contains a tennis court, riding stables, and a separate equestrian riding area, 2 managed driveways and a mixture of garden ground pasture and woodland.

8. The house is shielded from the main A811 and B822 roads by virtue of trees. Access to the estate is provided by two sets of identical gates one at the East lodge, reached from the A811 and the other at the West lodge, off the B822. Each set of gates consists of a main double gate, wide enough for vehicular access framed on each side by a smaller and narrower pedestrian gate. The gates are metal set in a stone frame.

9. These gates were initially manually operated but during the course of 2003 were mechanised by the Snowies so that the main vehicular gates are operated electronically and remotely. At or about that time the pedestrian gates at the West lodge were locked

10. The Snowies were the key holders. In or around August 2006 the Snowies and the Rosses entered into a lease whereby responsibility for the gates at the west lodge was vested in the Rosses. There was no apparent reason, either in relation to security or insurance that explained the lease arrangement

11. There have been regular and frequent access takers during a period of years whether using the grounds as a shortcut to the right of way from Kippen to Gargunnock, for walking dogs, walking for pleasure or cycling. Such access has been taken before and after the Snowies purchased the estate. In addition there have been access taken by youngsters who used a part of the estate as a place to drink, by courting couples and by people driving vehicles.

12. The locking of the pedestrian west gate prevented such access including legitimate pedestrian access. The locking of the west gate did not render the premises secure. Access could be taken through the hedge on the fields to the west of the west gate and entering through the Ross' back garden or at any break in the fence. The estate can also be accessed through Boquhan Home Farm or through the east gate.

13. The first defenders received complaints from prospective access takers about the locking of the west gate and the consequent prevention of access. There was then sundry correspondence and meetings involving the first defenders, the Snowies and the Rosses. The attempts to resolve matter by agreement were fruitless; the first defenders insisted that the west gate pedestrian access was re-instated. The Snowies and the Rosses declined to open the gate.

14. The gate remained locked and then from some period in or around late 2005 jammed, although the Snowies and the Rosses would not have allowed access even if the gate was capable of being opened. The lock was only

removed because the gate was otherwise unusable. Access could not be gained other than with knowledge and agreement of the Snowies or other residents. As a result of that impasse, the first Defenders issued the Snowies with a written notice alleging a contravention of Section 23 of the Act on *8 March 2006.* The Rosses were served with a separate but related notice in relation to the locked gate after the existence of the lease was disclosed.

15. It is not necessary that the west gates be locked to enable the Snowies to have reasonable measures of privacy nor to ensure that their enjoyment is not unreasonably disturbed. It is not necessary that the gate be locked for insurance purposes. It is not necessary that the gate be locked for security purposes.

16. The plan which the Snowies have submitted to show the land "necessary" for the "security" includes all the garden ground to the south of Boquhan House including the stables, the riding paddock It also includes both driveways from the gate. The Snowies have concerns about the safety issues arising from the game shooting which takes place and the occasional helicopter landings. The Pursuer has adequate security measures in relation to these fears in-so-far as they can be countered and can by judicious signage on a temporary basis warn any access takers of such events.

17. The estate is subject to access by the Snowies, the Rosses, the other tenants, their respective families friends and other visitors, the owners of horses stabled, the users of the riding area, the farm workers in respect of the access rights to allow the cattle to be milked and pastured on a daily basis; in addition the public have unfettered access to all the boundaries of the estate

Accordingly, the Pursuers being in contravention of the Section 14(1) of the 2003 Act and the Defenders' notice being both necessary and reasonable, *(1)*

DISMISSES Crave One of the Application; *(2) DISMISSES* Crave 2 of the Application; *(3) FINDS AND DECLARES* that the land at Boquhan House, Kippen, Stirlingshire, all as shown hatched in black in the plan attached hereto, comprises in relation to that house sufficient adjacent land over and upon which access rights under the Land Reform (Scotland) Act 2003 may not be exercised so as to enable persons living in the house to have reasonable measures of privacy in the house and to ensure that their enjoyment of the house is not unreasonably disturbed.

APPOINTS a hearing on the 13th day of May 2008 at 10.00am to determine the precise terms of the order to be granted and to deal with all questions of expenses

NOTE:

[1] The pursuers were represented by Mr John Campbell, Q.C., and Stirling Council by Mr Andrew Smith, Q.C., and the Ramblers Association by Miss Frances McCartney, Solicitor. There are two related applications; all parties agreed that the evidence in this case should be treated as the evidence in the other application. I was greatly helped by the focused way in which the matter was conducted and by the provision of a joint minute and written submission. I was also considerably assisted by the site visit and the provision by way of productions of a number of plans and diagrams which made for a proper understanding of the locus. Parties were agreed at the hearing of submissions on 5 November 2007 that the most intelligible way of issuing a decision in this case was for a map to be marked to show the extent of ground in respect of which the pursuers are entitled to privacy. Throughout the judgement reference to access is to pedestrian access unless otherwise specified.

[2] It is fair to say that much of the evidence was not in dispute in that factual assertion was not challenged, although the conclusions to be drawn

from them, or the inferences to be drawn, were the subject of challenge. The one exception is Mr Joseph Holden, whose evidence I will return to in due course.

[3] The pursuer had a perfectly genuine and intelligible wish for privacy for himself and his family. He also includes his tenants in that, again a matter to which I will return. The house itself is bounded to the north by the main A811, being the main road between Stirling and Dunbartonshire, and to the south by the public right of way between Gargunnock and Kippen. Similarly the property of Boquhan estate is surrounded by and infiltrated by land belonging to Boquhan Home Farm, whereby to the north-west of the estate there is a field owned by the Boquhan Home Farm which is used as pasture everyday, but there are also rights of access from the Boquhan Home Farm in relation to the movement of cattle.

[4] The house is accessible on an anticipated basis by gates at both the west lodge, which leads on to the main B822 and the east lodge, which is on the main A811 as well as by way of a gate to the southern end of the private garden just at the Boquhan burn.

[5] The property is however generally accessible via Boquhan Home Farm and through almost any part of the perimeter, for example at the rear of the Rosses' property.

[6] It became clear, even from the evidence of the pursuer, that there was a core of regular, indeed frequent, access taken by genuine recreational walkers, including dog walkers.

The evidence

[7] Euan Snowie gave evidence first, after there had been a site visit. He said that the estate had been purchased in 2001; The estate had seven

properties, stables a tennis court and extensive managed driveways and garden.

[8] Mr Snowie gave evidence about his wish for privacy and for security for himself, his family and for his tenants, and for his land and horses as well as the cattle which crossed the property, and indeed the prospective walkers endangered by cattle. He was concerned about both property and personal crime.

[9] I accepted that the pursuer's concerns were genuine but his wish to restrict access so informed his evidence as to render some of it unhelpful in the determination of this matter. It seemed to me his evidence was genuinely given, but he was at pains not to say anything which might support any view of Land Reform (Scotland) Act 2003 other than his own. He regarded anybody moving around the estate as "suspicious" (see page 1/19 C of the shorthand notes and following). Mr Snowie described an incident where he met a couple with a torch and baton, which he regarded as suspicious and threatening. It was clear that the person had a stick, perhaps even a walking stick. The use of the term baton in the context of the visit was, in my view, pejorative and designed to be.

[10] He prided himself in being able to tell whether someone was a genuine walker or someone up to mischief (page 1/24 E), although this position was undermined by his assertion that he had never seen any genuine walkers.

[11] He appeared to brush over the correspondence which had taken place as if the notice from Stirling Council to open the gate had come out of the blue.

[12] The evidence about the lease of the West gates between the Snowies and the Rosses was particularly unconvincing. I am left, having heard from Mr Snowie and Dr Ross, with absolutely no idea why that lease was entered

into, what the consequences of it were and what the purpose of it was. It may well be that there is a perfectly intelligible and sensible explanation for the ceding of responsibility for opening and shutting the gate by the householder, an estate owner, to someone who inhabits a house on the estate, but if it was not satisfactorily canvassed in the evidence before me. A cynical view might be that it was a way to try and avoid the notice served by Stirling Council in relation to the gate, a matter of course cured by the convening of the Ross's as parties in another action.

[14] Similarly, Mr Snowie's evidence about the requirements of his insurers was confusing and certainly did not match the pleading whereby the locking of the gate was said to be a condition of the household insurance. He had to accept that the insurers had not been told of the lease arrangement

[15] I was not impressed by his explanation for obtaining a report from Kildonan Consultants; where there might have been concerns, I am satisfied that the only reason for their employment at the time they were instructed was because of this case, a matter fortified by my assessment of Mr Holden's evidence.

[16] At page 1/44 C Mr Snowie gives an account of those whom he would allow into the land and over what area of land, being those that he describes as "*bone fide* walkers". Mr Snowie had at an earlier stage offered to allow access to named persons, both of which positions seem to misapprehend the purpose of the Act.

[17] Item 24 of the defenders' production was a letter sent by Mr Snowie on behalf of both himself and the Rosses to the Council, which letter included the phrase *inter alia* "incidentally, it has never been the subject of public access" but he admitted under cross-examination that he had seen people walking (page 1/96 F and in particular 1/97 B); his reply on being asked why he said

in the letter that it had never been the subject of public access was as follows:

> "Because I didn't see it as a right of way when I bought the property. I didn't see it as right of way, I always acknowledge that the right of way was along the top and didn't understand where people were trying to get to from access, they are really just coming up past homes."

The position in this letter was of course maintained to Mr Holden and informed the Kildonan report. Mr Snowie dissembled, when being asked straightforward questions on this point; I considered that he just could not bring himself to say that he had encountered genuine recreational walkers and he did not want, in particular, to admit that he had misled Kildonan.

[18] Similarly, the evidence about horse disease (strangles) being potentially introduced to his horses by casual visitors was undermined in my view by the number of people on the site visit that walked round and through Boquhan Estate without any concern being given to the apparent biohazard caused by people entering the stables area. I heard no expert veterinary evidence about that supposed risk.

[19] It was only later at the first day of the proof that it became clear that Mr Snowie's evidence was that the gate was not at that time locked but was simply jammed.

[20] It was plain that he had encountered a number of walkers at least some of whom were genuine recreational walkers between 2001 and 2003 when the gates were locked. The report from Kildonan was predicated on Mr Snowie's instruction, but also was bolstered by the history of thefts and housebreakings which were not borne out by the evidence from either Mr Snowie or Dr Ross, or indeed any other witness.

[21] Mr Snowie's position appeared to be that if someone was not courteous to him then they could not under any circumstance be a genuine recreational walker. His assessment of his "right" to exclude people seems to be crystallised at page 2/427 A and following where everything is private because he says that it is private

[22] The point is made in submissions that Mr Snowie was wholly unreliable. I think he was just anxious to assert his position. I did not consider there was anything sinister about his attitude although, of course, a reluctance to answer straightforward questions can give rise to doubts about reliability. I thought in general his evidence was characterised by an almost instinctive reluctance to accept that any access taker could be genuine, or indeed to say anything that might not wholly suit his case.

[23] Mr Snowie asserted that the privacy he was seeking was not only for himself but for the Rosses and all the other tenant occupants of property within the Boquhan Estate. When Miss McCartney pointed out in cross-examination that the access that he proposed to give including unrestricted access over the property he owned on the north-side of the A811, his answer was disingenuous and to an extent evasive. If he is truly concerned about the privacy of his tenants, the concern seems to stop at the A811.

[24] Mr Snowie's evidence has therefore to be seen in the context of someone who is determined to say nothing that might undermine his own definition of privacy; he repeatedly asserted that the house was bought as a private retreat and that the extent to which there should be privacy was a matter to be determined by him

Dr Barbara Ross

[25] Dr Ross is the wife of Professor Lindsay Ross and the second pursuer in the related action. She gave evidence of having stayed in the west lodge for 26 years; they had suffered one break-in in 1983 or 1984, the theft of a car and various more minor thefts from the garden area; the house sits just inside the west gate; the Rosses own ground on each side of the driveway; their garden is well defined. The house can be reached by a gate through the adjacent field to the south on the B822. She confirmed that they had preferred the security offered by the locked and mechanised gates. Her evidence was also vague about the effect and benefit of the lease of the locked gates. She also conflated the vehicular and pedestrian access issues. She said that they had been bothered over the years by passers by and she felt both her security and privacy were enhanced by the restriction of access. It was plain that they valued their privacy. It was equally plain that there had been very limited incidents indeed whereby security was compromised. She accepted that their garden ground was well defined and she also accepted that access could be obtained through the field at the back of her house. Nonetheless, for her and her husband it was a matter of importance for their personal security that they retained control over the west lodge gates. She confirmed (page 2/171 D-F) that there had been a number of walkers.

Joseph Holden

[26] The third witness was Joseph Holden, the author of the Kildonan report. Mr Holden had had a distinguished career with Central Scotland Police and retired at the rank of Chief Superintendent but amongst his particular responsibility was as Senior Tactical Commander in Operation and Contingency Planning for the G8 Summit when it was held at Gleneagles in 2005. However distinguished that aspect of his career was, he was very inexperienced in relation to the security services provided by Kildonan.

[27] The evidence which he gave purported to be by way of an independent assessment of the risk to Mr Snowie presented to the court as an objective aid. I am afraid that it did not impress me as such. It was clear that some of the bases upon which the report was prepared were factually incorrect. He had also been told by Mr Snowie that there had been no genuine recreational walkers in the estate since the Snowies had moved in, a matter which Mr Snowie accepted was not true; this was plainly not Mr Holden's responsibility.

[28] However, I was not impressed by the recording of the incident which Mr Snowie had reported, whereby he came across a couple described in the report as having a torch and a "baton". Mr Snowie's evidence was that the baton was more of a walking stick; Mr Holden's evidence, that the word "baton" was neutral rather than indicative of a weapon, was as incredible as it was surprising from a former police officer.

[29] The terms of the report were driven by Mr Snowie's wish for privacy, rather than the wish for privacy being driven by a genuinely objective report on appropriate

[30] The information contained in the report seemed to have been entirely based upon what he had been told by the pursuer, with the exception of the crime statistics upon which he relied to which I will return. For example, he did not make enquiries about the disease "strangles", but took Mr Snowie's report of what the vet had said; he made no real enquiry but made observations in the report about the danger presented by this disease.

[31] The report did make a number of sensible and useful recommendations as security precautions, although little that would have not occurred to the layman; however, in relation to the value of the rest of the report I felt that Mr Holden did no more than maintain a patina of objectivity; he did not make

a good impression. There were a number of reasons for reaching that conclusion.

[32] In the first place he was inexperienced in this particular role. This was the first time he had given evidence in this capacity and was in relation to his first report.

[33] Secondly, he relied on statistics which were out of date and sought to extrapolate misinformation from them; he relied on the Crime report of 2000, when there was one from at least 2005/2006. His report invited the reader to multiply recorded crime by three to obtain real crime figure, a suggestion he had to (rightly in my view) depart from when it was pointed out to him; when confronted by up to date figure he sought refuge in evidence of a conversation with the chief constable at a social event as to the "real" statistics. Additionally, he appeared to equiperate a low detection rate with a high crime rate, at one stage seeming to suggest that groups of criminals scoured the crime statistics to determine the lowest detection rates.

[34] Thirdly he had jumped to conclusions about the drunkenness of the access takers spoken to by Mr Snowie and in relation to the frequency of such incidents. He also as I have recorded had used the word "baton" in evidence and in his report in circumstances when it can only have been to characterise it as a weapon; his attempts to suggest baton was a neutral word was disingenuous. He sought to portray all access takers as not genuine.

[35] Fourthly, he thought that someone climbing into a field or across a wall through a hedge in the countryside would be sufficiently noteworthy to cause anyone viewing it to alert the police (3/11 C). I preferred the account of Mr Morris (at 4/155D) whereby he gave evidence that it was accepted by the government that it was a "perfectly normal part of the exercising of statutory access rights."

[36] Finally he did not think to record in his report that a right of way crossed the east drive way. In circumstances where he had chosen to record the miniscule and peripheral risk caused by the storage of fertiliser (saying "It would be a wonder if I had not included it in a security audit" at 3/69 C), I found it extraordinary that he omitted this reference to a right of way. Either he did not appreciate its importance, or he did and deliberately omitted it as it did not sit well with the thrust of the report. Either explanation undermines materially the usefulness of the report.

[37] When he was being cross examined, perfectly properly and fairly, about this omission he dissembled before trying to suggest that the defender's counsel was "sniggering and shaking his head" (At 3/71 F) , a comment both unwarranted and unworthy. At the very least Mr Holden showed a sensitivity which would not accord with his years' experience in the police force. At most, he was involved in a strategy which tried to avoid answering questions which he felt might be unhelpful to the pursuer.

[38] I considered whether all of these criticisms could be explained by his lack of experience, but the impression of favouring the Snowies is fortified by the fact that each of his acts and omissions had the effect of bolstering the Snowies' position. If these were a catalogue of naïve and careless errors made by an inexperienced security consultant, one might expect that some resulted in a worsening of the Snowies' position but, from mis-remembering the date of the burglary suffered by the Rosses to the anecdotal evidence of the chief constable's "true" crime figures, to the omission of the right of way (but inclusion of the fertiliser risk and the risk of strangles being introduced), the whole of his evidence was given in a way that demonstrated a commitment to giving evidence entirely favourable to the pursuers, whatever the factual position. I find the evidence of the perceived security threat to be wholly unreliable.

[39] I dwell on Mr Holden's' evidence for two reasons; in the first place it is clear from the *Gloag* judgement (Ann Gloag –v- Perth and Kinross Council, Sheriff Michael Fletcher at Perth 12th June 2007) that the independent security evidence was material in relation to the ultimate decision in so far as it related to the property, the type of person likely to own such a property and the risks to security and privacy which such persons might face; in the second place Mr Holden was, on one view, the only wholly independent witness from whom the court heard. (Mr Morris, whilst having no direct connection with this case can hardly be described as disinterested.) However he failed to approach the matter with the objectivity which the court is entitled to expect from a purportedly independent expert.

[40] The report was clearly prepared with view to the litigation, and Mr Holden was determined that both the report and he would be entirely supportive of Mr Snowie.

Mr Robert Wheelan

[41] Mr Wheelan had been a tenant in 1 Garden cottage for a period of 30 years. He gave evidence that he had his own well defined garden but that he had found the position better since the gates had been locked

Mr Robert Graham

[42] Mr Graham was an impressive and interesting witness, but ultimately of limited relevance (and that is no reflection on the witness). The useful evidence related to the coming and going of his cattle over and through the estate, the fact that an open pedestrian gate would not be likely to lead to escaping cattle, the dangers in dealing with a Limousin cow in calf or with a calf at foot.

Mr Don Robertson

[43] Mr Robertson was the tenant of East lodge and had been for four years. He also spoke about the traffic through the estate

Mr Richard Barron

[44] Richard Barron gave evidence for the first defenders. He is employed by the first defenders as a senior access officer and had responsibility for the Land reform access anticipated by the Act. It was clear that the council's interest was provoked by a number of complaints. A lot of the evidence seemed to stray into his interpretation of the Act and the access code. It was clear that there was little thought given to the act in the period between contact first being made and the action being raised; effectively Mr Barron accepted that no real thought had been give to the area which would give reasonable enjoyment; however in my view that does not vitiate matters; the court has a responsibility to proceed on the basis of the evidence led and submissions made. The views of the council are of limited relevance at the time of the hearing.

Mrs Quita Lewis

[45] Mrs Lewis gave evidence of having been visiting on the estate for a period of thirty years both on foot and on bicycle. She described herself as both a regular and a frequent visitor over that period until the gates were locked, frustrating such visits. She had not though to contact the pursuers directly to resolve matters.

Mrs Marion McGloin

[46] Mrs McGloin was Mrs Lewis's sister in law and lived in the home farm cottages. She also spoke of frequent and regular walks over the estate, which

eventually came to end when the gate was locked. She had had to climb out of the estate at the west gate on one occasion. She had not contacted the Snowies directly.

Mr David Morris

[47] Mr Morris gave evidence for the second defenders. He is the Director of the Ramblers' Association in Scotland and has been since 1989. He campaigns for greater access to the countryside. He gave evidence in general terms about the background to the Act, the access code and in relation to the kind of access which was allowed at the Balmoral estate. Whilst general, the evidence was helpful for example to contrast with that of Mr Holden in connection with the climbing of fences as a normal feature of access-taking.

The law

[48] I adopt verbatim the analysis of the law contained in Sheriff Fletcher's judgement in *Gloag* at paragraph [24] and following … as follows

> The Legislation.
>
> [24] Section 1 of the Land Reform (Scotland) Act 2003 provides:
>
> "1. Access rights
>
> (1) Everyone has the statutory rights established by this Part of this Act.
>
> (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.

(3) The right set out in subsection (2) (a) above may be exercised only --

(a) for recreational purposes;

(b) for the purposes of carrying on a relevant educational activity; or

(c) for the purpose of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.

(4) The reference --

(a) in subsection (2) (a) above to being on land for any of the purposes set out in subsection (3) above is a reference to --

(i) going into, passing over and remaining on it for any of those purposes and then leaving it; or

(ii) any combination of those;

...

(7) The land in respect of which access rights are exercisable is all land except that specified in or under section 6 below."

[25] Access rights granted by the Act are available only if they are exercised responsibly in terms of section 2 of the Act. A person is to be presumed to be exercising access rights responsibly if they are exercised so as not to cause unreasonable interference with any of the rights (whether access rights, rights associated with the ownership of land or any others) of any other person but the person would not be exercising access rights responsibly if he engaged in conduct excluded by section 9 of the Act including crossing land in breach of interdict, being on land for

a criminal purpose or for hunting shooting of fishing. Similarly disregarding the guidance on responsible conduct set out in the Access Code incumbent on persons exercising access rights would not be exercising access rights responsibly.

[26] Section 6 of the Act sets out land over which access rights are not exercisable. It provides as follows:

6. Land over which access rights not exercisable

(1) The land in respect of which access rights are not exercisable is land --

(a) to the extent that there is on it --

(i) a building or other structure or works, plant or fixed machinery;

(ii) a caravan, tent or other place affording a person privacy or shelter;

(b) which --

(i) forms the curtilage of a building which is not a house or of a group of buildings none of which is a house;

(ii) forms a compound or other enclosure containing any such structure, works, plant or fixed machinery as is referred to in paragraph (a)(i) above;

(iii) consists of land contiguous to and used for the purposes of a school; or

(iv) comprises, in relation to a house or any of the places mentioned in paragraph (a)(ii) above, 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 is not unreasonably disturbed;

(c) to which, not being land within paragraph (b)(iv) above, two or more persons have rights in common and which is used by those persons as a private garden;

..."

[27] Section 7(5) of the Act provides that

"(5) There are included among the factors which go to determine what extent of land is sufficient for the purposes mentioned in section 6(1)(b)(vi) above, the location and other characteristics of the house or other place.

[28] Section 10 of the Act provides for the drawing up of a "Scottish Outdoor Access Code" as follows:

10. The Scottish Outdoor Access Code

(1) It is the duty of Scottish Natural Heritage to draw up and issue a Code, to be known as the Scottish Outdoor Access Code, setting out, in relation to access rights, guidance as to the circumstances in which --

(a) those exercising these rights are to be regarded as doing so in a way which is or is not responsible;

(b) persons are to be regarded as carrying on activities, otherwise than in the course of exercising access rights, in a way which is likely to affect the exercise of these rights by other persons;

(c) owners of land in respect of which these rights are exercisable are to be regarded as using and managing, or otherwise conducting the ownership of it, in a way which is or is not responsible;

(d) owners of land in respect of which these rights are not exercisable are to be regarded as using and managing, or

otherwise conducting the ownership of it, in a way which is likely to affect the exercise of these rights on land which is contiguous to that land."

[29] In summary the Act allows responsible access to all land other than specified types of land which are excluded in the Act. These types include all buildings and certain land immediately surrounding buildings including the curtilage of a building which is not a house and importantly in this case, land which comprises, in relation to a house 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 is not unreasonably disturbed.

[30] Section 28 of the Act makes it competent for the sheriff to declare areas of land to be land in respect of which access rights are or are not exercisable. It is in the following terms so far as is relevant to this case:

"28. Judicial determination of existence and extent of access rights and rights of way.

(1) It is competent, on summary application made to the sheriff, for the sheriff --

(a) to declare that the land specified in the application is or, as the case may be, is not land in respect of which access rights are exercisable;

(b) to declare --

(i) whether a person who has exercised or purported to exercise access rights has exercised those rights responsibly for the purposes of section 2 above;

(ii) whether the owner of land in respect of which access rights are exercisable is using, managing or conducting the ownership of the

land in a way which is, for the purposes of section 3 above, responsible.

..."

[31 In this case the pursuer applies to the court for a declarator that land specified in the application is not land in respect of which access rights are exercisable. She founds on the exception contained in section 6(1)(b)(iv) and the question in the case becomes how much ground could be said to be 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 is not unreasonably disturbed. The Act itself gives very little assistance to those making a decision as to how much land falls within that definition. The only reference to any factors which should be taken into consideration that I can find is contained in section 7(5) of the Act which enacts that the factors which go to determine what extent of land is sufficient for the purposes mentioned in that subsection include the location and other characteristics of the house or other place. I interpret that as meaning that one should take into account the location and other characteristics of the house when deciding what area of ground is sufficient for the purposes of the subsection."

I accept and adopt the helpful analysis of the law from that case which relates to the same issue.

[49] This matter proceeded by way of written submission. No party wished to add anything to the written submission

[50] One relatively minor point arises; Counsel for Stirling Council made detailed Submissions about the meaning of curtilage. In the circumstances I prefer the Submission on behalf of the Pursuers that the question of curtilage is only relevant in relation to a building "which is not a house" in terms of

Section 6(1)(b)(i); although it is not necessary for me in the determination of this matter to define curtilage, it would I think be difficult to conclude that for example the driveway has formed part of the curtilage of the house.

[51] The real crux of the matter is the test to be applied when assessing what is "reasonable" in the context of a decision about measures of privacy and enjoyment in terms of s 6(1)(b)(iv) of the Act. In the written Submission for the pursuer (Paragraph 33) it is asserted;

> "reasonable privacy is not an objective standard".

The Submission equiperates flexibility with the introduction of a measure of subjective judgement. The Submission continues;

> "since there is no definition of "reasonable privacy" or "enjoyment of that house" or "unreasonable disturbance", a decision maker must exercise that judgement in the circumstances".

The Submission continues;

> "reasonable privacy is a standard to be measured … by the standards of the persons affected in the house in which the privacy is sought …" That is the proper "person specific" and "location specific" standard according to the words of the Act, and is how it should be applied here."

[52] I cannot agree with that Submission. It seems to me that the Court is obliged, in interpreting this part of Section 6, to determine what a reasonable person living in a property of the type under consideration would require to have to enjoy reasonable measures of privacy and to ensure enjoyment of the house was not unreasonably disturbed. That is an objective test.

. [53] At Paragraph [45] of the judgement in *Gloag* Sheriff Fletcher said

> "[Section 6] … makes reference to sufficient adjacent land to enable "persons living there" rather than "the person living there" which implies to me that the legislators had in mind not that the Courts would take

into account the individual proprietor for the time being but would have in mind generally the persons living there."

[54] I agree with that observation. In my opinion, if the test were subjective, that would lead to the possibility of repeated applications being made depending on the particular views, concerns, family circumstances and even prejudices of any particular proprietor, which cannot be the purpose of the Act. I regard the test as an objective one, which factors in the particular characteristics of the property.

[55] In this case the only relevant provision is Section 6(1)(b)(iv). The factors in determining the extent of land is sufficient include the location and other characteristics of the house.

[56] Again I agree with Sheriff Fletcher in that anyone contemplating the purchase of a house such as Kinfauns Castle or in this case Boquhan House would not consider doing so if the house itself and its grounds (and by that I mean a material area around the house) were not able to be used by them privately. The reasonable person would consider that reasonable measures of privacy for that house and sufficient adjacent land secure their enjoyment of the house was not unreasonably disturbed would require a reasonably substantial area of ground. The purpose of excluding the ground from the rights of access contained in the Act would not be to secure the enjoyment of the "policies" for the occupants of the house, but to secure the enjoyment of the house itself.

[57] Taking that into account, I consider that the land sought to be excluded on behalf of the Pursuers is far too much. It is plain that the driveways do not require to be secure for any privacy. The estate is in effect surrounded by dairy farm pasture which is used on a daily basis with the consequent movement of cattle. The estate can be entered through the farm. Accordingly the estate's security is to an extent compromised. When I also

consider the public right of way and the two public roads which are adjacent to the estate together with the number of tenants, and the access taken in relation to the stables it is clear that the security of the estate would not be compromised by the opening of a pedestrian gate at the West lodge.

[58] In determining the area in terms of the Act, it is reasonable for the persons such as the pursuers to have an area of ground around the house which can truly be regarded as private, and that should include ground on each side of the Boquhan burn and the tennis court and changing area as well as some of the managed gardens, extending to near the riding area. My sympathy with the Mr Snowie's position in relation to maintaining the integrity of the estate by allowing no access at all is tempered by the fact that his purported concern for his tenant did not extend to those across the A811

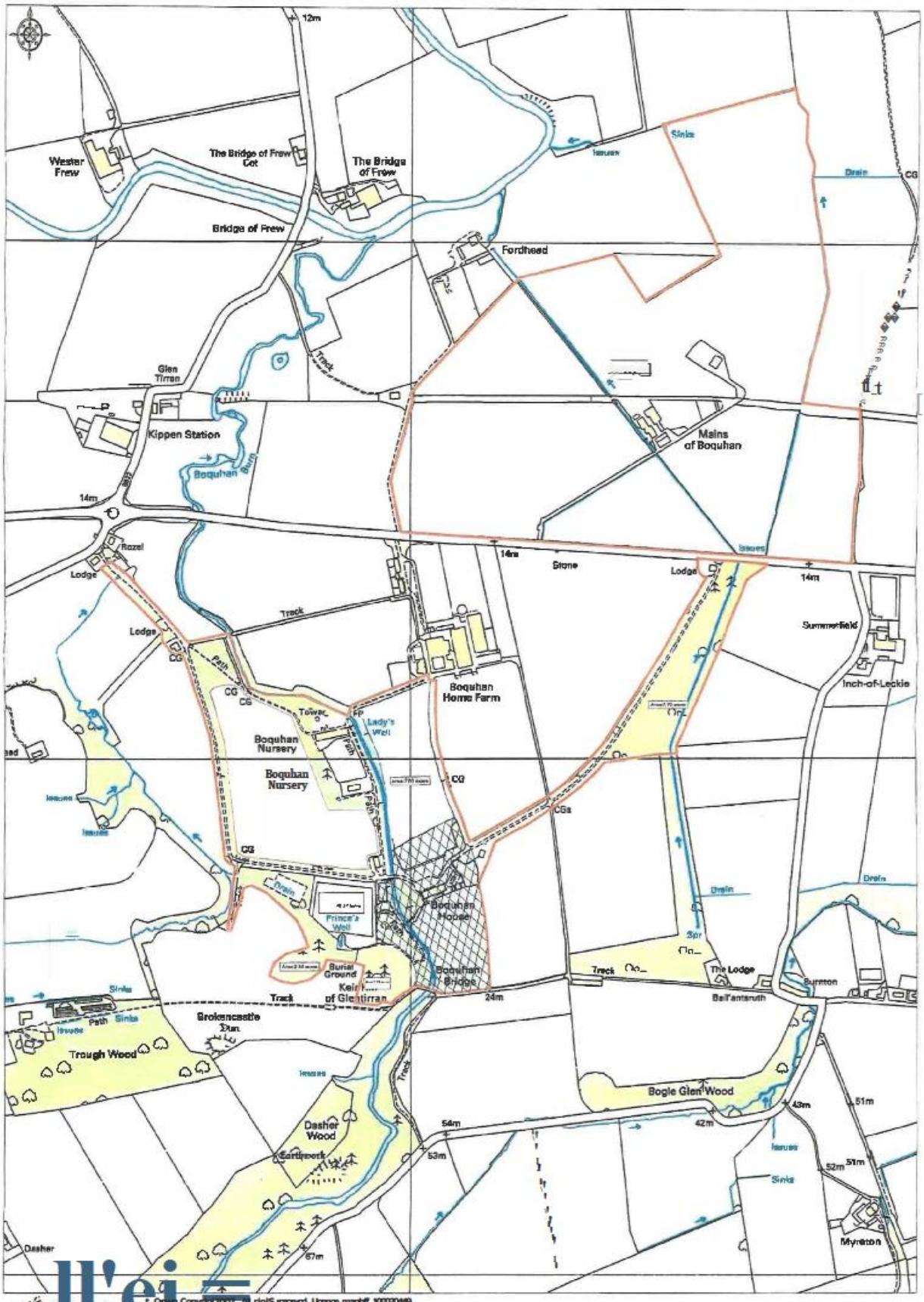
[59] To that end I have determined with use of a map the area of land over which I consider it appropriate to give the protection afforded by the Act. As can be seen, that extends to substantial portion to the front of the property, preserving the car park area and part of the field at the front, the whole of the rear garden, as bounded by the shrubbery together with a portion of the garden from the tennis courts to the back at the west side of the Boquhan Burn, extending to the west as far as the riding area as I think it is reasonable for there to be a degree of both privacy and enjoyment for persons in the house when visiting the garden area, tennis court or changing room.

[60] I do not consider that the driveways can be considered sufficiently adjacent to the house. The notion that the tenants would suffer is in my view unsustainable. There may be cases where the existence of tenants may be one of the characteristics justifying a larger area excluded form access, but this is not such a case. Each of the tenants has a well defined garden area. No reasonable access taker could misunderstand the ground attaching to each of the tenant properties. So far as Professor and Dr Ross are

concerned, I deal with their property in a separate judgement but I should emphasise that, if their application to exclude from public access an area of the West Driveway at the B822 had been successful, it would have prevented access via the West Gate in any event, giving the Rosses and their successors a "ransom strip," and giving the Snowies a successful outcome in relation to their attempts to prevent access through that gate.

[61] Given that the driveways are not part of the ground to be excluded, it follows, again as has been indicated, that there is no justification for the gate remaining locked.

[61] I have fixed a hearing in relation to whether any further orders require to be made to allow the decision to be effected and to deal with all questions of expenses



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Land owned by Euan Snowie- outlined in red (180.38 acres)