IN THE COURT OF APPEAL (CIVIL DIVISION) CA-2025-000794
ON APPEAL FROM THE HONOURABLE MRS JUSTICE LANG
BETWEEN

THE KING on the application of
THE RAMBLERS' ASSOCIATION **1st Respondent**
and
SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS **2nd Respondent**
and
ROXLENA LTD **Appellant**

FIRST RESPONDENT'S APPEAL SKELETON ARGUMENT

"**CB *x/y***" means Tab *x*, page *y* of the Core Bundle
"**SB *x/y***" means Tab *x*, page *y* of the Supplementary Bundle
"**AS *x*"** means ¶*x* of the "Appellant's Appeal Skeleton Argument 30 June 2025" (CB 3/23-42)
"**LJ *x***" means ¶*x* of the judgment of Lang J (CB 8/77-108)
"**OD *x***" means ¶*x* of the Order Decision that was the subject of the claim for judicial review (CB 22/287-324)

INTRODUCTION

1. The Ramblers' Association ("**the Ramblers**") brought a claim for judicial review of the "**Order Decision**" (CB 22/287-324) of a rights of way inspector to refuse to confirm the addition of a number of footpaths to the "definitive map and statement" ("**the DMS**") for Cumberland Council ("**the Council**"). The case for confirmation was based on 20 years public use so as to give rise to "deemed dedication" under section 31 of the Highways Act 1980 ("**Section 31**", "**the 1980 Act**"). The Inspector accepted that such use had occurred so as to satisfy Section 31, save for one period of 4 months in 2001 when the public had not used the paths because of the imposition of restrictions on public use due to the foot and mouth outbreak. The Inspector held that this 4-month intermission in public use was "*a break in continuity of use which was more than de minimis*", and that *for that reason* the criterion in Section 31 was not satisfied.

2. The Ramblers claim was based on two grounds, (i) "**JR Ground 1**", that it was irrational for the Inspector to treat the period of 4-months of non-use due to foot and mouth as defeating the claim under Section 31, in circumstances where the use had otherwise continued for 19 years and 8 months, had restarted immediately upon the lifting of the relevant foot and mouth restrictions, and was explained fully by those restrictions, and (ii) **JR Ground 2**, that the Inspector had erred in law by substituting the question of whether the use over the whole of the 20 year period was sufficient with a question as to whether the interruption was "*de minimis*". Underlying both of these grounds were certain legal propositions, set out in more

detail below, but essentially that (i) the question of the adequacy of public use is to be judged by reference to use over the 20 year period as a whole, (ii) that an intermission in use for a shorter period of less than 20 years is relevant to judging the sufficiency of use over the period as a whole but is not, in itself, fatal to the claim under Section 31, so there is no *de minimis* threshold, and (iii) that (for JR Ground 1 only) in considering the effect of any intermission on the mind of the reasonable landowner, it will be relevant to consider any objectively ascertainable explanation for the intermission, such as that use was prevented by flooding or by the foot and mouth outbreak.

3. The issues on the appeal ought therefore to be whether the judge was correct to uphold either or both of the JR Grounds, and / or whether she took an approach to the underlying legal propositions which was erroneous.

4. That is not how the Appellant has approached the appeal, and the Appellant's overall characterisation of the issues raised by the appeal are therefore misleading or at least confusing. For example, AS 4 in the Appellant's Skeleton ("Introduction", CB 3/24) says that:

> *The effect of the Judge's judgment is that, provided there is an explanation for the non-use, an intermission in public use of 10 years would still not lawfully be sufficient to preclude a finding that the public had "actually enjoyed" a way for a "... full period of 20-years*".

5. This is wrong. The Ramblers did not argue, and the judge did not decide, that the fact that an intermission in use within the overall 20 year period could be "explained" would mean that the intermission could not "lawfully be sufficient to preclude" a finding in favour of the public. The judge held only that, in considering the sufficiency of use over the 20 year period as a whole, the presence of such an explanation would be a relevant factor. As she put it at LJ 86 (CB 8/99), "objectively ascertainable facts which place the public's conduct in context ... will be relevant to answer the objective question of how the reasonable landowner would consider the matter".

6. This mischaracterisation of the issues is important because it makes it quite difficult to identify the issues raised by the Appellant's Grounds of Appeal ("**the Appeal Grounds**", to distinguish them from the "**JR Grounds**"). This is true in particular for **Appeal Ground 1** (CB 2/19-21), where it is unclear whether the Appellant's principal argument is that the judge was wrong to consider that explanation was "relevant" in the sense explained in LJ 86 (CB 8/99), or only whether she would have been wrong to say that an explanation was decisive in the way suggested at AS 4 (CB 3/24). If it is the former, then Appeal Ground 1 is resisted on the basis that the judge was correct to consider that explanation was relevant in the sense just

explained. If it is the latter, Appeal Ground 1 is resisted on the basis that the judge made no such finding. Appeal Ground 1 also raises two completely distinct points, which are in reality wholly distinct grounds of appeal but which are wrong for the reasons explained below.

7. **Appeal Ground 2** (CB 2/21) contends that the judge was wrong to find that the Inspector had erred by substituting the question of whether the break in continuity was *de minimis* for the question of whether use over the 20 year period was sufficient. The basic problem with this ground is that it completely ignores what the Inspector said, as explained below. She clearly and repeatedly directed herself that the key question for her was whether the break in continuity of use was "more than *de minimis*", and the Appellant does not appear to argue that this approach would have been correct.

8. This Skeleton starts with the identification and analysis of the relevant legal principles, which, it is submitted, will assist the court in identifying the real issues on the appeal. The background is then identified, before turning to the Appeal Grounds.

DEEMED DEDICATION UNDER SECTION 31 OF THE HIGHWAYS ACT 1980

The statutory provisions

9. Prior to the enactment of section 1 of the Rights of Way Act 1932 ("**the 1932 Act**"), an act of past dedication of a public right of way could be inferred "at common law", on the basis of public use "as of right". This was based on the idea that the best explanation for the public's conduct was that the public actually had the right that they were exercising. However, there was no presumption that such inference had to be drawn, only that it could be drawn if all the facts justified it.

10. The 1932 Act altered this by creating a statutory presumption of dedication on the basis of past use by the public as of right. This was re-enacted, with immaterial changes[1], in Section 31(1) of the 1980 Act:

> ***31.— Dedication of way as highway presumed after public use for 20 years***
> *(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.* [Emphasis added]

[1] As enacted, section 1(1) of the 1932 Act had an additional restriction in the case of 20 years use, that it would be defeated by evidence that there was no landowner with capacity to dedicate the land. That additional restriction did not apply, however, in the case of 40 years enjoyment: section 1(2) of the 1932 Act. The two subsections were later amended to apply a single 20-year period in all cases which was not subject to landowner capacity. That difference does not, materially, affect the application of the case law to section 31(1).

11. The underlined phrase ("... actually enjoyed ... 20 years") appeared in section 1 of the 1932 Act. It is common ground that case law concerning section 1 of the 1932 Act applies, without alteration, to Section 31(1).

12. The same phrase also appeared in Prescription Act 1832 ("**the 1832 Act**"), as Hilbery J observed in *Merstham Manor Ltd v Coulsdon and Purley UDC* [1937] 2 KB 77: the words of the 1932 Act are "reproductions of the language used in" in the 1832 Act (LJ 59). It follows that case law on the meaning of those words in the 1832 Act is equally applicable to the 1932 Act and the 1980 Act, and it was understood that this was, largely at least, common ground before Lang J. There is some challenge to this under Appeal Ground 1, addressed below.

13. Accordingly, in what follows, it is not generally necessary to distinguish between case law on the 1832 Act, the 1932 Act or the 1980 Act, where it concerns the interpretation of the key phrase highlighted above.

Propositions of law[2]

14. The following propositions can be derived from the case law. Some are obvious and uncontentious, some less so, but it is nevertheless sensible to spell them out:

    (1) Proposition 1: Section 31 of the 1980 Act (and its predecessors etc) provides that a public right of way will be deemed to have been dedicated by 20 years continuous enjoyment of a way by the public. **Authority:** the words of section 31(1).

    (2) Proposition 2: "Continuous Enjoyment" will be established by public "use" or "user" over the 20 year period. In the case of a footpath, such use will be by walking, in the case of a bridleway, by walking and riding, and so on. **Authority:** Scott LJ in *Jones v Bates* [1938] 2 All ER 237, at 245C-D.

    (3) Proposition 3: The use in question must be "as of right", which is interpreted to mean without force, stealth, or permission (*nec vi, nec clam, nec precario*). The question is objective rather than subjective, as to whether the public conduct presented itself as "as of right" rather than whether particular members of the public subjectively believed that

[2] Eight propositions are set out below. In the lower court, the Ramblers identified three propositions at ¶17 of their Skeleton Argument (CB 16/174). Proposition 1 in that Skeleton corresponds to Proposition 4 below. Proposition 2 in that Skeleton corresponds to Propositions 5 and 6 below (which have been broken down for the sake of clarity, albeit they are in a sense opposite sides of the same coin). Proposition 3 in that Skeleton corresponds to Proposition 8 below. It seems helpful to identify the additional propositions below (1, 2, 3 and 7) for the sake of exposition. Propositions 1-3 are not understood to be controversial. Proposition 7 emerged in the course of argument in the court below and is understood to be the target, or a possible target, of Appeal Ground 1.

they enjoyed the right in question. **Authority:** *Jones v Bates,* at 245-E-H, *R v Oxfordshire CC, ex parte Sunningwell PC* [2000] 1 AC 335, at 356.

(4) Proposition 4: For the presumption to arise, the public use over the 20-year period must be sufficient to bring home to the mind of the reasonable non-absentee landowner that the public are asserting a continuous right of enjoyment. Again, the question is "objective", as to how the use would appear to the putative reasonable landowner, not what the actual landowner believed. **Authority:** Lindley LJ in *Hollins v Verney* (1884) 13 QBD 304, at 315, Lord Neuberger PSC in *Lawrence v Coventry* [2014] AC 822, at ¶¶142, *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 1 P & CR 13, at ¶60, Ouseley J in *Wright v DEFRA* [2016] EWHC 1053 (Admin), at ¶21.

(5) Proposition 5: In considering whether the use is sufficient in this sense, the relevant question is whether the use over the period "taken as a whole" is sufficient, not whether the use in any particular sub-period is sufficient for that period seen in isolation. **Authority:** As for Proposition (4) above, especially Lord Neuberger in ¶142 of *Coventry v Lawrence.*

(6) Proposition 6: As a corollary of the previous proposition, the "use" in question need not be "continuous", and "mere absence of continuity" or "intermission" does not stop time running to establish the 20-year period. The use in question need not be continuous throughout the 20-year period. However, an intermission in use may be relevant in considering whether, seen as a whole, the use over the 20 year period is sufficient. So intermission in use is *relevant,* but not *fatal*. **Authority:** Lord Denman CJ in *Carr v Foster* 3 QB 581, at 632, Lindley LJ in *Hollins v Verney* at 313, Scott LJ in *Jones v Bates* at 246B, Lord Neuberger in *Lawrence v Coventry* at ¶141.

(7) Proposition 7: In considering the effect on the mind of the reasonable landowner of an intermission in use, it will be relevant to consider any "explanation" for that intermission which would have been apparent, so as to consider whether the non-use in a given period is consistent with the public's assertion of a right in that period. This point was correctly captured by Lang J in the instant case when she said:

> *86. … The Claimant correctly submits that the question is how the conduct of the person asserting the right would appear to the putative landowner. In considering that question, objectively ascertainable facts which place the public's conduct in context (e.g. that there was a flood which prevented them from using the way) will be relevant to answer the objective question of how the reasonable landowner would consider the matter. …*

Authority: Lord Denman in *Carr v Foster* at 632, Lindley LJ in *Hollins v Verney* at 314, Lord Evershed MR in *Lewis v Thomas* [1950] 438, at 444.

(8) Proposition 8: The question of whether the use is sufficient in the above sense is to be distinguished from the question of whether the "enjoyment" has been "without interruption" within the meaning of section 31(1). An "interruption" in this sense requires, not mere cessation of use, but "an obstruction", an "overt act", or an "interference with the enjoyment of the right". **Authority:** Patteson and Williams JJ in *Carr v Foster* at 632*,* Scott LJ in *Jones v Bates* at 246C, and *passim.*

15. Not all of these points are understood to be controversial. The central plank of the Ramblers' argument in the court below was that, in light of Propositions 5 and 6 above, the correct question for a decision maker to ask is whether the use over the 20 year period seen as a whole is sufficient to satisfy Section 31, not whether there was a "more than *de minimis*" break in the continuity of use. It is unclear to the Ramblers whether the Appellant in fact disagrees with this, or with Propositions 5 and 6 above. The Appellant's position on this seems to have fluctuated in the course of the claim. Since this has always been the central plank of the Ramblers' argument, it would be helpful if the Appellant could in fact clarify whether it challenges Propositions 5 and 6 above, or not[3].

16. Certain other propositions can be identified which the Ramblers / Lang J do not support:

(i) The Ramblers do not argue, and have never argued, that an intermission, however long, will be irrelevant to the establishment of the 20-year period. The fact that the public's use has been intermittent may be highly relevant to whether the use over the 20-year period, taken as a whole, is sufficient to bring home the public assertion of a right to the landowner. The longer the intermission, the more likely it will be concluded that the use, taken as a whole, is not sufficient. Propositions 5 and 6 above serve only to exclude the opposite contention, that a lack of use in any given period will automatically defeat the claim under section 31(1), regardless of the quality of the use in the rest of the period.

(ii) The Ramblers do not argue, and have never argued, that the fact that there is an "explanation" for the use will in and of itself mean that any period of intermission must be discounted. Lang J did not hold, and the Ramblers do not contend, as suggested at AS 4 (CB 3/24), that "*provided there is an explanation for the non-use, an intermission in public use of 10 years would still not lawfully be sufficient to preclude a finding that*

[3] The Ramblers made the same invitation for clarification in ¶27 of its High Court Skeleton Argument (CB 16/176), but has not received a clear answer. At one point in the court below the Appellant seemed to accept Propositions 5 and 6 in part, in that it sought to distinguish between cases where an intermission was caused by land not being available, and cases where it was available but the public chose not to use it. The judge rejected that particular argument at LJ 88 (CB 8/99). That point is resurrected at AS 38 (CB 3/32-33), but the overall position remains unclear.

the public had "actually enjoyed" a way for a '...full period of 20 years". The Ramblers expressly accept that an intermission of 10 years *could* defeat a claim under Section 31, regardless of the explanation for that intermission. Indeed, it can be said that it is *likely* to do so. The propositions above are more modest, that an intermission, however long, must be judged in the context of use over the 20-year period seen as a whole, and having regard to any objectively ascertainable explanation for that intermission.

(iii) The Ramblers do not argue, and have never argued, that the question of whether use is sufficient is not "a question of fact". It plainly is a question of fact. However, like the determination of any other statutory test, the question of whether there has been a "full period of 20 years" requires the evaluation of the facts against the applicable legal test. The applicable test is whether the use over the period as a whole is sufficient to bring home the public assertion of a right to the mind of the reasonable landowner. To say, therefore, that it is a "question of fact" (e.g. AS 3 (CB 3/24), AS 29 (CB 3/30)) obscures rather than illuminates, because it begs the question of how the relevant facts are to be evaluated.

Case law

17. The judge undertook a comprehensive review of the relevant case law at LJ 60-88 (CB 8/91-99). For ease of reference, key passages, including those identified above as authority for specific propositions, are set out here. The focus is on Propositions 5-7, since Propositions 1-4, and 8, do not appear to be controversial on this appeal.

18. *Carr v Foster* was the very first case on the 1832 Act. The question was whether a claim to a prescriptive right by use over the relevant period (30 years) was defeated by lack of use over two years. Lord Denman CJ said:

> *I am of opinion that the thirty years' enjoyment was sufficiently made out. There must be some interval in the enjoyment of all such rights; and it must be a question for the jury, in each case, whether the right was, substantially, enjoyed for the requisite period. It has been ingeniously argued that a thirty years' enjoyment cannot have taken place where there has been a two years' intermission. But the words of sect. 1 are "without interruption," not "without intermission." And the intermission must be a matter open, in every case, to explanation. ... where actual enjoyment is shewn before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.* [Emphasis added] **Propositions 6, 7 and 8 above**

19. In the same case, Patteson J observed that "'interruption' must mean an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord", and added:

> *How many times the right has been exercised is not the material question, if the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff might apply equally if there were a cesser for seven years. I am not prepared to say that it would not. It might be that, under the circumstances, the party had no occasion to use the right. The question*

would always be for the jury. So long an intermission would be a strong, piece of evidence against the continued right: but it would be for them to determine. **Propositions 6, 7 and 8**

20. Williams J said that an interruption "means an obstruction, not a cessor or intermission, or any thing denoting a mere breach of time" (**Proposition 8**).

21. *Hollins v Verney* concerned a claim to a prescriptive right to cut wood, where the right had been exercised only once every 12 years. Not surprisingly, the claim failed on its facts. But the court nevertheless rejected any argument that there was some minimum requirement, as a matter of law, of frequency of length or intermission. Lindley LJ said that "we are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, though there is no proof of actual user in every year" (at 313). He explained the relevance of a period of non-user as follows at 314:

... the total absence of user for any year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user. **Propositions 6 and 7**

22. At 315, he said:

... no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term ... the user is enough at any rate to carry to the mind of a reasonable person…the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. **Propositions 4 and 5**

23. These cases concerned the 1832 Act. The first reported case on the 1932 Act was *Merstham Manor,* which recognised that the 1932 Act reproduces the language of the 1832 Act. The second reported case, and still the most authoritative case on the 1932 Act, is *Jones v Bates.* Scott LJ's judgment has been generally treated as particularly authoritative. Having explained that enjoyment is to be demonstrated by use, and the meaning of "as of right", he said:

The next requirement of the statute, "without interruption", means that the ***enjoyment*** *of the right must not have been interrupted. If for the statutory period members of the public have used the way as of right, and their exercise of that right has in fact not been interrupted, then the statutory consequence follows. The word "interruption" must be given its proper import in its grammatical context. A mere absence of continuity in the de facto user proved will not prevent the statute from running. If that were not so, the necessary proof in public right of way cases would often break down – especially in the 40 year period – simply because witnesses were not available to fill all the gaps in such proof. No interruption comes with the statute unless it is shown to have been an interference with the enjoyment of the right of passage. The change of the law is that, upon proof of such user for 20 or 40 years, the conclusion of dedication follows as a presumption juris et de jure, instead of as an inference of fact to be drawn by the tribunal of fact.*

[Bold emphasis in original, emphasis by underlining added] **Propositions 6 and 8**

24. Subsequent cases have restated this. In *Lewis v Thomas* [1950] KB 438, it was said:

The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken-down vehicle so that nobody could pass along it at all. It is obvious that in such a case no court would hold that there was such an interruption as was intended by the section. In the forming of that conclusion, the circumstances in which the barring of the way took

place and the complete absence of any intention to stop anybody from going along it would, I think, be a relevant circumstance.

25. The "circumstances in which the barring of the way took place" are, in effect, equivalent to the "explanation" of how why the obstruction occurred and why the public did not use the way, so this supports, *inter alia*, **Proposition 7**.

26. These cases and others were cited by Scott Baker J, as he then was, in *Fernlee Estates Ltd v City and County of Swansea* [2001] EWHC Admin 360, at ¶16:

16.. In order to constitute an interruption for the purposes of Section 31 (1) of the Highways Act 1980 there must be some physical and actual interruption which prevents enjoyment of the way rather than merely acts which challenge the user while allowing it to go on: Merstham Manor Ltd v Coulsdon and Purley [1937] 2KB 77 , 84–85. A mere absence of continuity in the de facto user will not stop time running, there must be interference with the enjoyment of a right of passage, Jones v Bates [1938] 2 All ER 237 , 246. Thirdly, "interruption" means "interruption of fact." However, the circumstances of and the intention with which the barring of the way takes place are relevant. For example, the blocking of a road by a broken down vehicle would not amount to a relevant interruption. Lewis v Thomas [1950] 1KB 438. **Propositions 5, 6, 7 and 8**

27. In *Wright v DEFRA,* Ouseley J framed the overall issue in a Section 31 case by saying, at ¶21, that, in relation to "quality of user", "*[t]he use had to be sufficient to bring home to the mind of the reasonable non-absentee landowner that the public were asserting a continuous right to use each route in question*" (**Proposition 4 and 5).**

28. The issue was revisited, in the context of the 1832 Act, in *Lawrence v Coventry*. At ¶¶142-3, Lord Neuberger said:

141 … I have already referred in para 37 above to the judgments in Carr v Foster 3 QB 581. Mere non-use, or inactivity, for two out of 20 years, at least in the absence of other evidence, would be insufficient to justify a court concluding that an action which has been carried out for the other 18 years fairly consistently and to a significant extent in each of those years failed to justify the conclusion that a prescriptive right had been established. It is a question of degree, and that is shown by contrasting the facts of the present case and of Carr with those of White v Taylor (No 2) [1969] 1 Ch 160, where non-use for two periods, each more than five years, did defeat a prescription claim.

142. The essential question in a prescription case has been said to be whether the nature and degree of the activity of the putative dominant owner over the period of 20 years, taken as a whole, should make a reasonable person in the position of the putative servient owner aware that a continuous right to enjoyment is being asserted.

[Emphasis added] **Propositions 4, 5, 6 and 7**

BACKGROUND: DEFRA GUIDANCE AND THE EARLIER *ROXLENA* CASE

29. Two aspects of the background leading up to the Order Decision (CB 22/287-324) must be mentioned. This aspect of the background is set out in more detail in the Ramblers' High Court Skeleton, at ¶¶36-47 (CB 16/178-182), and is explained by Lang J at LJ 89-111 (CB 8/99-104), but it has some importance in explaining why the issues developed in the way that they did before the Inspector, so for that purpose it can be briefly summarised here:

(i) The Defendant (2nd Respondent) Secretary of State had published "guidance" specifically addressing the implications of Foot and Mouth for rights of way. In the form that it took prior to 15 August 2023 ("**Guidance Version 1**") (SB 1/3-4), it advised that an intermission caused by Foot and Mouth could never amount to an "interruption" in public use for the purposes of Section 31. The Ramblers agree with that but they accept that this has no precedential or persuasive status on the legal issues raised by this case. However, Version 1 of the Guidance did also provide some helpful factual context for the foot and mouth outbreak generally, which was available to the Inspector when she took her decision, so that may be noted as follows (SB 5/94):

> *2.1. To prevent the spread of foot and mouth disease during the outbreak in 2001, many local authorities restricted access to land under the Foot and Mouth Disease Order 1983 (as amended). The Order permitted the closure of land regardless of the presence of public rights of way.*
> *2.2. It may be argued that this restriction on access brought about an 'interruption' that could prevent the acquisition of rights by deemed dedication under section 31(1) of the Highways Act 1980.*
> *…*
> *2.5. The duration of the orders that restricted access varied in different areas but were generally in operation for 3-6 months.*

(ii) Prior to the Inspector's decision in the instant case, concerning the Paths in Hayton Woods, the Council had to determine whether it should "make" the footpath Order that is the subject of the present case ("making" the order being a necessary prequel to the confirmation of that order, which is what the Inspector was concerned with). The Council did make the Order, and that was the subject of an earlier claim for judicial review by Roxlena, which came before Kerr J as *R (Roxlena) v Cumbria CC* [2017] EWHC 2651 (Admin) ("*Roxlena HC*[4]"). Kerr J dismissed the claim, but in the course of doing so he made some *obiter* observations about Version 1 of the Guidance, as follows:

> *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.*

This can be read as suggesting that any intermission in use which is more than *de minimis* will defeat the claim under Section 31, regardless of its cause. In any event it is the first appearance in the case law on Section 31 of the concept of a *de minimis* break

[4] Kerr J's judgment was appealed to the Court of Appeal: [2019] EWCA Civ 1639. The appeal was dismissed. The correctness of Kerr J's remarks at ¶73 did not arise and was not addressed.

in continuity. Kerr J did not hear argument on this point and his remarks are not necessary to his decision (which was to dismiss rather than allow the claim by Roxlena).

(iii) On 15 August 2023, the Secretary of State published revised guidance on foot and mouth ("**Guidance Version 2**") (SB 5/92-97), which responded to Kerr J's judgment in *Roxlena HC*. The new guidance is quite lengthy and nuanced, and grapples with the new concept of a more than *de minimis* break in continuity. Guidance Version 2 repeats the factual background to the foot and mouth outbreak set out above. It was extant at the time of the Inspector's Order Decision (CB 22/287-324) and is referred to by her.

(iv) Both versions of the Guidance have subsequently been withdrawn and not replaced.

30. The main relevance of this is that it provides some context for the introduction by the Inspector of the concept of a "more than *de minimis*" intermission in use. Both Kerr J's judgment and Version 2 of the Guidance are capable of being read as suggesting that a more than *de minimis* intermission in use will, of itself, defeat a claim under Section 31, and the Inspector appears to have read them in that way.

31. It is common ground that neither version of the Guidance is binding persuasive legal authority.

32. As to the judgment of Kerr J, the Ramblers' position is that it is wrong, at least if it is to be read as contradicting Propositions 1-8 above.

33. Before Lang J, there was considerable argument about the status of Kerr J's observations, whether they are *obiter*, whether the point was argued, and so on. She deals with this in some detail at LJ 89-108 (CB 8/99-104), concluding, correctly in the submission of the Ramblers, that his remarks are *obiter* (LJ 95)(CB 8/102), that they were "liable to mislead readers" (LJ 96), and that he was not referred to relevant principles and authority (LJ 97-103)(CB 8/102-103).

34. The Ramblers rely on Lang J's analysis of Kerr J's judgment, both as to its precedential status and as to its correctness. In this court, of course, the issue assumes less importance, because this court, unlike Lang J, is not required to apply the principles in *Lornamead v Kaupthing* [2011] EWHC 2611 as to how High Court judges should treat earlier High Court judgments. There is a wealth of case law, cited above, which does bind this court, and which shows that Kerr J was wrong, quite apart from the other limitations identified by Lang J.

THE ORDER DECISION

35. Following the Court of Appeal's judgment in *Roxlena,* which dismissed the challenge to the making of the Hayton Woods Order, consideration had to be given to confirmation of the Hayton Woods Order. Since there were statutory objections (not least from Roxlena itself), the Inspector was appointed. The Order Decision is dated 10 April 2024 (CB 22/287-324).

36. The applicants for the Order sought confirmation on a number of different bases, including historic mapping evidence showing that rights of way had existed over a long period of time, so-called "common law dedication", and deemed dedication under Section 31. As already noted, there was no argument for deemed dedication of the bridleway. The Inspector rejected the claim for common law dedication of both the Paths and the Bridleway, and no issue has been taken with that (so the Inspector's rejection of the Bridleway stands unchallenged).

37. In relation to deemed dedication of the Paths under Section 31, the Inspector found that the tests under Section 31 had been met in all respects, save for one issue. It is not necessary to revisit her conclusions on various other arguments raised by Roxlena, which she rejected.

38. The Inspector explained at OD 86 (CB 22/300) that the Appellant's counsel "confirmed that Roxlena accepts that members of the public used all the routes shown in the Order over the relevant 20-year period and on the regularity claimed but raises two points", one of which was the issue of interruption / intermission caused by Foot and Mouth. So the critical question, in circumstances where it was common ground that public use over the remaining 19 years and 8 months was sufficient to satisfy Section 31, was whether the claim was defeated by the lack of public use in that four-month period.

39. The relevant reasoning is at OD 104-131 (CB 22/303-307). Having summarised the background, and having referred to Kerr J's approach in the *Roxlena* judgment, the Inspector explained her approach to the law as follows (CB 22/305):

> *116. The crux of the matter here is whether as a matter of fact there was a break in continuity which was more than de minimis so that there had not been actual enjoyment of the claimed routes for the full 20 years. Whether there had been an interruption in use is a different point albeit capable of arising from the same facts. A use could cease without interruption occurring but result in less than 20 years use being shown. Of course, it will depend on the circumstances.*
>
> *117. For the routes to be 'actually enjoyed' for the purposes of section 31(1) requires sufficient use of the way over the required 20-year period. This is a matter of fact to be determined in each case. The motive for using the ways is irrelevant. It is undisputed that a short period of non-use which is de minimis (i.e. too small to be considered) would not affect the running of time.*

40. This is completely clear, and permits of only one interpretation. The Inspector identified the core question, not as whether the use over the whole of the 20 year period was sufficient (having regard to the lack of use in the four months, but not treating it as determinative), but

as whether the four month break was "*de minimis*". That is clear from the opening sentence of OD 116 (CB 22/305), which identifies this as the "crux of the matter", and it is supported by the rest of the passage, including the final sentence of OD 117 (CB 22/305), which contrasts a break which is "more than *minimis*" with a break that is "too small to be considered".

41. Lest there be any doubt as to the Inspector's approach, however, it is also clear from the remainder of her reasoning, at OD 118-127 (CB 22/305-306). None of this reasoning poses the question of whether use over the period of 20 years was sufficient when seen in the round, and none of it even addresses the quality of the use outside the four month "break". The focus is exclusively on the quality of the use in that four-month break. The key factual conclusions on that four-month period (but not the 20 year period seen in the round) are as follows (CB 22/306):

> *124. No-one could recall precisely how long the foot and mouth restrictions lasted in the area but witnesses consistently referred to several months. It is known that Orders came into force at the end of February 2001 whereupon public paths in Cumbria were closed. Restrictions remained in place for at least 4 months, possibly much longer. Mr Holmes thought it was until September/October 2001. It is not essential to establish the precise period. Once the foot and mouth restrictions were lifted people continued to use paths through Hayton Woods as before.*
>
> *125. From the tested evidence, the reality is that all but one person stopped using the Order routes whilst restrictions for foot and mouth disease were in place. Even then, the practicalities meant that such use could not have extended across all the Order paths without contravening the restrictions in place for the public paths. The evidence of one person does not suffice to show that the routes were actually enjoyed by the public during the outbreak. That is particularly so when all other witnesses had stopped use. The evidence points firmly to a period of non-use over at least 4 months falling within the requisite 20-year period.* [Emphasis added]

42. The Inspector's overall conclusion then followed on (CB 22/306):

> *126. To some extent use will be intermittent depending on when people choose to walk the paths. A mere cessation of use may not break continuity of actual enjoyment. In my judgement, as a matter of fact and degree, this was not a short break that can be regarded as de minimis. It was a prolonged period where the Order paths were not actually enjoyed by the public. Closure of the three public paths clearly had a deterrent effect and people kept out of the woodland. Moreover, from the landowner's perspective the public use had stopped and so they could not reasonably know that a continuous right to enjoyment was being asserted that ought to be resisted.*
>
> *127. All things considered, it leads me to conclude that, in the particular circumstances of this case, the Order routes had not been actually enjoyed by the public for a full period of 20 years before the date of bringing into question. This alone means that the requirements of section 31 of the 1980 Act are not met for the presumption of statutory dedication to arise.* [Emphasis added]

43. These passages leave no room for doubt about the Inspector's approach. She did not, at any point, ask whether the use over the 20-year period taken as a whole was sufficient to bring home to the mind of the reasonable landowner that the public were asserting a continuous right of enjoyment. She asked instead whether the public use in the specific period of the four month intermission was sufficient to bring home the public's assertion of a right during this specific period (OD 124, "during the outbreak" (CB 22/306)), and / or whether the break in

continuity was "more than *de minimis*" (OD 116 (CB 22/305), OD 126 (CB 22/306)). Although she appears to have accepted the obvious point that the intermission in use was fully explained by the foot and mouth restrictions, she did not appreciate, or take account of, the implications of this for how the public's lack of activity in this period would present themselves to the mind of the reasonable landowner, because she failed to appreciate the potential relevance of that explanation to the significance of the intermission.

THE RAMBLERS' CLAIM, AND THE JUDGMENT

44. In light of the above, the Ramblers brought the instant claim for judicial review, alleging that the Inspector had erred in law in two respects:

    (i) JR Ground 1: It was not open to the Inspector to find that the four month intermission in public use due to foot and mouth meant that the public's use over the remaining 19 year and eight month period did not satisfy Section 31, in circumstances where one member of the public continued to use the paths even in this period, where public use resumed as soon as the restrictions were lifted, and where the Inspector clearly accepted that the reduction in public use was due to foot and mouth.

    (ii) JR Ground 2: The Inspector erred in law by substituting a *de minimis* test for the question of whether the use as a whole over the 20 year period was sufficient.

45. It may be, on reflection, that it would have been more logical to present the grounds in the oppositive order, since JR Ground 2 alleges a discrete legal error whereas JR Ground 1 is that, regardless of how the Inspector approach it, her conclusion was not open to her. JR Ground 2 helps to explain how the Inspector reached the wrong conclusion as alleged in JR Ground 1. They were in fact presented to the judge in reverse order orally, and she also dealt with them in that reverse order (see LJ 112-128 (CB 8/105-108)). That is simply a matter of presentation and does not affect the substance.

46. In that regard, and although it did not bind Lang J, and does not bind this court, it is worthy of note that the Secretary of State had conceded the claim on the basis of JR Ground 1. The Secretary of State's reasons for that concession were set out in a letter dated 16 October 2024 (CB 12/122-124), which is set out in full at LJ 43 (CB 8/86-88), but which said, materially, as follows:

    3. In the present case, the Inspector considered the issue of actual enjoyment for a full period of 20 years at paragraphs 104 – 131 of her decision letter. The Inspector's findings included the following:

    a. The Inspector found that there was a period of non-use of "at least four months" within the 20 year period (paragraphs 124 – 125).

b. The period of non-use occurred when statutory restrictions imposed in response to foot and mouth disease were in force. The Inspector found at paragraphs 108 – 110 that the statutory restrictions imposed in response to foot and mouth disease did not directly apply to the Order routes in question, but that "in all likelihood" passage along most of the Order routes "would have been prevented by the closure of the three public paths" (paragraph 110).

c. The Inspector found that Cumbria was severely affected by the foot and mouth outbreak, with the impact "acutely felt" by the community in the locality of the Order routes, and "In this climate, residents were highly conscious of the risks of disease spread through people movement in rural areas and keen to act responsibly" (paragraph 106).

4. The Inspector relied on the period of non-use to conclude that the requirement of actual enjoyment for a full period of 20 years was not met (paragraphs 125 – 127). At paragraph 126, the Inspector stated that "Moreover, from the landowner's perspective the public use had stopped and so they could not reasonably know that a continuous right to enjoyment was being asserted that ought to be resisted".

5. In light of the Inspector's findings at 3a-c above, the Defendant accepts that it was not reasonably open to the Inspector to find that the reasonable landowner could not know that a continuous right to enjoyment was being asserted that ought to be resisted. The Defendant accepts that, in all the circumstances, a reasonable landowner would consider that the period of non-use was due, directly or indirectly, to the foot and mouth restrictions.

6. Under Ground 1, the Claimant alleges inter alia that "No reasonable landowner would conclude, from absence of public use in the period of restrictions, that the public assertion of the right (as demonstrated by public use in the rest of the period) had been withdrawn" (Statement of Facts and Grounds, para. 44(ii)). The Defendant accepts the correctness of that statement, on the facts of the present case.

47. Lang J accepted both grounds. On JR Ground 2, her reasons are at LJ 115-123 (CB 8/105-107). In particular, as she put it:

123. The Inspector asked herself the wrong question, by focusing on the landowner's objective state of knowledge during the 4 month intermission, instead of his objective state of knowledge over the whole of the 20 year period. The reason why a "mere absence of continuity" or an intermission does not defeat the claim under section 31(1) HA 1980 is precisely the fact that it is not necessary to show that the use during the period of an intermission is in and of itself sufficient to alert the landowner. It is only necessary to show that the overall use in the 20 year period us sufficient to have this effect, taking account of such breaks as may have occurred.

48. This, with respect, is clearly correct, in light of the matters set out above.

49. As to JR Ground 1, Lang J set out the Inspector's key factual finding at LJ 124 and 125 (CB 8/107-108), and accepted the Claimant's submission that "no reasonable landowner would conclude, from the absence of public use in the period of restrictions, that the public assertion of the right (as demonstrated by public use in the rest of the period) had been withdrawn". This, again, is submitted to be clearly correct.

50. The Appeal Grounds, which barely engage with any of this, must be considered against this background.

APPEAL GROUND 1

51. This "ground" seems to involve a number of quite unrelated points. First, at AS 15-40 (CB 3/27-36), Roxlena develops an argument about the judge's approach to the "explanation" for any period of intermission in public use ("**The Explanation Ground**"). Secondly, at AS 41-50 (CB 3/36-37), Roxlena develops a completely unrelated argument about how the judge strayed into the "merits of an evaluative judgement for the decision maker" ("**the Merits Ground**"). Third, at AS 51-61 (CB 3/38-40), Roxlena develops another completely unrelated argument about the application of the "highly likely" test in section 31(3C) of the Senior Courts Act 1980 ("**SCA**") ("**the Highly Likely Ground**"). Since these are separate points, they need to be addressed separately.

The Explanation Ground (AS 15-40) (CB 3/27-36)

52. Roxlena's first ground of appeal is pleaded as follows in AS 15 (CB 3/27-28):

> *15. The critical finding by the Judge was that, when applying the statutory question whether a way has been "actually enjoyed by the public … for a full period for 20-years, one must ask whether any gaps in enjoyment by the public are capable of "explanation", so that they must be disregarded (see J.65, 87-88 and 108).*

53. The most basic problem with this ground of appeal is that it is at best unclear what error of law is being alleged. Part of the problem is that it conflates a number of different issues, as to whether:

    (a) Roxlena reject Propositions 5 and 6 above (essentially, that mere cessation will not defeat a claim under section 31 if the use seen over the period as a whole is sufficient), or

    (b) Roxlena accept Propositions 5 and 6, but reject Proposition 7 (that the "explanation" for any period of non-use is relevant in considering how the use seen as a whole would present itself to the mind of the reasonable landowner), or

    (c) Roxlena accept Propositions 5, 6 and 7, but contend that the fact that there is an explanation for the intermission is not decisive.

54. In so far as it is (a), this ground of appeal is wrong for reasons already given. The case law cited above clearly establishes that the mere fact that there is an intermission in use within the overall 20 year period is not fatal to a claim under Section 31, but it must be seen in the overall context of the overall use in the 20-year period to see if that use is sufficient taken as a whole. The passages above from *Carr v Foster, Jones v Bates, Hollins v Verney,* and *Lawrence v Coventry,* could not be clearer on these points.

55. In so far as it is (b), this ground is again wrong, again for reasons already given. The case law is again crystal clear, and it accords with principle. Per Lord Denman CJ in *Carr v Foster,* in

the very first of the long line of cases cited above, "*intermission must be a matter open, in every case, to explanation*". That is repeated in different language in later cases. The reason that that is correct is that it accords with the underlying requirement to consider how the public's use, seen as a whole, would present itself to the mind of the reasonable landowner (Proposition 4). Thus, as Lang J said at LJ 86 (CB 8/99), "objectively ascertainable facts which place the public's conduct in context ... will be relevant to answer the question of how the reasonable landowner considered the matter".

56. For completeness, this version of this ground of appeal would not necessarily provide a basis to set aside the judgment below even if it were made out. That is because Proposition 7 is not necessary to the Ramblers' success on Ground 2 of the claim for judicial review, which depends only on saying that one must consider the period as a whole and not treat intermission as decisive, rather than on saying that explanation is relevant. That is without prejudice to the Ramblers' position that Proposition 7 is clearly correct.

57. In so far as it is (c), that the availability of an explanation for non-use is not decisive, the Ramblers would agree, as would Lang J. Lang J did not hold that the fact that there is an explanation for an intermission in public use is, in and of itself, a sufficient basis to completely disregard the intermission. She only held that the fact that there is an objectively ascertainable explanation for a particular period of non-use that is consistent with the public's enjoyment of the asserted right over the period as a whole will be a relevant factor in considering how the use over the 20 year period would present itself to the mind of the reasonable landowner. Accordingly, this is not a basis to criticise the judgment below. It is simply not a material ground of appeal.

58. Roxlena develops its "Explanation Ground" by reference to three different points. They are all wrong.

59. **First**, at AS 17-27 (CB 3/28-30), they place reliance on section 15(6) of the Commons Act 2006 ("**the 2006 Act**") as a relevant (or even decisive) guide to the interpretation of Section 31 of the 1980 Act. This is wholly wrong, for two freestanding reasons.

60. It is true that, as was held in *Cape Brandy Syndicate v IRC* [1921] 2 KB 403, "subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous". However, the principle is much narrower than Roxlena contends:

(i) The 2006 Act deals with village greens. Section 31 deals with rights of way. They are, it may be said, cousins, but they are not "on the same subject". They are differently worded. That is fatal in itself.

(ii) The 1932 Act is not ambiguous. Indeed, it is not clear what ambiguity is being relied on, since, as explained above, Roxlena's argument is unclear. It is not really clear what legal proposition the Appellant seeks to derive from its proposed analogy with section 15(6) of the 2006 Act. But in any case, Section 31 and its predecessors, as interpreted in innumerable cases all of which precede the Commons Act 2006, has been consistently interpreted as explained above, without any suggestion that it is ambiguous. Even if the original wording of the 1832 Act might have been thought to be "ambiguous", it is far too late for its meaning to be fixed by a statute passed in 2006, given the accumulation of binding case law between 1832 and 2006.

(iii) Even when it applies, the principle in *Cape Brandy* is not that you can simply look to a later statute, which contains express language, and infer that an earlier Act must mean the same thing or that the absence of express language implies an opposite meaning. The circumstances in *Cape Brandy* were that earlier legislation had two possible meanings, but later legislation, which was designed to dovetail with it, could only be made sense of on one of the two possible meanings of the earlier legislation. So the court was entitled to look at the later legislation as casting light on the earlier legislation, essentially to avoid an absurdity in the later legislation. See also "Bennion, Baily and Norbury on Statutory Interpretation", Eighth Ed, Lexis Nexis, 2020, ¶24.19, which gives some sense of other cases where the principle has been applied (very rarely), all of which require something far more specific than just that one statute is clear and the other is not. Nothing of that kind is found here. Roxlena simply points to the later legislation as indicating that Parliament could have used different or more specific language. The language used by Parliament in a 2006 statute can tell one nothing about language used in a 1980 statute, *a fortiori* when that earlier language harks back to 1832. The *Cape Brandy* principle does not alter that. This court gave short shrift to a similar attempt to interpret the Public Contracts Regulations 2015 by reference to the Procurement Act 2023 in *Brookhouse Group Ltd v Lancashire CC* [2024] PTSR 1513, ¶62.

61. In any event, the Appellant's whole argument is based on a fundamental misreading of section 15(6) of the Commons Act 2006, which in fact says the exact opposite of what the Appellant

contends. At least so far as the Ramblers understand the Appellant's argument, it contends that section 15(6) shows that, if Parliament wishes to produce a situation where a period of non-use can still count against the 20-year period, it will say so expressly. As it says at AS 21 (CB 3/29):

> *... where Parliament wishes any period of non-use to be disregarded, it stipulates that expressly. The fact there is no similar provision in the Highways Act 1980 is a powerful indicator against implying a requirement to disregard a period of non-use into that statutory regime.*

62. The premise of this argument is therefore that section 15(6) of the Commons Act has an analogous effect to that contended for by the Ramblers, in allowing for time to continue running against the landowner even when use is prevented by an enactment (such as Foot and Mouth restrictions). But in fact section 15(6) does the very opposite. It says:

> *(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.*

63. So this says that, where use is prevented by an enactment, the period in question does not count toward the 20-year period. In the context of Foot and Mouth, such restrictions would have prevented the establishment of a village green by reference to the period of time in which such restrictions were in place[5].

64. This being so, if one took the Appellant's argument seriously, it would support the Ramblers' position, not the Appellant's. Parliament must have considered that, absent section 15(6), a period of non-use would fall to be considered as part of the 20 year period, and would not defeat the claim under section 15. That is why it made express provision to the contrary. By the same token, in the absence of the equivalent of section 15(6) in section 31, a period of non-use must be taken into account. Alternatively, section 15(6) is "ambiguous", and cannot therefore provide a safe guide to the interpretation of Section 31 for this additional reason.

65. To be clear, the Ramblers do not invite the court to go down this route. Section 15(6) of the 2006 Act is of no assistance in construing Section 31. But it does rather demonstrate the problems with the Appellant's argument.

66. **Second**, the Appellant argues at AS 27-38 (CB 3/30-33) that the judge "departed from the pre-existing case law". In fact, even within this sub-sub-ground, there are two separate points,

[5] It is not clear to the Ramblers whether this means (a) that the interposition of Foot and Mouth would have defeated a village green claim over any period that straddled the restrictions, or whether (b) the period in question is to be excised completely so that one can rely on a period that is 20 years in total, counting periods both before and after the restrictions. Since the court is not construing section 15(6) of the Commons Act 2006 in this appeal, it is not necessary to reach a conclusion on this. What is clear is that section 15(6), on any view, has no analogy of any kind in Section 31, and cannot be a guide to its interpretation.

first, at AS 30 (CB 3/30), that the judge was wrong to rely on cases under the 1832 Act rather than those on public rights of way under the 1932 and 1980 Acts, and secondly, that the judge failed to deal with *De Rothschild v Bucks CC* (1957) 8 P & CR 317.

67. As to the first of these points, the 1832 Act case law is relevant because the 1932 and 1980 Acts adopt the exact same language as was used in the 1832 Act, to address the exact same problem that a right (private or public) could not be established automatically by a fixed period of use. That is the point made by Hilbery J in *Merstham Manor,* and the Ramblers had understood it to be common ground below. Plainly, the relevant principles may play out differently in different factual scenarios, but that does not alter the relevant principles. In any event, all of the Propositions set out above are equally supported by cases on public rights of way as well as those under the 1832 Act.

68. As to *De Rothschild,* in this case there was an "intermission" in public use that lasted for the final 8 years out of the 20-year period. The use did not restart before the end of the period, so there was 12 years use followed by 8 years non-use. It is right to say that that was potentially explained by wartime restrictions on public access, but that does not alter the fact that the final 8 years involved no use at all. On those facts, the court concluded, unsurprisingly, that that cessation of use for 8 years, which was never re-started, defeated the claim on the facts. There is nothing in the judgment to gainsay the proposition that an intermission is not fatal *per se*, as opposed to when it is of such length that the landowner cannot be expected to realise that the public are asserting a right throughout the period.

69. The reliance on this case is a good illustration of the way that the target of this ground of appeal is unclear. *De Rothschild* does demonstrate that the fact that there is an explanation for the public's non-use cannot be decisive in favour of the public, because there was such an explanation for the entirety of the period of non-use, and the claim still failed. So if the Ramblers, or the judge, had made the mistake of thinking that the existence of an explanation was decisive in this way, then *De Rothschild* would rebut that. But, as explained above, neither the judge, nor the Ramblers, have ever made this mistake. They say only that the fact that a period of non-use can be explained is relevant in considering how it would be perceived by the landlord. *De Rothschild* says nothing about this.

70. **Third**, at AS 39-40 (CB 3/33-36), the Appellant contends that the case law does not support the judge's conclusions on the law, which aligns with the Ramblers' arguments. The case law has been exhaustively analysed above, as well as by the judge at LJ 60-75 (CB 8/91-95), and is perfectly clear. That analysis is not repeated here. The only observation to add is that the

Appellant's arguments confuse the principles established by the cases with the particular facts. For example, in *Carr v Foster,* addressed at AS 39(a) (CB 3/33), it is true that the court only held that a jury had been entitled to find that the right was established, not that they were compelled to do so. But the basis on which the court upheld the jury's findings was that a mere intermission did not defeat the claim automatically, which is the only principle which the judge or the Ramblers draw from it. Likewise, as already stated, it is right that in *Hollins v Verney,* the claim for a prescriptive right failed on the facts, which involved a single use followed by a 12-year intermission. But again, that does not change the principles stated by the court, as set out above, which is that intermission *per se* does not automatically defeat the claim and may be capable of explanation.

The Merits Ground (AS 41-50) (CB 3/36-37)

71. The target of this ground appears to be the judge's acceptance, under JR Ground 1, that on the facts of this case it was irrational to find that the 4-month intermission in public use during foot and mouth defeated the claim for public rights of way over the Paths.

72. It is important that this ground is addressed on the correct premise, which is the law as set out in Propositions 1-8 above. The effect of those propositions is that the Inspector was not entitled to treat mere intermission in use as, in and of itself, defeating the claim under Section 31, and further that she would have to consider the effect of any explanation for public non-use. It is clear that the Inspector did not in fact approach the matter in this way, as explained above, so her "evaluative judgment" is of less weight than it might otherwise be. Further, it must be addressed on the facts of this case, which were as follows:

    (i) The Inspector held that the public used the Paths as of right, and with sufficient regularity etc, for 19 years and 8 months out of the 20 year period.

    (ii) The Inspector held that, even in the four month period of foot and mouth, one member of the public had been able to continue to use the Paths regularly.

    (iii) There was (objectively, and as found by the Inspector) a clear and uncontested explanation for the lack of use in the period by other members of the public, namely that the foot and mouth restrictions prevented use. The foot and mouth restrictions were not imposed by the landowner, and he was equally subject to them.

    (iv) The foot and mouth restrictions applied equally both to the Paths, but also to previously established public rights of way, so their imposition is entirely consistent with the public's assertion of a public right of way over the ways in question. No reasonable landowner would conclude, from the fact that the public had ceased to use the Paths in

the relevant period, that the public had, for that reason, ceased to assert their right of enjoyment. He would conclude, just as in relation to rights of way already shown on the DMS, that the public were not using the Paths temporarily because of Foot and Mouth.

(v) The Inspector specifically held at OD 124 (CB 22/306) that "once the foot and mouth restrictions were lifted people continued to use paths through Hayton Woods as before".

73. On those facts, the finding that it would be irrational to treat the four-month intermission as defeating the right built up over the remaining 19 years and 8 months was fully justified. If necessary to say so on this appeal, it was correct. The Defendant Secretary of State in the High Court had expressly conceded this ground, on the basis of irrationality, and it is striking to set the facts of this case (four month intermission, ready explanation) against cases like *Carr v Foster* where a much longer intermission was found to be acceptable.

<u>The "Highly Likely" ground (CB 3/38-40)</u>

74. In the High Court, Roxlena pleaded an argument that the court should refuse relief for various reasons. The Ramblers' Skeleton Argument in the High Court analysed this as an argument that would require consideration of the "highly likely" test in section 31(3C) of the SCA, and set out various reasons why it was bound to fail if the claim otherwise succeeded (CB 16/191-193). Roxlena then expressly abandoned this argument in its own Skeleton, and made no oral submissions upon it, so the court did not need to, and did not, address it.

75. Roxlena now makes a completely different argument as to why the judge should have refused relief under section 31(3C), which was not made to the court. Arguments to the effect that relief should be refused under section 31(3C) generally require evidence to substantiate them. They are highly fact sensitive and judgmental, so they are not suitable as points to take for the first time on appeal.

76. Section 31(3C) provides that the court "**may"** of its own motion consider whether the outcome would have been substantially different if the conduct complained of had not occurred, and "must consider that question if the defendant" asks it to do so. In this case neither the defendant Secretary of State nor Roxlena as interested party asked the court to consider this issue, so the court had a discretion.

77. The first hurdle to the Appellant's reliance on this provision is therefore that it involves an appeal against the exercise of discretion by the trial judge, and the Appellant identifies no basis for saying that the judge acted unreasonably in failing to address this issue in the absence of a request from the Appellant, or otherwise exercise her discretion to consider it.

Presumably, if the point was obvious, the Appellant's counsel should have identified it themselves. They did not. This is fatal to this ground / sub-ground.

78. The second hurdle is that the Appellant's argument for the refusal of relief under section 31(3C) is incomprehensible in terms of its interaction with section 31(3C). Section 31(3C) requires analysis of what the outcome would have been if the error or errors had not been made. In this case, one must therefore assume that both (or, at any rate, at least one) of the JR Grounds succeeded, so the Inspector erred in her approach to the *de minimis* issue and reached an irrational conclusion on the facts. It is quite impossible, on that hypothesis, to see how the court could have refused relief, whatever other point is advanced. The Inspector would have been bound to confirm the Order in relation to the Paths, or at the very least the issue must be reconsidered on remittal (which is the only relief the court granted).

79. Thirdly, the Appellants' underlying argument at AS 54-58 (CB 3/38-39), which is said to provide the basis for the refusal of relief, is at best hard to understand. It seems to be that there was an "asymmetry" between the right claimed (full public use) and that established (full public use except where foot and mouth restrictions are in place). That is non-sensical. The right claimed and established was simply full public use. Such public use would, and always will, have to yield, to overriding restrictions under other legislation concerning public health, and as already pointed out, such restrictions during foot and mouth were imposed on pre-existing public rights of way as well as over other land where such rights might be in the course of being established. In any event none of this has anything to do with section 31(3C) of the SCA. The logic of the Appellant's argument is, not that the Inspector should have held that no rights exist, but that she should have held that some kind of restricted right had been established, subject to future foot and mouth restrictions. That is not accepted but even if it were correct, it would require quashing of her Order Decision and remittal.

GROUND 2 (AS 62-68) (CB 3/40-41)

80. This ground is that the judge was wrong to hold that the Inspector had erred in law, under JR Ground 2, by substituting a test of whether the intermission was *de minimis* for the question of whether the use over the whole of the 20 year period was sufficient, taken as a whole. The legal premise of this ground is presumably that it would be an error of law for the Inspector to apply a *de minimis* threshold in place of asking whether the use over the period as a whole was sufficient. In the court below, the Ramblers understood the Appellant to have accepted that that would be an error of law. So the ground is that the Inspector did not make this error,

or at least that her reasons are capable of being read as not making this error and she should therefore be given the benefit of the doubt.

81. So far as the Ramblers understand it, the Appellant's key point on this ground is the proposition at AS 64 (CB 3/40) that "the Judge should have proceeded on the basis that an expert Inspector understood the law correctly absent a positive contrary indication, see: *Jones v. Mordue* [2016] 1 WLR 2682 at [28]". On this basis, it is said that the court should have in some way given the Inspector the benefit of the doubt or should otherwise have concluded that the Inspector did not err in law treating the *de minimis* question as "the crux of the matter".

82. Similar points are made at AS 66 (CB 3/41) with reference to *St Modwen v SSCLG* [2018] PTSR 746.

83. There are of course innumerable cases which say, in the planning context, that the court should not be too willing to find errors of law by planning inspectors, and should not be legalistic, "hypercritical" etc. Decisions should not be "laboriously dissected". The basic principle, is that in *South Bucks DC v Porter (No. 2)* [2004] 1 WLR 1953, at ¶36, that the reasoning "must not give rise to substantial doubt as to whether the decision-maker erred in law", and that:

> *... such adverse inference will not readily be drawn.*

84. Some caution must be exercised about applying this case law completely unmodified to the rights of way context. Rights of way cases do not depend upon the application and interpretation of planning policy, nor upon planning judgment, but on the application of legal principles to findings of historic facts. They are more akin, in that regard, to court judgments than to planning inspector decisions, and many rights of way inspectors are qualified lawyers.

85. However, it is accepted that the broad point, that one must read decisions benevolently, and as a whole, and not strain to find errors of law or infer such errors from mere lacunae in the reasoning or infelicitous phrasing, is fully applicable. Indeed, that broad approach applies even to appeals from judgments of lower courts: see for example *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409.

86. However, none of these cases confer immunity upon a lower court or even a planning inspector from a plain error of law. In the present case:

    (i) The Inspector expressly directed herself at OD 116 (CB 22/305) that "the crux of the matter here is whether as a matter of fact there was a break in continuity which was more than de minimis so that there had not been actual enjoyment of the claimed routes for the full 20 years". She continued in the rest of OD 116 and 117 in words that do not

qualify this and which to an extent reinforce it, especially the final sentence of OD 117 (see above).

(ii) No part of the Inspector's reasons, at OD 118 to her conclusion at OD 127 (CB 22/305-306), addresses the quality or extent of the public use outside of the four-month period of intermission, or sets that against the reduced use in the four-month period to reach an overall conclusion. The reasoning in these paragraphs considers only the quality of use within the four-month intermission.

(iii) The reasoning in these paragraphs reinforces the conclusion that the Inspector's only concern was with whether the use in this period, seen in isolation, was sufficient to bring home the public assertion of right within this specific period. For example at OD 125 (CB 22/306) she says that "the evidence of one person does not suffice to show that the routes were actually enjoyed by the public during the outbreak".

(iv) OD 126 (CB 22/306), which draws the threads together, deliberately returns to the *de minimis* question. The explanation given there for why the claim failed is that "as a matter of fact and degree, this was not a short break that can be regarded as *de minimis*". The rest of the paragraph again focusses on use in the specific four month period.

87. The Inspector's approach could not be clearer. It was to substitute the *de minimis* question for a consideration of use over the period as whole. If that was her approach, then she erred in law, for the reasons already given but also as appears to be acknowledged by the Appellant.

88. In the Inspector's defence, it is entirely understandable that she should have made this error. The judgment of Kerr J does strongly suggest that the question is whether an interruption is *de minimis,* and the water had been further muddied by the Version 2 of the Guidance Note (SB 5/92-97). So there can be no criticism of the Inspector, who was no doubt attempting faithfully to make sense of the judgment in *Roxlena* and the Version 2 of the Guidance Note, for making this error. The fact that the water had been muddied in this way tends to reinforce the conclusion that she erred as alleged. But in any event, she did err.

CONCLUSION

89. The appeal should be refused.

TIM BULEY KC

LANDMARK CHAMBERS

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