Neutral Citation Number: [2019] EWCA Civ 1639

Case No: C1/2018/0004

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE KERR
[2017] EWHC 2651 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 October 2019

Before:

Lord Justice Simon
Lord Justice Lindblom
and
Lord Justice Irwin

- -

Between:

R. (on the application of Roxlena Ltd.)	**Appellant**
- and -	
Cumbria County Council	**Respondent**
- and -	
Peter Lamb	**Interested Party**

- -
- -

Mr George Laurence Q.C. and Ms Claire Staddon (instructed by **Underwood Vinecombe LLP**) for the **Appellant**
Mr Alan Evans (instructed by **Cumbria County Council**) for the **Respondent**
The Interested Party did not appear and was not represented.

Hearing dates: 14 and 15 May 2019

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. How should a surveying authority approach the evidence said to justify its making an order to add a footpath to its definitive map and statement of public rights of way under section 53 of the Wildlife and Countryside Act 1981? That question arises in this appeal.

2. The appellant, Roxlena Ltd., appeals against the order of Kerr J., dated 30 November 2017, dismissing its claim for judicial review of a decision of the respondent, Cumbria County Council, on 4 January 2017, authorizing the making of an order under section 53(3)(c)(i) and (iii) of the 1981 Act to add 34 footpaths to its definitive map and statement, and to extend a bridleway, over land owned by Roxlena and the interested party, Mr Peter Lamb, in woodland known as Hayton Woods, in Cumbria, which is used for shooting game-birds. The decision was made by the county council as surveying authority.

3. After the county council had made its decision it agreed to a request made by Roxlena's solicitors not to act on the decision for six weeks, or, if proceedings were brought, "unless and until the proceedings are finally disposed of in [its] favour". Having dismissed the claim, Kerr J. granted permission to appeal on a single ground – ground 3. I granted permission to appeal on the other three grounds on 4 December 2018.

The issues in the appeal

4. There are four main issues in the appeal. First, was the judge wrong to conclude that there was sufficient evidence to justify making the order (ground of appeal 1a); wrong not to conclude that, if the supporting evidence was insufficient to demonstrate, on the balance of probabilities, that the footpaths subsisted on the alignments shown on the draft order map and thus to justify the confirmation of the order, it could not have been reasonable to allege their subsistence to justify making it; and wrong to conclude that the question of whether the evidence would support confirmation could properly be postponed to an inquiry (ground 1b)? Secondly, was he wrong to conclude that the county council had not failed properly to investigate the evidence of the 40 people who had said they used the footpaths during the outbreak of foot and mouth disease in 2001 (ground 2)? Thirdly, was he wrong to conclude that the county council had made a relevant and effective "discovery" of evidence within section 53(3)(c) (ground 3)? And fourthly, was he wrong to conclude that there was sufficient evidence to justify making an order extending the bridleway (ground 4a); and wrong not to conclude that if the supporting evidence was insufficient to demonstrate, on the balance of probabilities, that the claimed bridleway subsisted on the alignment shown on the draft order map and thus to justify confirmation of the order, it could not have been reasonable to assert its subsistence to justify making it (ground 4b)?

The statutory framework

5. Section 31 of the Highways Act 1980, "Dedication of way as highway presumed after public use for 20 years", provides that "(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 actually been 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".

6. In Part III of the 1981 Act, section 53, "Duty to keep definitive map and statement under continuous review", states:

> "53. –
> (1) In this Part "definitive map and statement", in relation to any area, means …
> (a) the latest revised map and statement prepared in definitive form for that area under section 33 of [the National Parks and Access to the Countryside Act 1949] …
> …
>
> (2) As regards every definitive map and statement, the surveying authority shall –
> (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and
> (b) as from that date, 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.
>
> (3) The events referred to in subsection (2) are as follows –
> (a) the coming into operation of any enactment or instrument, or any other event, whereby –
> (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
> (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
> (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 or a restricted byway;
> (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 or restricted byway;
> (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, 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; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to –
(a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; …
…
…

(5) Any person 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); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.
…

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2)."

7. Paragraph 1 of Schedule 14 to the 1981 Act requires an application to be "made in the prescribed form" and to be "accompanied by … (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and … (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application". Paragraph 3(1) requires the authority "[as] soon as reasonably practicable after receiving a certificate under paragraph 2(3) … (a) [to] investigate the matters stated in the application; and … (b) after consulting with every local authority whose area includes the land to which the application relates, [to] decide whether to make or not to make the order to which the application relates".

8. Paragraph 2 of Schedule 15 provides that "[an] order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7". Paragraph 7(1) provides that "[if] any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him". Under paragraph 7(2) "[where] an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall, subject to sub-paragraph (2A), either … (a) cause a local inquiry to be held; or … (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose". Paragraph 7(3) provides that "[on] considering any representations or objections duly made and the report of any person appointed to hold an inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications".

The origin of these proceedings

9. The dispute now before us in this appeal has a long and tortuous history, which was fully recounted by the judge (in paragraphs 22 to 57 of his judgment). I gratefully adopt his narrative, and will refer only to the salient parts of it.

10. Hayton Woods has not been surveyed by the county council, because successive owners have exercised their right not to permit entry for that purpose. Nor are there aerial photographs showing any paths beneath the trees. Evidence of those routes and their use, much of it contentious, is in various maps, records, witness statements and responses to questionnaires.

11. On 6 January 2011 an application was made by Mr Roger Horne under section 53(2) of the 1981 Act for an order modifying the definitive map and statement by adding a network of footpaths identified on 70 user evidence forms and shown superimposed on an Ordnance Survey map of 1901. In correspondence with the county council in October 2011, the solicitors acting for the then owners of the land, Mr and Mrs Day, drew attention to the fact that in February 2001, under the Foot-and-Mouth Disease (Amendment) (England) Order 2001, the county council had prohibited 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". If this prohibition applied to the disputed rights of way, it would have fallen within the 20-year period of asserted uninterrupted enjoyment under section 31(1) of the 1980 Act, which began in 1990.

12. As the judge said (in paragraph 30 of his judgment), "[the] solicitors then did what they could to thwart Mr Horne's application, in a series of lengthy letters, taking various points". Their efforts culminated in a letter dated 7 February 2013, contending that Mrs Day had not been properly served with Mr Horne's application, and that the application had lapsed because Mr Horne had died. The application was to have been considered at a meeting of the county council's Development Control and Regulation Committee on 27 March 2013. An officer's report had been prepared, which took account of Mr and Mrs Day's objection but recommended that an order should be made under section 53(3)(c) – subject to confirmation – because there was sufficient evidence that the rights of way could reasonably be alleged to subsist. In the end, however, the committee did not consider the application. On 26 March 2013 the officer wrote to those who were now promoting Mr Horne's application, saying the county council had decided "not to proceed because it appears that the notification requirements … have not been complied with".

13. On 2 April 2013 another application was made, by Mrs Rebecca Tiffen. It was in the same terms as Mr Horne's. It relied on the same user evidence forms, and other material, including documents and maps of various provenance between 1814 and the 1950s. It was vigorously opposed by Mr and Mrs Day in solicitors' letters to the county council in May and June 2013. The land was sold to Roxlena – later in 2013 or in 2014. On 26 March 2015 Mrs Tiffen wrote to the county council withdrawing her application, saying she had "received a letter from the solicitors representing Roxlena [dated 24 March 2015] threatening legal action against [her] personally", which had "led [her] to this decision", and she was "in no position to counter this". Mr George Laurence Q.C., who appeared for Roxlena, rightly acknowledged it was "highly regrettable" that such a letter should have been written.

14. The county council did not, however, cease dealing with the application. A report on it was prepared in draft by its Senior Countryside Access Officer and published in July 2015, recommending that the order should be made. An objector, Mr Boyd Holmes, commenting on the draft report, challenged the assertion that there had been 20 years' uninterrupted enjoyment of the routes. On 10 August 2015 Roxlena's solicitors threatened proceedings if the officer's recommendation were followed. In September 2015 several objectors submitted statements asserting that, contrary to the evidence in some of the user evidence forms, there had not been 20 years' uninterrupted enjoyment of the routes. Various contentions were made about the use of the routes while the restrictions under the 2001 Order were in force. Alleged legal errors in the process were – as the judge put it (in paragraph 39) – "debated at length in depressingly long letters".

The March 2016 report

15. The officer's report was published in final form on 21 March 2016. It was due to be put before the committee at its meeting on 30 March 2016. The recommendation in the report was that the order be made but that the county council's position should be neutral if there was "significant evidence" against its being confirmed.

16. Considering the objections to the application – in section 5.0 of the report, "Detail" – the officer said the county council "has been denied access to the land by the owner for the purpose of surveying the claimed paths and has therefore relied on the application plan to plot the routes as shown on [the draft order map]". In his view, however, it was "possible [for the county council] to fulfil its duty to prepare a map, with sufficient accuracy, of the claimed alignments without a site survey and … that has been so in this case" (paragraph 5.1(e)). He rejected the contention that the "control measures" introduced under the 2001 Order, which had caused a "temporary interruption" of use of the claimed footpaths, had brought "a sufficient interruption to the claimed user period for the purpose of section 31(1) of [the 1980 Act]". This was, he said, "a matter of judgment for the decision maker which needs to be reasonably exercised". The advice in the Planning Inspectorate Advice Note 15, that "… 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)" – was, he said, "not an authoritative statement of law as only the courts can provide that" (paragraph 5.1(f)).

17. At the end of the report – in section 9.0, "Conclusion" – the officer acknowledged that "this is a complex case with conflicting evidence", but expressed "the opinion that sufficient evidence has been brought forward at this stage 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 at Appendix A" (paragraph 9.1), and also that "sufficient evidence has been brought forward at this stage to show a reasonable allegation that public bridleway 117004 should be extended to point G as shown on the plan at Appendix A" (paragraph 9.2). There was "some force" in the legal arguments put forward by Roxlena's solicitors, but the officers' view was that "the alleged errors of law can be answered as set out in the report". There would, however, be a risk in resolving to make the order, because Roxlena had said it would challenge such a decision, and the court might find in its favour. This was, said the officer, "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" (paragraph 9.3).

18. After the report was published but before the committee met, Roxlena's solicitors, in a lengthy letter to the county council dated 22 March 2016, repeated and elaborated their legal arguments, appending documents running to more than 150 pages. The application was then withdrawn from the committee agenda, and deferred to a future meeting.

The committee meeting on 4 January 2017

19. The application eventually came before the committee at its meeting on 4 January 2017. By then, in mid-November 2016, Roxlena's solicitors had again warned the county council that Roxlena would challenge by a claim for judicial review any resolution to make the order. In December 2016 the officer produced another report, to which the March 2016 report and voluminous other material were appended. The officer's recommendation was now different. It was that for the footpaths "no order be made on the evidence submitted", but that for the bridleway the committee should authorize the making of an order to extend it to point 23, and – if there were no objections – its confirmation.

20. In section 5.0 of the report, "Detail", the officer considered three main points of objection to the making of the order. He dealt first with "Point (i) Cessation of use due to Foot and Mouth Outbreak". After discussing the evidence and arguments put forward, including the lack of evidence that the land had been "taped off" (paragraph 5.1.10), he said (in paragraph 5.1.16):

> "5.1.16 Having revisited the evidence as a whole, officers consider they may have fallen into error in too readily accepting there was a temporary interruption of use as that is not necessarily borne out by all the evidence before the County Council. There are clearly conflicts in the evidence that need to be resolved but at the order making stage the 57 users, who make no reference to any interruption of use, represent a body of apparently credible evidence of lack of interruption of the claimed routes during the Foot & Mouth outbreak. The conflicts in the evidence cannot be resolved one way or the other on the documentary evidence but it is considered that the evidence of the 57 users who make no reference to any interruption of use would allow an order to be lawfully made on the "reasonably alleged to subsist" basis in accordance with the approach set out in the case of [*R. v Secretary of State for Wales, ex p. Emery* [1998] 4 All E.R. 367]."

21. The officer went on to say that if the committee was satisfied that the 20-year period for the purposes of section 31 of the 1980 Act had been interrupted during the outbreak of foot-and-mouth disease and that the interruption was not "de minimis", it must "consider resolving not to make an Order … or risk a challenge by way of Judicial Review" (paragraph 5.1.17). But he added that in the officers' view it "would be reasonable to make the order in light of [the Planning Inspectorate's Advice Note 15] and the guidance supplied by the recent decision for Marble Quarry" (paragraph 5.1.18).

22. In his conclusions on "Point (ii) Exact alignment of claimed routes not known by [the county council]", the officer said (in paragraph 5.2.1):

> "5.2.1 … The application map is based on a 1901 Ordnance Survey 1:10,000 plan. These maps were produced from precision surveying at the time that gave plans of high

quality and accuracy. Nevertheless not all of the detail of this area shown on a modern Ordnance Survey 2015 matches the information on the 1901 Ordnance Survey 1:10,000 plan of the same area. It is difficult to determine which detail has moved in the intervening 114 years and which detail may have been located incorrectly on either plan. The 2015 Mastermap does not show the networks of tracks shown on the 1901 plan because many updates of Ordnance Survey plans are done by observing overhead photographs. Although the ancient tracks shown on the 1901 plan may physically exist on the ground today, they would not be visible in wooded areas on aerial photographs. The regulations require a submission plan to be 'not less than 1:25,000' so the application map is substantially larger than the basic requirements although the detail on it was plotted no later than 1901. … ."

23. He added, however, that "a considerable level of effort has been shown by the persons submitting user evidence forms to show what routes they have used by marking alignments on the plan and in many cases adding further detail on a supplementary form or in an attached letter". Users had "not indicated that they walked wherever they wished and [had] said that they followed specific trods that appeared well used and unobstructed", and some had "indicated that many of the paths were benched and specifically constructed as tracks and therefore very obvious to follow. …" (ibid.).

24. He accepted that "a site survey would have helped in identifying the routes on the ground". The alignments of the routes shown on the application plan had been "interpreted and then transferred to the draft order plan", which, he said, "cannot be as accurate as it would have been had it been possible to carry out a site survey" (paragraph 5.2.2). On the "antiquity, and alleged out of date nature, of the application map", he acknowledged that "[a] serious weakness of the 2015 Mastermap is that it does not show the network of tracks shown on the 1901 plan which appear to be the majority of the routes claimed on the user evidence plans" (paragraph 5.2.3). Given "[the] thickness of the lines marked on the claim forms", he said that "the clarity of marking and accuracy of the maps used … are not adequate to show the precise location of the claimed routes and … this must be accepted as a serious weakness in the evidence submitted with the claim" (paragraph 5.2.4).

25. On "Point (iii) No discovery of evidence", the officer said the "gist of this point appears to be that no new evidence was discovered with Ms Tiffen's application as it contained the same evidence as the earlier application submitted by Mr Horne". He rejected this argument. There had been "no discovery of evidence in [Mr Horne's application] because the evidence submitted by [him] was not considered as part of any formal determination". The application "was not determined on the evidence". It had been "turned down because it did not conform to the statutory requirements". Thus "[the] evidence 'discovered' has yet to be considered as part of a substantive determination and so it has not been 'discovered' twice" (paragraph 5.3.1).

26. The officer went on to consider the evidence for the extension of the bridleway to point 23. He referred to the Hayton Parish 1814 Inclosure Award, which, he said, "[officers] believe … provides evidence that the track to the quarry (D to 23) is a right of way for the specific group of people detailed in the award …" (paragraph 5.4.2). He concluded (in paragraph 5.4.8):

"5.4.8 In the 1950 Parish Schedule … the claim for the extent of bridleway 117004 … is "… [to the Quarry]" not to stop 120m short. The associated claim plan (Appendix

G) shows a claim route numbered '3' running from point D not easterly to the quarry but in a northerly direction to point 22 … . Later First Review plans from 1967 show the claimed route numbered '4' as starting at C and stopping at point D. The [public] 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. There appears to be a case that the Parish Council of the time 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."

27. In the officer's view those considerations were "probably the most significant evidence that the bridleway be extended to point 23". Combined with the "historic evidence", they supported the making of the order, "notwithstanding that the Inclosure Award may only [show] private rights" (paragraph 5.4.9).

28. In section 7.0, "Legal Position", he said that although Mrs Tiffen had "requested the withdrawal of her application", the county council was "still obliged to assess the evidence that has come to its attention and decide whether to make a modification order" (paragraph 7.3). On the approach to be taken at this stage, he said (in paragraphs 7.5 and 7.6):

"7.5 [The county council] has a duty to consider all relevant evidence available to it, and then to reach a conclusion. All the evidence must be weighed in the balance and any relevant legal principles applied to it. The burden of proof imposed on [the county council] at the stage of deciding whether to make a modification order is to consider whether or not sufficient evidence is available for an Order to be made based on whether or not the evidence as produced discloses either that a right of way subsists or that it is reasonable to allege that a right of way subsists. In order to answer the first of those possibilities in the affirmative, it is necessary to show that, on a balance of probabilities, the right of way exists. For the second possibility to be established, it is necessary to show that a reasonable person, having considered all the relevant available evidence, could reasonably allege that a right of way subsists. This is a lesser burden of proof than is required should the application proceed beyond this stage. If the Order were to be made, it would need to be confirmed before it takes effect. Should objections be raised, a public inquiry may be held before a final decision is made by the Planning Inspectorate. At that stage the burden of proof is whether the footpaths can be said to exist on the higher "balance of probabilities" test.

7.6 The reason for the difference is to allow for the resolution of conflicts of fact. This can only be done if people give their evidence and are cross-examined on it. The County Council does not know at the Order making stage whose version of events will be preferred."

29. In section 9.0, "Conclusion", the officer said this was "a complex case with conflicting evidence" (paragraph 9.1), and "a finely balanced matter" (paragraph 9.2). As for the alleged "legal errors", he did not accept that there had been "no discovery of evidence" (paragraph 9.2.1) or that the order should not be made because there was a cessation of use of the claimed routes during the outbreak of foot-and-mouth disease amounting to an interruption under section 31 of the 1980 Act (paragraph 9.2.2). There was, however, "some merit" in the argument that the county council could not make the order because it

did not know "the exact alignment" of the claimed routes. The recommendation now was that an order should not be made for the claimed footpaths (paragraph 9.2.3). But "sufficient evidence" had been "discovered" to show a "reasonable allegation" that the bridleway should be extended to point 23 (paragraph 9.3). The committee "[did] not need to follow the recommendation in this report"; it "could make an Order in respect of the claimed footpaths in addition to the extension of [the bridleway]" (paragraph 9.4). If the committee accepted that the footpaths "cannot be identified with sufficient precision without a site survey it should accept the recommendation in the report and resolve not to make an order in respect of the claimed footpaths" (paragraph 9.5).

30. At the committee meeting on 4 January 2017 supporters of the application addressed the members. Mr Laurence spoke on behalf of Roxlena in opposition to the making of the order, as did Mr Boyd Holmes. Councillor McGuckin urged the committee to follow the recommendation in the March 2016 report. A transcript records his contribution to the discussion, which included these remarks: "if you deny access then you defeat the claim", and "[that] is not how we should be doing it" (lines 392 to 394); and "one of our crucial issues is to fulfil our duties and accept where there is evidence and where we can take a reasonable decision that these paths exist, that we support them" (lines 403 to 405). The committee resolved, by a majority of 11 to four, to make the order.

Was there sufficient evidence to justify making the order for the footpaths?

31. Before the judge, and again before us, Mr Laurence argued that there was insufficient evidence to justify adding the claimed footpaths to the definitive map and statement. The clear, and correct, advice in the officer's report in December 2016 was that the county council should not make an order for the footpaths because the officers were not satisfied they could mark the routes on the draft order map precisely enough. In reaching this conclusion the officers had departed from the view they had expressed in the March 2016 report. They had done so in the light of the argument presented by Roxlena's solicitors' letter dated 22 March 2016. Their revised view was rejected by the committee for no obvious or good reason. Their advice that the committee did not need to follow their recommendation was tantamount to saying, wrongly, that even though the footpaths could not be accurately drawn on the draft order map without a site survey, it would still be reasonable to allege they subsisted – as the officers had advised in the March 2016 report.

32. Mr Laurence submitted that the "reasonably alleged to subsist" test in section 53(3)(c) of the 1981 Act could not be satisfied, for the purposes of making an order, if the evidence would be insufficient to demonstrate, on the balance of probabilities, that the asserted right does in fact subsist. In this case the evidence was insufficient to demonstrate that. At its January 2017 meeting the committee should have been advised that the uncertain evidence about the position and alignment of the claimed footpaths was insufficient to justify confirmation. That advice was not given, nor did the committee consider the question. This was fatal to the county council's decision to make the order. It was a "plain error of law" (see the judgment of Dyson J., as he then was, in *R. v Wiltshire County Council, ex p. Nettlecombe Ltd.* [1998] 96 L.G.R. 386, at p.394).

33. Kerr J. did not accept those submissions. In his view the "exacting standard of precision" demanded by Mr Laurence was higher than the law requires and would often be impossible to meet – for example where, as in this case, a "determined and hostile landowner"

exercises his right not to co-operate in the process by permitting access to the land (paragraph 61 of the judgment). Agreeing with observations made by Sir George Newman in *Perkins v Secretary of State for Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin), the judge said the surveying authority must make a judgment on the best evidence it has. Here the county council's committee was entitled to take the view that the evidence of the alignment and width of the footpaths was sufficient (paragraph 62). It would be a rare case where the court was prepared to "second-guess" the outcome of an inquiry to determine the force of the objectors' case, when the objection was an attack on the exercise of the surveying authority's judgment. This would normally only be done where "the high *Wednesbury* threshold" was reached (paragraph 63). At its meeting on 4 January 2017 the committee had accepted Councillor McGuckin's contention that it was able to "take a reasonable decision that these paths exist" (paragraph 65). The "strength or weakness" of an order, said the judge, is "what the inspector is there to determine" (paragraph 66). The committee had not acted unlawfully by preferring the officers' view in the March 2016 report to that in the December 2016 report. Roxlena's attack on the adequacy of the map and other evidence could be made to an inspector in an objection to the order's confirmation (paragraph 69).

34. Mr Laurence submitted that the judge's approach was wrong. The judgment in *Perkins* did not support the proposition he drew from it. The fact that a landowner exercises his right to deny access to his land is wholly irrelevant to the standard of evidence required to support the making of an order under section 53. The judge was also wrong, said Mr Laurence, not to conclude that if the evidence was insufficient to demonstrate on the balance of probabilities that the claimed footpaths did subsist on the alignments shown on the draft order map, and thus to justify the confirmation of the order, it could not have been reasonable to allege their subsistence, to justify making the order. It was not right to conclude, as he did, that the question of whether the evidence would support confirmation could be put off to an inquiry. Every authority faced with an application under section 53(5) must ask itself whether, if the order were unopposed, the evidence taken at its highest in favour of the public would support confirmation.

35. I cannot accept this argument. I think the judge's approach and reasoning were correct. The court's role here is to consider whether the county council could lawfully make the order it did. In a more refined form, that question is essentially whether, at its meeting on 4 January 2017, the committee could lawfully decide to take a different course from that recommended to it in the December 2016 report. As the judge recognized, the test by which this question is to be answered is a public law standard of review. Did the committee misdirect itself on the relevant statutory provisions? And if it did not, was its decision unreasonable in the "Wednesbury" sense, or otherwise unlawful? The answer to both questions, in my opinion, is "No".

36. I see no basis for concluding that the committee misunderstood the relevant statutory provisions. There is nothing in the minutes of its meeting on 4 January 2017, or in either of the officer's reports, to suggest it did.

37. Under the 1981 Act the order-making part of the process is separate from confirmation, and involves a different approach to the evidence. This has been consistently recognized by the courts. The procedure under Schedule 14 to the 1981 Act was described by Roch L.J. in *ex p. Emery* (at p.377b) as "preliminary". He said (at p.377e-h) that "[where] there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the

landowner had no intention during the period to dedicate the way to the public, … then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists". However, where there is "conflicting evidence on one or other or both issues", an authority "must bear in mind that an order under [section] 53(2) made following a [Schedule] 14 procedure still leaves [objectors] with the ability to object to the order under [Schedule] 15 when conflicting evidence can be heard and those issues determined following a public inquiry". He went on (at p.379c) to approve observations made by Owen J. in *R. v Secretary of State for the Environment, ex p. Bagshaw* (1994) 68 P. & C.R. 402 (at pp.407 to 409) – that the words of section 53(3)(c)(i) indicate "that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right of way does subsist", and that "bearing in mind the structure of [the 1981 Act], this seems to be clear". He also endorsed Owen J.'s formulation of the relevant question as being "Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?". Consistent with this is another observation made at first instance, by Evans-Lombe J. in *Todd v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin) (at paragraph 51(iii)) – that the provisions of paragraph 6 of Schedule 15, which confer on an authority a discretion to confirm unopposed modification orders, "… imply a revisiting by the authority … of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage".

38. As Mr Alan Evans submitted for the county council, the statutory regime does not provide, or imply, that the surveying authority may only make an order under section 53 of the 1981 Act if it has first concluded not merely that a right of way actually "subsists" or is "reasonably alleged to subsist", but also that, on the balance of probabilities, the order will actually be confirmed after all the relevant evidence, whatever it may be, has been considered by an inspector at an inquiry. This would be a much more onerous requirement than Parliament saw fit to impose on a surveying authority at the order-making stage.

39. The submissions made by Mr Laurence seem to conflate the two stages of the statutory process: the making of the order and its confirmation. As the judge held, this is inappropriate. It is not the surveying authority's task, when considering whether an order should be made, to anticipate the outcome of an inspector's consideration of the evidence presented to him and tested before him at an inquiry, effectively forestalling that stage of the process. This would be the consequence of substituting the balance of probabilities standard of proof for the reasonable allegation test at the order-making stage. The crucial question for the surveying authority at that stage is whether it is at least reasonable to allege that the right of way subsists. Sometimes it will be clear that this is not a reasonable thing to allege – for example, where there is a conflict of evidence and it becomes obvious that the allegation of a right of way subsisting will be impossible to maintain. But if in the view of the authority the allegation is reasonable, it may make the order.

40. There are two alternatives under section 53(3)(c)(i): either that the right of way subsists or that it is reasonably alleged to subsist. If the surveying authority were obliged to apply the balance of probabilities test to the allegation of a right of way subsisting, that distinction would be eroded or removed. This cannot have been what Parliament intended by including the second alternative. The statutory purpose is not hard to discern: that orders may be made where the relevant allegation is reasonable, but not unless it is.

41. Mr Laurence's argument does not draw strength from *ex p. Emery*, or any other case law to which he referred – including *O'Keefe v Secretary of State for the Environment* [1996] J.P.L. 42. In *ex p. Emery* Roch L.J. accepted (at p.379d-f) that in some circumstances a claim could be rejected "as an unreasonable allegation, because a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail". By contrast, however, "where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under [section] 31 [of the 1980 Act], then the allegation that the right of way subsists is reasonable … , unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that the use of it by the public could not give rise at common law to any presumption of dedication" (ibid.). This reasoning, with which I agree, lends no support to the concept that in such a case the surveying authority must, at the order-making stage, suspend or disapply the test of reasonable allegation and scrutinize the case for confirmation by applying the balance of probabilities.

42. At its meeting on 4 January 2017 the committee was correctly advised on the task it had to perform, and the approach required under the statutory scheme. The advice in paragraphs 7.5 and 7.6 of the December 2016 report shows no legal error. It properly reflects the separate stages of order-making and order confirmation, and the different evidential requirements in each. The committee only had to resolve, on the material then before it, whether the proposed order should be made. The decision was, of course, for the members to make, not the officers. The committee was guided by the December 2016 report, to which the March 2016 report was appended. The advice given in the December 2016 report was presented to the members both with a justification for deciding to make the order and with a justification for deciding not to do so. It set out, and discussed, the various contentions put forward on behalf of Roxlena in opposition to the making of the order, including the legal arguments. The officer acknowledged that the case was "complex … with conflicting evidence" (paragraph 9.1), and "finely balanced" (paragraph 9.2). In view of his misgivings about the evidence on "the exact alignment" of the claimed routes, he recommended that the order should not be made, but he expressly advised the committee that it did "not need to follow" his recommendation (paragraph 9.4): in effect, that it was reasonably open to them to take a different view on the evidence before them – which they clearly did.

43. The committee's decision, though contrary to the officer's recommendation, was not irrational. The members were entitled to take the view they did of the material before them, to conclude that the shortcomings of the evidence on the exact alignment of the claimed routes did not prevent the order being made, and to accept the opinion expressed by the officer in the March 2016 report that the evidence was sufficient to show a "reasonable allegation" that the rights of way subsisted. This was a matter for their own judgment. Unless the exercise of that judgment was flawed by some significant error of fact, it could only be impugned on "Wednesbury" grounds.

44. As Sir George Newman said in *Perkins*, having referred to observations made by Purchas L.J. in *R. v Secretary of State for the Environment, ex p. Burrows and Simms* [1991] Q.B. 394, "… if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise

delineation actually relating to the right of way in question"; and "[where], as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes … there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence" (paragraph 14). In that case the inspector appointed to decide whether or not to confirm two footpath orders, had dealt with various issues relating to the precision with which the claimed footpath should be shown on the definitive map and described in the statement. In Sir George Newman's view, "[her] conclusions on those various points were a matter of judgment for her on the evidence available and, to a degree, were for her discretion as to how things should be shown within the Order" (paragraph 16). The inspector had concluded, on the material before her, that the description in the statement, taken with the map, would enable a reasonable person to understand where the footpath was. Sir George Newman saw this as "a matter for the planning judgment of the Inspector" and saw no grounds for interfering with her conclusion (paragraph 17).

45. A similar conclusion applies no less in this case – where we are concerned only with the evidence being considered at the order-making stage, not the evidence as it might eventually be before an inspector at an inquiry. The committee did not make any error of fact, nor did it overlook any relevant material available to it, and in my view its impression of the evidence falls within the range of reasonable judgment. The judge's conclusion to this effect is unimpeachable. There is nothing to suggest that the committee decided as it did because it thought it was unnecessary, or unimportant, in the course of the statutory process, to establish the location and alignment of the claimed paths with as much accuracy as was possible. This was not the tenor of comments made by members, including Councillor McGuckin, in the discussion at the meeting on 4 January 2017. It was not being said that all the committee required was evidence, however slight, of the public using some, though indeterminate, route across the land. The real thrust was that the evidence of the location and alignment of the claimed routes, though by no means perfect, and not as good as it might have been had the land been surveyed, was still sufficiently clear.

46. The judge recognized this. He did not misunderstand the reasoning in *Perkins*. He did not gauge the reasonableness of the committee's exercise of judgment by the false criterion that even if the evidence of location and alignment was likely to prove inadequate for the depiction of the route on the definitive map and its description in the statement, the evidence as it was would have to suffice. That is not what was said in *Perkins*. And it is not what Kerr J. said in his judgment here. He simply concluded (in paragraphs 61 and 62) that the committee was reasonably entitled to find the evidence of location and alignment good enough to justify making the order. This was not to reduce the accuracy envisaged in *Perkins*. It was entirely consistent with the reasoning there, and in my view correct.

47. I do not accept the suggestion that the members' rejection of the recommendation made to them in the December 2016 report must be regarded as unreasonable because in the officers' view (in paragraph 5.2.3) it was a "serious weakness" of the 2015 Mastermap that it did not show the network of tracks marked by users on the 1901 Ordnance Survey map. It was not unreasonable for the committee, in the absence of a survey of the land, to assume that the position and alignment of the routes had not altered in any material way in the intervening 114 years. The officer pointed out to the members (in paragraph 5.2.1) what the limitations of the 2015 Mastermap were. As he explained, it did not show features on the ground, because it had been compiled from an analysis of aerial photographs, which would not show footpaths within Hayton Woods that were obscured in views from the air. This

was not to say, however, that the footpaths did not exist, merely that the 2015 Mastermap was not evidence that they did. The officer referred to the care taken by users in marking alignments on the plan, and the further detail some had provided. There was evidence of "well used" tracks. As Mr Evans submitted, where the paths marked by users on the plan coincided with tracks shown on the 1901 Ordnance Survey map and there was a lack of evidence that those tracks no longer subsisted on the same alignments, it was not irrational to assume this was so (see the judgment of Lord Clarke of Stone-cum-Ebony in *R. (on the application of Trail Riders Fellowship) v Dorset County Council* [2015] 1 W.L.R. 1406, at paragraph 28, Lord Toulson's at paragraph 39, Lord Carnwath's at paragraphs 59 and 71, Lord Neuberger of Abbotsbury's at paragraph 94, and Lord Sumption's at paragraph 107).

48. In the circumstances I think the committee was reasonably entitled to prefer the view expressed in the March 2016 report (in paragraph 5.1(e)) that it was possible to "prepare a map, with sufficient accuracy, of the claimed alignments without a site survey", to the doubts expressed in the December 2016 report. This was a classic matter of judgment for the members. It was not unreasonable for them to conclude that, in its totality, the evidence they had received of the location and alignment of the claimed footpaths, whether or not it would ultimately be enough to satisfy an inspector, was nevertheless sufficient to justify the making of the order.

Did the county council fail to discharge its duty to investigate?

49. Mr Laurence argued that the county council had failed, under paragraph 3(1)(a) of Schedule 14 to the 1981 Act, properly to investigate the assertions that the claimed footpaths had been used during the outbreak of foot-and-mouth disease in 2001. In the March 2016 report the officers had accepted there had been a "temporary interruption" of use of the footpaths by members of the public in that period, though – in the light of Planning Inspectorate Advice Note 15 – not a sufficient interruption to defeat the making of the order. In the December 2016 report, having reconsidered the available evidence, they acknowledged that that conclusion might have been wrong. A number of those who had completed user evidence forms – 40 in fact, not 57 – had claimed to have used the footpaths in that period. But there were circumstances to suggest they had done so inadvertently – including the way in which the relevant question (question 3c) was framed in the user evidence form, the findings of the county council's 2002 report on the outbreak of foot-and mouth disease, the evidence of 12 people that there had been no use of the paths in that period, and the evidence of 13 members of the public who mentioned the outbreak of foot-and-mouth disease but did not claim to have used the paths in that period. At the committee meeting on 4 January 2017 Mr Boyd Holmes told the members that the public were "shut out" of Hayton Woods "for months …". It was incumbent on the county council to satisfy itself that, in spite of all this, the assertions made in the user evidence forms were true.

50. Kerr J. did not accept the view stated in the Planning Inspectorate Advice Note that an interruption of use caused by measures put in place to restrict the use of footpaths during an outbreak of foot-and-mouth disease was incapable in law of amounting to an interruption in use (paragraph 73). In this case the exercise the county council had to perform was not to make a finding of fact on the question of whether the 40 people had used the paths during the outbreak in 2001. It was "sufficient to identify evidence making it reasonable to allege that the rights of way subsist". The county council had done this by looking at the content of the user evidence forms (paragraph 74). The "simple point" was that "40 persons gave

evidence of uninterrupted use of the routes over the requisite 20 year period". The county council's duty to investigate the matters stated in the application had been "performed by officers tabulating and analysing the [user evidence forms], 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" (paragraph 75). Questions bearing on the interruption of use were "points for the inspector at an inquiry, if one is held" (paragraph 77). The county council did not have "to ask specific questions about foot and mouth disease at the present preliminary stage". There was no duty to ask the 40 people a further question on "the specific subject of foot and mouth" (paragraph 78).

51. Mr Laurence submitted that the judge misunderstood Roxlena's argument here. In the light of Roch L.J.'s judgment in *ex p. Emery*, if there was a conflict of fact where resolution in favour of the public would justify confirmation, it would be reasonable to allege the subsistence of a right of way, and this would justify the order being made. This was not in dispute. So if the 40 members of the public who apparently claimed to have used the paths during the outbreak of foot-and-mouth disease had truly intended to make that claim, and if their evidence were accepted, this would be a proper basis for confirming an order and thus a proper basis for making it in the first place. Roxlena did not contend that making the order could only be justified if the county council found the 40 members of the public had used the paths in that period. Rather, the submission was that the county council's duty to investigate required it to establish whether those 40 people had intended to claim what they had. To say it was "sufficient to identify evidence making it reasonable to allege … the rights of way subsist" was wrong. The county council had failed to investigate whether that evidence reflected what the 40 people had really meant to say.

52. I cannot accept those submissions. The analysis on the previous issue is also relevant here. At the order-making stage of the statutory process, the consideration of evidence is necessarily less intense than at the stage of confirmation. The context here is the need to consider whether a right of way may reasonably be alleged to subsist. In that context, a surveying authority's duty to "investigate" under paragraph 3(1)(a) of Schedule 14 to the 1981 Act does not constrain it to investigate a particular matter in greater depth and detail than it reasonably judges to be necessary in the circumstances.

53. In this case, by the time the county council's committee came to consider the making of the order in January 2017 it had the benefit of the officer's advice in the two reports, which described and analysed the evidence relating to the interruption of the use of the claimed routes during the outbreak of foot-and-mouth disease in 2001. If the committee had considered the evidence on interruption of use to be insufficient for its purposes at the order-making stage, or to require more assessment than the officer had provided in the two reports, it could have sought further evidence or asked for further work to be done. But it was not compelled to do so if it was to discharge its duty to "investigate" in paragraph 3(1)(a) of Schedule 14. It was not obliged by the duty to "investigate" to tackle every actual or potential conflict of evidence that an inspector would have to resolve in due course. As Mr Evans submitted, the "margin of appreciation" here was generous (see, for example, the judgment of Green J., as he then was, in *AA & Sons Ltd. v Slough Borough Council* [2014] EWHC 1127 (Admin)).

54. I agree with the judge that the evidence of interruption of use within the relevant 20-year period, contentious as it was, did not have to be more deeply investigated than it was before

the county council decided to make the order. The county council did not have to go behind the user evidence forms and send letters to the 40 users who had said they did use the paths during the outbreak of foot-and-mouth disease, or a sample of those users, to ask whether they had inadvertently claimed to have done so. As the judge said, those 40 people had given some evidence of the uninterrupted use of the routes over the relevant 20-year period. That evidence could reasonably be taken at face value at the order-making stage. The county council did not have to assume it was unreliable because the 2001 Order had been in force at a relevant time. It might or might not withstand questioning at the confirmation stage. But it did not have to be investigated more fully before the order could lawfully be made.

Was there a "discovery" of evidence within section 53(3)(c)?

55. In his conclusions on this issue, Kerr J. referred to Mr Laurence's submissions based on the first instance decisions in *Mayhew v Secretary of State for the Environment* (1993) 65 P. & C.R. 344 and *R. v Secretary of State for the Environment, ex p. Riley* (1990) 59 P. & C.R. 1, but found neither of those cases relevant. The argument that the evidence that Mr Horne had carefully assembled must be ignored would be, he said, "disturbing if correct", for it would mean that a surveying authority "must shut its eyes to relevant evidence, which would be contrary to the interests of justice" (paragraph 82). He was in no doubt that the county council had acted lawfully in relying on the user evidence forms in deciding to make the order (paragraph 88). The "event" that had triggered the county council's duty to consider them was their "discovery" in January 2011 when Mr Horne made his application, which was an "event" within section 53(3)(c). Though that application then "fell away", the county council's duty under section 53(2)(b) remained (paragraph 89). The statutory language did not support the proposition that the "continuous review" duty was displaced by the successive applications under section 53(5) (paragraph 90). When Mrs Tiffen made her application in April 2013 the discovery of the user evidence forms had not yet been acted upon – because of the "dissuasive efforts" of Mr and Mrs Day's solicitors (paragraph 92). But there was nothing to preclude the county council performing "belatedly in January 2017" its duty under section 53(2)(b), or to prevent an applicant such as Mrs Tiffen from relying, in an application under section 53(5), on "evidence discovered years earlier but not yet acted upon by the authority concerned" (paragraph 93). This understanding of the statutory provisions did not make the procedural requirements in Schedule 14 pointless, and the court would grant relief where unfairness resulted from those requirements being breached or ignored (see the judgment of Dyson L.J., as he then was, in *R. (on the application of the Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 W.L.R. 138, at paragraph 55) (paragraphs 95 and 96).

56. Mr Laurence criticized that reasoning. He submitted there had been no effective discovery of evidence under section 53(3)(c). There was therefore no requirement for the county council to make an order under section 53(2), either under its free-standing duty to keep the definitive map and statement under continuous review, or because it was obliged to decide whether to make an order in response to Mrs Tiffen's application. The judge was wrong to hold otherwise.

57. Relying on the judgment of Macpherson J. in *ex p. Riley*, Mr Laurence submitted that relevant evidence already discovered once cannot be the subject of a subsequent discovery within section 53(3)(c)(i). Macpherson J. said (at p.5) that the discovery of evidence meant

exactly that. And he accepted that "evidence" was not restricted to new or fresh evidence. Mr Laurence stressed that the evidence brought forward by Mrs Tiffen in support of her application for the claimed footpaths was identical to that adduced by Mr Horne in support of his. She had produced no new evidence of her own. Evidence adduced in support of an application under section 53(5) that is not proceeded with cannot be treated as having been discovered under section 53(3)(c) to engage the surveying authority's free-standing duty under section 53(2).

58. The burden of Mr Laurence's argument here is that an order under section 53(2)(b), based on user evidence of the kind adduced by Mr Horne, should only be made on an application taken to its conclusion under section 53(5). The circumstances in which section 53(5) and Schedule 14 require evidence produced by an applicant to be treated as having been "discovered" for the purposes of section 53(3)(c) no longer apply when the surveying authority decides the application cannot be proceeded with because of a failure to comply with the procedural requirements of Schedule 14.

59. Contrary to the judge's conclusion, Mr Laurence submitted, a relevant "event" calling for the surveying authority to exercise its free-standing duty to keep the definitive map and statement under continuous review does not occur when the application, with the accompanying evidence, is received by the surveying authority. The only event that occurs then is the trigger for the authority to exercise its duty under paragraph 3 of Schedule 14, and subject to the procedural requirements in paragraphs 1 and 2, to investigate the application and "decide whether to make or not to make the order to which the application relates". A subsequent application of the kind made by Mrs Tiffen, accompanied only by evidence that had already been discovered, cannot alter the position. The same evidence cannot be discovered twice. The effect of section 53(5) and Schedule 14 is to require an applicant who makes another, later, application to bring forward at least some new and probative evidence – as was done in *ex p. Riley* – before the surveying authority has jurisdiction to consider the previously discovered evidence as well. But in any event in this case the county council had already acted on the discovery of the evidence adduced by Mr Horne, by deciding it was not going to proceed with his application because of his failure to comply with the procedural requirements. This, submitted Mr Laurence, is by no means unjust. The evidence itself is not lost – because on a subsequent application supported by fresh evidence, the surveying authority must have regard to the previously discovered evidence under section 53(3)(c)(i)**.** That provision refers to the discovery of evidence being "considered with all other relevant evidence …", which would include previously discovered evidence.

60. This case, Mr Laurence argued, was distinguishable on its facts from *Mayhew*. In his judgment in that case Potts J. referred (at p.353) to the meaning of the verb "to discover" as "a mental process in the sense of the discoverer applying his mind to something previously unknown to him". There, said Mr Laurence, the evidence in question had already been discovered soon after 1969 and could not be discovered again. It was a discovery that took place in the past, for which section 53(2)(a) provided. The critical difference between the documents in *Mayhew* and the user evidence forms in this case was that in *Mayhew* the surveying authority had genuinely discovered the material after 1969 in circumstances calling for an order under section 53(2)(a), which is not what happened here.

61. Mr Laurence also submitted that no reliance should be placed on observations made, obiter, by Dyson L.J., as he then was, in *Winchester College* (at paragraph 55), to the effect that

where a surveying authority decides not to waive any default in compliance with the procedural requirements of Schedule 14, it is open to it "… to treat a non-compliant application as the "trigger" for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3)". Mr Laurence said this was incorrect. But in any event the point had not been not fully argued in that case, and the court did not consider the separate question, which arises on the facts here: does a decision not to waive a procedural defect permit, or require, the surveying authority to treat the non-compliant application as triggering a decision under section 53(2)?

62. In my view those submissions are not cogent. One must start with the statutory language. Section 53(2) refers to the occurrence of any of the "events" specified in subsection (3). The potentially relevant event in this case is the event described in subsection (3)(c), which is "the discovery … of evidence which (when considered with all other relevant evidence available to them) shows …" any of the matters referred to in subsection (c)(i), (ii) and (iii). In each case the occurrence of the specified "event" is not simply the "discovery" of the evidence in the sense of its being physically found. It also requires a consideration of that evidence, together with any other relevant evidence available to the surveying authority, which actually "shows" the circumstance in subsection (c)(i), (ii) or (iii) – in effect, therefore, a composite event. That consideration of the evidence must surely be a consideration of its substance, by the surveying authority, rather than its merely being received from the applicant with the application. It involves the surveying authority undertaking that "mental process" on the evidence discovered. If the evidence has not been "considered", a relevant event for the purposes of section 53(3)(c)(i), (ii) or (iii) will not have occurred. The event cannot occur until one of those three circumstances has actually been shown.

63. I accept, as did the judge, that evidence discovered by somebody once – in the sense of its being found for the first time – cannot, in that sense, be discovered by that person on a second or subsequent occasion. But this is not to say that evidence, once discovered, but not so far considered by the surveying authority, cannot be considered on the second occasion when it is submitted. That is this case. By the time Mrs Tiffen made her application under section 53(5), in April 2013, the evidence in the user evidence forms submitted by Mr Horne with his application in January 2011 had still not been considered, in its substance, by the county council. It had not been considered because the county council had been dissuaded from determining Mr Horne's application by the efforts of Mr and Mrs Day's solicitors. In these circumstances I do not see in the provisions of section 53 any restriction preventing Mrs Tiffen from relying in her application on the same material as had Mr Horne in his, without that material ever having previously been considered under section 53(3)(c). This was, I think, the essential point in the judge's analysis, though he did not express it in quite the same way.

64. I reject the argument that the effect of the provisions in section 53(5) and Schedule 14, read with section 53(3)(c), is to compel an applicant to bring forward some new and previously undiscovered evidence before the surveying authority may consider, for the first time, evidence previously discovered but never considered in substance. That is not what the provisions state, nor a sensible inference from them. If the interpretation contended for by Mr Laurence were right, previously discovered but unconsidered evidence, which had not been considered because of some procedural mistake by a previous applicant, could only be considered if there also happened to be some new evidence never discovered before. This

would have arbitrary consequences, and cannot have been Parliament's intention. It would, in effect, elevate a procedural error – in this case the lack of service on Mrs Day – to a substantive outcome, until some further evidence happened to be discovered. In many cases it would prevent a consideration of significant or compelling evidence, merely through some minor default.

65. As Mr Evans submitted, the judge's conclusions on this issue do not offend the principle of legal certainty. They do not mean that a substantive decision under section 53, taken on particular evidence, should be re-opened in the absence of some evidence justifying that course. That is not what happened here. In this case there was no substantive decision on the material produced by Mr Horne, because that evidence was not considered. There was no previous determination to engage the principle.

66. The judge was also right to conclude that neither of the first instance decisions in *ex p. Riley* and *Mayhew* assist the court on the issue here. In *ex p. Riley* a relevant substantive decision had previously been taken by the surveying authority. *Mayhew* is also materially different on its facts, but it supports the principle that evidence may be capable of lawful consideration some time after the point of discovery – in that case a review that had never resulted in a formal decision.

67. Like the judge, I also think there is no obstacle in the statutory provisions to the surveying authority taking into account previously discovered but unconsidered material in discharging its free-standing duty under section 53(2)(b). Similar reasoning applies. Where the surveying authority, because of a failure by an applicant to comply with the procedural requirements of Schedule 14, has decided that an application should not be proceeded with, that decision does not disapply the free-standing duty. Again, to reach the opposite conclusion, one would have to read into the statutory provisions a qualification Parliament did not insert. The free-standing duty in section 53(2)(b) is not suspended or displaced by the making of an application under section 53(5). It is a continuous duty. In discharging it, the surveying authority is not debarred from considering evidence not previously considered, though submitted with an application never determined. Nor does it have to await a further application adducing that evidence again, together with evidence not submitted before.

68. I would add, finally, that none of these conclusions denies a proper role to the procedural requirements in Schedule 14. Those requirements are to be complied with. But an applicant's failure to comply does not automatically have the result of circumscribing the scope of the surveying authority's jurisdiction under section 53, and does not impinge on the free-standing duty in section 53(2)(b). This conclusion seems consistent with Dyson L.J.'s observations in *Winchester College* (at paragraph 55), with which I agree.

Was there sufficient evidence to justify making the order for the bridleway?

69. Mr Laurence submitted there was insufficient evidence to justify extending the bridleway on the definitive map and statement. When the officers recommended in the December 2016 report that such an order be made, they regarded as the "most significant evidence" the 1950 Parish Schedule at Appendix F to the report, and the "associated claim plan" at Appendix G. But the plan in Appendix G was not the "associated claim plan". It was therefore impossible to establish either the alignment or the end of the bridleway – which

was described in the schedule to the draft order as ending "at the Quarry in Gelt Woods". So, submitted Mr Laurence, the "most significant" evidence supporting the extension of the bridleway did no such thing. And the county council could not reasonably conclude, as the officers advised in the December 2016 report, that "sufficient evidence [had] been 'discovered' … to show a reasonable allegation that [the bridleway] should be extended to point 23 as shown on the plan at Appendix A". Mr Laurence also submitted that the county council should have considered whether the documentary material discussed in paragraph 5.4 of the December 2016 report was sufficient to support the confirmation of an order extending the bridleway. It did not do so.

70. The judge acknowledged that the "associated claim plan (Appendix G)" referred to in paragraph 5.4.8 of the December 2016 report was the wrong plan, which did not show the bridleway (paragraph 104). He rejected the criticism levelled at the officer's analysis – in particular, the contention that it made no sense for the route to turn to the south from point D to point 24 and from there north-east to point 23, and that this was not borne out by contemporary maps. He also rejected the argument that the county council should have applied a "balance of probabilities" test rather than the lower test of "reasonable allegation" (paragraph 108). The court should not substitute its own judgment for the decision-maker's. The "threshold of intervention", said the judge, is "the high one of irrationality" (paragraph 109). Roxlena's case was, in effect, an invitation to the court to embark on its own assessment of the historical documents and maps, and to disagree with the county council's, "without properly alleging irrationality, still less establishing it". The "balance of probabilities" test could not be substituted for that of "reasonable allegation", merely because this would be the applicable standard at the stage of confirmation if the order were unopposed (paragraph 110). It should be for the inspector at a public inquiry to weigh and evaluate the weaknesses of the evidence supporting the extension of the bridleway. There was no justification for the court to interfere with that exercise (paragraph 111).

71. Mr Laurence submitted that those conclusions of the judge were mistaken. As with the claimed footpaths, if the evidence before the county council was not enough to demonstrate on the balance of probabilities that the claimed bridleway subsisted on the alignment shown on the draft order map, and so to justify confirmation, it could not have been reasonable to make the order.

72. I disagree. I do not accept the submission that because the map at Appendix G showed a route that was not the claimed bridleway, the evidential basis for adding the stretch of bridleway to which the application related fell apart, and that the allegation of the subsistence of the bridleway on that alignment and to that extent could not be reasonable. As Mr Evans submitted, one must not ignore what the officer said in paragraph 5.4.8 of the December 2016 report. The officer referred there to the 1950 Parish Schedule, and the assertion made by the parish council that the bridleway extended to a point ending at the "Quarry in Gelt Woods", rather than some indeterminate point short of the quarry. He also suggested, sensibly, that it would have been surprising if the bridleway had ended where it was shown on the definitive map – at Point D on the map at Appendix A – because that was a dead end, and not a destination of any kind. These observations did not depend on a map showing the route of the bridleway all the way to the quarry. The officer recognized that the application plan did not show that. The identity of the plan itself made no difference.

73. And in any event the officer also referred, in the same paragraph, to other plans from 1967, which, he said, "show the claimed route … starting at C [Grey Stone] and stopping at point

D". This was taken to be the existing bridleway, though it did not appear to go as far as the quarry. But other passages in the December 2016 report provide a more complete picture, indicating that the route shown in the 1950 Parish Schedule as a bridleway ending at the quarry was the same route to the quarry as had been shown in the 1814 Inclosure Award, which the officer described in paragraph 5.4.2 of the report as the "track to the quarry (shown as D to 23 on draft order plan)". Taken as a whole, the relevant material could properly be taken as amounting to a reasonable allegation of the claimed route. That conclusion was not unlawful.

74. The reasons I have given for rejecting the parallel argument relating to the footpaths are also relevant here. The crucial question is whether the allegation is a "reasonable" one. This is not a high test, and deliberately so. The fact that the allegation is based on primary documents rather than user evidence as such does not bear on the principle. A reasonable allegation can properly be based on documentary material alone – as Roch L.J. effectively accepted in *ex p. Emery* (at p.379c) when endorsing Owen J.'s observation in *ex p. Bagshaw* (at p.409) that "if … the evidence were to be wholly documentary it might be possible, satisfactorily or reliably, to evaluate that evidence without any necessity for a hearing, and in these circumstances answer the question whether a reasonable person could reasonably allege a right of way to subsist".

Conclusion

75. For the reasons I have given I would dismiss the appeal.

Lord Justice Irwin

76. I agree.

Lord Justice Simon

77. I also agree.