Case No: CO/12700/2009

Neutral Citation Number: [2010] EWHC 738 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Thursday, 4th March 2010

Before:

MR JUSTICE LANGSTAFF

- -

Between:

WHITWORTH

Claimant

- and -

SECRETARY OF STATE FOR ENVIRONMENT, FOOD & RURAL AFFAIRS

Defendant

- -

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Mr Elleray QC appeared on behalf of the **Claimant**.

Mr Coppell appeared on behalf of the **Defendant.**

- -

Judgment

(As Approved)

Mr Justice Langstaff:

1. On 14 October 2005, the Cumbria County Council made the Cumbria County Council (Parishes of Grange-over-Sands and Broughton East District of South Lakeland) Public Path Modification Order No. 1 of 2005 ("the Order"). This provided, amongst other things, for a public right of way usable by all forms of traffic -- that is a BOAT, a byway open to all traffic --to pass through the farmyard of High Hampsfield Farm, Grange-over-Sands in Cumbria. It is not difficult to understand why the then owner, a Mrs Lockwood, and their successors-in-title ("the claimants") should object, which they did. High Hampsfield Farm is at the northern end of, and sits beside so that its wall opens on to, a fell. The Hampsfield Fell is depicted on a map referred to in the order. That map should be attached to this judgment as an annexe.

2. The origin of the order began in 1993, when walkers and those on horseback would use a route across the fell, which one way or another ended up at, or passed by High Hampsfield Farm, found their way barred by locked gates, and saw a notice or notices to the effect that no horses were permitted. They complained to the county council. The routes which they could take from High Farm near Grange to or past High Hampsfield Farm to the north were not designated as footpaths on the definitive footpath map. Mindful of its duty to keep the definitive map of public rights of way under continuous review, an obligation which derived from the Wildlife and Countryside Act of 1981, section 53(2)(b), the Council, as surveying authority, considered the evidence available to it, and concluded that it should make the order. It had in mind section 53(3)(c)(i) and (ii)

of the 1981 Act, namely that the authority had discovered evidence which, when considered with all other relevant evidence available to them, showed:

> "that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;
>
> (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description"

3. The effect of the order, so far as is relevant to these proceedings, was to identify on the plan a number of points by letters. I shall endeavour to give a brief verbal description for readers of this judgment, but reference needs to be had to the plan itself for a better understanding. Just north of Grange-over-Sands is High Hampsfield Farm. The path which ultimately led northwards to High Hampsfield Farm began at the junction of Springbank Road and Hampsfield Road at Point A on the map. It past northwards along the side of Eggerslack Woods to a point where there was a division of paths at Point B. One branch went to the northwest, up and over Hampsfield Fell. At its northerly end, it met the wall of High Hampsfield Farm at an entrance which had been laid a long time ago from the farm on to the fell. That is Point C. From the division of ways at Point B, therefore, the route B to C went across the fell to High Hampsfield Farm. It continued through C to D, through the farmyard, to join the U5232 roadway.

4. The other branch from Point B also headed northwards, but northeasterly. After a short distance of some 60 metres or thereabouts, there was a further division, with

a road running south-southeasterly from that point. That road is known as Slackwell Road. It is at that point that the path from B in this direction left the fell. It continued north to Point E; again, at Point E there was a division. Part of the route continued through Point F to Point G, in a north-northwesterly direction and then back north-northeasterly to Point G; whereas an alternative route across a stile took the user to the north-northeast first, and then north-northwest to the same point, Point G. The resulting map forms something of an elongated diamond appearance between Point E and Point G. Anyone heading north, having used either of those routes to Point G and returning there to one undivided path, would then continue northward to reach Home Farm at Point H. Between Home Farm and Point D, which it will be remembered was the entrance of the driveway to High Hampsfield Farm, where it joined the U5232, is the route H to D, or (travelling east) D to H.

5. The order proposed various rights of way over the tracks from A to H. It was opposed. There were 17 objections. An inquiry began on 19 March 2007. On that day the Inspector whose decision is called into question in these proceedings first inspected the area. Over the next four days, he heard evidence and submissions made on behalf of the objectors. On 17 May, having considered that evidence and the written material which had been put before him, the Inspector confirmed the order, but he did so subject to modifications. In particular, he did not confirm that the highway should be a byway open to all traffic. Instead, he provided that it should be a restricted byway. I shall return to the meaning of "restricted byway" later in this judgment. The consequence was that a further inquiry was necessary, limited to the proposed modifications of the original order. That began on

9 September 2008. The consequence was that on 10 October 2008, the Inspector confirmed the order as he had modified it. Then this application was made to the court once the Public Path Modification Order No. 1 had been notified as confirmed, something which occurred on 24 October 2008.

6. The Wildlife and Countryside Act 1981 provides, effectively by Schedule 15 and paragraph 12, for the procedure by which the validity of an order may be questioned. Paragraph 12 reads:

> "(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph."

Section 53 is that to which I have already referred. In this case, it is not suggested that any requirement of the schedule has not been complied with. The issue is whether or not the order which has taken effect is or is not within the powers conferred by section 53, to which I have already referred. Subparagraph (2) provides:

> "On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

7. The nature of the challenge is thus a challenge akin to judicial review. Specific acceptance of this by the parties was noted without disapproval in the case of Wild v Secretary of State for the Environment, Food & Rural Affairs and Dorset County Council [2010] EWCA Civ 1406. Paragraph 7 of the judgment of Scott Baker LJ is in these terms:

> "It is common ground that Keith J, who heard the application, was entitled to interfere with the inspector's decision but only on ordinary judicial review principles."

Because it was common ground between the parties, no detailed legal consideration of the principles applicable was given by the court. However, insofar as it is open to me to do so, I am satisfied that the conclusion which the parties have reached was appropriate.

8. The approach is that which is demonstrated in an analogous context by the judgment of Lord Denning MR in Ashbridge Investments v the Ministry for Housing and Local Government [1965] 1 WLR 1320 at 1326, in which Lord Denning MR considered the approach on a statutory appeal under the Housing Act 1957. Schedule 4 of that Act permitted a person aggrieved by an order to question it on the ground that it was not within the powers of the Act or that any requirement of the Act had not been complied with. That phraseology is redolent of that which is used in the Wildlife and Countryside Act, under which this appeal is brought. Lord Denning MR said this in relation to those powers (see 1326F):

> "The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come: or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position where the court has power to interfere with a decision of a lower tribunal which has erred in point of law."

9. That same view is expressed in relation, again, to similar statutory provisions in the case of Reid v the Secretary of State for Scotland [1999] 2 AC 512 at 541F to 542A. Lord Clyde in his speech notes as follows:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of [an] irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it

> is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.
>
> These principles are quite clear."

I adopt the approach which was agreed in Wild, and which is identical to that enjoined by Ashbridge and by Reid.

10. It is said in this appeal by Mr Elleray QC, on behalf of the claimants, that some of the Inspector's reasoning turns upon his consideration and evaluation of historical documents. He urges that it is open to this court to make its own construction of those documents. That is because, he says, the construction of documents is a matter of law for a court. However, the documents to which he refers are almost entirely in the form of maps. To ask me to approach maps as though they were legal documents, such as contracts in writing, in respect of which the court might make its own construction, is to invite me to adopt an approach to these documents ignorant of the fact that the documents were not intended, being maps, to have particular legal effect in the same way as contracts, deeds, statutes and the like. I reject that approach.

11. In particular, maps may require factual interpretation, and facts are the province of the Inspector and not of this court. They may have to be related to the topography of the terrain; they may have to be understood by reference to the purpose for which they were made. Two examples, though there are many more: any walker following one of Wainwright's maps of walks in the Lake District would be following a map which did not purport to be precise, in the way that an Ordnance

Survey map might be; it was not designed for that purpose. It is designed simply to show the walking route, with the main features of that route. Again, a roadmap showing the principal highways in the country is not, in itself, evidence that there is or is not a particular connecting road of lesser importance; its function is not to record every road, but to record the principal highways. Much, therefore, inevitably depends upon the purpose and nature of the map, and an appreciation may have to be formed by someone expert in such maps, as is an Inspector, of the material available, or likely to have been available, to a cartographer at a particular time that any particular map was made.

12. I remind myself, too, that when the principal ground of appeal is, as it is here, perversity of the decision of the fact-finding tribunal, and secondly, an argument that there was no evidence to support some findings, there is an increased risk that the appellate body's close examination of the evidence, and of the findings of fact by the Inspector, may lead it to substitute its own assessment of the evidence and to overturn the findings of fact made by him. Only the Inspector hears all the evidence first hand. The evidence available to this court on an appeal on a question of law is always seriously, and incurably, incomplete. Much as one, or sometimes both, of the parties would like it to be so, an appeal from an Inspector is not a retrial of the case. The scope of the appeal is limited to consideration of the questions indicated by the scope of the statutes cited above, interpreted as the judgments cited above would suggest.

13. The answers must, of course, be considered in the context of the entirety of the proceedings, and the whole of the decision; but with an awareness of the

limitations of the court's confidence to question the evidential basis for findings of fact by the Inspector. It is a rare event for an appellate body to have all the documents put in evidence to the inquiry. No official transcript of the oral evidence exists. In this case, counsel have not put before me any agreed note, even, of the evidence that was given, though some note was apparently taken. If an order is made for production of the Inspector's notes, that would usually be on a selective basis related to the particular grounds of appeal, which should in a perversity challenge always be particularised. That has not been done here. Most important of all, none of the witnesses give oral evidence on an appeal.

14. Thus it does not help much for a party to draw attention to that which a witness states in a written document, or even more so a questionnaire form, where that witness has given oral evidence; and even where he does not, what he says in the written document or form has to be considered in the light of other evidence. An example here is where one witness, a Mr Roscoe, said in writing that he had not had the permission of a landowner to walk over the landowner's property, but then later said he did. The apparent conflict had to be resolved. Here, there was available the evidence of Mr Repton, the landowner of the time, to the effect, so the Inspector found on credible grounds, that he gave permission to no-one, since he assumed none was needed. If Roscoe's evidence in his later statement was, on its own, put before the court on appeal, it could be seriously misleading. Any proper appreciation of what he had to say could only be reached by the Inspector who heard him, and had evaluated what he had to say in the light of the other material, including what Repton had to say, available to him, and insofar as he accepted it.

15. Before I turn in more detail to the challenges made to the answers given, and my conclusions upon them, I should say a little more about some of the underlying law. What is in issue is rights of way. It is generally recognised that once a highway, then, under common law, always a highway. A highway may be created by having been dedicated by a landowner over whose land the way passes. He may do so either expressly or by implication. In Todd v the Environment Secretary [2004] 1 WLR 2471 at paragraph 55, it was said that the creation of a right of way under common law involved a two-stage process: the first stage, dedication by the landowner, express or to be implied by his acquiescence in public use of the way over an appreciable period of time; and second, acceptance by the public by use of the way after dedication.

16. In Ex Parte Hood [1975] QB 891, 896F-H to 897A, Lord Denning said this:

> "The object of the statute [that was the National Parks and Access to the Countryside Act 1949, which provided for the first definitive map] is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: once a highway, always a highway. But nowadays with the bicycle, the motorcar and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there."

17. After 1835, to which reference was made by Lord Denning, an unadopted highway could be dedicated and accepted by use by the public. However, as Lord Hoffmann observed in R (on the Application of Godmanchester County Council) v the Environment Secretary [2008] 1 AC 221 at 246:

> "… user was no more than evidence from which dedication could be inferred. It was open to the jury to ascribe the user to toleration or some other cause. Since, as I have said, some other cause was in real life more likely, it became difficult to predict when or for what reason a jury would have sufficient sympathy with the users of the highway to find that there had been a dedication."

18. The Highways Act 1980 provides for a method of creation of rights of way which does not depend upon the common law to which I have just referred. The underlying theory behind the section is that there is a deemed statutory dedication, rather than one which has to be established by evidence that, expressly or impliedly, there has been an actual dedication. But, in effect, the statute, as I shall demonstrate, draws attention to certain criteria which must be satisfied if a right of way is to arise by this means. Section 31 provides as follows:

> "(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."

I shall omit, for the moment, reference to subsection (1)(a), which was inserted in 2006:

> "(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 …"

19. The background to that Act, and its derivation in and from the Rights of Way Act 1932 is expanded by Lord Hoffmann in the case of R v Oxfordshire County Council, Ex p Sunningwell Parish Council: see, in particular, pages 350 to 353F, and 351H to 353D, in the report of that case in [2000] 1 AC 335. The 1932 Act, as Lord Hoffmann there points out, contains a proviso which allows the presumption of dedication to be rebutted by sufficient evidence that there was no intention during the period to dedicate such a way. It follows that, rather than positive evidence of dedication being required, what is necessary evidentially is the opposite, that dedication is not to be inferred from sufficient user. Secondly, it must be noted that the period of 20 years is to be calculated backward from the date that the right was put in question.

20. Two issues thus arise. First of all, has a right of way been established, either at common law or by 20 years' uninterrupted user prior to the date that the right was put into question under The Highways Act? And secondly, the nature and character of that user. The nature and character of the user is not essential to establish that there has been a right of way, but it is essential to establish the proper description of that right. A track may be a footpath; it may be a bridleway, in which case horses are entitled to use it as they are not entitled to use a footpath; it may be a driftway, in which case cattle may be driven along it; it may be a carriageway, in which case it is open for use by anything which has wheels; and it may, given a modern addition to the terminology in the Natural Environmental and Rural Communities Act 2006, be a restricted byway. A restricted byway is a

right of way which may be used by those on foot, those on horseback, and by vehicles which are not mechanically propelled. Such a vehicle would, for instance, be a horse-drawn cart or a pony trap. It would, for instance, include a bicycle.

21. The Inspector, when approaching his task, describes what material he had regard to in considering the case which was made by the county council, and that objected to by the objectors. That case fell into two parts. The first part was an historical survey of documents and materials -- largely, as I have said, maps -- which related to times prior to the 1920s. In particular, he focused upon events from the late 18th century and throughout the 19th century. Secondly, he enquired as to the evidence available to him of recent user in order to answer the questions which arose under section 31 of the Highways Act. In doing so, he recorded in his decision that he had had regard to a number of sources: first, the award given by commissioners as an Inclosure Award in 1809; secondly, pre-enclosure plans; thirdly, 19th century commercial maps; fourthly, a local history written by someone who had, in his view, and on good grounds, intimate knowledge of the process which had taken place during the enclosure; fifthly, maps for the purposes of use by those who wished to use bicycles; sixthly, the inferences to be drawn from documents showing returns made in respect of the Finance Act of 1910, which imposed a tax relevant to his determination; and finally, the oral evidence of those who had in more recent times been concerned either with the use of, or the ownership of, the relevant tracks.

22. The Inspector set much of this out at paragraph 13 in outline, before turning from paragraphs 14 onward of his decision to express his evaluation of them. It is not for me to query any finding of primary fact which he has reached. It is asserted that I may review the evaluation by the Inspector of those facts. However, it seems to me that the approach I have to take must be limited by the authorities to which I referred at the start of this judgment. Thus, in effect, the challenge becomes, and is accepted to be by Mr Elleray, a perversity challenge in effect, and a challenge that there was in some respects no evidence upon which the Inspector could properly reach a conclusion that non-mechanically propelled vehicles had used the track in question, that between points B, C and D, for the whole of the 20 years or more which section 31 of the Highways Act required.

23. What the Inspector found is set out in commendable care and detail in a decision which is impressive in its clarity, its order and its apparent thoroughness. I pay tribute to the general quality which it displays. He resolved the different contentions which were made to him in respect of the maps. He concluded that so far as the documentary evidence was concerned, at paragraph 82, it demonstrated the existence of routes through time that had been depicted consistently as being open to public use, and which were shown in a way which allowed an inference to be drawn that the route was not solely for use by pedestrians. He considered that the Finance Act evidence tipped the balance away from the route B-C-D being a public carriageway, but that the remainder of the documentary evidence was sufficient on a balance of probabilities to show that public right of way rights had come into existence at some point subsequent to the setting out of the road under the Inclosure Award.

24. To reach that conclusion, the Inspector had first examined the Inclosure Award in the light of the pre-enclosure plans. The pre-enclosure plans were relevant not because it was asserted they showed any then existing right of way to which rights could since the award apply, because the award would have the effect of extinguishing any ways as being usable as a right, unless they had been awarded by the commissioners, but were relevant to show the natural description which might have been applied to particular features, amongst them Hampsfield, and that which it might indicate to a reader or writer at the time. Having looked at the award and noted that it set out the route B-C-D, he concluded that that did not show whether such a route was or was not a public right of way. The Award described it as being a private carriage and driftway, and therefore it could not be public in the usual sense of the word. But he noted that no class of private user was proscribed, and it was plainly open for use by people beyond those to whose land the route ran, or over whose land it crossed. He dealt with that at paragraphs 33 to 40 of his decision.

25. The Inspector then considered what had been made during Victorian times of the route thus set out and expressed to be private. He concluded that the maps which he had been shown, though none was necessarily conclusive, indicated that there was an expectation that the public might use the route as it had been awarded by the Inclosure Commissioners. Thus, at paragraph 50, he felt able to say that the small-scale maps showed that the Inclosure Award route, although set out as a private carriageway and driftway, had by the early part of the 19th century the reputation of a public route which was not limited to pedestrian traffic.

26. The sale plans of property to the south indicated that routes shown on the plans of the estates leading to the north were likely to be public highways of a higher status than a footpath. The local history, written by Stockdale, he assessed between paragraphs 54 and 55. Ordnance Survey maps showed the existence of the feature on the ground; but the function of such maps, the Inspector noted, was not to record public rights of way. Therefore, they did not assist particularly. But the annotations on the 1913 map provided some supporting evidence of the capability of the routes, B-C-D included, to carry traffic other than that on foot. They did not provide any evidence as to the precise nature of that use. The Inspector considered the Finance Act to have the effect which I have already recorded; local guidebooks, which did not assist with the route B-C-D; and 20th century small-scale commercial maps, which indicated that the 20th century user had inclined to regard A-B-E-F-G-H as a more prominent, easily usable route for their purposes than that which led directly across the fell at A-B-C-D, and to which this appeal relates. Then in a lengthy section, paragraphs 74 to 82, he set out the conclusions, with the ultimate result which I have already reported.

27. The challenge which is made here to the findings which the Inspector reached left me a little puzzled, because the challenge in respect of the 1980 Act averred that the Inspector had no evidence, or no proper evidence, from which he could conclude that non-mechanically propelled vehicular traffic had used B-C-D for the whole of at least a 20-year period prior to the date it was called in question. If Mr Elleray is right in that latter submission, then the Inspector's categorisation of the route B-C-D as being a restricted byway would fall. It would not matter if this court felt that it could and should have been described as a bridleway. The award

as made would fall; the consequence would be that the Inspector, or an Inspector, would have to conduct a new inquiry if the Council sought once again to make an order to the same effect.

28. That being the case, it is not obviously material to have to determine whether the Inspector was or was not right in determining that the documentary evidence in respect of the times before 1920 did or did not give rise to a bridleway. There is no obvious link, save one to which I shall come, between his determination in that respect and his resolution of the evidence in respect of The Highways Act part of the case. But because it has featured so largely in the presentation and evidence before me, I shall nonetheless deal with the challenge which is made to this first part of the Inspector's determination.

29. What Mr Elleray says, in summary, is this: there are a number of aspects in which, individually, the Inspector was not entitled to reach the conclusion he did. Taken together, those points demonstrate that he reached a conclusion which he was simply not entitled to reach and which was perverse. The argument rested heavily upon the interpretation of maps. Mr Ellery told me that the Inspector had treated Hampsfield on some maps as equivalent to High Hampsfield Farm. The significance is this: a route ending at High Hampsfield Farm and beginning at Point B would be most likely a route B-C-D, the route in question. If, however, Hampsfield referred not simply to the farm and the buildings surrounding it, but to the general area, then that implication would not follow. There would be no reason, either, why B-E-F-G would not equally well satisfy the description of a route beginning in the south near Grange-over-Sands and heading for Hampsfield.

30. The Inspector considered that matter, which was argued before him at the inquiry, and he came to the conclusions about it which he expressed beginning at paragraphs 14 to 16, from which he derived an understanding of Hampsfield which informed his view of the maps. I am entirely satisfied that it was within his entitlement to reach that view on that material which it was his expert task to do, and it cannot be said that he necessarily erred in law or in fact in doing so.

31. The second point taken as a principal point was that the Inspector was wrong to regard the way B-C-D as being a public way; it was expressly private in the Enclosure Act. A private way is private necessarily, and private does not mean public. I note that the Inspector was particularly careful not to assert that the Inclosure Award created a public right of way. He recognised expressly its private character: see paragraphs 39, 50, 53, 55 and 61 of his decision. His view became (see paragraph 75) that by the middle of the 19th century what had been awarded as a private road had acquired some public status.

32. In my view, the fact that a road may have been awarded as a private road did not forever thereafter prevent it acquiring the characteristics of a public right of way, if that was its general use; and evidence of its general use could be derived from the sources to which the Inspector had regard. It is, indeed, plain from the fierce argument which occurred before the inquiry that it was, in effect, common ground that the maps might lead to one conclusion or the other; and the Inspector came to a conclusion which, it seems, was within his entitlement to do, on principles which I have already set out.

33. Next, it was submitted to me that the Inspector could not, from the maps, conclude that the route B-C-D was any more a route to which the maps referred as having the reputation of a public way than the route B-E-G-H. If Mr Elleray was right about this it would indicate that, there being now no challenge to B-E-G-H as a right of way, and the use of B-E-G-H having been more regular and more consistent in the 20th century than before, there would be no space for interpreting the maps as showing anything about B-C-D.

34. As to this, there were detailed submissions made to me about the effects of various maps. The submission was, for instance, that a map by Greenwood in 1818 did not depict A-B-C-D, but was more consistent with A-B-E-F-G. But the Inspector, in a revealing passage at paragraph 45, dealt with this. He said:

> "That Greenwood was depicting ABCD as part of the road available at the time was demonstrated by the overlaying of the current carriageway network and the Order routes onto Greenwood's map by the Council by means of a Geographic Information System. At corresponding scales, there is a noticeable correlation between the adopted carriageway network and the routes shown as cross roads by Greenwood. And the route shown by him over Hampsfield Fell corresponds closely with ABCD."

That extract demonstrates all too clearly the dangers of this court coming to conclusions upon seductive arguments, well presented, about maps, without having available to it the full range of material before the Inspector, and the nuances which he could draw in respect of that, both by having himself inspected the terrain and having listened to local residents. A similar point is made about the map by Hennet of 1828. It seems to me that the Inspector was entitled to

come to the conclusion he did that it showed A-B-C-D; as, it seems to me, he was entitled to conclude, did Cary's half-inch map of 1813 (see his paragraphs 47 to 49).

35. The maps, therefore, it seems to me, cannot be said necessarily to bear out the criticism that Mr Elleray makes of them. It is not for this court to ask what it would have made of the maps, but whether it was open to the Inspector, in the light of all the evidence, the material, and his experience, to make an evaluation. It is plain to me from his decision that he was careful and thorough about his work, and I cannot say that his conclusion was necessarily wrong.

36. The next point made was that, alone amongst those routes shown on the enclosure plan, Hampsfield Road, A-B-C, had a spur from B to E, creating something of a Y-shaped appearance on the map, with the right-hand arm of the Y being very short. There was no separate name given to the spur, if it was truly a spur. An alternative view, more consistent, urged Mr Elleray, with the material before the Inspector, was that there was no route over the fell, B-C-D, to be known as Hampsfield Road; rather, that description applied to the entirety of the road B-E-F-G-H, to the exclusion of B-C-D. In particular, the point was that Slackwell Lane branched to the south, and the maps on the small scale did not show the small spur, and therefore it was to be concluded that there was no left-hand arm of the letter Y, as one might see from standing back from the map, and as would be A-B-C.

37. These points were made to the Inspector. He dealt with them between paragraphs 23 to 32, under the heading, “Location and extent of Hampsfield Road”. It is plain that he had well in mind the nature of the point which was being made. At paragraphs 26 and onwards in particular, he made reference to the spur and considered the arguments that might be made about it. He concluded that he could not say why it was that the Commissioners broke with their apparent convention of making a separate award for all roads in the case of this layout. But he noted that the text of the award described the same road -- that is, Hampsfield Road -- as having two separate outlets from the fell. He had earlier identified by reference to the pre-enclosure maps that there were two outlets from the fell, or inlets to it; and they were it appears about the points which were relevant. He concluded that he found the Council’s submission that the award had followed the line A-B-C, with a spur to E, to be more persuasive than the alternative explanation put forward by the objectors. That was a conclusion as to the weight and significance of evidence, that is within the Inspector’s province. It is not for this court to second-guess him; no issue of law arises. It was asserted that the route B to C was an accommodation track and no more. This, it seems to me, takes matters nowhere, and does not answer the main points which were made by the Inspector in his award.

38. Finally, of the main points which were made to me, there was reference to the importance of the Finance Act of 1910. What was argued here was that reductions in tax liability could be claimed for the existence of public rights of way across property. It could be shown from documents what reduction in tax the owners of High Hampsfield Farm had sought. The metreage of the routes across

the farm for which a claim was made was 2,010. The county council had demonstrated by reference to their definitive footpath statement prepared in 1949 that there were 1,650 metres recognised by it prior to the inquiry beginning. It was not possible to demonstrate with any certainty where the remaining 360 metres of rights of way might be located.

39. The Inspector considered the evidence. He dealt with it between paragraphs 62 and 65. He concluded that the reduction in tax claimed by owners in lieu of rights of way was of limited assistance in determining the extent of public rights in existence in 1910. I consider he was within his entitlement to do so.

40. I have reviewed the challenges made to the conclusions of the Inspector on the documentary evidence and the evidence which related to the time prior to 1920, and I conclude that there is nothing to invalidate the Inspector's conclusion, to which I have already referred, in respect of that part of the evidence. I note, as Mr Coppell, who appears for the Secretary of State, urged me to do, that in this case there has been no challenge, beyond those I have described, to the Inspector's approach, to his statement of the law, to his application of the law, and to his expression of it with clarity.

41. I come then to deal with the questions which arise in respect of the second part, into which the evidence naturally falls, that in respect of section 31 of the Highways Act 1980. Here, Mr Ellery notes that a specific period needs to be identified; that is, a period of 20 years next before the right of way is put into question. The Inspector did not assign a particular date in the year as being the

date at which the question was first raised. He concluded (paragraph 109) that the relevant period for B-C-D was up to a time in 1993, but he did not say what date. He took the 20-year period as therefore being 1973 to 1993, though the mathematical purist might argue that that spanned 21 rather than 20 years. But he did not ascribe a date by day and month to the precise starting point.

42. In my view, there may be some cases in which it is necessary, and may be essential, to do so. A period of 20 years is, after all, a full period of 20 years. It is not 20 years less a couple of weeks. But there may be many cases in which the evidence is necessarily general. A case such as this is one in which it may be very difficult, if not impossible, to prescribe a precise date, the date that the route was called in question. Indeed, it is required to be a matter of conclusion for the Inspector rather than a matter of agreement or establishment as a date of precision on the evidence. He did not have to be concerned with a precise period of 20 years if the evidence established the requisite user beyond 20 years. By taking the time period 1973 to 1993, he indicated something of a generous approach to that in favour of the claimants, although it would depend precisely upon which date in the year is considered.

43. I therefore look to see whether the evidence he had of user during that period went on for such a minimum time as justified the conclusion that he finally reached. Here, the evidence was given by local residents, and those who had used or claimed to have used the track, in the form of witness statements for some, questionnaires for others, letters, oral evidence, or a combination of all these.

44. At bundle 1, at tab 6, page 66, there is a useful schedule set out by the county council which summarises the user of route B-C-D, amongst other relevant routes, by the witnesses who gave evidence about it. It describes the years of use, the dates claimed, and the way in which they had used the route, and any further relevant information in a box to the far right.

45. This schedule is a very useful summary, but again I must be careful not to be misled or seduced by it, because it may not represent the final state of the evidence after all had been heard and considered by the Inspector. I repeat again the point I made at the outset with respect to the evidence of Roscoe and Repton. What is said here is that there was no evidence from any one person that they had used the route B-C-D for the whole of the requisite 20-year period. Nor, it is suggested, was there evidence of use by non-mechanically propelled vehicular traffic throughout that period; that the only evidence of non-mechanically propelled vehicular traffic was evidence of the use of a horse and trap, as to which the Inspector recognised that he had no evidence of its use prior to 1976 (see paragraph 113), and therefore was an inadequate basis to conclude that there was such use for 20 years, since by definition it was less than 20 years.

46. Mr Elleray focused his attack both in respect of the evidence about use by horses, and use by what I shall call vehicles. As to both, the Inspector said at paragraph 126:

> "Although none of the users who appeared at the inquiry individually demonstrated use of any of the order routes for their required period of 20 years, it

> is not necessary under section 31 of the 1980 Act that all users should fulfil this requirement."

I pause there; that is plainly right. Use as of right *nec vi, nec clam, nec precario* by some users, overlapping with such use by other users, will be sufficient if it continues over the period of 20 years or more to establish the public right of way. The Inspector continued:

> "The frequency and level of use of the claimed routes is not untypical for rural bridleways, and I consider that the oral evidence given reflects and supports that, given the remaining untested user evidence submitted by the Council.
>
> 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 of the rural area is sufficient to raise the presumption of dedication of a public right of way over ABCD…"

47. It was only necessary, submitted Mr Coppell to consider parts of the evidence available to the Inspector to demonstrate that there was some evidence available which was capable of supporting that conclusion. Thus he drew attention to the evidence of Angela Herbert (see page 300 of the common bundle). In her written questionnaire, she had claimed that she had used a path from the late 1950s to the late 1980s on horseback, and before and after that on foot. And indeed, she said that she had owned a riding school and she had taken hacks out during the early 1960s.

48. It was observed in respect of her evidence by Mr Elleray that she made reference to bridlepaths through the woods, which she did; and he says, with justification, that there were no woods on the fell. That may well be so; but she did say (paragraph 20 of her questionnaire) that the paths had been used as bridlepaths through the woods ***and*** over Hampsfield Fell. And attached to her questionnaire was a map, upon which she had outlined a route from B to C to D, which corresponds with the B-C-D claimed, as well as a further map upon which she had drawn and demonstrated a number of routes, one of which was B-C-D. That on its own, submits Mr Coppell, is sufficient. In my view, it is not necessary here to seek out one user; the point that he made is one which I accept, that there was ample evidence, which it is unnecessary without unduly burdening this judgment to set out at length, of the use by horses.

49. What gave me greater pause for thought was the question and questions raised by whether the user went beyond that which would support a conclusion that there was here a bridleway. That involved an evaluation by the Inspector of two forms of transport. The first was the use of a pony and trap by a Mr Clay. Mr Clay says that he used the pony and trap on a regular basis, it appears probably fortnightly, throughout the period from 1976 onwards. 1976 does not, so far as I can see, appear from his written material and must have been derived by the Inspector from what he said orally. I reject the suggestion that if one person uses a pathway so regularly, it cannot give rise to there being a carriageway, when use to a lesser extent in aggregate, but by several different users over the same period, might. What matters is the nature and quality of the use taken as a whole, and whether it is secretly, with permission, with force; those requirements which are well

understood as necessary for the establishment of a right of way. But Mr Elleray is entirely right in pointing out that that evidence would assist the Council only for the period between 1976 and 1993, when the route was called into question; and that is not 20 years.

50. So what did the Inspector find in respect of use of pedal cycles?. At paragraph 111, he said that B-C-D had been used by a pedal cycle by two persons. He said at paragraph 114 that cycle use of all routes, which plainly includes B-C-D though it also related to other routes he had under consideration in his decision, had commenced for two users in 1969, with two other individuals having cycled the routes from the 1950s. At paragraph 119, he reported some of the evidence of Mr Roscoe. He reports that Mr Roscoe had been resident in Hampsfield since 1969, and had used both A-B-C-D and A-B-E-F-G-H "countless" times on foot and by pedal cycle. Reading this together with the evidence of Mr. Clay would thus be a sufficient basis to uphold the Inspector's conclusions.

51. But Mr Elleray drew attention to parts of Mr Roscoe's evidence which were capable of conflicting with such use establishing a right of way. He told me that the evidence had been that he, Mr Roscoe, had used the route with the permission of the owner. This would not, therefore, be use as of right. He conducted a careful and thorough analysis of the written material in the common bundle, in order to demonstrate to me that there was no evidence upon which the Inspector was entitled to rely to come to the conclusion that there had been any cycle use which might span the period from 1973 or 1974 through to 1976 to marry up with the starting date of use of the pony and trap, or thereafter.

52. This submission deserves some respect. In bundle 1, behind tab 6, is set out some of the witness statements which, presumably, were supported by oral evidence. Mr Harvey was a friend of Mr Roscoe. If, therefore, Mr Roscoe was permitted to use the track, then so might Mr Harvey come within that permission if, indeed, he had ever used the track. What Mr Harvey said in his witness statement (see page 88, bundle 1) was that he had used the route between B and C. He said at paragraph 4 that he had used it with Mike Roscoe and that "We were never stopped or challenged." He did not remember Mike or Joe saying that they were allowed to use the route. There had been no discussions about entitlement; it did not seem to be an issue. He described then how, in the 1970s and 1980s, he would often cycle round on the roads and (penultimate paragraph, page 88) he had also cycled along the route from High Hampsfield Farm to B; that is a reference, as one understands the writing, to B-C-D. He describes how he had ridden up there perhaps every month in the 1990s. A map attached to that witness statement showed clearly the route B-C-D, as well as B-E-F-G.

53. In his questionnaire form, he had also appended a map. He had described in that questionnaire his use of some paths on foot, and depicted in a different colour the use by bicycle and foot. He does not show the route B-C-D. This is one of those complications of evidence, therefore, from which, given the written material without evaluation, by listening to the witnesses and by considering what is said in the light of all the other evidence, a court on review cannot do better than to simply say that this is why courts on review are careful not to descend into the arena of determining facts for themselves. There was, on one view, material

available from which the Inspector could conclude that a bicycle had been used in the relevant periods, through relatively unspecifically described by Mr Harvey. The County Council could also use his evidence to support a view that Mr Roscoe was wrong when he described how he had used the track with permission.

54. Mr Wareing, in his written statement (page 92), described how he had used what he called "these tracks" up to the age of 16 to 17, that would be up to the early 1960s, and he said that he had cycled. At the bottom of his statement, he says: "When we were kids, we also used to go along the track at High Hampsfield."

    That must, in my view, be a reference to B-C-D. He then describes leaving the road and going through the farmyard, and then along the track; which must be a description of that particular route, given what I have been told. He said he did not think he had used it since he became an adult, which would be in 1964, or possibly 1967, given the change in the age of majority. The evidence is suggestive only, rather than definitive, but it is part of the evidence which was available to the Inspector.

55. Mrs Weinger (see volume 1, page 93) described how she kept her horse in a field at the back of her house when she was nine or ten. She described having ridden over parts of the fell with a friend, and having on occasions, if she did not go on horseback, gone on bicycle. And sometimes there would be two of them, herself and her friend, with just one of the horses, so one would ride a horse and the other would ride the bike. In the middle of her statement, she describes racing her friend over a grassy stretch alongside the wall towards High Hampsfield and that is then described as a well-defined track, definitely a route to follow going over

and then down through High Hampsfield Farm. At page 94, she says again that at about the same time, that is when she got to about 18 in 1994, she rode her bike to High Hampsfield and was told that the land was private. And so after that, she started riding her bike the other way, by E-F-G. That is suggestive, though not conclusive of the first reference being a reference to the route B-C-D.

56. Mr Wycherley, on whom Mr Coppell placed some reliance initially, in my view, given what he said at page 97, that he did not remember cycling over B to C, could not possibly support the use of cycles over that route, depending of course upon whether he said anything different when he came to give oral evidence.

57. As to Mr Roscoe, it has to be noted that he gave different accounts. In the initial account in questionnaire form in 1994, he described having frequently cycled the route, which from his description is B-C-D to Grange, from 1971 to 1980. At what is page 218 in the common bundle, there is a statement which is inconsistent with that. He describes having permission to do it. At page 220 is a letter which he wrote in 2003, later still, in which he encloses a map which shows in blue a route which he had taken, but gives a description of cycling along a route which appears to have been consistent more with A-B-E-F-G. If he had had permission, as I have already mentioned, he would have had it from Mr Repton. Mr Repton's evidence was considered by the Inspector. The Inspector concluded, having evaluated the evidence, that Mr Repton, who had himself in an earlier statement denied ever giving permission because the use of the way was notorious, and then later changed this to describe how he had, that Mr Repton had indeed known of the use, had not given express permission to anyone for its use (as he first

claimed), and it is plain therefore that his acceptance of that evidence would naturally incline him to a view of Mr Roscoe's evidence accepting of that part of it which was consistent with his view that Mr Repton had not given permission.

58. This is, therefore, making sense of conflicting evidence, evaluating it and coming to a conclusion. If he came to the conclusion that Mr Roscoe had used the route as he described, by cycle, over the period he described, without permission, plainly openly and plainly without force, that use would amply support the conclusion to which he came. The Inspector did not conduct an analysis in those detailed terms, save so far as I have indicated. But he did not have to; it was sufficient for the purposes of his decision to summarise the evidence as he did, and to recognise, as perhaps was inevitable, in paragraph 110, that the material given to him by witnesses necessarily was likely to overlap. I cannot, having considered with some care the evidence upon which he relied, come to the conclusion that he was wrong to conclude that bicycles had been used throughout the period.

59. That, however, does not entirely dispose of this appeal. That is because a further point of law arises. The Countryside and Rights of Way Act 2000, at section 48, effectively prevents any new highway open to all traffic being created if it had not been previously recognised as such. It does provide, by subsection 48(4), for restricted byway rights. A restricted byway is defined:

> "… 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."

And “restricted byway rights” means:

> “(a) a right of way on foot,
>
> (b) a right of way on horseback or leading a horse, and
>
> (c) a right of way for vehicles other than mechanically propelled vehicles.”

Section 30 of the Countryside Act 1968, by subsection (1) provided:

> “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.”

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.

62. Mr Elleray's case is twofold. First, it is best expressed by that which was submitted to the Inspector in the 2008 inquiry by one of the objectors. At paragraph 27 of the Inspector's decision on that occasion, he notes that 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 by pedal cycles during the relevant period under consideration as being irrelevant because of the possible acquisition of Restricted Byway rights."

As can be seen, that submission began upon the basis that a bridleway had been established.

63. Thus, the first answer to Mr Coppell's point is to suggest once a highway, always a highway; if a highway at common law, then a bridleway; if a bridleway, then the rights under section 30 would prevent use of a cycle being inconsistent with it being any more than a bridleway.

64. The second argument is a broader one. It does not begin with the necessity of establishing a bridleway, but with the argument that there can be no inference from the use of a bicycle alone that a way has been used as a restricted byway rather than a bridleway. I was referred to guidance given by the Planning Inspectorate in respect of definitive map orders to ensure consistency

guidelines (see tab 18 of the authorities bundle). At paragraph 5.47, the guidance says:

> "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."

That may suffer from the same need to show that there was a public bridleway, but nonetheless it is a submission which deserves an answer. The fact that there is guidance given by the Secretary of State is not, in any sense, determinative or even indicative of the conclusion of the court. The views of others, even the Secretary of State, as to what the law is cannot bind the court.

65. So one issue for me is whether the guidance there expressed is correct. And that point applies, too, to the first answer which Mr Coppell gives to this, which is to point that at paragraph 5.46 of the same guidance, it is said:

> "It is … possible from long use of bicycles on a footpath or bridleway … to give rise to a claim for a BOAT. Inspectors will need to consider whether vehicular use of the way in question has given rise to, or is likely to give rise to, a public nuisance, i.e. if the use of bicycles has given rise to, or the use in the future of bicycles and/or any other vehicles in the way, is likely to give rise to, a public nuisance, the claim for BOAT must fail. The public nuisance issue is one to be determined by Inspectors by reference to the particular facts before them."

66. It was plainly in the light of that guidance that the Inspector himself gave his own answer to the submission to which I have already referred, in paragraph 27 of his

2008 decision. I continue my recitation of what he said from the point at which I left off:

> "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 an 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."

Discussion

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.

70. Accordingly, having considered those submissions with the care that they merit, I have in the event come to the conclusion that I must reject the objection made to the Inspector's determination on this basis. It follows that, there being no error of

law which has been identified to me, the Inspector was within his powers to determine as he did. Therefore, in light of the framework conferred by the Wildlife and Countryside Act, I have to dismiss this claim, and I do.

Order: Appeal dismissed.

Mr Coppell: My Lord, I seek an order dismissing the claim, and an order that the claimants pay the defendant's costs, to be taxed if not agreed.

Mr Justice Langstaff: What do you say, Mr Elleray?

Mr Ellery: I can't oppose that, my Lord. I have lost, so there should be fair costs to be assessed. We have not seen any schedules of costs, so there is no question of --

Mr Justice Langstaff: It has gone on for more than a day. I do not think that a summary assessment would be appropriate.

Mr Elleray: My Lord, has no material on which to make a --

Mr Justice Langstaff: I have none. So it will be detailed assessment of the defendant's costs. The claimant is to pay the defendant's costs, to be assessed if not agreed.

Mr Elleray: My Lord, then with respect, I seek two matters.

Mr Justice Langstaff: Certainly.

Mr Ellery: First, permission to appeal, and I will indicate the grounds very briefly, but if you are against me on that, would my Lord extend my time from 21 days to 35 days to file a Notice of Appeal seeking permission to the single Lord Justice. My reasons for that are twofold. First, we will want to obtain the transcript of my Lord's judgment, so as to help inform any application for permission to appeal. Second, I have difficulties next week, at least that will help apply my mind to this question, but they are duties of a public nature. But I will --

Mr Justice Langstaff: Tell me, what is the basis for the application for leave to appeal?

Mr Elleray: First, my Lord, in relation to the late 18th and 19th century documentation, we do contend that within the constraints of the principles of judicial review, that the Inspector is either right or wrong as a matter of law that the 19th century documents, including the maps, show B-C-D as a public bridleway and that we have a real prospect of persuading the Court of Appeal that he was simply wrong to conclude that it was. Secondly, my Lord, in relation to the section 31 enquiry, we say that the Inspector is wrong in law that evidence that he accepted could establish a restricted byway, given (a) the physical characteristics of the route, (b) the proper analysis of forms --

Mr Justice Langstaff: Sorry, the --

Mr Elleray: Proper analysis of forms and statements; (c) the sufficiency of level of use, which is a point picked up in the passage in Gale and in paragraph 5.9 of the

Department's guidelines, and (d) the evidence of cycle use in what we describe as the deficit time, 1973 to 1976, was with permission. In other words, in essence, my Lord, under a number of those heads, we say that two cyclists cannot establish the public right on a track of this character over a fell. My Lord, that is -- and (inaudible) of those grounds on which we seek permission, my Lord would only have given me permission if my Lord identified I had any real prospect. I hope within what I have said about a modern right, of course, we would also be running the point which my Lord discussed at some length about whether cycles add anything to a bridleway, given the 1968 Act.

Mr Justice Langstaff: Yes. I am going to refuse permission. It seems to me there is no proper force in the first of the grounds, which is about the documents; and in any event, as it seems to me and as I said, the case really turns or falls on the Highways Act. As to the second, those seem to me to be, with one exception, matters of fact which were well within his discretion. The matter upon which I have more sympathy with your application, but not enough to think you have reasonable prospects of success, is that in respect of the impact of the 1968 Act.

Mr Elleray: Thank you, my Lord.

Mr Justice Langstaff: I should add that you have not made a submission that it requires for some other reason to be heard. There is no other reason which is obvious to me. There are two grounds for appeal. One is prospect of success; one is that there is some other compelling reason why it ought to be heard. This is not one of those cases which for that reason requires to be heard, as I see it.

Mr Elleray: It was the real prospect ground that I was putting forward.

Mr Justice Langstaff: Thank you very much. You wanted the 35 days. I am sorry I had not dealt with that. Let me just say that, yes, you have that extension of time, and I shall order an expedited transcript.

Mr Elleray: I am grateful, my Lord. I should have said, there is no prejudice to the users of the track over that period.

Mr Justice Langstaff: No.
