Neutral Citation Number: [2017] EWHC 2651 (Admin)

Case No: CO/787/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2017

Before :

THE HON MR JUSTICE KERR

Between :

THE QUEEN on the application of ROXLENA LIMITED	**Claimant**
- and -	
CUMBRIA COUNTY COUNCIL	**Defendant**
- and –	
PETER LAMB	**Interested Party**

George Laurence QC and Claire Staddon (instructed by **Underwood Vinecombe LLP**) for the **Claimant**
Alan Evans (instructed by **Legal and Democratic Services, Cumbria County Council**) for the **Defendant**

Hearing dates: 24th and 25th October 2017

Approved Judgment

Mr Justice Kerr:

Introduction

1. This is a judicial review challenge to a decision of the defendant (the council), acting through its Development Control and Regulation Committee (the committee) made on 4 January 2017, authorising the making of a statutory order which, subject to confirmation, would add to the definitive map and statement of public rights of way for Cumbria, certain rights of way comprising 34 footpaths (or 44, depending how they are counted) and a bridleway, over land owned by the claimant company and the interested party.

2. It is important for readers of this judgment, particularly those unfamiliar with the law, to understand that I am in no way concerned with the merits of any debate about whether members of the public should have access to any footpath or bridleway on privately owned land in Cumbria, or anywhere else. This court is only concerned with the question whether the decision of the council challenged in this case, was taken in accordance with the law.

3. The challenge is brought by permission of Lang J, on four grounds. First, it is contended that it was not lawful for the council to reject the view of the Corporate Director, Economy and Highways, in his December 2016 report, that there was insufficient evidence of the alignment of the new rights of way on the map. The claimant submitted that it was not possible to discern from the available evidence and with sufficient precision where the routes would run on the ground and, thus, on the definitive map.

4. Secondly, it is submitted that without a further enquiry which it was *Wednesbury* unreasonable not to make, there was insufficient evidence to support the committee's decision that it was reasonable to allege that there had been uninterrupted enjoyment of the footpaths in question (hereafter, "the routes" including the bridleway only where the context so indicates) for a 20 year period from 1990 to 2010, applying the test in section 31(1) of the Highways Act 1980 (the 1980 Act).

5. Thirdly, the claimant submits that the council was barred from making the decision challenged because it took account of written evidence of uninterrupted enjoyment of the routes produced in an application which had not been determined because of a supposed procedural defect (absence of proper service of the application); which meant that the council was, applying the relevant provisions in the Wildlife and Countryside Act 1981 (the 1981 Act), precluded from taking that evidence into account.

6. Fourthly and finally, the claimant says that the evidence to support the decision to add the bridleway to the definitive map by statutory order was misinterpreted and was manifestly insufficient to support the making of such an order, even if the making of the order were unopposed; and that it was not legally open to the committee to decide to include the bridleway in the order on the strength of that evidence.

7. On the basis of those four contentions, the claimant invites the court to quash the committee's resolution. The claimant says that there is no need for it and the council to incur the expense of a public inquiry, which would be the next stage in the process

if the decision to make the order is upheld and the claimant exercises its statutory right of objection to the confirmation of the order by the Secretary of State.

The Statutory Provisions

8. I refer to the provisions as amended where there have been amendments. I confine my account to the most directly relevant provisions and to the parts of those provisions that are relevant to the issues in this case. Mr Laurence QC, for the claimant, referred extensively to various repealed provisions applicable at the time of certain authorities on which he relied. I will refer below to some of those cases when considering the parties' submissions.

9. Where a way over any land has been actually enjoyed by the public as of right (which broadly means without the owner's permission, secrecy or force) without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway, unless there is sufficient evidence (which, it is agreed, is not the case here) that there was no intention during that period to dedicate it (section 31(1) of the 1980 Act).

10. The 20 year period runs backwards from the date when the right of the public to use the way is brought into question (section 31(2)). In this case, it is agreed that this date fell at some point during 2010; such that the 20 year period relied upon by proponents of the rights of way at issue in this case runs from some time in 1990 to some time in 2010. The exact start date in 1990 and end date in 2010 are not stated in the evidence and do not matter.

11. Part III of the 1981 Act deals with public rights of way. The "surveying authority" for a particular area (here, the council) is required to maintain a "definitive map and statement" (section 53(1)). The map and statement are "conclusive evidence as to the particulars contained therein" to the extent provided for in section 56 of the 1981 Act. In relation to footpaths and bridleways they are conclusive evidence that there was, at the "relevant date", i.e. the date specified in the statement or in an order, a right of way on foot or, in the case of a bridleway, on foot, horseback or leading a horse.

12. The authority became obliged, as soon as reasonably practicable after the "commencement date" (28 February 1983) by order to make such modifications to the definitive map and statement as they consider requisite in consequence of certain events that occurred before 28 February 1983 (section 53(2)(a)); and as from that date, it must by section 53(2)(b):

> "... keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event".

13. The "events" triggering those duties are set out in section 53(3)(a), (b) and (c). So far as material here, they are:

> "(a) ....

> (iii) a new right of way has been created 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 .... ;
>
> (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path .... ;
>
> (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—
>
> (i) 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 .... "

14. The modifications to the definitive map and statement that may be made by order must include the addition to the statement of particulars as to the position and width of any public path or byway open to all traffic which is or is to be shown on the map; and any limitations or conditions affecting the public right of way over it (section 53(4)).

15. Section 53(5) introduced a new right. A member of the public may:

> "apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); ....".

The provisions of Schedule 14 have effect "as to the making and determination of applications" under subsection (5).

16. Schedule 14 is headed "Applications for Certain Orders under Part III" and contains procedural provisions governing the form of applications, notice of them and determinations by the authority. They must be made on the prescribed form and accompanied by a map and documents relied on (paragraph 1). They include an obligation to serve a notice in the prescribed form "on every owner and occupier of any land to which the application relates" (paragraph 2(1)).

17. The applicant must then certify to the authority in the prescribed form (paragraph 2(3) and (4)) that the service requirements have been complied with. The authority must then as soon as practicable "investigate the matters stated in the application" (paragraph 3(1)) and after consulting other local authorities whose area includes the land in question, "decide whether to make or not to make the order to which the application relates" (paragraph 3(1)).

18. By section 53(6), the timing of entry into force of orders made under section 53(2) depends on which of the "events" has led to the making of the order. Where the event is that a new right of way has been created, such that the land over which it runs is a public path, the order takes effect on being made. In cases of expiration of a 20 year period of uninterrupted actual enjoyment of the way (section 53(3)(b)) or "discovery of evidence" cases (section 53(3)(c)), the order takes effect, or not, as provided for in

Schedule 15, which has effect "as to the making, validity and date of coming into operation" of the order (section 53(6)).

19. In the latter class of cases, the order does not take effect until confirmed by the Secretary of State following a local inquiry or, in cases where the making of the order is unopposed, until the order is confirmed by the authority (Schedule 15, paragraphs 2, 6 and 7). In the latter case, the authority may confirm the order without modification or, if the authority requires modification of the order, may submit it to the Secretary of State for confirmation with or without modifications (paragraph 6).

20. Where there are objections and a local inquiry is held, the Secretary of State may, after the objections are heard by the appointed inspector and after considering the inspector's report, confirm the order with or without modifications (paragraph 7). A "person aggrieved" wishing to question the validity of the order may then apply to the High Court, which may quash all or part of the order (paragraph 12(1) and (2)).

21. The right to make such an application can only be exercised during the period of 42 days starting on the date of publication (under paragraph 11) of the notice describing the order and the date it took effect (paragraph 12(1)). Apart from the right to apply to the High Court exercisable during that 42 day period, "the validity of an order shall not be questioned in any legal proceedings whatsoever" (paragraph 12(3)).

The Facts

22. The claimant is incorporated in the British Virgin Islands. It owns much of the land in issue in this case, at Hayton Woods in Cumbria (the land), a wooded area with tree cover in many places. The council is the "surveying authority" for the area for the purposes of Part III of the 1981 Act. The interested party also owns part of the land. He has taken no part in the proceedings.

23. Although the land is not a forest, the tree cover is such that it is not possible to obtain aerial photographs of any paths that might appear on it. Successive owners of the land have exercised their right to refuse entry, so that the council has not been able to perform any form of ground based survey. Evidence of the routes and use of them over the years consists of maps, records, witness statements and answers to questionnaires rather than direct evidence of the physical state of the land.

24. The modern history in the case begins with the year 1990, the year the statutory 20 year period of alleged uninterrupted enjoyment of the land began. About a decade later, there was an outbreak of foot and mouth disease which badly affected Cumbria. On 27 February 2001, government enacted the Foot-and-Mouth Disease (Amendment) (England) Order 2001, conferring a power on local authorities to prohibit the movement of persons in or out of identified areas, except on a public highway open to vehicular traffic.

25. The council exercised that power the next day, prohibiting in Cumbria "the movement of any person on moorland or on a public footpath or bridleway which adjoins or gives access to agricultural land, except on a public highway open to vehicular traffic". The prohibition did not apply to the routes in this case, even if and to the extent they adjoined or gave access to agricultural land, since they had not been established as footpaths (or a bridleway) on the definitive map and statement.

26. A disagreement arose several years ago between persons wishing to walk on the routes, and successive owners of the land, who did not and do not agree to this unless with their consent. As I have said, I am not concerned with the rights and wrongs of the arguments. On 6 January 2011, a Mr Roger Horne applied under section 53(2) of the 1981 Act for an order modifying the definitive map and statement by adding a network of footpaths identified in "Evidence Forms" supplied and "shown on the attached map".

27. The map attached was a 1901 ordnance survey map from Carlisle Library, with the routes superimposed on it. The evidence forms were called "Form WCA.8" produced by the council (known as User Evidence Forms, hereafter UEFs), starting with an invitation to tell the truth when filling it in and informing the person completing it that the information in it may be used in a public inquiry. There were 70 such forms supporting Mr Horne's application. The council produced a tabulated analysis of them.

28. The form was a questionnaire about the duration and extent of use of any routes used, their width, any interruptions or obstructions, the purpose, mode of transport, any connections with the landowners, and whether he or she would be prepared to attend a public inquiry and give evidence. Such a person could be summoned to attend by compulsion of law (Local Government Act 1972, section 250), though the form did not state that.

29. In October 2011, the solicitors for a Mr and a Mrs Day, then owners of the land now owned by the claimant, made contact with the council, drawing attention to the 2001 order made at the time of the foot and mouth outbreak, and asking for information. A subsidiary dispute then developed about whether the council's officers were entitled to enter the land without consent; an action for trespass was threatened and it was agreed that they could not.

30. The solicitors then did what they could to thwart Mr Horne's application, in a series of lengthy letters, taking various points. Eventually, in a 46 paragraph letter dated 7 February 2013, they advanced the argument that one of their clients, Mrs Day, had not been properly served with the application, though it was not suggested she was unaware of it. The letter went on to say (at paragraph 41) that while the defect in service could be remedied, Mr Horne had since died and the law did not provide for another person to take over pursuit of his application, which lapsed on his death.

31. The question of Mr Horne's application was to be considered by the committee on 27 March 2013. There was an officer's report, with a modern map attached showing the proposed routes of 34 footpaths and one bridleway. The report noted the landowners' objections but recommended that the council should make an order under section 53(3)(c)(i) of the 1981 Act (subject to confirmation) as sought by Mr Horne, on the ground that there was sufficient evidence, without a site survey which could not be done, that the rights of way in question could reasonably be alleged to subsist.

32. The meeting did not take place, however. The day before it was due to take place, the author of the report wrote to proponents of the late Mr Horne's application informing them that the council had decided "not to proceed because it appears that the notification requirements set out in the legislation have not been complied with". Proponents of the new rights of way did not give up, however.

33. On 2 April 2013, a Mrs Rebecca Tiffen made an application in the same terms as Mr Horne's, and in addition in respect of a claimed bridleway, relying on the UEFs already submitted in support of Mr Horne's application and, in addition, on other historic materials comprising awards and maps dating from 1814 to the 1950s. The solicitors for Mr and Mrs Day argued against Mrs Tiffen's application in further contentious correspondence with the council in May and June 2013. Mr and Mrs Day then sold their land to the claimant later in 2013, or in 2014.

34. The claimant's solicitors sought to deter Mrs Tiffen's application from proceeding or prevent it from succeeding. The efforts bore fruit; she wrote to the council on 26 March 2015 "to withdraw my application", as she had "received a letter from the solicitors representing [the claimant] threatening legal action against me personally. This has led me to this decision. I am in no position to counter this."

35. The council did not accept that her application should be ignored, and merely acknowledged receipt of her "request to withdraw" the application, continuing to consider it thereafter. The procedural provisions governing applications under section 53(5) of the 1981 Act are silent on any question of withdrawal of an application.

36. I interject that the authority was right to continue dealing with Mrs Tiffen's application. The obligation to investigate the matters stated in it, consult the other local authorities in the area and "decide whether or not to make the order" (paragraph 3(1)(b) of Schedule 14 to the 1981 Act) in my view survives any purported withdrawal. The claimant's solicitors suggested otherwise in correspondence at the time but, wisely in my view, did not test the point in court then or seek to argue it before me.

37. A draft report on Mrs Tiffen's application began to circulate outside the council as well as within it. On 21 July 2015, a Mr Boyd Holmes took issue with many points in it, including the proposition derived from the UEFs that there had been 20 years' uninterrupted actual enjoyment of the routes. The recommendation in the draft report, as at August 2015, was that the order Mrs Tiffen had sought should (subject to confirmation) be made and that thereafter the council should remain neutral if "significant evidence" against the order then emerged.

38. The claimant's solicitors' letter dated 10 August 2015 stated that they would bring proceedings if the recommendation were followed. A meeting fixed for 26 August did not proceed; at the time, counsel's advice was being sought by the council. Before it could respond to the solicitors' letter, several written statements were sent to it by objectors in early September 2015 (and later) stating that, contrary to the evidence in some of the UEFs, there had not been 20 years' uninterrupted actual enjoyment of the routes.

39. On 23 October 2015, the council wrote to the claimant's solicitors' disputing the latter's proposition that the council would be making three specific legal errors if it were to make the order sought in Mrs Tiffen's application. The disagreements were debated at length in depressingly long letters. On the evidential front, it was by now clear that there was conflicting evidence on the issue of 20 years' uninterrupted actual enjoyment of the routes.

40. The claimants pointed, in particular, to the 2001 outbreak of foot and mouth disease and the local 2001 order restricting access to the countryside. According to a Mr Clifford Bland, at that time "all access to the woods was closed with the public footpaths being sealed off with caution tape". Some of those who had completed the UEFs had mentioned the outbreak of foot and mouth disease, with varying comments, some saying it had interrupted their use of the routes; others, that it had not.

41. In mid-February 2016, the council informed the claimant that the matter would go back to the committee on 30 March 2016. A report was published on 21 March 2016 (the March 2016 report) with appendices lettered A to N, and was available at the meeting. There was no shortage of information available to the members. The recommendation remained the same: the order should be made, subject to confirmation, and thereafter the council should remain neutral if there was "significant evidence against" the order made.

42. In the body of the report, the author set out in detail the legal and factual justification for the recommendation. It is unnecessary to set out the full detail here because the March 2016 report was overtaken by subsequent events. The concluding part stated (paragraphs 9.1 and 9.2) that officers considered that this was this was "a complex case with conflicting evidence" but there was:

> "sufficient evidence .... to show a reasonable allegation that there has been uninterrupted use on foot for more than 20 years by the public of the routes shown on the plan [and] sufficient evidence ... to show a reasonable allegation that public bridleway 117004 should be extended to point G as shown on the plan ...".

43. Despite that view in favour of making the order, the author was careful to draw attention to the litigation risk should the expected proceedings ensue if the order were (subject to confirmation) made. The recommendation was therefore tempered with the cautious observation (paragraph 9.3) that:

> "[t]his is one of those finely balanced matters where the Committee might come to a different conclusion to its officers and accept the legal arguments put forward on behalf of the landowner."

44. The litigation risk loomed even larger the day after publication, when the claimants' solicitors sent another long letter reiterating what it said would be legal errors if an order were made, culminating in a confident assertion that the court would stop any order by injunction and informing the committee that leading counsel, Mr Laurence, had been instructed to address the committee on 30 March. The documents appended to the letter ran to 159 pages.

45. The letter led to the matter being withdrawn from the agenda and consideration of the application being deferred to a future meeting, while the late correspondence was investigated. There the matter rested until mid-November 2016, when the claimant's solicitor enquired after the progress of Mrs Tiffen's application and was informed that a report would be placed before the committee on 4 January 2017.

46. That was met by a warning that the claimant would challenge by judicial review any resolution to make the order sought in the application. An undertaking was sought not to act on any such resolution until the legal position had been resolved. The council's response was that the request for such an undertaking would be placed before the committee.

47. A further report (the December 2016 report) was produced, even more voluminous than the March 2016 report. Its appendices ran from A to G; the whole of appendix B was the March 2016 report together with its appendices A-N, which were appendices of appendix B to the December 2016 report. Once again, no one could say that the members were not fully briefed on the proposals, which included all the evidence of use and non-use, and some analysis of that evidence.

48. This time the recommendation was different: no order should be made in respect of the alleged public footpaths; but members should authorise the relevant chief officer to make an order extending bridleway 117004 to point 23 on the attached plan; and if there were no objections to the bridleway being thus extended, the relevant corporate director should be authorised to confirm the order. The rationale for recommending that no order should be made in respect of the alleged footpaths appears to have been as follows.

49. First, there was conflicting evidence on the issue of use and, therefore, it was open to members to find either that there was no interruption of use during the 20 year period, or that there was (paragraphs 5.1.16-5.1.17). Further, the exact alignment of the routes was difficult; while a site survey had been prevented and was not legally necessary, it would have helped. Yet further, a legal point was being taken that no new evidence had been "discovered" when Mrs Tiffen's application was made.

50. The author then dealt with the legal position and again with the undoubted litigation risk. In the concluding section of the report, he opined that while the legal point concerning "discovered" evidence was bad, and while there was evidence entitling the committee to find 20 years' uninterrupted use of the footpaths, the difficulties in attempting to plot the routes without a survey were too great.

51. The author explained that the landowners had claimed that this must bar the making of an order; "officers have looked at this aspect … in further detail and have conceded there is something in this point"; extrapolating from old maps was unsatisfactory; and in the circumstances, "officers consider this ground of challenge does have some merit as they are not satisfied that they have been able to position the routes on Appendix A with adequate precision" (paragraph 9.2.3).

52. As regards the bridleway, however, the author took a different view. Mrs Tiffen's additional evidence, which on any view had been "discovered" within section 53, supported the view that existing bridleway 117004 should be extended to "point 23" on the attached map. The author's assessment of that additional evidence at paragraphs 5.4.1-5.4.9 (to which I shall return) led to the different recommendation for the bridleway.

53. When the committee met on 4 January 2017, the December 2016 report was debated and discussed in detail. The footpaths officer, Mr Andy Simms, explained the reasoning in the report, and the recommendations. Mr Laurence then spoke in support

of the objectors' case, concentrating his fire mainly on the recommendation concerning the bridleway. He mentioned a change to the proposed route and the difficulty in resolving the issue of the route, which he said required more time for the claimant to put forward submissions.

54. He was followed by Mr Boyd Holmes, also objecting to the bridleway on the basis that the proposed route and map were unsatisfactory and the evidence too unclear to support the making of an order in respect of it. There was then some poring over maps, some questions and some discussion of the difficulty caused by lack of access to the land.

55. A councillor, Mr McGuckin, mentioned the effect of the foot and mouth outbreak in 2001. He then spoke in favour of the recommendations in the March 2016 report, advocating the making of orders in respect of the footpaths and the bridleway. He argued that threats of judicial review should not defeat the making of the proposed orders. The evidence to support them was sufficiently clear, he reasoned.

56. After considerable further discussion, a vote was moved by Mr McGuckin. By eleven votes to four, the committee voted to authorise the corporate director to make an order (subject to confirmation) adding the routes to the definitive map and statement in respect of both the footpaths and the bridleway. It is those two decisions that are challenged in these proceedings.

57. In January 2017, the claimant's solicitors managed to secure an undertaking from the council not to act on its resolution of 4 January 2017 for six weeks and not to act on it thereafter, if proceedings were brought, "unless and until the proceedings are finally disposed of in the Council's favour". The status quo was thus preserved pending the outcome of the litigation which then ensued.

The Issues, Reasoning and Conclusions

Ground 1: Route Alignment

58. The first ground is that it was not lawful for the council to reject the recommendation in the December 2016 report against adding the routes to the definitive statement and map, because there was insufficient evidence of the alignment of the new rights of way on the map. The claimant submitted that it was impossible to discern from available evidence with sufficient precision where the routes would run on the ground and, thus, on the definitive map.

59. The main points made at length in correspondence and then in the pleadings and written and oral submissions of the claimant can be summarised as follows:

(1) The evidence relied on to support the making of an order must show the route alignment of the footpaths with sufficient precision to plot the exact route and width of the footpaths in question, using the prescribed scale, so that the footpath in question is (in the words of a circular, Circular 1/2009, paragraph 4.16) "unambiguously unidentified".

(2) This is of particular importance because it is a criminal offence to obstruct a public footpath; and the public, for its part, need to know where they can walk without trespassing.

(3) The level of detail on the 1901 Ordnance Survey map does not properly match the 2015 Ordnance Survey map; the former does not enable the council properly to determine the route and width of the footpaths. Nor would it be possible for the definitive statement to describe the alignment and width accurately.

(4) The absence of a site survey, which the claimant and predecessors in title had lawfully prevented, is fatal to the ability of the council to depict the alignment and width of the routes accurately. Aerial photography cannot make good the deficit because of tree cover.

(5) The strength of the evidence to support the making of the order must be such that, in the absence of any objection triggering a local inquiry, it would be lawful to confirm the order applying a "balance of probabilities" test rather than the lower test of reasonable allegation.

(6) It was unlawful for the committee to take a different view from that taken by officers, on the basis of the case put forward by the objectors. The only conclusion open to the committee was that it could not make the order in respect of the footpaths.

(7) The error is as much a "plain error of law" (per Dyson J, as he then was, in *R v. Wiltshire CC ex p. Nettlecombe Ltd*, Divisional Court, 24.11.97, unreported, at transcript p.13H and at p.14E) as the error of pure statutory construction the county council was threatening to commit in that case.

(8) The court should not, therefore, refuse relief in the exercise of discretion on the basis that there was an adequate statutory alternative remedy, namely a local public inquiry by an inspector appointed by the Secretary of State. An inquiry would be costly and time consuming and is unnecessary.

60. Mr Evans, for the council, countered those arguments with detailed points which, however, can be summarised relatively briefly thus:

(1) Dyson J in the *Nettlecombe* case had emphasised that the discretion to grant relief in a case such as this should be exercised with caution and only in cases where there is a plain error of law, such as the error of statutory construction in that case. This is not such a case.

(2) The issue of sufficiency of evidence to support the making of an order is one of judgment for the committee members, whose exercise of judgment can only be impugned on the usual public law grounds (*Perkins v. Secretary of State for the Environment* [2009] EWHC 658 (Admin) per Sir George Newman (sitting as a deputy High Court judge) at paragraph 16).

(3) As stated in the December 2016 report, the committee were free to take a different view from officers, just as officers themselves had taken a different view when

writing the March 2016 report. There was evidence on the basis of which a reasonable committee could take the view it did, without a site survey.

(4) A high level of precision is desirable but not always attainable where the existence of the way "is shown by historical maps of varying quality, vintage and produced for varying purposes" (*ibid.*, paragraph 14). The map and statement need not (paragraph 13):

> "attain some particularly high level of precision in the sense of showing the detail of the route in terms of its precise location on the ground to a manifestly high degree of particularity."

(5) The detailed criticisms levelled at the quality of the cartographical evidence do not displace the validity of the judgment made by the committee. The criticism that the width of the routes cannot be ascertained with sufficient precision is answered in the December 2016 report itself (at paragraph 5.2.1, answering paragraph 23 of a solicitors' letter), in line with government guidance:

> "[o]fficers consider that all the routes could be recorded as 1.8m wide, the minimum necessary for two users to pass in comfort, occasional pinch points accepted [sic] [excepted]."

(6) The committee were not directed specifically to adopt a "balance of probabilities" standard of proof, as distinct from the test of whether the routes could reasonably be alleged to subsist. Therefore, even if the higher standard were the correct one, it cannot be shown that the committee failed to apply it.

61. I prefer the submissions of Mr Evans. The exacting standard of precision demanded by Mr Laurence is higher than the law requires and would frequently be, unjustly, impossible to meet; for example where, as in this case, a determined and hostile landowner exercises the right not to co-operate in the process by permitting access to the land.

62. I respectfully agree with the remarks of Sir George Newman, albeit in a slightly different context, in the *Perkins* case. The obligation on the surveying authority is to make a judgment on the basis of the best evidence it has. I agree with Mr Evans that the issue is one of judgment and that this committee was entitled to take the view that the evidence of route alignment and width of the footpaths was sufficient.

63. I think it would be a rare case in which the court were prepared to second-guess the outcome of a local public inquiry to determine the force of the objectors' case, where the nature of the objection was an attack on the exercise of the surveying authority's judgment. I accept the council's submission that the court would normally have to be persuaded that the high *Wednesbury* threshold was reached before it would interfere.

64. I do not accept Mr Laurence's argument that the members could not lawfully take a different view from that set out in the report without giving reasons why they were departing from the view of the author. There was no freestanding "reasons" challenge

to the decision; the proposition must therefore be that want of rationality is established by the absence of any such reasons. I do not accept that the proposition can be applied here.

65. It was clear that the committee favoured the view expressed in the March 2016 report in preference to that expressed in the December 2016 report. Indeed, Mr McGuckin at the meeting advocated the view that the route alignment was sufficiently clear. The transcript of the meeting shows that when he spoke he was, in his words, "supporting the recommendations in the March report". The committee plainly accepted his view that there was "clear evidence" of the routes, such that "we can take a reasonable decision that these paths exist".

66. I do not think it is enough that the objectors consider, or even that the court considers, that the case in support of the making of an order is weak (a point on which I express no view). Its strength or weakness is what the inspector is there to determine. Absent irrationality or a plain error of law such as an error of statutory construction, the inspector is better placed than the court to determine whether an order should be confirmed or not.

67. In this respect, the case is one where the court's discretion to grant relief would fall on the other side of the line from a "plain error of law" case such as *Nettlecombe*; even if, which I do not accept, any likely error of approach, or acceptance of insufficiently exacting standards of evidence, were discernible.

68. I accept that a local public inquiry can be a time consuming and expensive exercise for a local authority with limited resources, but the argument can be overstated. As an example, in this case the relentless correspondence from the claimant and its predecessors in title may well have already consumed more resources than a local inquiry would, even without the present proceedings and any appeal that may follow.

69. I therefore reject the first ground of challenge. The committee did not act unlawfully by taking the view expressed in the March 2016 report and not that expressed in the December 2016 report. The claimant's attack on the adequacy of the map and other evidence can be made to the inspector by means of an objection to confirmation of the order.

Ground 2: Actual Enjoyment Without Interruption

70. The second ground of challenge is that without a further enquiry, which the council irrationally failed to make, there was insufficient evidence to support the committee's decision that it was reasonable to allege that there had been uninterrupted enjoyment of the footpaths in question, i.e. the routes, for a 20 year period from 1990 to 2010, applying the test in section 31(1) of the 1980 Act.

71. Mr Laurence's submissions to support the second ground were in summary the following:

(1) The council should have had in mind the proposition, to quote from his skeleton argument, that "people who fill in evidence forms frequently do so without recalling periods when their use was interrupted, especially if the period of non-

use was owing to some external event which may or may not have caused the landowner to take steps of his own to prevent use".

(2) The council's report in 2002 into the effect of the foot and mouth outbreak referred to "the closure of the countryside" and noted that many normal visitors to the countryside stayed away. The conflict of evidence between those who filled in UEFs asserting uninterrupted use of the routes, and those who asserted that there an interruption in use of the routes, should be seen in that light.

(3) The claimant accepts that if there were a real conflict of evidence, the council was entitled to take the view that the claimed footpaths were reasonably alleged to subsist (*R. v. Secretary of State for Wales ex p. Emery*, CA, unreported, 9 July 1997, per Roch LJ at transcript pp.21-26). The question for the council is whether the totality of the evidence shows "that it is reasonable to allege a right of way" (*ibid.* at p.25).

(4) There was no question on the UEF specifically asking about the impact of the foot and mouth outbreak in 2001 on use of the routes. UEFs were completed by 70 persons, only 13 of whom mentioned the foot and mouth outbreak. Of the 57 who did not mention it, only 40 attested to uninterrupted use of the routes since 1990. The other 17 said their use started after 2001 when the foot and mouth outbreak was already over.

(5) Of the 13 persons who mentioned the foot and mouth outbreak, a number said that it influenced them against use of the routes during the outbreak. Some 4 or 5 deponents who said their use began in or before 2001 did not answer the question whether there was a temporary interruption in their use for any reason. Nine of those who said their use began before 2001 said they would not take part in a public inquiry.

(6) Faced with that evidence, and other evidence flatly denying uninterrupted use since 1990, no reasonable council could have done other than enquire further of the 40 persons attesting to uninterrupted use since 1990; for example, by writing a letter along the lines of one drafted and included in the claimant's skeleton.

(7) Failure to make this enquiry was a failure to investigate the issue properly and was irrational, such that it was not lawfully open to the council to answer yes to the question articulated in *Emery*: whether the totality of the evidence shows that it is reasonable to allege a right of way.

72. Mr Evans, for the council, submitted in response:

(1) that the duty to "investigate the matters stated in the application" (paragraph 3(1)(a) of Schedule 14 to the 1981 Act) was fully performed. There was no authority or warrant for the claimant's argument that the authority was obliged to try to resolve the conflict of evidence. The forum for resolving it is before the inspector at an inquiry.

(2) The council was not required by law to start from the proposition that the evidence in the UEFs was unreliable due to a tendency not to recall periods of interruption in use of the routes, especially if caused by an external event. The duty was fully

performed by obtaining the UEFs and they were properly considered by officers and members at the meeting on 4 January 2017.

(3) A temporary cessation of use due to the foot and mouth outbreak, even if more than *de minimis*, would not in law amount to an interruption in use. There is an inspector's decision to that effect in a case known as the *Marble Quarry* case.

(4) This also accords with government advice in an "Advice Note" of November 2012 which states at paragraph 9:

> "... it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an 'interruption' under section 31(1) [of the 1980 Act]".

73. I do not agree with the proposition in the Advice Note, and that derived from the *Marble Quarry* decision, that an interruption which is more than *de minimis* but caused by measures taken against foot and mouth disease, is incapable in law of amounting to an interruption in use of a footpath or other way. I see no basis for that proposition. Use or non-use is a question of fact; the cause of any non-use is not the issue.

74. But in my judgment, there was plenty of evidence available to the council entitling it to conclude, without further enquiry, that it was reasonable to allege a right of way. The exercise the council had to perform was not to make a finding of fact; it was sufficient to identify evidence making it reasonable to allege that the rights of way subsist. The council did that by looking at the content of the UEFs.

75. The simple point is that 40 persons gave evidence of uninterrupted use of the routes over the requisite 20 year period. The council's duty to "investigate the matters stated in the application" was performed by officers tabulating and analysing the UEFs, considering them and commenting on them in the March and December 2016 reports, and by the committee then considering them before deciding that it was reasonable to allege that the rights of way subsist.

76. It is of course correct that users of footpaths may forget a time when they were not using them, whether because of measures taken against foot and mouth disease, or some purely personal reason such as moving away from the area for a time. The example of military service as a possible reason for an interruption in use, was mentioned in the UEF questionnaire.

77. Foot and mouth was, indeed, not mentioned in the questionnaire. The prohibition order made in 2001 did not apply to these routes even if they were adjacent to agricultural land because the routes were not dedicated public highways. But the order may nonetheless have exerted a deterrent influence at least on some. These are points for the inspector at an inquiry, if one is held.

78. It was not incumbent on the council to ask specific questions about foot and mouth disease at the present preliminary stage. I agree with Mr Evans that there is no warrant for Mr Laurence's duty to ask the 40 persons he identified a further question

on the specific subject of foot and mouth. The second ground of challenge is not well founded.

Ground 3: Discovery of Evidence

79. The third ground of challenge is that the council wrongly took into account the written evidence in the UEFs when determining Mrs Tiffen's application, because that evidence had already been "discovered" within section 53(3)(c)(i) of the 1981 Act, and could not be discovered again: the failure of Mr Horne's application and Mr Horne's death ruled his evidence out of account.

80. Mr Laurence's submissions supporting this ground were to the following effect:

(1) An item of evidence may only be the subject of a "discovery" by the authority for the purposes of section 53(3)(c) of the 1981 Act on a single occasion. The evidence in the UEFs was discovered by the council when Mr Horne submitted them. The evidence in the UEFs could not be discovered again when Mrs Tiffen adopted them.

(2) Therefore, the only evidence discovered by the authority when Mrs Tiffen made her application, was the additional materials on which she relied in respect of the claimed bridleway, over and above the UEFs Mr Horne had produced. She did not produce any relevant additional undiscovered evidence in support of the claimed footpaths; while the council, for its part, did not rely on or refer to any such evidence in support of the claimed footpaths, either in its reports, or in its decision or before the court.

(3) The council should, therefore, have limited its consideration of Mrs Tiffen's application to that additional evidence, relevant only to the bridleway, and should have put the UEFs out of its mind, leaving no evidence to support the existence of the claimed footpaths.

(4) Where an application is made under section 53(5), as in Mrs Tiffen's case, the application is for an order under section 53(2), but the duty under section 53(2)(b) to "keep the map and statement under continuous review" is impliedly displaced and the authority must not act of its own motion to make an order under section 53(2)(b).

(5) In such a case, by section 53(5) the duty of the authority is limited to considering the "events" falling within paragraph (b) or (c) of subsection (3). Paragraph (b) refers (for present purposes) to the expiration of a 20 year period of uninterrupted enjoyment of the land in question. Paragraph (c) refers to the event of "discovery" by the authority of "evidence" supporting a reasonable allegation that a right of way subsists.

(6) Here, Mrs Tiffen's attempt to adopt and rely on the UEFs produced by Mr Horne was misconceived in law, because there was no discovery of that evidence when Mrs Tiffen made her application; the UEFs had already been discovered when Mr Horne made his application; that *event* had already happened and could not happen again.

(7) Mr Laurence relied on observations of Potts J in *Mayhew v. Secretary of State for the Environment* (1993) 65 P&CR 344, at p.11. Potts J had noted Macpherson J's observation in *R. v. Secretary of State for the Environment ex p. Riley* (1989) 59 P&CR 1 that discovery of evidence meant exactly what it said and agreed with counsel that "evidence" bore its full and natural meaning and should not be restricted to new or fresh evidence.

(8) Potts J then cited the *Concise Oxford Dictionary* and noted that the verb "to discover" means to find out or become aware, and "connotes a mental process in the sense of the discoverer applying his mind to something previously unknown to him".

(9) Thus, the "event" in section 53(3)(c) must be the discovery of evidence in the sense of facts not previously known to the authority. The content of the UEFs was already known to the council, unlike Mrs Tiffen's additional materials.

81. Mr Evans' submissions in response to the following effect, were very different:

(1) he accepted that when considering Mrs Tiffen's application the council did not rely on or refer to any evidence in support of the claimed footpaths, in its decision or before the court, over and above the UEFs originally produced by Mr Horne in support of his application.

(2) He accepted that there is a logic to the proposition that evidence cannot be discovered twice. The logic is that you cannot discover what you already know. On the other hand, as Potts J had pointed out in *Mayhew*, the meaning of "evidence" was wide and unrestricted.

(3) Further, the "discovery" of evidence is indeed a mental process, but it is not a one-off event. The discovery is not complete until the discoverer reaches a decision on the evidence, on whether or not the evidence under consideration justifies the making of an order.

(4) The application by Mrs Tiffen should be regarded as, in substance, a continuation of the application by Mr Horne. The discovery of what Mr Horne was putting forward when Mrs Tiffen's application was considered, represented (to quote from Mr Evans' skeleton) "a single continuous process of discovery across the course of the two applications".

(5) Furthermore, the duty to keep the map and statement under continuous review (section 53(2)(b)) remained in place, irrespective of the non-determination of Mr Horne's application and the purported withdrawal by Mrs Tiffen of her application. That is the correct approach, and is as it should be; otherwise, the authority must artificially blind itself to evidence that may be relevant and probative on the issue of uninterrupted use.

82. I turn to my reasoning and conclusions on this issue. Mr Laurence's arguments based on *Riley* and *Mayhew* were very detailed, but neither case is directly in point here. His submission that the evidence Mr Horne had carefully assembled must be ignored, would be disturbing if correct. As Mr Evans said, it would mean the authority must shut its eyes to relevant evidence, which would be contrary to the interests of justice.

83. I accept that the content of the UEFs was the subject of "discovery" within section 53(3)(c) when Mr Horne submitted his application. I accept also that they were not discovered a second time when Mrs Tiffen made her application, after Mr Horne's was left undetermined. I reject Mr Evans' artificial proposition that "discovery" of evidence occurs gradually over time. That does not fit with the natural meaning of the verb "discover", on which Potts J commented in the *Mayhew* case.

84. Nonetheless, I would be reluctant to accept Mr Laurence's interpretation of the provisions unless driven to do so by the language of the statutory provisions. It is preferable to interpret the provisions in a way that promotes justice. Mr Laurence's argument was purely linguistic; he did not advance any convincing reason why justice would be served by loss of the probative value of the UEFs by adventitious lack of service on Mrs Day, followed by Mr Horne's death.

85. I initially formed the view that Mrs Tiffen's reliance on the UEFs, and the council's reliance on them even though they were not newly discovered, could be supported by invocation of the authority's duty under section 53(3)(c) to treat them as part of "all other relevant evidence available to them", which the authority must consider when considering newly discovered evidence in a case falling within section 53(3)(c).

86. However, both parties have disabused me of that view. They agree that the newly discovered evidence from Mrs Tiffen did not relate to the footpaths at all, only to the claimed bridleway. In so far as Mrs Tiffen's application touched upon the claimed footpaths, her evidence was that contained in the UEFs, i.e. the same as Mr Horne's evidence.

87. It is also agreed that the council's decision cannot be regarded as a finding that (under section 53(3)(b)) the relevant 20 year period of uninterrupted use of the claimed footpaths had in fact expired. The parties agree that the council's decision was not to that effect; if it had been, the finding of 20 years' uninterrupted use would have to have been made on the balance of probabilities, rather than applying the lower test of reasonable allegation.

88. I have, nonetheless, come to the clear conclusion that the council acted lawfully in relying on the UEFs when it made its decision at the meeting on 4 January 2017, for the following reasons.

89. The *event* that triggered the council's duty to consider the UEFs was the *discovery* of the UEFs, which occurred in January 2011, when Mr Horne made his application. That discovery was an event falling within section 53(3)(c). Mr Horne's application then fell away. But the duty of the council under section 53(2)(b), as soon as reasonably practicable after the discovery of the UEFs, by order to make such modifications to the map and statement as appeared to it to be requisite in consequence of the discovery of the UEFs, remained in place.

90. I accept Mr Evans' submission that there is no good reason why the duty under section 53(2)(b) of the 1981 Act to keep the map and statement under continuous review should cease to apply when an application is made under section 53(5). I see nothing in the statutory language to support Mr Laurence's proposition that the "continuous review" duty was displaced by the successive applications under section 53(5).

91. In January 2011 when the UEFs were *discovered*, the council also came under a duty under section 53(5), read with Schedule 14, to determine Mr Horne's application. Mr and Mrs Day's solicitors then persuaded the council that the application was defective for want of service on Mrs Day. Mr Horne then died and the council was persuaded, rightly or wrongly, that the defect in service thereby became irremediable (see paragraph 41 of the Days' solicitors' letter of 7 February 2013).

92. When Mrs Tiffen made her application in April 2013, she did so (as regards the claimed footpaths) in reliance on the discovery of the UEFs which had occurred (and occurred only once, as Mr Laurence correctly submits), in January 2011. By the time Mrs Tiffen made her application, the discovery of the UEFs had – owing to the dissuasive efforts of the Days' solicitors - not yet been acted upon, either by determination of Mr Horne's application or by performance of the "continuous review" duty under section 53(2)(b).

93. I can see nothing in the statutory provisions that precludes the council from performing, belatedly in January 2017, its duty under section 53(2)(b) to make such modifications as it considered requisite in consequence of the discovery of the UEFs six years earlier. Nor do I see anything in the statutory language which prevents an applicant such as Mrs Tiffen from relying, in an application made under section 53(5), upon evidence discovered years earlier but not yet acted upon by the authority concerned.

94. For those reasons, I do not accept the claimant's interpretation of the statutory provisions, I accept the submissions of Mr Evans for the council to the extent I have just indicated, I find the third ground of challenge not well founded and I reject it.

95. Mr Laurence suggested that such an interpretation would render the Schedule 14 procedural requirements pointless. I do not agree. An authority proceeding to determine an application under section 53(5) should require compliance with Schedule 14; its provisions are there to be complied with. If the authority does not do so and unfairness to objectors results, this court can grant relief to correct the unfairness, though not every breach of Schedule 14 will lead to quashing of an order: see *R (Warden and Fellows of Winchester College) v. Hampshire County Council* [2009] 1 WLR 138, per Dyson LJ at paragraph 55.

96. By similar reasoning, if an authority were to misuse its function of continuous review (enacted by section 53(2)(b)) for the improper purpose of denying objectors the benefit of the procedural rights conferred on them by Schedule 14, relief could be granted by this court to correct any resulting unfairness to the objectors. Nothing of that kind occurred in this case.

Ground 4: Sufficiency of Evidence; the Bridleway

97. Finally, in its fourth ground of challenge, the claimant says that the evidence to support the decision to add the bridleway to the definitive map by statutory order was misinterpreted and was manifestly insufficient to support the making of such an order; it was not legally open to the committee to decide to include the bridleway in the order on the strength of that evidence.

98. Before considering the submissions and the merits of this ground of challenge, I return to the December 2016 report at paragraphs 5.4.1-9, where this issue was considered. The author cited further evidence that may support the case that the existing bridleway (known as 117004) should be extended to "point 23" as marked on the council's map.

99. The further evidence referred to consisted of a paper compiled by two local historians, Dr J. G. Mather and Dr O. Mather. Their paper was a commentary on maps and records dating back to the 1770s. The conclusion offered was that the material "requires a careful and holistic consideration in order to achieve a sound and objective overview".

100. The opponents of the proposed new rights of way had objected that the materials proffered in support of the extension to point 23 on the map had not been properly analysed by the council. In the report, the author accepted the point that a document called the "Inclosure Award" of 1814 relating to Hayton Parish, did not state that the track to "the quarry", running from "D" to point 23 on the map is a "public carriageway, highway or occupation road", as it does in the case of other routes shown on the award plan.

101. There was acceptance of some force in the objectors' criticism that the class of persons in respect of whom there was evidence of access to the quarry, called "public Freestone Quarry", via point D to point 23 on the map "would not in modern terms be regarded as the general public"; and that the award "does not make it clear whether the general public have a right to use the 'public watering place' located at point .... 23 on draft order plan".

102. However, the author of the December 2016 report went on to point to conflicting evidence in other historical papers which "appear to support that the claimed route is a public route". He went on to quote from that evidence: a paper from the Inclosure Commissioners dated 1809 and public notices in the Carlisle Journal in 1810.

103. The author went on to mention three maps dating from, respectively, 1774, 1823 and 1892, the second and third of which were said to add "a little weight" or "weight" to the evidence that the route from point D to point 23 on the map was a public right of way.

104. The author then went on to refer to a parish schedule dating from 1950. That schedule, he argued, supported the proposition that the bridleway (then bearing a different number) runs "to the Quarry", not to a point "stopping 120 metres short of that quarry". A plan was then mentioned which the author thought was an "associated claim plan" but it is accepted by the council that this was an error, that the wrong plan was mentioned and that the plan mentioned does not show the bridleway.

105. The report's author then went on to refer to other review plans from 1967 onwards showing the "claimed route" but stopping at point D. The author argued that "[p]ublic rights of way were supposed to be claimed from one highway to another or to a public place. They should not be claimed to a dead end or place without any public significance". He argued that the parish council of the time may have:

"incorrectly claimed the route or that a small drafting error was made in excluding that part of the route now claimed and that was not picked up through the consultation process".

106. The conclusion was that the evidence from the mid-20th century, taken together with the older evidence from the 19th and 18th centuries, raised a credible case that "the order should be made notwithstanding that the Inclosure Award may only shows [sic] private rights". The committee was invited to consider that, but reminded that it should disregard evidence of pedestrian use as evidence of equestrian use would be required.

107. The committee evidently accepted that analysis and rejected the case for the objectors, which was that the evidence was not capable of supporting the existence and exercise of a historic public right of way on horseback in respect of the bridleway, in particular as regards the proposed extension from point D to point 23 via point 24. The committee resolved to make an order adding the route from point D through point 24 to point 23 on the definitive map.

108. Mr Laurence submitted in his skeleton argument that the analysis in the report "leaves much to be desired". He engaged in a critique of it, arguing that it makes no sense for the route to turn to the south from point D to point 24 and thence north east to point 23, and that this is not borne out by contemporary maps. He suggested that the council should have applied a "balance of probabilities" test rather than the lower test of reasonable allegation.

109. In my judgment, however, Mr Evans is right to point out that no legal misdirection is asserted; the assessment of the evidence was a matter for the report writer and for the committee to consider. The court should not substitute its judgment for that of the decision maker and the threshold of intervention is the high one of irrationality.

110. I accept that the claimant's case amounts in effect to an invitation to the court to embark on its own analysis of the historical documents and maps and to disagree with that of the council, without properly alleging irrationality, still less establishing it. Nor do I accept that the "balance of probabilities" test can be substituted for the test of reasonable allegation, merely because that would be the applicable standard at confirmation stage if the order were unopposed.

111. In my judgment, there is no plain error of law here and it should be for the inspector at a public inquiry to weigh and evaluate the weaknesses which the claimant says afflict the evidence supporting the addition to the bridleway. I am not prepared to interfere with the exercise of that function by granting any relief and, indeed, I see no basis to do so. The fourth and final ground of challenge therefore also fails.

Conclusion

112. For those reasons, I do not find the claimant's arguments persuasive, I conclude that none of the four grounds is made out and I dismiss the claim.