Case No: CO/3431/2014

Neutral Citation Number: [2015] EWHC 85 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2015

Before :

MR JUSTICE COLLINS

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Between :

	TRAIL RIDERS FELLOWSHIP	**Claimant**
	- and -	
	SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**

- -
- -

Mr Adrian Pay (instructed by **Messrs Brain Chase Coles Solicitors**) for the **Claimant**
Ms Jacqueline Lean (instructed by **Treasury Solicitor's Department**) for the **Defendant**

Hearing dates: 5 December 2014

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Judgment

Mr Justice Collins:

1. This claim is brought pursuant to paragraph 12 of Schedule 15 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of an inspector on behalf of the defendant who on 4 June 2014 confirmed with modifications an order entitled the Derbyshire County Council (Byway Open to All Traffic along Bradley Lane between Pilsley village and the A619 – Parishes of Pilsley and of Hassop) Modification Order 2010. The title is somewhat misleading since the modification in question substituted Bridleway for Byway Open to All Traffic (BOAT) in the order. The County Council had sought to designate Bradley Lane as a BOAT, hence the title of the order.

2.The effect of the designation as a bridleway instead of a BOAT is that no motorised vehicles can use it. It is limited to pedestrians, horse riders or pedal cyclists. The claimant has in the past used it for motorcycles and wishes to be able to continue that use.

3.That Bradley Lane is a highway is not disputed. In order to decide whether it was a vehicular highway, the inspector had to consider such historical documentary evidence as was available. In addition, if he was not persuaded that the documentary evidence showed that the route was a vehicular highway, he had to consider whether there had been a use by the public as of right and without interruption for a period of twenty years before its status was brought into question (see Section 31 of the Highways Act 1980). The inspector held a public enquiry in December 2012. He concluded that the County Council had not established to the required standard, namely the balance of probabilities, that the route was a vehicular highway. He decided that it should be designated as a bridleway. Objections were raised to the conclusion that it should be designated as a bridleway and so the inspector held a second inquiry in March 2014. His original decision was regarded as an interim decision. Following the second inquiry, he maintained his interim decision.

4.I should first set out the statutory and common law background. At common law, a highway's classification was threefold. First, it could be a footway, appropriated to the sole use of pedestrians. Secondly, it could be what was described as a pack and prime way, called a bridleway, which was both a horseway and a footway. Thirdly, it could be a cartway, which comprehended the other two and was also a cart or carriageway. A report of a committee which had been set up to consider access to the countryside in 1947 advised that in order to prevent rights of way being forgotten and lost a complete survey should be put in hand so that an authoritative record of rights of way could be prepared. This was dealt with in the National Parks and Access to the Countryside Act 1949 (the 1949 Act). Section 27(1) of the 1949 Act required every county council to carry out a survey of "all lands in their area over which a right of way……is alleged to subsist" and prepare "a draft map of their area showing thereon a footpath or a bridleway…..". Section 27(6) defined the following relevant expressions:-

> " 'footpath' means a highway over which the public have a right of way on foot only.
>
> 'bridleway' means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway.
>
> 'road used as a public path' means a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.

'public path' means a highway being either a footpath or a bridleway".

5. Much trouble was caused by the definition of 'road used as a public path' (RUPP). It was intended to cover highways which were cartways at common law, but the problem lay in the word 'mainly'. In R v Secretary of State for the Environment ex parte Hood [1975] 1 QB 891 Lord Denning, MR said at p 897F :-

> "The object of the draftsman was to include cartways over which there is a public right of cartway, but which are used nowadays mainly by people walking or riding horses….The draftsman intended to exclude metalled roads used by motor cars".

6. Following resolution of any issues raised in the draft map and statement prepared by a council, a definitive map and statement (DMS) was to be prepared. Section 32(4) of the 1949 Act provided:-

> "A [DMS] shall be conclusive as to the particulars contained therein…..to the following extent, that is to say –
>
> (a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date specified in the statement a footpath as shown on the map.
>
> (b) where the map shows a bridleway, or a [RUPP] the map shall be conclusive evidence that there was at the said date a highway as shown on the map and that the public had thereon at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights aforesaid……"

7. In the Countryside Act 1968, the 1949 Act was amended to remove the RUPP categorisation. Section 33 applied Schedule 3. The 1968 Act required there to be a special review so that inter alia RUPPs were no longer to be shown. Paragraph 9(1) of Schedule 3 provided:-

> "In the special review the draft revision, and the definitive map and statement shall show every road used as a public path by one of the three following descriptions:-
>
> (a) a "byway open to all traffic",
>
> (b) a "bridleway",

(c) a "footpath",

and shall not employ the expression "road used as a public path" to describe any way".

Paragraph 10 sets out the test to be applied for reclassification of RUPPs. It reads….. "The considerations to be taken into account are:-

(a) whether any vehicular right of way has been shown to exist,

(b) whether the way is suitable for vehicular traffic having regard to the position and width of the existing right of way, the condition and state of repair of the way and the nature of the soil…..".

8. The 1981 Act repealed and replaced the material provisions of the 1949 and 1968 Acts. Sections 53 to 58 of the 1981 Act set out the approach for categorisation of highways which now (subject to some amendments in the Countryside and Rights of Way Act 2000 (the 2000 Act)) must be applied. Section 53 requires that the DMS be kept under continuous review. Section 53(2) requires the relevant authority to make such modifications to the DMS as appear to it to be requisite in consequence of inter alia the discovery by the authority of evidence which shows that a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist (s.53(3)(c)(i)).

9. Section 56 of the 1981 Act provides that a DMS shall be conclusive evidence in relation to each of the three categories, namely footpath, bridleway and BOAT. But in relation to footpaths and bridleways, the designation in the DMS was to be without prejudice to any question whether the public had any right other than those shown in the DMS. The 2000 Act by s.47 made further provisions where DMSs' continued to show RUPPs and provided that any such way should be shown as a "restricted byway", which s.48(4) defined as meaning a right of way by foot, or horseback or leading a horse and for vehicles other than mechanically propelled vehicles.

10. Section 66 of the 1981 Act gives definitions which follow, for footpaths and bridleways, those which had been contained in the 1949 Act. A BOAT is defined to mean:-

"a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".

11. I should refer in addition to the Local Government Act 1929. This transferred to county councils responsibility for all highways in rural districts for which the district council

was highway authority. These were termed 'county roads', but road as defined simply meant a 'highway repairable by the inhabitants at large'. Thus 'road' in the Act did not necessarily connote a vehicular use. Bakewell RDC showed the order route on a map which was handed over to the County Council (called a handover map) as an 'unscheduled other district road'. It is described as 'bad, grass grown and little used'. It is recorded by the County Council as a non-classified highway (NCH). Neither of these classifications necessarily imply that there is or was a right of vehicular use.

12. This claim is brought under Paragraph 12 of Schedule 15 to the 1981 Act. Schedule 15 sets out the procedural requirements which must be followed before any order such as that in issue in this claim is made. Paragraph 12 provides:-

> "12. (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.
>
> (2) 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."

This approach of the court is the same as that applicable in claims under sections 288 or 289 of the Town and Country Planning Act 1990. Thus it is only if an error of law is established that I can find in the claimant's favour. It is important to bear in mind that it is not permissible for there to be any review of the factual issues. The inspector was bound to exercise his judgment on the facts found by him (most of which in this case are based on documentary material) and that judgment cannot be impugned unless it was one which could not rationally have been reached or which was erroneous because of a failure to have regard to a material particular or because regard had been had to an immaterial particular.

13. Ground 2 relied on by the claimant sought to challenge the inspector's conclusion that the order route was a bridleway. The claimant's 'interest' was to establish that the inspector was wrong to conclude that it was not a BOAT. Thus whether if not a BOAT it should have been designated to be a bridleway rather than pedestrian way does not affect the claimant's interests. But in reality as Mr Pay recognised Ground 2 added nothing

since his attack lay against the failure to decide that the order route was a BOAT. Furthermore, if it was not a BOAT, there was no error of law in the inspector's conclusion that it was a bridleway.

14. The inspector is to be regarded as an expert tribunal so that the hurdle to surmount to establish perversity is a high one. Furthermore, since the approach is the same as that which applies to judicial review, I must be careful not to let any views I may hold on the merits influence my judgment. That would be to retry the case and to allow my assessment of the evidence to drive my decision. Thus only if the inspector fails to apply the correct test or as I have said, to take all and only relevant factors into account, the weight to be given to them being a matter for him, or the decision reached was perverse can the claim succeed. I echo the words of Charles J in R (Elveden Farms Ltd) v SSEFRA [2012] EWHC644 (Admin) at paragraph 3.

15. The earliest recorded reference to the order route dates from 1627. It is described as a rugged track used by packhorses which led through Pilsley and across the valley to Hassop. Various maps were produced at the two inquiries from the latter part of the 18th century. While consistent with the order route being part of a way which goes between Pilsley and Hassop, the inspector concluded that none of these maps established that it was for carts or other vehicular traffic. That conclusion cannot be impugned and Mr Pay did not seek to challenge it.

16. However, the fact that there was a way between Pilsley and Hassop of which the order route formed part is of importance. In 1801 an Act of Parliament authorised the diversion of a section of the road between Baslow and Bakewell to an alignment corresponding to what is now the A619 road. The order route lies between Pilsley and the A619. The way to Hassop continues after a short turn along the A619. It was referred to in the inquiry as HRB6. It is now a restricted byway pursuant to the provisions of the 2000 Act since it was recorded in the DMS produced in 1951 as a RUPP. The order route was not given any description in the DMS, a matter to which for reasons which will become apparent Mr Pay attaches considerable importance.

17. Mr Pay submits that the inspector made two substantial errors in relation to the significance of the description of HRB6 as a RUPP and the absence of any description of the order route. First, in his ground 5, he submits that the inspector was wrong in attaching no weight to the description of HRB6. He refers to paragraph 36 of the inspector's second decision. The inspector had drawn attention to the provisions of s. 32(4)(b) of the 1949 Act and the corresponding provisions of s.56(1)(d) of the 1981 Act which provided that where a map showed a bridleway or a RUPP it was conclusive evidence that the way was a highway which the public could use with horses or on foot but was 'without prejudice to any question whether the public had at that date any right of way other than the right agreed'. He continued:-

> "Therefore the depiction of a RUPP was only conclusive evidence of a footpath or bridleway rights, with the possibility of the existence of public vehicular rights left open. This means that I do not consider that any reliance can be placed on the original recording of this way as a RUPP before it was reclassified under the provisions of the [2000 Act]".

18. Ms Lean says that this must be read in context. In paragraph 34 the inspector said:-

> "In respect of Hassop RB6, the surveyor considered it to comprise of sections of footpaths and RUPPs in 1951. Reference is also made to the relevant schedules to use by agricultural vehicles. This evidence is not supportive of Hassop RB6 being a recognised vehicular through route at the time. However, as Mr Kind points out the whole of this way was subsequently recorded on the definitive map as a RUPP. Whilst the reason for the change is not known, I accept that the decision by the Council to show the way as a RUPP should be given some weight. Nevertheless, as outlined below, an issue arises in relation to the public rights that existed in relation to RUPPs."

Thus it is clear that the inspector did recognise that some weight should be attached to the description of HRB6 as a RUPP. Accordingly, what he is saying in paragraph 36 is not, as Mr Pay suggested, that no weight should be attached to the description but that in the inspector's view the designation was not a reliable indicator of vehicular rights.

19. Mr Pay makes the point that designation of a bridleway would not exclude the possibility of vehicular rights. Thus designation as a RUPP showed that the view was taken that there was at least a reasonable possibility of vehicular rights. This is consistent with observations of the Court of Appeal in Fortune v Wiltshire CC [2013] 1 WLR 808. In that case, it was accepted that the inclusion of a relevant part of a way known as Rowden Lane as a RUPP showed that the view had been formed that vehicular rights were "reasonably alleged". But the inspector did not misdirect himself in considering that in the circumstances the designation of HRB6 as a RUPP did not necessarily show that either HRB6 or the order route in fact carried vehicular rights.

20. Mr Pay in his Ground 4 submits that the inspector misdirected himself in considering the significance of the failure to give the order route any designation in the DMS, coupled with what was shown in the 'handover map' following the 1929 Act. It was shown coloured green in the handover map which suggested that it was regarded as an "un-scheduled other district road". The order route was described as "Bad, grass grown and little used". This certainly indicates that it was regarded as a highway but is hardly a pointer to vehicular use. The County Council recorded it as a non-classified highway (NCH). It stated, as set out in its case before the inspector, that a note on the council records indicated that that did not in itself show that the route carried vehicular rights. The council's witness at the first inquiry confirmed that a percentage of NCHs had been

found following public inquiries not to be BOATs. The inspector in paragraph 31 of his final report accepted that the handover map could be supportive of the order route having the reputation of a vehicular highway, but made the proper reservation that the issue was not subjected to any public scrutiny. Hence the importance of the council witness's evidence.

21. The handover map together with the council's records shows that the order route was regarded as a highway. Since historically it was with HRB6 a way between Pilsley and Hassop and HRB6 was recognised on the DMS as a highway, it was certainly strange that the order route was not given a classification. It is incidentally to be noted that HRB6 was divided into sections of footpaths and RUPP: that is not consistent with overall vehicle use. Mr Pay submits that the omission of the order route is only consistent with it being considered that it carried vehicular rights which were not limited.

22. In his interim report, the inspector at paragraph 48 stated:-

> "The claimed route was not alleged to be a public right of way when the original definition map was compiled. However, this may have been due to the fact that the route was already recorded in the Council's maintenance records. The fact that Pilsley footpath No 2 connects at both ends with the claimed route is also suggestive of the route being a highway".

In his final report, at paragraph 33 he said that it remained his view that evidence in relation to the compilation of the DMS suggested that the order route was considered to be a highway but not necessarily vehicular in nature. If it was a highway, it should have been identified in the DMS as a footpath, bridleway or RUPP unless it was for vehicular use. So Mr Pay submits that its absence is powerful evidence that it was regarded as having vehicular rights.

23. The inspector does not specifically refer to this submission (if it was made), and Mr Pay submits that he was wrong to say that the order route was not alleged to be a public right of way. This showed, he submits, that the inspector seemed to fail to appreciate that not all rights of way qualified for inclusion in the DMS. However, the suggestion that it was considered to be a vehicular right of way is not supported by the evidence and certainly it would be very strange if it was vehicular when HRB6 was not. The inspector's review of the material evidence was thorough and the nature of the route was itself inconsistent with general vehicular use. At most, it could have been a RUPP which would now be a restricted byway by virtue of s.47(2) of the 2000 Act which would exclude mechanically propelled vehicles.

24. On the findings of fact made by him, the inspector was justified in considering that the omission from the DMS was an error which may have resulted from a failure to

appreciate that the order route was a highway. The view that it was for general vehicular use was inconsistent with his findings. Obviously, if his findings were not lawfully reached, different considerations will apply.

25. In his Ground 3 Mr Pay asserted that the inspector failed to appreciate that the naming of the order route as Bradley Lane showed that it was for vehicular use. This submission is based upon what is said to be the evidential impact of the use of the word 'lane'. In Fortune v Wiltshire CC [2010] EWHC B33 (Ch), HH Judge McCahill QC, sitting as a deputy judge of the Chancery Division, had had to consider whether Rowden Lane was a highway for use of vehicular traffic. At paragraph 712 he said:-

> "…..[T]he word 'lane' has been judicially defined as usually meaning a minor road leading between one main road and another".

In paragraph 953 (vii) the judge in the summary of his findings stated that the word 'lane' implied a highway running between two major roads. The Court of Appeal did not comment on the judge's observations about the significance of the word 'lane' but decided on a review of the evidential findings made by him that his decision was correct.

26. The inspector in his final decision referred to the definition of 'lane' which I have set out above. In paragraph 17 he said this:-

> "Irrespective of whether the claimed route could be defined as running between the two main roads I am not satisfied from the judgment or dictionary definitions provided that the word 'lane' is necessarily supportive of a route being a particular class of highway. The status of a route is a matter to be determined from the evidence as a whole. In my view, it is a descriptive term and provides no clarification regarding what rights exist over a particular route."

This is entirely consistent with the approach of the Court of Appeal in the Fortune case. Mr Pay suggested that the inspector had ignored the impact of A-G v Woolwich (1929) J.P.173, a decision of Shearman, J. But the judge there said that 'lane' usually meant a minor road leading between one main road and another main road, observations which were picked up in the Fortune case.

27. Some support for vehicular use was said to result from the fact that a short section of the order route was known as High Street, being an extension of the street running through Pilsley. But that description is limited to twentieth century documents and in any event cannot, as the inspector properly concluded, show that the whole of the order route must have had vehicular rights. It is unnecessary in the circumstances to consider what a street means in law or statute.

28. The inspector in his two decision letters considered at length and in detail the evidence of documents and maps from the nineteenth and twentieth centuries. Much was made on the claimant's behalf of evidence relating to plans for railways to be constructed during the nineteenth century which would have crossed the order route. These could be regarded as consistent with the view being taken by those responsible for the plans that there were vehicular rights. Nevertheless, the plans were never put before Parliament and so there was no detailed consideration of the issue. Mr Pay accepted the inspector's conclusions in relation to the railway evidence to the effect that the evidence was supportive of the claim that the route was a vehicular highway but was not conclusive.

29. I do not consider that it is necessary to lengthen this judgment by going through the evidence and the inspector's conclusions in detail. Suffice to say that I accept that he could properly as a matter of judgment have found the order route to be a BOAT, but equally he was entitled as a matter of judgment to reach a contrary conclusion. None of the specific matters raised by Mr Pay with which I have dealt persuade me that the inspector's decision is flawed.

30. In Ground 1 Mr Pay submits that the decision was irrational. Essentially, he submits that overall the evidence was such that the only reasonable conclusion was that the order route was open to vehicular traffic. This is an impossible submission. As I have said, the inspector could properly have concluded in the claimant's favour, but the condition of the order route, described in the 1930s as "Bad, grass grown and little used" and not significantly improved since, coupled with the history which is inconclusive and certainly does not show with any degree of clarity that vehicular use was or is available as of right, entitled him to conclude as he did. Ms Lean's criticism of Ground 1 that it is essentially an attempt to retry the factual issues seems to me to have merit.

31. I should only add that there was evidence of use which was relied on to attempt to show a 20 year vehicular use as of right and, it is said, to support the claim that such use had been permitted. The inspector dealt with the user evidence saying (paragraph 65 of his interim report):-

> "I accept there was some vehicular use of the route prior to the 1990s and this is supported by the evidence of [two witnesses] at the inquiry. However, in the light of the quality of the user evidence supplied and the fact that there is credible conflicting evidence, I am unable to conclude that, on balance, the vehicular use is sufficient to raise a presumption of dedication under the statute…..Furthermore, I consider that the quality of the user evidence is not sufficient to infer the designation of a vehicular highway at common law."

32. Mr Pay recognised that he could not challenge the conclusion in relation to the designation under statute. And it seems to me that the further conclusion that the user

evidence did not infer vehicular designation was inevitably correct.

33. It follows that I dismiss the claim.