Appendix 17

Whitworth v Secretary for Environment, Food and Rural Affairs [2010] EWCA Civ 1468

Whitworth & Ors v Secretary of State for Environment, Food & Rural Affairs

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
20 December 2010

Case No: C1/2010/0945

High Court of Justice Court of Appeal (Civil Division)

[2010] EWCA Civ 1468, 2010 WL 5126428

Before: Lord Justice Maurice Kay Lord Justice Carnwath and Lord Justice Tomlinson

Date: 20/12/2010

On Appeal from Queen's Bench Division, Administrative Court

Mr Justice Langstaff

CO/12700/2009

Hearing date: Monday 6th December, 2010

Representation

Anthony Elleray QC (instructed by Napthens LLP) for the Appellants.
Lisa Busch (instructed by Defra) for the Respondent.

Judgment

Lord Justice Carnwath:

Introduction

1. The appellants are the owners of High Hampsfield Farm, Grange over Sands, Cumbria. It lies to the north of an area known as Hampsfield Fell ("the Fell"). The dispute arises out of the making and confirmation of the Cumbria County Council (Parishes of Grange over Sands and Broughton East: District of South Lakeland) Public Path Modification Order Number 1 ("the 2005 Order"). The 2005 Order as confirmed shows a "restricted byway" running through the appellants' farmyard, and close to the house. The Appellants, and their predecessors, have disputed the existence of any public rights over that part of the route, and more particularly of rights to use it for non-mechanical vehicular traffic. On 4th March 2010 Langstaff J dismissed their application to quash the relevant part of the 2005 Order. They appeal with permission granted by Patten J.

2. The judge provided a verbal description of the 2005 Order routes. (I note, in passing, some surprise that he had to do this for himself. The inspector's otherwise comprehensive decision-letter did not contain such a description, and there appears to be none elsewhere in the voluminous papers before us.) For present purposes, it is sufficient to outline the most relevant features.

3. The way as confirmed by the inspector starts at point A (on the 2005 Order plan), at the junction of Springbank Road and Hampsfield Road, immediately to the north-west of the village of Grange-over-Sands. It runs northwards on a single line until point B (just to the south-west of "Greasy Barrow Woods"), where its splits into two routes: BCD to the west and BEFGH to the East. Route BCD runs north-west and north over Hampsfield Fell to High Hampsfield Farm (point C), and then north-east for a short distance to join the U5232 road (point D). The other branch heads north from Point B towards Home Farm (point H), at which point it joins a way north-east to point D (route DH). When considering some of the older plans, it has to be borne in mind that Home Farm was previously known as Hampsfield Farm, leading to possible confusion with High Hampsfield Farm. A copy of the 2005 Order map can be found on the Planning Inspectorate's website. [1]

4. The contentious section is that part of route BCD which runs through the farmyard of High Hampsfield Farm, referred to as section C to C1. Point C is at the north-east corner of the yard at the beginning of the track leading north to Point D. Point C1 is some 40 metres south of C, where there is a gate leading from the farmyard into the Fell.

5. The present dispute can be traced back to an incident in 1993, when walkers and riders using the route across the Fell from the south found their way barred by a locked gate at point C1, with a notice indicating that no horses were permitted. They complained to the Council. At that time, the routes were not then designated as footpaths on the definitive footpath map. This led the Council to review the position, and some years on to make the orders now under challenge.

The statutory framework

6. Two groups of statutory provisions are in play: first, those governing the "deemed dedication" and use of public rights of way; secondly, those governing the making of the 2005 Order and its confirmation.

Dedication and use

7. It is unnecessary for me to repeat the judge's description of the history of statutory provisions dating back to the Rights of Way Act 1832 , which replaced or supplemented the common law relating to the dedication of highways. An authoritative exposition is to be found in the speech of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council: [2000] 1 AC 335* , pp 350 to 353F. The modern successor to those provisions is Highways Act 1980 section 31 , which provides:

> (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
>
> (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question …"

8. Also relevant are two sets of provisions governing the categorisation and permitted use of public ways.

Permitted use of bridleways by bicyclists

9. Section 30 of the Countryside Act 1968 (as amended) provides:

> "(1) Any member of the public shall have, as a right of way, the right to ride a bicycle, [not being a mechanically propelled vehicle], on any bridleway, but in exercising that right cyclists shall give way to pedestrians and persons on horseback."

10. The Planning Inspectorate's "Consistency Guidelines", issued for the guidance of inspectors conducting rights of way inquiries, states:

> "5.47 Use of bicycles in a public bridleway after 3rd August 1968 (the date on which section 30 of the [1968 Act] came into force) cannot give rise to a claim or be used to support a claim for vehicular rights."

As the judge noted (para 64-5), the correctness of that guidance is in issue in these proceedings.

Exclusion of mechanical vehicles

11. The categorisation of byways with respect to use by vehicles has undergone a number of changes. The concept of "byways open to all traffic" ("BOATs") was introduced by the Countryside Act 1968 , as a refinement of the original "roads used as public paths" ("RUPPs"). For present purposes it is sufficient to refer to the Countryside and Rights of Way Act 2000 (the relevant provisions of which came into effect in 2006), which introduced the concept of a "restricted byway", defined as

> "… a highway over which the public have restricted byway rights, with or without a right to drive animals of any description along the highway, but no other rights of way."

"Restricted byway rights" are defined as rights of way on foot, rights on horseback or leading a horse, and rights for "vehicles other than mechanically propelled vehicles" (s 48(4)). Routes previously shown on definitive maps as "roads used as public paths" were automatically redesignated as "restricted byways" (s 47). Section 66 of the Natural Environment and Rural Communities Act 2006 (which came into effect at the same time [2]) prevented the creation other than by statute of new public rights of way for mechanically propelled vehicles. At the same time a new subsection was inserted into section 31 of the Highways Act (see para 7 above):

> "(1A) Subsection (1)—
>
> (a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but

> (b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles."

12. The significance of these provisions, for present purposes, is that use by mechanically propelled vehicles is not in issue. The question in practical terms was whether there were any public rights of way over the relevant routes, and if so whether they were no more than rights on foot or on horseback, or included use by non-mechanical vehicles.

Procedure

13. The procedure for the making and confirmation of orders is set out in Wildlife and Countryside Act 1981 schedule 15 . The main stages can be summarised as follows:

i) On making the order, the council must publicise it, giving an opportunity for objections (para 3).
ii) If any objections are made and not withdrawn, the order must be referred to the Secretary of State for confirmation, following a local inquiry or hearing (para 7). Except where otherwise provided, the decision will be made by an appointed person (or inspector), rather than by the Secretary of State (para 10).
iii) If the inspector proposes to make modifications, including changes to the description of the way, he must give notice of them, and, if there are objections, hold a further inquiry or hearing to consider them (para 8).
iv) Following the final decision to confirm an order, the council must publicise it (para 11). Any person "aggrieved" by the confirmed order may challenge its validity by a statutory application to the High Court within 42 days of publication of the notice, on ordinary judicial review grounds (para 12; and see *Wild v Secretary of State [2010] EWCA Civ 1406* para 7). If the challenge is successful, the Court may –

> "… quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant." (para 12(2))

14. The scope of the further inquiry under paragraph 8 (para (iii) above) was considered by Sullivan J in Marriott v Secretary of State [2000] EWHC 652 (Admin), [2001] JPEL 559. He held that, while such an inquiry was in itself limited to consideration of the modifications, that did not preclude the inspector considering new evidence relating to other matters relevant to his previous decision, and if necessary reopening the first (para 7) inquiry for that purpose. As he explained:

> "It would be most undesirable if an Inspector, having conducted an inquiry under paragraph 7, and having become aware of relevant new information, was obliged to reach his decision under paragraph 7 on a knowingly incomplete or inaccurate basis. That would simply result in the need for another order under section 53, to which Schedule 15 would apply. So the lengthy process would have to start rolling all over again.
>
> But that does not mean that a paragraph 8 inquiry is the proper forum to consider such new evidence. During the course of submissions, both [counsel] accepted the proposition that an Inspector who has held a paragraph 7 inquiry has an inherent power to re-open that inquiry, prior to reaching a final decision, if he considers that re-opening is required in the interests of fairness. Take the case where the Inspector, having concluded a paragraph 7 inquiry, is not minded to propose any modifications to the Order but is still in the process of preparing his decision. Following the close of the inquiry, he receives new, cogent evidence relating to the Order. He may not, lawfully, disregard that evidence. He must consider how best to deal with it.
>
> In some cases, the only fair course might be to re-open the paragraph 7 inquiry, having given the parties proper notice. In other cases it might be appropriate to deal with the new information by an

> exchange of written representations between the parties. Alternatively, the Inspector might feel that the new information was so insignificant that it would not affect his decision, so it was unnecessary to invite the parties' comments, either in writing or at a re-opened inquiry." (paras 84-6)

15. I did not understand either party before us to question that view of the statutory provisions.

The 2005 Order procedure in this case

16. By the 2005 Order, the Council proposed to modify the definitive map by adding a new BOAT on the part of the path shown as B-C on the Map (including section C to C1), and upgrading the part of the path shown as C-D from a footway to a BOAT. There were 17 objections to the 2005 Order, one being Mrs Lockwood, the then owner of High Hampsfield Farm.

17. The inspector appointed by the Secretary of State, Mr Alan Beckett ("the Inspector") was one of the panel specialising in rights of way inquiries. He held a public local inquiry over four days in March 2007, and conducted an unaccompanied inspection of the routes. The two objectors, one being Mrs Lockwood, were represented by counsel (Mr Foster). Some twenty witnesses gave evidence.

18. On 17 May 2007, the Inspector made his first provisional decision, which was to confirm the 2005 Order with modifications, one of which was that the way ABCD should be a "restricted byway" rather than a BOAT. I shall need to look at parts of his reasoning in more detail later. At this stage it is sufficient to note the main points:

i) He conducted a detailed analysis of the extensive documentary material, dating back to the 18th Century, and including an Inclosure Award of 1809, and concluded that it was -

> "… sufficient, on a balance of probabilities to show that public bridleway rights had come into existence at some point subsequent to the setting out of the road under the inclosure award." (paras 12-82)

ii) He held that the relevant 20-year period for the purpose of deemed dedication under section 31 of the 1980 Act was 1973 to 1993 (paras 94-109).

iii) Having considered in detail the documentary and oral evidence relating to this period, he held:

> "I conclude that uninterrupted use as of right of the Order routes ABCD, BEFGH and DH by both equestrians and non-mechanically propelled vehicles had occurred during the 20-year periods under consideration." (para 110-134)

iv) He held that there was no evidence of a lack of intention to dedicate as respects route BCD (para 137).

19. As there were further unwithdrawn objections to his proposals, including one from Mrs Lockwood, a second inquiry was held on 9th September 2008. She was represented by the same counsel. The Inspector's final decision confirming the orders as modified was dated 10th October 2008.

20. In his decision-letter, he noted that in the event none of the objectors' submissions addressed the proposed modifications. Mrs Lockwood's submissions had been presented very late, and were in substance directed to the merits of the first decision. He commented:

> "9. Mrs Lockwood's objection had been made on 10 August 2007. A number of requests had been made by the Council for advance disclosure of any documents or evidence which the objector sought to adduce in order for preparations to be made for the second inquiry. However, between 31 January 2008 when Mrs Lockwood's initial objection had been enlarged upon and 22 August 2008, when documents were submitted, there had been no indication of what evidence the objectors sought to put forward. The evidence relied upon by the objectors was presented two weeks before the second inquiry opened.
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> 10. The production of the documents two weeks before the inquiry had not left sufficient time for consideration to be given to the scope for broadening the inquiry to include paragraph 7 matters. However, the documents did not contain any new evidence of substance (see below) that would have justified widening the scope of the inquiry. Furthermore, three other objections to the proposed modifications had been withdrawn. It may have been prejudicial to the interests of those individuals for a paragraph 8 inquiry to have transformed itself into something with a wider remit, as they would not have had the opportunity to participate. I note from the attendance list that none of these erstwhile objectors attended the inquiry. As the matters sought to be raised by the current freeholders had already been explored at the first inquiry both in oral and written evidence, they suffered no prejudice in the inquiry being confined to paragraph 8 matters. "

21. Later in his decision-letter he commented on the new documentation, and the legal issues that had been raised and explained why they did not affect his conclusions. In a separate decision, he made an award of costs against Mrs Lockwood on the grounds of "unreasonable behaviour…resulting in unnecessary or wasted expense". An application for judicial review in respect of that decision was dismissed by the High Court on 17th March 2009, and has not been renewed in this court.

The grounds of appeal

22. The Grounds of Appeal raise four matters, in summary:

i) The Inspector erred in law in finding that use of a bicycle would be consistent with a finding that route BCD was anything more than a bridleway, since members of the public have had a right to use bridleways for cycling since the coming into force of section 30(1) of the 1968 Act.
ii) In any event, the evidence of use of route BCD found by the Inspector over the period 1973 to 1993, by one man with a pony-trap, and two cyclists, was insufficient to justify a finding of rights to vehicular use.
iii) In any event, use by cyclist was not capable as a matter of law of giving rise to a claim to public entitlement to a vehicular right recognised in law, and in particular to any claim for restricted byway status.
iv) Langstaff J erred in law in concluding that "there was evidence before the Inspector" that could justify his conclusion that the Order route running from point C1 to C, and from point C to D, was an ancient bridleway.

Permission to appeal has not been granted for ground (iii), application for which was made very shortly before the hearing. We indicated at the start of the hearing that we would hear argument without prejudice to the decision on the grant of permission.

23. As Miss Busch (for the Secretary of State) observes, there is an appearance of unreality about the grounds as so formulated, since they do not address the substance of the Appellants' objection, which was to the confirmation of any public rights over their land. Grounds (i) to (iii) are addressed to the evidence relating to use by a pony-trap and bicycles, but not to the use

by horse-riders. As she says, this seems of limited practical significance, since, if use as a bridleway is established, then use by bicycles is permitted under the 1968 Act. Ground (iv) is directed to the Inspector's treatment of the historic evidence leading to his finding of bridleway rights over section C to C1, but again does not challenge the modern use leading to the same conclusion.

24. Mr Elleray's answer was that if any of his grounds succeeded, then the court's only power would be to quash the whole of the Order so far as relates to the Appellants' land, with the result that the whole issue of public rights over their land would be reopened. I will return to this point at the end of this judgment.

Ground (iv) — Historic use

25. It is convenient first to dispose of ground (iv), which can be dealt with shortly. In Mr Elleray's skeleton argument it is submitted that there was "no documentary evidence" that could support the Inspector's conclusion that there was an ancient bridleway between points C and D; or alternatively that in his analysis of the documentary material "the Inspector failed to take account of relevant matters or took account of irrelevant matters". There follows a summary of a number of documents referred to by the inspector, which it is suggested are inconsistent with or do not support his reasoning.

26. The judge reviewed this material in some detail, and concluded that there was nothing to invalidate the Inspector's conclusion, based on his own expert view of the material (paras 24 to 40). I do not propose to repeat the task in this judgment. With respect to Mr Elleray, it seems to me that the manner in which he chose to present this part of his argument made his task hopeless.

27. The Inspector's review and analysis of the historic material runs to some 70 paragraphs. This was not a matter of interpretation of legal instruments, which would naturally be appropriate for review by the courts, but of factual inferences to be drawn from a range of disparate material, including maps, sale plans, local history and guide-books. It could not possibly be said that there was "no evidence" to support the Inspector's conclusion. The challenge would have to be one of irrationality.

28. That presents a high hurdle in any circumstances. While in theory it might be possible in a case such as this, it would require a review of all the material on which the Inspector relied, not just the few items highlighted in the skeleton. It would also require much longer than the three hour estimate which had been agreed for the hearing. In the event, because (no doubt sensibly) he chose to concentrate on the other points, including the ground on which he had not yet received permission, Mr Elleray left himself no more than a few minutes to deal with this ground. The few doubts that he may have been able to sow in that time were a wholly inadequate basis for overturning this part of the decision. I do not see it as the task of the court to make up for the deficiencies in presentation, at least where as here an appellant is represented by experienced leading counsel. I would dismiss this ground of appeal.

Grounds (i) and (ii) — Use of bicycles

29. Grounds (i) and (ii) are best considered together. In order to do so it is necessary to examine in more detail the Inspector's findings and conclusions on this aspect.

The Inspector's findings and conclusions

30. The following is his account of the evidence relating to use of the routes, including specifically BCD, during the period from 1973 to 1993 (highlighting in italics the parts of particular relevance to these grounds):

> "110. It is difficult to break down the oral and written user evidence into discrete parcels for use of the four routes under consideration, and much of the user evidence overlaps. With some exceptions, all of the witnesses had used all the routes at issue. In considering whether use has been as of right for the relevant 20-year period under consideration, I have dealt with the user evidence collectively for all of the routes at issue, with particular emphasis on individual routes where necessary.
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> 111. An analysis of the user evidence indicates that use other than on foot had been made of AB by 26 people prior to 1994 and 49 had used BCD prior to 1993. *BCD had been used on foot by 18 people, on horseback by 20 people, with a pedal cycle by 2 persons and with a pony and trap by one person.* Five individuals considered their use had been with permission of the owners of High Hampsfield Farm. Thirty-one individuals had used BEFGH prior to 2003. Two individuals had driven the path with a pony and trap, 15 had ridden on horseback, 4 had walked or cycled, 9 had walked and one had driven the path in a motor car. Fourteen respondents had used DH with a motor car, with the earliest reported use arising in the 1960s. Extensive use of DH is reported by pedestrians, horse riders and cyclists in the 20 years prior to 2003.
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> 112. The earliest use of AB on horseback was in the 1940s, with other users commencing their use in the 1950s and 1960s. The bulk of the user evidence relates to the period between 1974–1994; eight people had used the route for the whole of the 20 year period in question.
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> 113. Eight individuals claimed to have ridden BCD throughout the 20 year period ending in 1993, with the earliest claimed use on horseback being in the 1950s. *Use with a pony and trap on ABCD took place between 1976 and 1993* and on BEFGH between 1976 and 2002. Only one respondent claimed use of BCD on horseback for the whole of the 20-year period under consideration, although other users claimed use in excess of 20 years for periods which ended prior to 2003.
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> 114. Cycle use of all routes had commenced for 2 users in 1969, with 2 other individuals having cycled the routes from the 1950s.
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> 115. None of the respondents mentioned challenges being made to their use of BCD until 1993 and there is no mention of locked gates being present along ABCD until 1994, when several noted the locking and chaining of gates at A2 and B along with the provision of ladder stiles adjacent to the gates. Similarly, there are no recollections of signs on AB stating "No Horses" until after 1993. Nine of these individuals gave evidence in person at the inquiry."

It will be noted that, while there is reference to considerable evidence as to use by riders of all routes including BCD, the only evidence of vehicular use of that route is of one pony-trap between 1976 and 1993, and two bicyclists from 1969.

31. In the following section, on "frequency of use", he noted but rejected the submission of some objectors that –

> "… the limited extent of use was insufficient for use to have come to the attention of the owners, and for them to have been aware that use was being made in such a manner that would lead to a claim of presumed dedication."

32. He contrasted the evidence of some witnesses who had not seen horse-riders on the routes, with that of other witnesses and "former landowners":

> "Mr Roscoe had been resident in Hampsfield since 1969 had used both ABCD and ABEFGH "countless" times on foot and by pedal cycle. Although he had not seen horses using BC, he had seen them on other parts of the claimed routes, and I heard direct evidence from five individuals of their personal use of these routes on horseback. The effect of the combined written submissions of Mr Cottam (the late owner of High Farm), Mr Repton (the former owner of High Hampsfield Farm) and Mr Vaughan (the former owner of Springbank) was that there had been equestrian use of ABCD, BEFGH and DH in the past. Mr Cottam's evidence was that the use he had seen was limited and infrequent.
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> 120. In evidence given to the Council, Mr Repton acknowledged that the route over what had been his property (BCD and BE) had been used by horse riders and by pony and trap during his father's ownership of the farm and that such use had continued whist he was the owner. Mr Repton did not state what degree of frequency of use he had observed, but the written evidence of Mr Cottam, Mr Repton and Mr Vaughan lends support to the claims of use of the path and demonstrates that although use of the paths had been limited it nonetheless took place.
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> 121. The frequency of use of those individuals who appeared at the inquiry was of use on horseback of approximately once every two weeks although there were some variations whereby the use of individual witnesses had increased to 2 or 3 times a week depending on weather conditions or the location of stabling for horses. *Those individuals whose evidence was of cycling or walking the routes at issue had been on a more frequent basis of up to 2 or 3 times a week.* Mr Clegg had driven his pony and trap over the order routes on a fortnightly basis. A number of the witnesses stated that use of these routes was as part of a much longer ride in the area and the routes had been incorporated into circular rides to exercise and train horses for endurance events."

33. As regards use by horse-riders, he concluded:

> "127. The evidence forms submitted as part of the application and generated by the Council's investigation, together with the oral evidence given at the inquiry demonstrates that use on horseback has been made of all the Order routes during the 20 year periods under consideration. I conclude that the nature and extent of the use in a rural area is sufficient to raise the presumption of dedication of a public bridleway over ABCD, BEFGH and DH."

34. As to vehicular use, he noted that there was limited evidence of the use of ABEFGH by cars in the late 1960s, but none of route BCD, and he noted that any such rights would have been extinguished in 2006. He continued:

> "129. There is however, evidence of more extensive use of the Order routes by non-mechanically propelled vehicles such as pedal cycles and pony traps. Such use cannot give rise to the dedication of bridleway rights; *following the introduction of the 2006 Act, use by pedal cycles can establish restricted byway rights where such usage does not give rise to a public nuisance.* There is no evidence before me use of the Order routes by pedal cycles or Mr Clegg's pony and trap has conflicted with other users of the currently recorded public footpaths. I consider therefore that it is possible for the reported use by pedal cycles and pony traps to have given rise to restricted byway rights over ABCD, BEFGH and DH."

> [I understand the reference to "public nuisance" to be based on the Consistency Guidelines para 5.45:
>
> > "A grant would not be lawful if, for example, it gave rise to a public nuisance. The grant of vehicular rights over an existing footpath might constitute a public nuisance to pedestrians using that path."]

35. Finally, under the heading "Use 'as of right'", he noted the conflicting evidence, particularly of Mr Repton, as to whether use of BCD was as of right (as required for deemed dedication) or with permission:

> "130. Mr Repton provided conflicting evidence as to whether any use of BCD or BE was as of right or with permission. In the written submissions a number of witnesses, including Mr Roscoe, considered that use of CB had been with the permission of Mr Repton who was a friend and neighbour. In telephone correspondence with the Council in February 2007 Mr Repton stated that he had never been asked for permission to use the route and had not given such permission. This contrasts with a statement he had provided to the objectors in November 2005 that he had occasionally given permission to friends and neighbours to walk or ride through the farm and onto the Fell. Mr Repton did not appear at the inquiry.
>
> 131. Mr Roscoe stated that when he had been a new resident in the area Mr Repton had suggested that he use DCB as a short cut out onto the Fell; the apparent invitation to use a route through the farmyard does not strike me as the giving of permission. The evidence form which Mr Repton completed in December 1993 and his correspondence with the Council in 2003 shows that he had known of public use of this route both on horseback and with pony traps during his father's ownership of the property between 1944 and 1986. In addition, in a witness evidence form completed in January 1994, Mr Repton's sister stated that as a child (i.e. during her father's ownership of the property) it had been her "duty to open gate onto fell for riders".
>
> 132. In my view, taking into account all the submissions made by Mr Repton, I conclude that he understood that use of BCD was well established and had occurred since at least his father's ownership and occupation of the property. In these circumstances, it is unlikely that Mr Repton would feel he needed to give permission to use the path, knowing as he did that general use by the public had been long established by the time he became the owner in 1986. To my mind, such evidence is consistent with dedication at common law of a route."

36. It seems that at the first inquiry no-one took the point that, because of the 1968 Act, use by bicycles could not be relied on as evidence of anything other than a bridle-way (that is, ground (i) in the present appeal). As I understand, that point was taken for the first time at the second inquiry. The Inspector rejected it:

> "27. Finally, Mrs Lockwood submits that if ABCD was a public bridleway on the basis of the documentary evidence, then any use by pedal cycles since 1968 would have been lawful under section 30 (1) of the Countryside Act 1968 and was not as of right. It was submitted that I should have rejected all evidence of use with pedal cycles during the relevant periods under consideration

> as being irrelevant to the possible acquisition of Restricted Byway rights. In my view, where both documentary and user evidence are presented, the requirements of Section 31 of the 1980 Act are such that the user evidence is to be considered separately and independently from any historic evidence adduced in relation to the same route. Whilst as assessment of the documentary and user evidence are linked by Section 53 of the 1981 Act, the assessments of the documentary and the user evidence are separate and discrete matters and the conclusions reached upon the documentary evidence are not relevant to any subsequent consideration of the user evidence. I do not accept that the evidence of use by pedal cycles should have been disregarded having reached the conclusion that, on a balance of probabilities, the documentary evidence showed ABCD to be a bridleway."

Ground (i) – the judge's view

37. The judge recorded the argument as he understood it, and the response of Mr Coppel for the Secretary of State:

> "60. Mr Elleray observes that the Inspector himself recognised that the use of a pony and trap began in 1976. The only non-mechanically propelled vehicle to which he referred in support of his conclusion that there was a restricted byway here was a bicycle. But use of a bicycle was (see section 30) entirely consistent with the right of way being as a bridleway. In the absence of any other evidence, if the evidence before an Inspector is of use since 1968 of a bicycle along a track, is it open to the Inspector to conclude that that use indicates that the track is one in which there are restricted byway rights or is the most that he can say that that track, otherwise used by horses, is a bridleway?
>
> 61. The answer which is given to this conundrum by Mr Coppell QC is that, on the wording of section 30, a cyclist has a right over what is recognised to be a bridleway. The section confers a right over a bridleway; it does not help to establish whether the right of the way is a bridleway or a restricted byway. And he argues that if, therefore, the bridleway had not been designated as such, then there is no right of way upon which section 30 could bite."

38. The judge himself arrived at the same conclusion as the Inspector by a rather different route:

> "67. What is relevant for a decision under section 31 of the Highways Act is whether or not the way in question has been used by anything which fits within the genus of non-mechanically propelled vehicle. It is something which fits that description, rather than a specific vehicle, which has to be looked at. Thus, it seems to me open to add use for a number of years by a pony and trap to use by another form of non-mechanically propelled vehicle, such as a bicycle or cart, or whatever may be.
>
> 68. Secondly, it seems to me that questions of this sort have to be answered in context. Where there is no evidence that those who used bicycles did so because they were exercising rights which they thought they had over what they understood to be a bridleway only, and were thus exercising those rights by reference to the 1968 Act, the general context must then be looked at. Here, there was evidence which the Inspector accepted which showed that before the Countryside Act came into effect, the route he was considering from B-C-D had been ridden by those on bicycles. That was either in breach of the law, or it was because they were exercising what they considered to be a right to cycle over the fell on that path. If that right immediately prior to the enactment of the Countryside Act would have been capable of establishing what would then have been a byway open to all traffic, continuation of use by that and other non-mechanically propelled vehicles after the coming into force of the Act would, it seems to me, be entirely capable of supporting a conclusion that the rights over a byway were not restricted to those of a bridleway.

> 69. I therefore consider that, in effect, the guidance which the Planning Inspectorate have given is broadly correct in its thrust. This is not a case in which the use of bicycles has been purely since 1968, and has to be viewed in isolation; there is a context. Part of that context includes a sense of the nature of the track; which, from the pictures before me and the descriptions, has been broad enough to invite use by wheeled traffic, even if the conclusion of the Inspector, as a result of his analysis of the Finance Act of 1910 and its impact, was that it was not a public carriageway at that time."

I take the reference to use by bicycles before 1968 to be a reference to paragraph 114 of the inspector's first decision (to which the judge had referred at paragraph 50), where he mentioned two individuals who "cycled the routes from the 1950s".

39. As I understand Miss Busch's submissions in this court, she adopts a similar approach to that of the judge. The Inspector, she says, was entitled to treat the use by bicycles, along with the use by Mr Clegg's pony-trap, and the use in the 1950s, as part of the "pattern of use", dating back some 60 years before 1993, which was sufficient to support his conclusion of restricted byway status.

Ground (i) – discussion

40. In my view, Mr Elleray's submission, in its simplest form, is correct. Under section 31 of the Highways Act one is looking for evidence of use as of right over a 20 year period to support a "deemed" dedication of a public right of way at the commencement of that period. The underlying principle is that of acquiescence by the owner in a use of the way carried on "openly and in the manner that a person rightfully entitled would have used it" (see Sunningwell (above) at p 353A). By section 31(1A)(b) use by non-mechanically propelled vehicles is to be taken into account, but that says nothing about the characterisation of the resulting right of way. For that purpose, it is necessary to consider what is implied by the owner's acquiescence.

41. In the present case, the Inspector had found that by 1968, and before the relevant 20-year period, the way had the status of a bridleway. After that time, use of the bridleway by cyclists would have been permitted by the 1968 Act. The owner would have had no power to stop it. There would be no justification therefore for inferring acquiescence by him in anything other than bridleway use. It matters not whether the cyclists were aware of the legal position. What matters is the effect of the use as seen by the landowner. It follows that in considering the extent of the deemed dedication, the use by cyclists should be disregarded. Since the only other evidence of use by vehicles is that of Mr Clegg's pony-trap, which admittedly did not extend for the full 20 years, there is no basis for the order to confer anything more than bridleway rights.

42. In my view, the same conclusion would follow even if there had been no finding of pre-existing bridleway rights, so that the claim had rested solely on use after 1973. One would then be considering the inference to be drawn from the actual use between 1973 and 1993. It is true that regular use by both horse-riders and cyclists over that period would be consistent with an assumed dedication as a restricted byway at the beginning of the period (had that concept then existed). But it is no less consistent with an assumed dedication as a bridleway, of which cyclists have been able to take advantage under the 1968 Act. Since section 30 involves a statutory interference with private property rights, it is appropriate in my view, other things being equal, to infer the form of dedication by the owner which is least burdensome to him.

43. Unlike the judge (and contrary to Miss Busch's submissions), I do not think that the evidence of use by cyclists in the 1950s can materially affect the case. Miss Busch relied on Rowley v Secretary of State [2002] EWHC 1040 para 23, in which Elias J held that the inspector had not erred by commenting that the evidence of use had been "bolstered" by use prior to the commencement of the 20-year period. I do not think that case helps her argument. That judgment turned on the view that "on a fair reading" of the decision, the inspector had concluded that there was sufficient use during the 20-year period, a view which was simply "reinforced" by the evidence of earlier use. It does not support the view that in the absence of relevant evidence of use in the 20-year period the gap can be filled by reference to earlier use.

44. In any event, I do not understand the Inspector in the present case to have placed significant weight on the earlier use, which was itself a matter of debate, at least so far as route BCD is concerned. His relevant conclusion (at 129) rests as I read it on the use by cyclists and the pony-trap in the 20-year period. If the use by cyclists is disregarded, the conclusion cannot stand.

Ground (ii)

45. The conclusion on ground (i) makes it unnecessary to consider in any detail ground (ii), which involves a consideration of the evidence relating to the use by the two cyclists. I would only observe that I see some force in Mr Elleray's submission that it was on any view insufficient to support a finding of use as enjoyment as of right "by the public". Mr Roscoe was a close neighbour (at Craglands), and Mr Harding was his friend. The way through the farmyard would, it seems, have been a convenient route from this property on to the Fell.

46. As the Inspector noted, there was conflicting evidence as to the basis of the enjoyment of the way through the farmyard. Mr Roscoe himself thought his use was "with the permission of Mr Repton who was a friend and neighbour" (para 130). However, the Inspector preferred the view that Mr Repton would not have needed to give permission "knowing as he did that general use by the public had been long established" (para 132). The latter comment is readily understandable so far as concerns bridleway use, of which there was plenty of evidence. It is less easy to accept its application to the use by Mr Roscoe and his friend, as these are the only examples of specific use of this route by bicycles. Even if that was not expressly permitted by Mr Repton, it is arguable that it should have been treated as an assertion of a *private* right, linked to Mr Roscoe's neighbouring property (Craglands), rather than evidence of use "by the *public* ".

47. In any event, on the basis of ground (i), I would allow the appeal. It follows that the 2005 Order designating this route as a restricted byway cannot stand. It is unnecessary in these circumstances to rule on the late application for permission to advance ground (iii).

Remedies

48. I turn to the question of remedies. My expectation would be that the order of the court should be related to the ground which has succeeded, rather than undermine the parts of the Inspector's decision which have not been challenged. The obvious way to give effect to this would be to modify the 2005 Order so as to re-characterise route BCD as a bridleway rather than a restricted byway.

49. I have already noted Mr Elleray's submission that this course is not open to us, and that the only available remedy is to quash the 2005 Order as a whole, leaving the County Council, if so minded, to recommence the process with a new Order. Although Miss Busch did not seek to challenge that view at the hearing, we were concerned at the implications for the time and expense of all those involved. We invited her to reconsider the issue, and to make further written submissions.

50. In the event, she has maintained the position that the only course open to the court is indeed to quash the 2005 Order so far as relates to route BCD. I am grateful for her clear submissions. For the record I will set out in full the substance of her reasoning, which I take to represent the considered position of the Secretary of State:

> "3. Paragraph 12(1) of Schedule 15 to the Wildlife and Countryside Act 1981 provides that if any person is aggrieved by an order which has taken effect and desires to question its validity on the ground, inter alia, that it is not within the powers of section 53 , he may within 42 days from the date of publication of the notice under paragraph 11 of Schedule 15 make an application to the High Court under paragraph 12. Paragraph 12(2) provides that on any such application the High Court may, if satisfied, inter alia, that the order is not within those powers, "quash the order, or any provision of the order, either generally or insofar as it affects the interests of the applicant".
>
> 4. By CPR Rule 52.10(1) , in relation to an appeal, the appeal court has all the powers of the lower court, i.e. for the purposes of the present case, the Court of Appeal also has the power to "quash the order, or any provision of the order, either generally or insofar as it affects the interests of the applicant".
>
> 5. If, therefore, the Court is minded to uphold the present appeal, it may make an order quashing part of the modification order, namely that part concerning the route between points B, C and D on the plan appended to the modification order. The relevant provisions of the modification order are

those set out in Part 1 of the Schedule to the modification order under the headings "Description of restricted byway 506027, Broughton East, to be added" and Description of existing footpath 506024, Broughton East, to be amended to restricted byway", together with the corresponding provisions of Part 2 of the Schedule concerning path numbers 506027 and 506024.

6. If the abovementioned parts of the modification order were to be quashed, it would be open to the [County Council] to make a new order with respect to route BCD. Any such new order would require to be made in accordance with the provisions of Schedule 15 to the 1981 Act.

7. In particular, the [County Council] would be required to comply with the publicity requirements contained in paragraph 3 of Schedule 15 ; the order would be required to be submitted to the Secretary of State, pursuant to paragraph 7(1), for confirmation by him in the event that any representation or objection duly made is not withdrawn; and, pursuant to paragraph 7(2) (subject to paragraph 7(2A)), the Secretary of State would be required to cause a local inquiry to be held or to afford any person by whom a representation or objection had been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose…

8. The question of whether an inquiry or a hearing would be held with respect to the order would, therefore, depend upon whether or not any representations or objections were duly made with respect to the order and not withdrawn, and upon the nature of those objections.

9. As the [Secretary of State] understands the matter, the [County Council} has indicated that if the modification order dealing with route were to be quashed (in whole or in part), then it would make a new order describing the relevant routes as bridleways. This would permit them to be used by equestrians and cyclists. Presumably the Appellants would object to such an order.

10. The procedure at an inquiry ordered to be held pursuant to paragraph 7(2)(a) of Schedule 15 to the 1981 Act is governed by Parts 1, 2, 4 and 6 of the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 ("the 2007 Rules"), while that governing hearings ordered to be held pursuant to paragraph 7(2)(b) is governed by Parts 1, 2, 3 and 6 of the 2007 Rules.

11. Rule 9(1) of the 2007 Rules provides that, except as is otherwise provided in those Rules, the inspector shall determine the procedure at the hearing. Rule 9(7) provides that the Inspector may at any stage refuse to permit the giving or production of evidence or the presentation of any matter which he considers to be irrelevant or repetitious. Rules 21(1) and 21(7) make similar provision with respect to Inquiries.

12. Notwithstanding the broad discretion conferred on Inspectors by the 2007 Rules as to the procedure to be followed at hearings and inquiries held pursuant to the provisions of paragraph 7 of Schedule 15 to the 1981 Act, there is, in the [Secretary of State's] submission, no scope for an Inspector holding a hearing or inquiry into a new order made with respect to route BCD to seek to truncate the process by reference to the evidence adduced at the previous inquiry. This is the case, moreover, irrespective of whether the same Inspector were to be appointed to hear the proceedings, or a different one.

13. The main reason for the above submission is that the statutory process for dealing with objections and representations must be complied with. This in turn would require objections and/or representations made with respect to the order to be considered afresh. Different objections and/or representations might well be made to those considered at the original Inquiries; different witnesses might well be called; the parties might well be represented by different Counsel (if they are represented at all); and the hearing or inquiry might well take place before a different audience. All of these considerations lead inevitably to the conclusion that the entire proceedings must be conducted de novo.

14. Further, as the Secretary of State submitted at the hearing before the Court, evidence in cases such as the present one must be viewed as a whole, and a global view taken, by way of an exercise of informed judgement, as to the conclusion concerning the status of the way in question, which it

> supports. It would, therefore, in her respectful submission, be unrealistic and impracticable for an Inspector at a new hearing/inquiry to take some parts of the relevant evidence as given (on the basis that it was established at the previous Inquiry), and also to permit new evidence to be adduced, and then to seek to put the two parts of the whole together in order to form a view. Rather, the Inspector would and would be required to approach the matter on the basis that all, or at least most, of the evidence must be considered afresh, in the context of the new proceedings."

51. Miss Busch went on to submit that the very fact that quashing the order would have this consequence was a matter justifying the court exercising its discretion to refuse any order. This was on the basis that since bridleway use and (under the 1968 Act) cycling use are not in issue, the possibility of use by other non-mechanical vehicles (such as a horse and cart) cannot be regarded as sufficiently prejudicial to the interests of the appellants to warrant the time and expense involved in reopening the whole process. I cannot accept that submission. If, as I have held, the appellants have established that the designation of a restricted way was wrong in law, they are entitled to a remedy. The fact that the only available remedy seems disproportionate may be a defect of the Act, but is not a reason for denying a remedy altogether.

52. I do not think it is appropriate for the court to seek to go behind the agreement between the parties as to the available form of remedy. It is, however, an unsatisfactory result, not least for those members of the public who took part in the inquiry, and for those who want to be able to use the route. They are entitled to expect the legal issues to have been settled after a process which has already taken over five years. On consulting the 1976 textbook to which I contributed (*Corfield and Carnwath: Compulsory Acquisition and Compensation*), I note that we drew attention to the issue which arises also in that context (we compared it to "Snakes and Ladders, square 99": see p 63–5). I feel both surprise and disappointment that almost 25 years later, and in spite of the changes brought about by the CPR and the introduction of the "overriding objective", the problem apparently remains (see e.g. De Simth Judicial Review 6th Ed para 17-030). I hope that attention will be given to amending legislation, if necessary, to allow for a more flexible remedy.

53. For these reasons, I feel constrained simply to allow the appeal on ground (i), and quash the order so far as affects route BCD.

Lord Justice Tomlinson:

54. I agree.

Lord Justice Maurice Kay:

55. I also agree.

Footnotes

1 http://www.planning-inspectorate.gov.uk/pins/row_order_advertising/councils/2008/documents/fps_h0900_7_52amap.pdf
2 See Natural Environment and Rural Communities Act (Commencement No 1) Order 2006 para 6