Application for a Definitive Map Modification Order
to record three restricted byways in the parish of Ringwood

Relevant Case Law

Discovery of evidence

1. As per the legislative framework set out in the Committee Report, the requirement for the surveying authority to consider making an order, is dealt with under section 53 of the Wildlife and Countryside Act 1981. Section 53 (3)(c)(i) states that a modification order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available to them, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates. The discovery of evidence by the surveying authority engages the provisions of section 53(3) and the 'event' specified in section 53(3)(c). The cases that follow examine what 'discovery of evidence' entails:

The Queen v SSE ex p. Riley [1989] JPEL 921

2. In this case the applicant had requested that Wiltshire County Council reclassify two bridleways as Byways Open to All Traffic. The application was rejected and an appeal to the Secretary of State for the Environment was dismissed on grounds that he was not satisfied that the applicant had provided any material, which would justify upgrading the highways. The court held that "*the County Council and the Secretary of State erred in their approach to section 53 of the 1981 Act. The words of the section must be given their ordinary and literal meaning. If evidence is discovered which is different from evidence originally relied upon…, it does not matter that such evidence does not really add to the weight of the original evidence… The new evidence was sufficient to trigger off the right to apply for modification of the highway*".

The Queen v SSE ex p. Burrows and another, The Queen v SSE ex p. Simms [1991] 2QB 354

3. The cases of *Burrows and Simms* were cases that involved a footpath that had erroneously been given the status of bridleway in a definitive map and statement, and the deletion of a bridleway that had been included in a map due to an administrative error. Both cases concerned the status of the definitive map and its modification through 'discovery' of evidence', the construction of Sections 53 and 56 of the Wildlife and Countryside Act 1981, and the justification of the Secretary of State to refuse to hear their appeals because of the case of *Rubenstein v Secretary of State for the Environment (1989)*. The court held that s53 and s56 could be reconciled once the purpose of the legislation as a whole was understood.

4. LJ Purchase stated that the 1981 Act recognises "*the importance of maintaining, as an up-to-date document, an authoritative map and statement of the highest attainable accuracy*". There is a duty to revise and keep the record up to date so that not only changes of status caused by supervening events, but also "*changes in the original status of highways or even their existence resulting from recent research or discovery of evidence*", should be taken into account. The passage of time had a part to play, not by way of perpetuating errors but by refining and updating the evidential content of the map and statement. Clearly with the passage of time events within section 53(3)(c) would become less and less frequent.

Mayhew v SSE [1992] 65 P & CR 344[1]

5. In the case of Mayhew v Secretary of State for Environment (1992), Hampshire County Council had upgraded three footpaths to Byways Open to All Traffic. The applicant sought to quash the modification order, the two main grounds being discovery of evidence and suitability. Regarding discovery of evidence, it was argued on behalf of the applicant that the evidence considered was not 'discovered' as the County Council had always had it in its archives. The appeal was dismissed, the court held that *"…the word "evidence" in section 53(3)(c) of the Wildlife and Countryside Act 1981 must be given its full and natural meaning and should not be restricted to "new evidence" or to evidence "not previously considered". The "event" in the subsection is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared*".

6. Potts J referred to the cases of Burrows and Simms – "*…section 53(c) differs from the preceding subparagraphs in that the use of the word "discovery" suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected*".

7. And R v SSE ex p. Riley - ""*To discover," means to find out or become aware. "Discovery," means finding out or making known (Concise Oxford Dictionary). It connotes a mental process in the sense of the discoverer applying his mind to something previously unknown to him. In my judgement, the "event" in section 53(3)(c) is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. Were it otherwise, the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision. Such a state of affairs would be at variance with the purpose and scheme of the legislation as well as good sense"*.

[1] Mayhew v SSE 1992 65 P & CR 344; Law Review September 1992

Burrows v SSEFRA [2004] EWHC 132 (Admin)[2]

8. In the case of Burrows v Secretary of State for Environment, Food and Rural Affairs (2004), the court held, in paragraph 26, that "*a definitive map can be corrected, but the correction… is dependent on the 'discovery of evidence'. An inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification*".

The Queen on the application of Dorset County Council [2005] EWCH 3405[3]

9. The court held, in paragraph 5, that "*The Secretary of State and the interested party submit that modification on the ground in question may indeed be made where there is the discovery by the authority of evidence; however, that the reinterpretation of evidence previously before the authority is not a ground for modification and that the claimant's case was based upon the interpretation of evidence previously before the authority which is not the discovery of evidence. The Secretary of State and the interested party further submit that this interpretation is consistent with authorities, including the decisions of the Court of Appeal in R v Secretary of State for the Environment ex parte Simms and Burrows [1991] 2 Queen's Bench 354, per Purchas LJ at 380, who refers to the discovery of new evidence, per Glidewell LJ at page 388, who refers to the finding of some information which was previously unknown, and per Russell LJ at 392; Fowler v Secretary of State for the Environment & Devon County Council [1992] 64 Property and Compensation Reports 16 per Farquharson LJ at 22, who referred to fresh evidence; and Trenchard v the Secretary of State [1997] EWCA Civil 2670 per Pill LJ, referring to further evidence becoming available and approving a definition of discovery as connoting a mental process in the sense of the discoverer applying his mind to something previously unknown to him. In my judgment, the Council has wholly failed to show that it has discovered any evidence. What it has done is to reinterpret the evidence that had been before it all along. I cannot see that that can arguably come within section 53(3)(c)(i). There must be a discovery, but there has been none. One does not discover a different interpretation and if one could do so, the process of mind changing could go on indefinitely. …*"".

[2] Burrows v SSFRA [2004] EWHC 132 (bailii.org)
[3] Dorset County Council, R (on the application of) v DEFRA [2005] EWHC 3405 (bailii.org)

Kotarski & Anor v SSEFRA [2010] EWHC 1036 (Admin)[4]

10. The case of Kotarski (2010), relates to a footpath and where there was divergence between what was recorded on the definitive map and what was recorded within the definitive statement. Although there was no new evidence, the court held, in paragraph 26 that "*In my view it is sufficient in the present case that the Council had recently discovered that there was divergence between the definitive statement and definitive map to bring the case within s.53(3)(c)(iii)*".

11. In paragraphs 24 and 25, the court had concluded that "*…The discovery that there is a divergence between the two is plainly the discovery of evidence, and it is unnecessary that it should be characterised as 'new evidence'. It is sufficient that there was the discovery of what the Inspector described 'as a drafting error', which was itself the result of what the Court of Appeal in ex. p. Burrows and Simms characterised as 'recent research'*", and that *"…this approach is consistent with (a) the general approach of the Court of Appeal in ex. p. Burrows and Simms… and 'the importance of maintaining an authoritative map and statement of the highest attainable accuracy'; (b) a general beneficial purpose that there should be powers to make definitive maps and statements consistent; and (c) the decision of Potts J in Mayhew v. Secretary of State for the Environment (1993) 65 P & CR 344 at 352-3, in which he specifically rejected the argument that the s.53(3)(c) modifications should be restricted to cases where 'new evidence had been discovered'*".

The Queen on the application of Roxlena Ltd v Cumbria County Council [2019] EWCA Civ 1639[5]

12. The case of *Roxlena* (2019), relates to a case where the Court of Appeal had dismissed an appeal against the High Court's decision to dismiss a landowner's claim for judicial review of an order made by Cumbria County Council which added 34 footpaths and extended a bridleway over their land. One of the questions considered in the case was whether the Council had made a discovery of evidence within section 53(3)(c) of the Act.

13. In January 2011 Mr Horne had made application for a modification order adding a network of footpaths identified on 70 user evidence forms. The application was refused, the county council had decided "*not to proceed because it appears that the notification requirements… have not been complied with*". In April 2013 Mrs Tiffin made an application on the same terms as Mr Horne.

[4] Kotarski & Anor v SSEFRA [2010] EWHC 1036 (Admin) (13 May 2010) (bailii.org)
[5] Roxlena Ltd, R (On the Application Of) v Cumbria County Council [2019] EWCA Civ 1639 (09 October 2019) (bailii.org)

14. The Court held that "*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) … 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*".

Planning Inspectorate Order Decision [2017] FPS/M1900/7/86[6]

15. The principal issue in this order decision was also whether there had been a discovery of evidence. The inspector found that there had been the discovery of some new evidence which include a parish map, Bartholomew's maps, London gazette notice, Geographia map and an archaeological report. At paragraph 16 the inspector has stated that "*There appears to be no judicial guidance on the extent of the new evidence required to trigger the provision in Section 53(3)(c). It therefore seems appropriate to consider the new evidence provided in conjunction with the previously considered evidence. However, the new evidence when taken together with the other evidence would need to be sufficient to find on balance that higher public rights exist over Rolph's Lane. This issue is not alleged to arise in relation to the other claimed routes*".

Planning Inspectorate Appeal Decision [2018] FPS/PO119/14A/2[7]

16. The principal issue between the parties in the appeal was whether there had been a discovery of evidence. The Inspector's view was that the appellant's case that the County Council misconstrued the evidence in the preparation of the draft map and statement, amounted to the "*reinterpretation of evidence previously considered by the County Council…*". Paragraph 12 contains a summary of the caselaw.

[6] FPS/M1900/7/86 (www.publishing.service.gov.uk)
[7] FPS/PO119/14A/2 (www.publishing.service.gov.uk)

Planning Inspectorate Appeal Decision [2021] FPS/G1440/14A/11[8]

17. The principal issue between the parties in the appeal was whether there had been a 'discovery of evidence'. The appellant had relied principally upon the provisions of the Warmingore Inclosure Act 1841 and the award made under that Act. The inspector has stated in paragraph 41 - "*That the Council seemingly failed to act upon the Inclosure Award evidence (for whatever reason) does not however displace the fact that (a) the Council was aware of the existence of the Inclosure Award evidence prior to the publication of the draft map; (b) that the Council had considered such evidence; and (c) had exercised the mental process involved in assessing that evidence in relation to the pre-publication draft map. It is not possible for evidence which has previously been considered to be re-evaluated in the absence of relevant evidence which was not available to the Council when the definitive map was first compiled*".

Res judicata – claim preclusion

18. Regarding the legal principle of res judicata, the following leading cases are referenced:

Virgin Atlantic Airways Ltd v Zodiac Seats UK Limited [2013] UKSC 46[9]

19. In the case of Virgin Atlantic Airways Ltd v Zodiac Seats UK Limited [2013] UKSC 46, Lord Sumption sitting in the Supreme Court described the doctrine as *"…a portmanteau term which is used to describe a number of different legal principles with different juridical origins*". The basis of the doctrine is to prevent a party from re-litigating an issue or defence which has already been determined (known as cause of action estoppel or issue estoppel) or which could previously had been litigated. The case provides the six principles of res judicata:
    i) A party is prevented from bringing subsequent proceedings to challenge an outcome that has already been decided (cause of action estoppel).
    ii) If a claimant succeeds in the first action and does not appeal the outcome, he may not bring a subsequent action on the same cause of action (i.e. to recover further damages).
    iii) The doctrine of merger treats a cause of action as having been extinguished once judgment has been provided and accordingly the Claimant's only right is the judgment itself.
    iv) A party may not bring subsequent proceedings on an issue that has already been determined (issue estoppel).
    v) A party may not bring subsequent proceedings which should and could have been dealt with in earlier proceedings (the 'Henderson v Henderson' principle).
    vi) There is a general procedural rule against abusive proceedings.

[8] FPS/G1440/14A/11 (www.publishing.service.gov.uk)
[9] Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46 (bailii.org)

Henderson v Henderson [1843] 67 ER 313

20. In the case of Henderson v Henderson (1843), the above principle (v) was laid down – "*…The plea of res judicata applies, except in special cases, not only to points which the Court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward*".

21. Officers do not consider that the principles of res judicata apply where there has been a discovery of evidence. The legal framework and case law envisage that further evidence may be discovered relating to a route where a surveying authority has previously decided that there was not satisfactory evidence to make an order, and where there has been a further discovery, the surveying authority are required to consider making an order.

The meaning of the terms Drove and Driftway

22. Regarding the terms 'drove' and 'driftway', officers reference the following case law and documents:

1626 – The First Part of the Institutes of the Laws of England by Sir Edward Coke[10]

23. Sir Edward Coke was one of the most prominent lawyers and legal writers during the Elizabethan and Jacobean eras. *The First Part of the Institutes of the Laws of England,* published in 1628, details three categories of highway - "*First a footway, which is called iter, quod est jus mundi vel ambulando homonis, and this was the first way. The second is a footway and a horseway, which is called actus, ab agendo; and this vulgarly is called pack and prime way which was the first or prime way, and a pack or driftway also. The third is via or aditus which contains the other two, and also a cartway; for this is jus eundi, vehendi, and vihicalum, and jumentum ducendi, and this is twofold, viz, Regia via the Kings Highway for all men, and comunis strata belonging to a city or town, or between neighbours and neighbours. This is called in our books chimin being a French word for a way…"*

1654 The Faithful Councellor, or, The Marrow of the Law in English by William Sheppard[11]

24. Sheppard is renowned as the most prolific and perhaps influential legal writers of his time. The Faithfull Councellor describes the actions that could be brought in common law and details three categories of highway - "*A way is passage for men to travel in. And there are three kinds of ways. 1. A footway, which is called Iter, quod est jus mundi vel ambulando homonis, and this was the first way. 2. A*

[10] 1626 The First Part of the Institutes of the Laws of England by Sir Edward Coke page 58 (www.wikimedia.org)
[11] 1654 The Second Part of the Faithfull Councellor: Or, The Marrow of the Law by William Sheppard (www.books.google.com)

foot and horse way, which is called Actus, ab agendo, and this is commonly called a pack and a prime way, because it is both a footway, which was the first and prime way and a pack and driftway also, via or Aditus, which doth contain the other two, and also a Cart-way, for this is jus eundi, vehendi, and vihicalum, and jumentum ducendi, and this is it which in the law books is called chimin".

1716 A Treatise of the Pleas of the Crown by William Hawkins[12]

25. Hawkins, a renowned Barrister and Serjeant-at-law of the 18th Century, examines what shall be said to be a highway – "…it is said that that there are three kinds of ways: 1. A footway, which is called in Latin, Iter; 2. A pack and primeway, which is both a horse and footway, and called in Latin, Actus. 3. A Cartway, which contains the other two; and also a Cartway, and is called in Latin, Via or Aditus, and this is either common to all men, and then it is called, Via Regia, or belongs to some city or town, or private person, and then it is called Communis Strata.

Ballard v Dyson [1808] 127 ER 841 CCP[13]

26. The principle issue in this case, which was regarding a easement, was whether there was a private right of way to pass and repass with cattle from a public street through a yard to a place of occupation.

27. Mansfield CJ details the commentary provided by Coke in The First Part of the Institutes of the Laws of England – "*Lord Coke is understood as speaking both of public and private ways, and what he says is equally applicable to both. 'Via or aditus contains the other two; (iter, and actus,) and also a cart-way, for this is jus eundi, vehendi, et vehiculum et jumentum ducendi, and this is twofold, viz. via regia, the king's highway, for all men, and communis strata, belonging to a city or town, or between neighbours and neighbours*'". In his commentary Mansfield also noted that "*in general a public highway is open to cattle*".

28. Lawrence J, in his commentary, notes that *"A grant of a carriage way has not always been taken to include a drift-way*", and Chambre J states that "I never thought that a carriage way necessarily included a driftway; but I think that prima facie evidence, and strong presumptive evidence, of the grant of a drift-way…. I believe the cases are very few where a carriage way has not been accompanied with this right".

[12] A Treatise of the Pleas of the Crown by William Hawkins 1716 (www.books.google.com)
[13] Ballard v Dyson [1808] 127 ER 841 CCP

Suffolk County Council v Mason [1979] AC 705, 709[14]

29. This case relates a public right of way was added to the Definitive Map as a footpath and then later established to be an ancient public cartway. The prominent issue within this case was whether a public right of way shown on the Definitive Map as a footpath, precluded the existence of the higher rights.

30. In this case Lord Diplock ruled that "*The law of highways forms one of the most ancient parts of the common law. At common law highways are of three kinds according to the degree of restriction of the public rights of passage over them. A full highway or 'cartway' is one over which the public have rights of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles and cattle. A 'bridleway' is a highway over which the rights of passage are cut down by the exclusion of the right of passage with vehicles and sometimes, though not invariably, the exclusion of the right of driftway, i.e., driving cattle, while a footpath is one over which the only public right of passage is on foot*".

The Report of Special Committee on Footpaths and Access to the Countryside 1947[15]

31. The Report of Special Committee on Footpaths and Access to the Countryside 1947, also known as the Hobhouse Report, included a comprehensive record of rights of way, which included footpaths, bridleways, and driftways. The definition for driftway and bridleway were combined into the current definition of bridleway, which was first expressed within Section 7 of the National Parks and Access to the Countryside Act 1949[16] - "…*a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway*". A similar with or without right to drive animals is also contained within the definition of restricted byway, as per, Section 48 of the Countryside and Rights of Way Act 2000.[17]

Halsbury's Laws of England 2019

32. Halsbury's Laws of England 2019 states that "*A highway may be dedicated subject to certain restrictions or obstructions; and it may be limited to a recognised class of traffic, that is it need not be a way for vehicles, as, if they are open to the public generally, footpaths, bridleways and driftways are highways*".[18]

Planning Inspectorate Appeal Decision [2017] E6840/W/16/516191[19]

33. Monmouthshire County Council had made an order adding a public footpath to the Definitive Map. An objection was received from the Open Spaces Society

[14] Suffolk County Council v Mason [1979] AC 705, 709
[15] National Archives (discovery.nationalarchives.gov.uk) BPC/4/18/4
[16] Legislation.gov.uk (legislation.gov.uk)
[17] Legislation.gov.uk (legislation.gov.uk)
[18] 2019 Halsbury's Laws of England Volume 55
[19] E6840/W/16/516191 (publishing.service.gov.uk)

who considered that the route ought to be recorded as a bridleway. The Inspector found that "*…the description of the route as a driftway gives no clear indication of whether this was likely to be a public use of the way or not... The definition of a public bridleway in terms of the Definitive Map and Statement is set out in Section 66 of the 1981 Act and indicates that it may or may not include the right to drive animals along it. Whether a driftway is always synonymous with a public bridleway is not settled*".

The meaning of the phrase 'Private Carriage Road' in Inclosure Awards

34. Regarding the status of been set out as private roads within Inclosure awards, officers reference the following case law and documents:

De condicionibus agroram - Siculus Flaccus – Circa AD 500[20]

35. Siculus Flaccus was a Roman land surveyor. He recorded the distinction between three different classifications of roads, which would have complemented one another to create a road system:

"Public roads (viae publicae), constructed at state expense, bear the names of their builders and they are under the charge of commissioners (curators viarum), who have the work done by contractors; for some of these roads, the landowners are required, too from time to time, pay a fixed sum".

"There are in addition local roads (viae vicinales) which after branching off from the main highway (via publica), go off across the country and often lead to other highways (viae publicae). They are built and maintained by the communities (pagi), who usually see that the landowners provide the workforce, or hand to each landowner the job of looking after the stretch of road going over his land… There is free movement along these public roads".

"Finally, there are ways leading across private estates that do not afford passage to everyone, but only those who need to reach their fields".

[20] De Condicionibus Agrorum (www.archive.org) page 109
A concise Dictionary of Greek and Roman Antiquities by Sir William Smith and Francis Warre Cornish 1898 page 666 (www.archive.org)
The Roads of Roman Italy: Mobility and Cultural Change by Ray Laurance 1999 pages 59-61

The Code of Justinian – 533[21]

36. The Code of Justinian is largely made up of material from classical times. It is in three parts, the third is the Digest, an anthology of the writings of the prominent jurists of the first to third centuries, in 50 books. Titles 7-11 of Book 43 deal with public roads, mostly taken from the commentary by Domitius Ulpian. Ulpian, who died in 223 was writing about the law which applied in Italy but is accepted to have applied in Britain[22].

    In Title 7 (paragraph 1), Ulpian in discussing public roads, distinguishes military roads (viae militares) from local roads (viae vicinales). In Title 8 (paragraphs 20-25) Ulpian again distinguishes between the hierarchy of different types of road and presents a summary of the legal view of public and private rights (servitudes):

    "*We call a road public if its land is public. For our definition of a private road is unlike that of a public road. The land of a private road belongs to someone else, but the right of driving along it is open to us. But the land of a public road is public, bequeathed or marked out, with fixed limits of width by whoever had the right of making it public, so that the public might walk and travel along it. Some roads are public, some private, some local. We mean by public roads what the Greeks call royal, and our people, praetorian and consular roads. Private roads are what some call agrarian roads. Local roads are those that are in villages or lead to villages*".

1654 The Faithful Councellor, or The Marrow of the Law in English, by William Sheppard[23]

37. Sheppard, in his Faithful Councellor, provides further detail as to what is meant by public ways – "*Public, the way is called via regia, the Kings Highway, or the Royal Way, which is a way that leadeth from one village to another, and to market towns, and this is a way for all men, and wherein every man ought to pass to-and-frow without let, which is called the Kings highway, because the King hath at all times passage in it for himself and all his people, and he may punish the nuisances and abuses done in it".*

38. Sheppard also details what is meant by private ways *"Private, and then it is either vicinalis that which doth belong to a village or town, or leadeth to, or from a village, or doth serve for a village to lead to the highway, church, market, field, or the like, and this way is called communis strata. Particularis, which is such a way*

[21] Translation by S P Scott 1932 (www.droitromain.univ-grenoble-alpes.fr/Anglica/D43_Scott.htm#VIII)
The Roads of Roman Italy: Mobility and Cultural Change by Ray Laurance 1999 pages 61-62
[22] Rights of Way Law Review 2009 – Highway Law before 1066 by Christopher Jessel
[23] 1654 The Second Part of the Faithfull Councellor: Or, The Marrow of the Law by William Sheppard (www.books.google.com)

as one or more hath by grant or prescription through another mans ground, either from one close to another, or from his house into the field, highway, or the like..."

R v Richards and others [1800][24]

39. In this case commissioners under an Inclosure Act had set out a private road and drove-way across a moor that linked two public roads - Shapwick Road and Somerton Road. The private road was set out for the use of the inhabitants of nine parishes, directing the inhabitants of six of the parishes to keep it in repair. The Court held that no indictment could be supported against the latter for not repairing it, it not concerning the public.

40. The judgement details that the public had access to the private road and drove even though it was set out as private - "*from the time of making the said award, all persons willing to pass and repass over the said drove-way, have at their free will and pleasure passed and repassed over the same on foot, and with cattle and carriages at all times when the same has been passable*".

Dunlop v Secretary of State for the Environment and Cambridgeshire CC [1995] 70 P & CR 307, 94 LGR[25]

41. This case related to a route that was described within a local inclosure award made in 1820 under the Inclosure Act 1801 as "*one other public bridle and drift road and footpath and private carriage road*". Sedley J provided an extensive commentary on the use of the phrase 'private carriage road'. The Court held that 'private carriage road' in the 1820 award was distinguished and distinct from a 'public carriage road', embracing a limited (albeit unspecified) class of user in the former and all users in the latter. The Court also held that if there was evidence that the permitted class of user of the track was large enough it would make the route a public right of way under section 54(3)a of the Wildlife and Countryside Act.

Buckland & Others v Secretary of State for Environment Transport & Regions [2000] EWHC Admin 279[26]

42. This case related to a route known as Barton Drove which ran between the villages of Winscombe and Barton, which had been added to the Definitive Map as two footpaths. Within the 1797 Winscombe and Sandford Inclosure Award, the Commissioners had set the route out as a private road but had stated that the road was for "*the use and benefit of all and every the Owners, Tenants and Occupiers of the several and respective Divisions and allotments, pieces and parcels of ground hereinafter mentioned to be by us set out, allotted, inclosed and awarded to them respectively with free liberty, power and authority for them*

[24] R v Richards and others [1800]
[25] Dunlop v SSE and Cambridgeshire CC [1995]
[26] Buckland & Ors v SSETR [2000] EWHC Admin 279 (bailii.org)

and all and every other person or persons whomsoever having any occasion whatsoever to go travel, pass and repass through, upon and over the same Roads and Ways and every or any or either of them on foot or on Horseback with Horses, Cattle, Carts and other Carriages Loaded or unloaded at their and every of their free wills and pleasure or otherwise howsoever as and when and as often as they or any or either of them shall think fit and proper".

43. It was argued that notwithstanding the description of the road in the Award as a 'private road', that the Commissioners had shown that they specifically intended the private roads to be as available for public use, and that 'private' referred merely to the responsibility for maintenance. The Court held that the Commissioners had no power to create a public highway in the guise of a private road.

Planning Inspectorate Rights of Way Section: Advice Note No 11 – The Meaning of "Private Carriage Road" – Dunlop v SSE[27]

44. Advice Note 11 explains the judgement in Dunlop v Secretary of State for the Environment (see paragraph 50 of this report) in so far as it relates to the interpretation of the phrase 'private carriage road' in an inclosure award. The advice note describes and explains the Planning Inspectorate's view of the judgement. The Advice Note concludes that "*Inspectors will need to decide, from the specific context and by taking into account all the evidence available, whether the use of the term 'private carriage road' in an inclosure award denotes a public vehicular right of way. However, the judgment in the Dunlop case provides valuable assistance for that process of interpretation, particularly on how the 1801 Act is to be properly interpreted*".

Partial Dedication

45. Regarding partial dedication the following case is referenced:

Poole v Huskinson [1843] M & W 827[28]

46. The Court held that "*There may be a dedication of a way to the public for a limited purpose, as for a footway, etc; but there cannot be a dedication to a limited part of the public, as to a parish*".

[27] Rights of Way Section: Advice Note No 11 (www.gov.uk)
[28] Poole v Huskinson [1843] M & W 827

Interruption to User

47. Regarding interruption to user, the following case is referenced:

Eyre v New Forest Highways Board [1892] 67[29]

48. The point raised in the case of Eyre v New Forest Highway Board (1892) was as to the right of a highway board to “metal or grave” ways across common or waste lands. In this case, the lands relating to the manor of Tadenham in the New Forest. The crux of the issue was whether there was a rite of passage over the common land, if there was a right of way then there would also be a duty to repair.

49. The Court referred to the fact that three generations of the same family had instructed their keepers to turn back people using the way in question and told the jury "*...if the impression left upon your mind by the bulk of the evidence that you have heard is that, notwithstanding his objection to it, he was not able to stop it and the thing went on, surely it is a very strong ground for supposing that there really was a right acquired by the public before that time which he could not interfere with*”.

Permission

50. Regarding permission, the following cases are referenced:

Attorney General and Newton Abbot Rural District Council v Dyer [1945] 1 CH 67[30]

51. In the case of the Attorney General and Newton Abbot RDC v Dyer (1945), the foreshore was privately owned. Evershed J commented "*It is no doubt true, particularly in a small community such as Bishopsteignton, that, in the early stages at least, the toleration and neighbourliness of the early tenants contributed substantially to the extent and manner of the use of the lane. But many public footpaths may be no less indebted in their origin to similar circumstances ...* ". Evershed J declined to attach weight to the fact that most of the witnesses who had used the way as ordinary members of the public had admitted to having been on friendly or business terms with the tenants of the land over which the path ran.

[29] Eyre v New Forest Highway Board [1982] 67

[30] Attorney General and Newton Abbot Rural District Council v Dyer [1945] 1 CH 67