

Byways and Bridleways Trust

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Jack Lane – a shambles that must never happen again.

The Byways and Bridleways Trust is calling on the Secretary of State for Environment, Food and Rural Affairs and the Deputy Prime Minister to take prompt and firm action to ensure that the series of mistakes made by one of their 'Independent Inspectors', and by the Planning Inspectorate's Cost Branch can never happen again.

Jack Lane is a partially enclosed track at Hunton, near Bedale, North Yorkshire, that was recorded as a public bridleway from Hunton village to its junction with another bridleway known as Hull Lane. North Yorkshire County Council made an order downgrading one third of the Jack Lane bridleway to footpath status and, in April 2002, objections to this order were heard at a public inquiry presided over by Inspector Graham Laslett. The principal objectors were Alan Kind (BBT), who also represented other objectors: local British Horse Society volunteers Catriona Cook and Rachael Connolly.

During the public inquiry, which stretched over five days, the Inspector announced early on that he could see where an error had happened in the making of the original 'definitive map' of rights of way indicating, he said, that there had clearly been an error in showing that part of Jack Lane as a bridleway, rather than a footpath. The objectors (and one of their witnesses, Lisa Norris) had a considerable amount of evidence found from research in archives of historical material, and maintained their position that, even with Mr Laslett's 'theory', the true status of Jack Lane was bridleway all through. Mr Kind, on behalf of himself and the other objectors, strongly objected to Mr Laslett's conduct of the inquiry during its course.

In his decision letters of July and November 2002, Mr Laslett confirmed the order downgrading part of the bridleway, and also made an award of costs totalling some £15,000 against Kind, Cook and Connolly. The British Horse Society decided not to defend the integrity of its volunteers, but with significant support from rights of way users nationwide, Alan Kind, strongly backed by the BBT and individuals across the country, took legal advice and commenced judicial review proceedings against the Secretary of State in respect of the costs award against him.

Over the next three years Alan Kind's team initiated and won two judicial reviews against the Secretary of State, culminating in the matter finally being resolved in Kind's favour almost three years to the day after the original costs award was published.

The conduct of this case – from Mr Laslett's handling of the inquiry, his wholly wrong damning of the objectors in his decision letter, the Planning Inspectorate's rubber-stamping of Mr Laslett's untenable position (not once, but twice) through to the Secretary of State's aggressive and bullying approach to the legal challenges – indicates that despite the earlier swingeing criticisms by the House of Commons Environment Committee, the performance of the Inspectorate and some Inspectors is still woefully inadequate. The Byways and Bridleways Trust will ask Mrs Margaret Beckett and Mr John Prescott to investigate this case, top to bottom, and take urgent action to ensure that similar mistakes cannot happen again. Cases like this one diminish the work of the many excellent Independent Inspectors based at Bristol and Cardiff and unless remedial action is taken the public will lose confidence in the Planning Inspectorate as a whole.

Digital versions - or prints - of these photos (and others), plus more information, available from editor@bbtrust.org.uk



Jack Lane #1. This is the stile that was the centre of the argument in the case - did it indicate that one end of Jack Lane was only ever a footpath? The Inspector decided it did.



Jack Lane #2. This is the part of Jack Lane that remains a bridleway, but now a cul de sac. How ridiculous!



Jack Lane #3. This is the ford on Hull Lane (bridleway). The objectors argued that if Jack Lane did not originally continue of the definitive map line, then it turned and ran to join Hull Lane at this ford.



Hull Lane #1. This is the condition of the Hunton end of Hull Lane. NYCC was very keen to downgrade Jack Lane, but made no effort to mend Hull Lane so that horse riders can use it safely. Further along it was also unlawfully ploughed out - photo available.

Jack Lane (part 1)

Anyone acting in a voluntary capacity in the rights of way arena should read this horror story and ask “could this happen to me too?” The answer is, probably, yes.

Alan Kind reports.

Jack Lane is the name given to either all, or at least the hedge-enclosed part, of bridleway 8 at Hunton, a small village just over five miles northwest of Bedale, North Yorkshire. The bridleway runs southeast-northwest, starting at the road between two chapels shown on the *Landranger* sheet 99 with the usual ‘+’ symbol, at grid reference 191928. Bridleway 8 runs about 650 metres, to ‘tee’ into bridleway 12 adjacent to Shindry Farm at GR 185931, and approximately the first two-thirds is hedged lane, and the last portion is across two pasture fields divided by a hedgerow/fence. Bridleway 12 is, at least for its hedge-enclosed southern portion (now largely grubbed out) known as *Hull Lane*.

The issue centred on an application by the owners of Shindry Farm, Mr and Mrs Sayer, for an order downgrading the cross-field portion of bridleway 8 to footpath status on the ground that it was recorded in error on the definitive map. The Sayers’ argument rested on the existence of two wooden stiles: one at the end of the hedge lane (point C on the map), and one in the hedge line between the two pasture fields at the Shindry end (point B). This was, they said, indicative that the route ABC across these two fields could only have been a public footpath. An application for this order was made during the 1980s, but the effect of the *Rubinstein* decision was such that the county council did not make an order. The application lay dormant until the reversing effect of *ex parte Burrows and Simms* allowed the matter to be brought back to committee where, notwithstanding counsel’s advice to the contrary, a resolution was passed to make an order downgrading the cross-field portion (ABC) of bridleway 8 to footpath. The southeast end of Jack Lane is referred to later as point D.

There were three principal objectors to the downgrading order: Catriona Cook and Rachel Connolly on behalf of the British Horse Society (as local officers of the BHS), Lisa Norris on behalf of the National

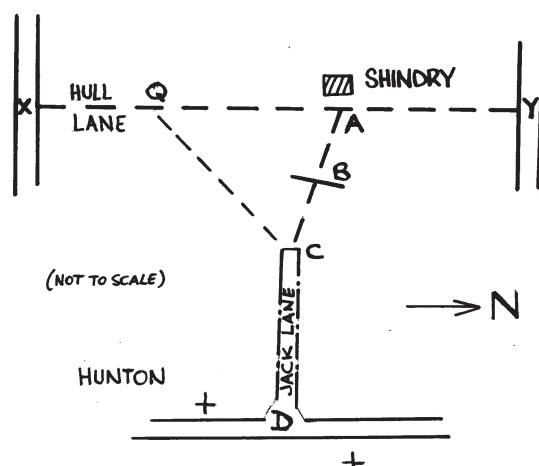
Federation of Bridleway Associations, and Alan Kind as an individual. These three objectors agreed to pool efforts into one case and presentation. Lisa Norris did a lot of archive research; Catriona Cook also did historical research, while Alan Kind prepared a short evidence proof, and concentrated mainly on presenting the case and making the appropriate legal submissions. In the run-up to the public inquiry, which was scheduled to open on 23 April 2002 it emerged that Mr and Mrs Sayer had engaged Tyneside solicitors Ward Hadaway, whose resident access specialist Dr Malcolm Bell would be their expert witness.

The county council’s bundle of evidence and background papers was not received by the objectors until the end of the week before the public inquiry, leaving Alan Kind unable to construct and prepare evidential bundles and submissions until the weekend. When the council proofs finally arrived it emerged that the order-making authority had done no archive research at all, and had not even interviewed the ‘non-user witnesses’ relied on by the applicants as principal proof that the stiles had been there for upwards of fifty years. When the inquiry opened in Newton-le-Willows village hall on the Tuesday morning, it was clear that there would be difficult waters ahead. The county council had their usual rights of way solicitor Mr Geoff Fell presenting the case for the order, with Mr Keith Watkins, rights of way officer, as witness to give evidence. Mr and Mrs Sayer arrived with their solicitors, Dr Bell, and Matthew Horton, QC, a silk with a strong reputation on the planning law circuit. The Inspector was one of the ‘old hands’: Mr Graham Laslett CBE, and he immediately faced a problem of representation and status. It emerged that

Mr Fell did not know that Mr and Mrs Sayer intended to take such an active role, and Mr Horton was adamant that he would not in any way merge his case with that of the OMA: he argued that Mr and Mrs Sayer were ‘principal parties’ and fully entitled to run their own case in parallel to that of the county council, and indicated that the Sayers would be seeking costs against the objectors. After a lengthy adjournment the seating was rearranged and the inquiry got underway with three, rather than the usual two, principal parties.

The parties’ advocates outlined their cases and named their witnesses. Alan Kind told Mr Laslett that he would give a short evidential statement as a witness, but would otherwise act as an advocate for all the principal objectors in order to conflate the issues and shorten the time taken. After the evidential statements were made, he would, as is usual, make a legal submission on important points of law – particularly one that (if he was correct) fettered the Inspector’s ability to confirm the order, even if it appeared that the line ABC was, truly, only a public footpath. Mr Laslett told Mr Kind that he must ‘merge’ his evidence and legal submission and be cross-examined on the legal matters as well as the evidence. Mr Kind objected strongly, but Mr Laslett insisted – although there was no question of the other two advocates being cross-examined themselves. It started to dawn on the objectors that this case was going to turn very unpleasant indeed – and it did.

In part 2: the evidence, the legal arguments, and the Inspector apparently making up his mind before he had heard all the evidence and legal submissions.



hope that its attempt to downgrade would succeed. Although the Inspector's refusal to confirm the order was issued on 29 July, still nothing was done by way of repairs, so Mr Seymour went back to Hull Crown Court yet again. These are extracts from the judgment of His Honour Judge Cracknell, dated 24 October 2003.

"This matter comes before me for a review. It is a matter which is now accumulating a rather lamentable history of what on the face of it appears to be delay or procrastination. The condition of this path is described as foundrous. It is only for the nimble-footed, apparently ... The status of this bridleway has been a matter of some contention between Mr. Seymour and the East Riding of Yorkshire. In March 1998, Mr. Seymour served a notice under s.56 of the Highways Act in relation to bridleway 21, Weedley Springs, South Cave, which provoked in due course a response ... it was not within the time specified by s.56. It was necessary, therefore, in due course, since nothing was done, for Mr. Seymour to take it further. In January 2000, a complaint was made, which came before this court exercising its inherited jurisdiction under the old Quarter Sessions' jurisdiction, and it came before Judge Morrell. He made an order that this part of the bridleway that we are concerned with was a highway, saying the East Riding of Yorkshire was liable to maintain it and recording that the East Riding of Yorkshire, having undertaken to repair the surface of the section of the highway to a suitable standard to accommodate the normal and expected traffic that needs or may need to use the way as a bridleway, should complete the necessary works and take the necessary proceedings, including legal proceedings which may be required, to facilitate that by the 27 November 2001, thus giving the authority about fifteen or sixteen months to do the work.

"They undertook to do the work and one assumes that the East Riding Council did not undertake it in a stage of benighted ignorance and that they knew what they were doing. This obligation to maintain was one which they had to take seriously and do something about it, but nothing did happen ... The matter came before the court again on the 21 June 2001... Absolutely nothing had happened and Judge Morrell varied the order by substituting the 20 June 2003 for the 27 November 2001, another very

generous extension which was to enable the authority to do the work which they had promised to do. Quite clearly, nothing has been done.

"So there it was in June of this year. With consent, the matter was listed for review. The respondent was to keep the complainant involved with the progress of the matter by submitting monthly reports and so forth, and there were orders for costs. In the interim, in June 2002, the local authority sought to have this downgraded to a footpath and the matter went to public inquiry in June of this year. On the 29 July, the downgrading to a footpath was not confirmed; the matter remains a bridleway.

Mr. Atkinson [counsel] says the council is caught between a rock and a hard place. They acknowledge their obligation, but they say they are anxious not to trespass on the land of an adjoining landowner, who is not being desperately cooperative and who needs to be. It is a matter for him entirely. I make no criticism of that, but that must have been a fact that they have known for years. It seems to me the analogy is not being caught between a rock and a hard place; the analogy is being caught like a rabbit in the headlights of an oncoming car. They seem to be wholly incapable of acting or doing anything at all.

"It is said now that the authority will let people know the reason why they have not done anything by writing letters. It seems to me that that is too little too late, frankly ... This order has simply been ignored. If there were difficulties with the adjoining landowner, or the landowner over whose land this bridleway goes, that must have been obvious years ago and the appropriate steps, if necessary, to be taken ought to have been taken. The whole business is characterized by delay and procrastination and I see not the slightest reason why this order should be varied. The obligation is there. It is time the matter was tackled instead of being put off ... there are all sorts of ways of finding out what the rights of the highway authority in terms of repairing are. In the light of what has happened, I have to say that any sympathy that I may have had for the East Riding of Yorkshire council has long since disappeared.

I do not propose to vary the order. It remains in force ... As to the issue of costs, one would have thought that the local authority would have learned by now, frankly. Once again, it has been necessary for Mr. Seymour to come to court to say 'Look, I have got this order. The local authority has got these obligations. They are not complying with them. What about it?' I think that he ought to have his costs."

Jack Lane (part 2)

Was the Jack Lane public inquiry the worst conducted in recent history? Part 1 of this story set the scene: now see the action. Alan Kind reports.

After the rather fraught 'preliminaries' the Jack Lane public inquiry got down to hearing evidence. Mr Keith Watkins, for the order-making authority, presented a thick folder of maps, witness statements, papers from the making of the original definitive map, and all the usual background and administrative stuff. There was no evidence as to the origins of the route over and above that on the first survey documents – and that was nothing of consequence. In essence, the OMA's case was that the stiles had been there since before the making of the definitive map; these were inconsistent with bridleway status, *ergo* a mistake had been made. This view was contrary to counsel's opinion received in the order application stage, but which members did not follow.

Dr Bell was the next witness, on behalf of the applicants, Mr and Mrs Sayer. Dr Bell had undertaken a considerable programme of archive research, looking at old maps, tithe records, the inclosure award, the Finance Act 1910, and other bits and pieces. It is a fair summary that Dr Bell found no evidence particularly persuasive one way or the other. The applicants also called several local people as witnesses, who could cumulatively testify to there having been a stile at B since before the Second World War. In cross-examination it was agreed that there was never historically a stile at C: there is an ancient gate still lying in the lane.

Next it was the turn of the objectors. Alan Kind outlined to the Inspector that almost all the evidence to be presented

concerned not the order route, ABC alone, but the whole of bridleway 8, ABCD. And further, there was some evidence that the through-route, if not on line DCBA, might well be on DCQ. The Inspector, Mr Laslett, demurred strongly. He said that he was interested only to hear evidence on the order route, ABC, and that the status of the length CD, or the existence of an alternative line, was not at issue. Mr Fell for the OMA, and Mr Horton for the applicant agreed with Mr Laslett that this was the correct approach. Mr Fell happily conceded that CD was a bridleway, but contended that this had no relevance to the order. Alan Kind refused to accept the Inspector's view on what evidence was relevant. The objectors' case, he told Mr Laslett, relied on the status of the whole to indicate the status of the part. In the end Mr Laslett reluctantly agreed that he should have to hear the objectors on this, and the evidence was introduced.

The objectors' principal research had been undertaken by Lisa Norris of the National Federation of Bridleway Associations. Mrs Norris believed herself to be a statutory objector, but the Inspector and OMA had no record of an objection; to simplify matters it was agreed that she should be a witness on behalf of Mr Kind. Mrs Norris had found, searched and reported almost exactly the same sources as had Dr Bell, with one significant addition: the manor court rolls.

During the presentation of the evidence, towards the end of day two, the Inspector interjected that he believed he had found in the council's bundle the 'key' to the question in the 'walking schedule' prepared during the original definitive map survey. This was, said Mr Laslett, a 'transposition' from what was on the walking schedule, to what appeared on the definitive map. The walking schedule described what went on to the definitive map as bridleway 8 (DCBA) as a bridleway, but noted on the map the presence of a stile at B. This route was described as joining a 'footpath' at Shindry – the route that went on to the definitive map as bridleway 12. Mr Laslett postulated that this 'transposition' of descriptions answered the question before the inquiry by indicating that a mistake had indeed been made – that BCA was only ever a footpath. He invited the views of the participants. The OMA and the applicants agreed that it was a likely explanation, and thus indicative that

the order should be confirmed. Alan Kind did not agree. It was, he said, a possible explanation, but it did not address the status of Jack Lane (CD), and nobody was saying that this was only ever a footpath; further, it did not stop the advancement of the alternative alignment argument: that the true line of the bridleway was DCQ. Mr Laslett made clear that he thought this was the 'answer' and indicative that a mistake had been made.

Mrs Norris's evidence demonstrated the difficulty of pinpointing the origin and status of 'lanes' through old inclosures. The Hunton inclosure act and award of 1811 inclosed only limited lands – much was ancient inclosure. The inclosure plan showed four pre-existing lanes: Jack Lane, Hull Lane, Green Lane, and Mill Beck Lane. None were set out in the award, but some allotments were set out by reference to them; plainly they were pre-existing. All four lanes were shown in the plan only extending as far as the limit of inclosed fields, but all four were put on to the original definitive map as through bridleways – extending well beyond the limits of the inclosure award. The award was also clear that the land at the end of the hedged part of Jack Lane, leading over towards the top end of the hedged Hull Lane, was 'waste ground', or 'open fields', so there was, i. no obvious physical constraint on the route having continued, and, ii. the likelihood of the necessity of a public road or bridleway to get access to this area.

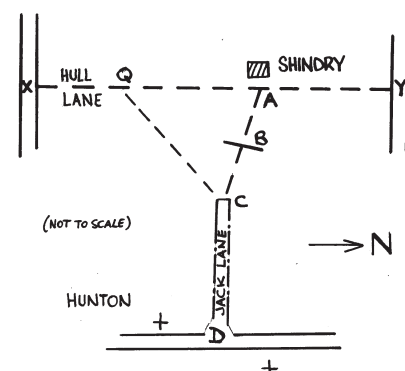
The hedged part of Jack Lane was 'coloured out' on the Finance Act 1910 plans, and the court rolls for the Manor of Hunton, as far back as 1728, record that a 'paine' was laid on several owners of land to repair Jack Lane. This happens again on a number of occasions, and there is a reference in 1758 to a paine concerning the '... road leading from Harding little gate leading to Shindry.' This is probably Jack Lane, but the 'Shindry' referred to could be the field at point C; equally it could be the farmsteading, which existed at the time. Mrs Norris's evidence was not subjected to much cross-examination; it was, after all, very similar to that of Dr Bell, manor rolls excepted.

Mrs Cook gave a short statement about the character of the route and how, with the 'logistics' of horse transport, the location of the village mill, and the east-

west disposition of the through-route incorporating Jack Lane and Green Lane, it would seem likely that the bridleway would not have terminated at C, 'in the middle of nowhere'. Mr Horton cross-examined Mrs Cook aggressively, so much so that Alan Kind asked the Inspector to intervene. He refused. Mr Horton demanded that Mrs Cook should elect for her 'preferred route'. Was it DCBA, or DCQ? Mrs Cook said that, on balance, she thought DCQ more likely, but it could have been DCBA.

On day three some more local witnesses spoke, with a further suggestion that there had been a through-route along DCQ. This was not particularly strong evidence. Later, Alan Kind gave a short statement in evidence (approximately 300 words, taking fifteen minutes). Mr Horton then cross-examined him for over eight hours on his evidence, on Mrs Norris's evidence, and on his legal submissions (which had not, of course, been given in evidence). Time and again, Mr Horton demanded that Mr Kind give a 'yes or no' answer to a proposition that Mr Horton said he had made in evidence. Mr Kind declined. He said that he had not made such a proposition or statement, so to give a yes or no answer to a false representation of his evidence would further compound the misrepresentation. Mr Kind reminded the Inspector that, i. he should not be cross-examined on legal matters, and, ii. if he had had an advocate there, that advocate would rightly have interjected to stop Mr Horton asking misrepresenting questions. Mr Laslett was content to let matters continue unchecked. During this cross-examination, Alan Kind tried to make the legal submission he had prepared in advance of the inquiry: very difficult when an experienced QC interrupts

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metres in length to the definitive maps of the parishes of Curdworth, Kingsbury, Lea Marston, Middleton and Wishaw. The two end sections of the route, comprising nearly half the total length, already have the status of 'D' roads, while another, some 565m. long, is on the map as a public footpath.

The county council's case rested on map and documentary evidence. The former, Mr Roberts finds, "builds a consistent picture of the order route running as a continuous physical feature ... for at least 227 years." Moreover, given that much of the route already carries acknowledged public rights, he concludes "that a public right of way of some sort subsists along the full length of the order route." In order to determine the nature of this right he turns to a number of key documents. The 1776 Lea Marston and Curdworth inclosure award shows what is, roughly, the middle third of the order route as a "Public Waggon and Drift Road." It is not shown as connecting with public highways at either end, but, the Inspector points out, it co-exists with part of the continuous through-route shown around seventy years later on the relevant tithe maps. These "confirm the existence of a substantial untithed route that correlates with its physical depiction on subsequent Ordnance Survey maps." One of them describes it as a "Road", another indicates to where the route ran.

Turning to later documents, Mr Roberts notes "the whole length of the order route is clearly shown uncoloured on the Finance Act 1910 records, suggesting that it was regarded as part of the general road network, and the field book specifically depicts it as 'Parish Road'. The schedule of land involved in the sale of the Moxhull Hall Estate in 1914 excludes most of the route (most of which it surrounds) from the sale, the remainder being annotated 'Public Road' on the sales map ... This is supported by the depiction of both ends of the route as unclassified county roads on the Warwickshire County Council highway records since 1929 ... Whilst I do not regard any single document, by itself, as providing conclusive evidence of the route as a whole, taken together they convince me that, on a balance of probabilities, the full length of the order route subsists as a BOAT."

Objectors pointed out that "those sections of the order [route] not appearing on the definitive map have not been used within living memory, the route being impassable in places." Mr Roberts comments that 'once a highway always a highway' is an established legal maxim [see **COURT SHORT**, this issue. Ed], and that a public right of way cannot be lost through lack of use or through it becoming impassable. It can be removed only by an appropriate legal process, and "there is no record that the 'Public Waggon and Drift Road' set out in the 1776 inclosure award (or, indeed, that any such public right of way along the order route) has ever been legally closed or diverted."

The order is confirmed, though with a modification specifying variable widths.

Decisions in brief

A diversion order made by St Albans City and District Council ran into technical difficulties because it proposed to close two definitive map footpaths while not providing an alternative route for one of them (a short spur running off the other). Responding to objections, Inspector S.M. Arnott writes: "I take note of s.119(1) of the 1980 Act and the options available to the OMA under that section for (a) creating and (b) extinguishing the public right of way as appears requisite for effecting the diversion, but am unable to read into this a possibility that a secondary path may be closed in addition to the main diversion where no alternative is provided for it – even if none is required. I agree with the objectors that, even if justified on merit,

the closure ... cannot be implemented in the present circumstances within this order made under s.119". Consequently she decides to delete all mention of this shorter path from the order before confirming it [FPS/B1930/4/1 of 12 November 2003].

In B&B 2003/1/1 we noted that an Inspector's decision to upgrade a Devon footpath route (previously reported in B&B 2002/6/31) had been quashed in the High Court. Subsequently Devon County Council made another modification order in identical terms, but its persistence has not been rewarded by success. After another public inquiry, Inspector Peter Millman has decided that there is sufficient evidence of lack of intention to dedicate any part of the route [FPS/J1155/7/27 of 18 November 2003]

On the basis solely of documentary evidence, Inspector Alan Beckett has confirmed an order made by Nottinghamshire County Council, upgrading three stretches of footpath in the parish of West Bridgford to form a bridleway route some 525m. in length. The evidence, as the Inspector remarks, is strong: an inclosure award of 1805 showing the route as part of a ten-foot wide "public bridle road from Tollerton to Edwalton"; maps of 1774 and 1835 designating it a "bridle road"; the annotation of "Bridle Road to Tollerton" in the Edwalton tithe map of 1845; and the labelling "B.R." in the Ordnance Survey 25 inch to the mile map of 1901.

Jack Lane *continued from page 13*

one at every turn. The arguments were quite straightforward – the need for *Trevelyan* 'clear and cogent' evidence of error, and the presumption against cul-de-sacs (*Eyre*, etc.) suggesting a probability that Jack Lane (or, at least, the bridleway) did not simply stop at point C. This latter resulted in yet another exchange with Mr Horton as to whether this was a legal presumption, a common sense presumption, or no presumption at all. Alan Kind also repeated, at least twice, the decision of the court in *R v. SoS for Environment, ex p. Kent County Council*, *The Times*, 11 November 1994; [1995] COD 157-232 at p.198. [See *Alternative Burdens*, B&B 2003/10/74] as indicating, quite unequivocally, that unless the Inspector

was satisfied that no alternative line (e.g. DCQ) existed, he was simply not able to confirm the order as regards CBA.

Including the site visit, the inquiry took four and a half days spread over two weeks (to suit Mr Horton's diary). It ended with lengthy applications for costs against the objectors by the applicants and the OMA. The objectors had already indicated they would apply for costs against the OMA only for unreasonable behaviour by refusing to do any research into the status of the bridleway.

In part 3: the decision letter, the costs decisions, and a very tense day in court.

Jack Lane (part 3)

A massive award of costs against the objectors changed the public inquiry landscape forever. Part 2 of this story set out the facts; now feel the pain. Alan Kind reports.

The decision letter from Inspector Graham Laslett came out on 16 July 2002; it contained few surprises for the objectors. Mr Laslett made a good job of reciting the proceedings and the nature of the evidence presented. At paragraph 62 he reports that “Mr Fell [NYCC’s solicitor] declined to question Mr Kind on his evidence because it could only entail matters not involved with ABC”, i.e. the whole of the bridleway including Jack Lane, not just the order section. At paragraph 63 he reports, “Mr Horton spent in excess of 8 hours questioning Mr Kind on his evidence and advocacy...” It is worth remembering that Alan Kind’s evidence took somewhere less than fifteen minutes to deliver. At paragraph 65, Mr Laslett reports, “...Mr Kind appeared to rely heavily on *R v. SoS for Environment, ex p. Kent County Council...*”

In his ‘overall conclusions’, Mr Laslett observes at paragraph 68 that he was “right to hear contentions [about the status of Jack Lane and the southern alignment – CQ] though I conclude they shed little if any light on higher status than as public footpath for the use of ABC at any time back to the earliest documents deposited with the inquiry.” And at paragraph 69, “I dismiss as far-fetched Mr Kind’s argument that ABC could have been the line taken to the fields ... if and when they were a place of public resort as open fields. If Jack Lane was used, the level connection to the apex of their lines at the ford (that is the southern alignment) is much more logical than ABC.”

Mr Laslett moved on in paragraphs 71 and 72 to the ‘inversion mistake theory’ he brought into the inquiry; if there was no such error, he says, there would be two coincidental ‘clerical errors’ and “Two errors would amount in my view to the raising of concerns about the competence of the parish surveyors.” He concludes at paragraph 77 “On a balance of probabilities basis, I find the inversion mistake argument the more convincing explanation of what is wrong with the work of the parish surveyors.” The order is therefore confirmed as made.

Move forward to the end of November 2002. The Secretary of State’s costs decision letters arrived. The objectors’ claim against

the order-making authority for unreasonable behaviour by not undertaking any research at all was rejected out of hand. The claim against the objectors (Alan Kind and the BHS) was upheld. To summarise a complex position, the Inspector had said that the objectors were unreasonable not to accept, at the end of the second day, that the ‘inversion theory mistake’ put forward by the Inspector himself, was so cogent as to dispose of any counter arguments; therefore, by maintaining their positions in the face of this theory, and Mr Horton’s cross-examination, they had unfairly lengthened the inquiry. The Secretary of State had altered Mr Laslett’s recommendation as to the quantum of costs, and fixed that Alan Kind should pay 60%, and the BHS 40% of the costs of both the OMA and the applicant (Mr and Mrs Sayer) for the last three days of the inquiry. Gleeful reports of the objectors’ predicament were immediately printed by the *Daily Telegraph*, *Yorkshire Post*, *Darlington and Stockton Times*, and others; the message was that objectors to North Yorkshire’s orders could expect nothing less for their temerity.

As you might imagine, the objectors were dumfounded. This award would be for many thousands of pounds against each party. What to do? Not only was there this massive bill hanging over their heads, but this was a mould-breaking decision: suddenly, the consequence of standing up and fighting with a carefully prepared case, and cogent legal argument, seemed to be that, as with court cases, costs could ‘follow the decision’. As always, wise advice came from an old head. Elizabeth Kirk, a founder of the BBT, said “this is a serious matter and way beyond our skills: go and see George Laurence QC.” A plaintive letter later, a stressed and rather emotional Alan Kind and Catriona Cook washed up at New Square Chambers on a dark November evening. Mr Laurence and a colleague in chambers, Adrian Pay, made time in their busy schedule to hear a summary of the case, and to look quickly through the order decision, the costs decisions, and the objectors’ evidence and submissions. This ran on into the mid-evening, and George Laurence gave Kind and Cook sage advice: “see if the other side will settle for an agreed

sum, and think very hard whether you can take the risk of pursuing this to judicial review and losing.” Until you have been in conference with two bright counsel, you cannot believe how rigorous it is: they almost get inside your head and turn it inside-out. Kind and Cook left mentally numb, but happy that they had, possibly, started the snowball rolling downhill.

George Laurence and Adrian Pay said they would look at the papers and put their mind to the matter; they were as good as their word. Kind and Cook were tasked to write up their notes from the inquiry, provide a ‘chronology’ of each day (not easy to recall, when you were advocate, witness and support team in one) and come back with myriad minor details of what had happened. Kind and Cook immediately received support from the rights of way community. Some people promised financial backing to fight straight away, and Robert Halstead in particular assisted in the preparation of an analysis of the DMMO case, and the preparation of a possible legal challenge. Quickly it became clear that there would be a degree of financial backing to fight, but probably not enough to fight, lose, and pay both sides’ costs. Kind and Cook asked George Laurence if he would consider taking the case *pro bono*; he replied that, on looking at the papers he considered they had “suffered an injustice” and would. Adrian Pay also kindly agreed to help on the same basis, and things progressed.

One ‘problem’ with taking such a case to judicial review is that, although the statute allows a three month window to launch the action, court protocol demands promptness, without which the application to seek review may be refused, notwithstanding the case is brought within the window. Speed was essential, and Christmas bit out a large chunk of time. Another major factor was the ‘status’ of the parties seeking judicial review. Alan Kind was an individual party, but Catriona Cook and Rachel Connolly were local voluntary officers of the British Horse Society, so it was the BHS itself that was dunned for costs, and had to decide to pay or fight. Catriona Cook had to get BHS’s HQ at Stoneleigh onsite, and quickly.

The BHS access consultant, Anne Lee, wrote a report to the Stoneleigh management. She was damning of the objectors: “I have read the Inspector’s decision letter ... In view

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of the objectors' evidence to the inquiry ... they would have been well advised to withdraw ... I would recommend that great care be taken when our volunteers, and/or the society itself, 'engage' members of other voluntary organisations to lead our case at an inquiry. However qualified, it is still the case that members of these other organisations also have a vested interest in 'winning' at inquiries, and while this might be considered some sort of advantage they may lack the objectivity and, possibly, the perception to know when it is better to yield the victory." Mrs Lee's assessment of the case is the more remarkable in that she had not actually seen the objectors' evidence or legal submission before reaching this conclusion.

As might be expected, the BHS approached the case with some hesitation. Stoneleigh engaged the matter through the services of its retained solicitors, Wright Hassell, while board members spoke for, or against, fighting it through to a conclusion. All this time, the statutory clock ticked, and it was only as the three-month window started to close that the BHS decided it would prefer to pay than defend its local officers' credibility. That left Alan Kind 'alone' (but, of course, backed by the BBT Trustees and many others, including individual BHS members and the ever-dependable TRF) to get the necessary paperwork done and the action launched. Disaster struck! The solicitor engaged to deal with the formalities misunderstood the situation, and the mandatory paperwork was not properly entered into court. This only came to light a couple of days after the window closed, but it might have been sufficient to have the application thrown out 'on a technicality'. The forms were then re-entered late, and, in truth, the other parties had suffered no disadvantage at all, their having been kept informed of matters throughout.

The nature of judicial review is that the applicant has to convince a judge of the merit of his case in order to win the opportunity to present the substantive case in court. All applications initially go to a judge 'on paper'; some are passed, and others are rejected, in which case the applicant must argue for leave in open court. This case was rejected for undue delay. The application finally came to court on 11 and 12 June 2003, before Mr Justice Elias. Both North Yorkshire County Council and Mr and Mrs Sayer had elected not to be joined in the action. George

Laurence and Adrian Pay had spent scores of hours preparing the witness statements and skeleton arguments on the substantive issues, and a strong case as to why the application should be allowed, even if it was not 'prompt'. The heads of argument on the substantive case were:

- 1950s evidence of non-existence of equestrian rights, C-A.
- Historical evidence to support bridleway rights over C-B-A.
- Refusal to reach any conclusion as to equestrian rights C-Q (or C- elsewhere) precluded any adverse costs order.
- Failure to reach any conclusion as to whether Jack Lane (D-C) continued as a bridleway beyond point C along some unknown alignment.
- No reasonable decision-maker could have come to the conclusion that the claimant's continued objection to the order caused the inquiry to be extended by a further three days.
- The decision-making process was in breach of natural justice....
- Circular 8/93 is wrong to treat the OMA and supporters as all being 'principal parties' for the purposes of costs.

The arguments were strongly put, with George Laurence and Adrian Pay opposed by Jonathan Karras for the Secretary of State. Mr Karras opposed the application particularly on the ground of absence of promptness. Elias J gave no comfort to either side in the hearing, but after a break for thought, came back to say immediately that the application would be allowed, with the lack of promptness caused by the BHS' attitude and approach in participating right until the very last minute, then withdrawing, and leaving Alan Kind alone to find and instruct a solicitor. So, in a way, the BHS's last moment choice to cut and run actually helped get the application allowed. The case would be set down for a full hearing, but a week later the Treasury Solicitor threw in the towel and conceded, on ground 6 above, at least. With the summer recess, it took until 18 October for the court to issue the consent order quashing the Secretary of State's award of costs against Alan Kind (and ordering a redetermination of the costs application, *de novo*) with the order expressly stating that the BHS must still pay its portion of the costs as awarded.

In late November 2003, PINS's 'costs branch' rumbled into life and invited the parties to make any further representations before the costs application was redetermined. Alan Kind asked that the skeleton argument as prepared for the judicial review be considered. On 10 December PINS costs wrote to say that they would "decide the costs application as soon as possible." Approaching seven weeks later, Alan Kind called PINS to ask for a progress report. He spoke first to an Eric Fuller, who said PINS is "extremely busy" and had had "no time to give it serious consideration." It is a "very difficult case", with "difficulties", and they were "not treating it lightly." They "can't give an exact date – next few weeks – are working to assemble the various papers." Alan Kind then spoke to Mr Fuller's departmental head – John Parnell. He said this was "the best we can offer – we are inundated with work – cannot give this case priority." Kind asked should it not get sorted quickly having already been judicially reviewed? "Should be looked at very carefully – demands of other workload." Mr Parnell also said that he "was not sure I would agree" that having been to the high court gave any urgency, and there is "no public interest – it is merely a costs issue." Kind asked about target times. "Seven weeks once the case is ready to be determined – it is proving difficult to meet the target on this one." "Are you meeting targets on other cases?" "Yes." "Then why difficult on this one?" "I won't go into details of why – I have a caseload to manage."

So there it rests for now. PINS's costs branch has turned over one entire set of cases while Jack Lane has been sitting in the tray marked 'trouble'. No doubt the order-making authority and the order applicants are just as keen as the voluntary sector to get it sorted and put away. The implications of this case are enormous to the voluntary sector, especially if any volunteers' organisation gets cold feet when the going gets a bit tough. B&B will revisit Jack Lane once the costs decision is redetermined, but in the meantime Catriona Cook, Rachel Connolly and Alan Kind wish to say that without the skill, warmth and hours of input by George Laurence and Adrian Pay, backed up by the donations and pledges of so many good people, this case just could not have proceeded. Thank you all.

Jack Lane update

Readers have asked what is the position with the infamous costs award in the case of the downgrading of Jack Lane, Hunton, North Yorkshire, where Mr Justice Elias quashed the decision of the secretary of state after a high court hearing on 11 and 12 June 2003. The ghastly saga was last brought up to date in *Jack Lane part 3* (B&B 2004/3/29). This is where we stand at 11 November 2004.

In December 2003, six months after the high court hearing, PINS said it was going to “decide the costs application as soon as possible.” Nothing happened so, on 19 March Alan Kind wrote to the secretary of state in complaint at the way the matter was being handled. Mrs Beckett did not acknowledge the letter so, in April, Kind wrote to his MP, Doug Henderson asking for help. Mr Henderson seemed to reach the parts that others’ letters cannot, and PINS’s “soon” finally turned out to be four months when, on 5 April, PINS wrote to say that the costs branch had decided that they would have to ask that Inspector Laslett be roused from his well-earned retirement, and asked to provide further ‘justification’ for his original costs recommendation. Alan Kind asked PINS to put to Mr Laslett specific questions arising from the arguments put forward in the judicial review a year previously.

Mr Laslett wrote a ‘supplementary’ report dated 15 May. In this he stood by his earlier decision and maintained a recommendation of an award of costs against Alan Kind. With only a minor variation, the secretary of state then indicated her intention to follow Mr Laslett’s recommendation, seemingly as though the matter had not been thoroughly ventilated in the high court and the original order quashed. The parties were invited to make further representations about the secretary of state’s interim decision.

With the help of counsel as before, Alan Kind made a further submission as to why Mr Laslett’s second recommendation was wrong, and why the secretary of state was wrong to endorse it. This went in on 23 July. By 11 August both the order applicant and the OMA had confirmed that they had no further comment to make, and PINS was ready to make the final determination. Nothing happened.

On 12 October (over two months later) Alan Kind wrote again to the secretary of state, Mrs Beckett, asking that the matter be brought to a prompt conclusion for everyone’s benefit. Again, Mrs Beckett did not even acknowledge the letter. Kind wrote again on 29 October – again ignored. Once more Kind wrote to Doug Henderson MP who, as ever, engaged with the matter immediately and wrote to *defra* seeking some action.

There it still rests. Three months on from the close of correspondence that set in motion the determination (which are, says PINS, normally done in 7-8 weeks) we still await the decision. This is now very nearly two years to the day that the costs decision first dropped on to doormats, seventeen months since the high court hearing, and well over a year since the quashing order was formally issued, and yet there is no urgency within PINS to get to the end of the tunnel. A cynic might suggest that *defra* sees this approach as a good way of putting ordinary people right off the idea of getting involved with any sort of contentious order – ‘Win or lose, right or wrong, we will make sure the process hurts you and teaches you a lesson. We will drag it out, we will not answer your letters, and we will cost you a lot of money and worry.’ Rights of way issues aside, is this any way for the executive of a country to behave towards its citizens? We will let you know the outcome; but please don’t hold your breath.

Has the muse deserted all of B&B’s subscribers? While the snowstorm of notices, orders and consultations grows ever fiercer, the supply of letters, pictures, articles and items of interest coming in to B&B has virtually dried up through 2004. Please add ‘send something good to B&B’ to your new year resolutions list!

INQUIRY ISSUES

[downgrading: RUPP to bridleway]

Revisionism in action

An Inspector decides that the reclassification of a RUPP as bridleway under the 1968 Act has extinguished previous vehicular rights.

Barney Grimshaw

FPS/K3930/7/30

17 August 2004

Preshute 12 is a 1100m.-long route just west of Marlborough, linking the A4 and an unsealed UCR, and recorded as a RUPP on the original definitive map. Following the implementation of the 1968 Countryside Act, the county council sought the views of the parish council on the appropriate status of the route. They stated that it was not used by vehicular traffic and that its surface was not suitable for such use; and in 1972 it was reclassified as a bridleway, without any objection. Thirty years later in 2002, the county council erected a ‘horse stile’ across the route, and this led Bill Riley to claim the existence of underlying vehicular rights. Accepting this, in 2003 the council made an order upgrading the route to byway status. Supporting the council at the subsequent public inquiry, Alan Kind represented the Trail Riders Fellowship, and Bill Riley the BBT and the Wiltshire Bridleways Association.

Readers may be aware that in March 2004 local authorities were advised by *defra* that claims for byway status on former RUPPs reclassified as bridleways should be rejected [see BBE 25.4.2004 pp. 1-4: *Riley Revisionism*]. The correctness or otherwise of this advice was the essential point at issue at the inquiry, since there was no dispute that “by the time of the preparation of the definitive map for the area, the order route had been established as a public vehicular route for a long time.” There were legal submissions against the *defra* advice from the council and its supporters, and none in favour of it. Having heard these the Inspector comes to the view that “the question of whether reclassification of a RUPP as a bridleway under the 1968 Act had the effect of extinguishing vehicular rights has not been conclusively determined in

Jack Lane Update #2

Readers may have been lulled by the silence into thinking that the Jack Lane costs case had been settled, or just lost in the mists of time. Not at all; *Jack Lane update* (B&B 2004/10/82) explained how after the Secretary of State threw in the towel at the first judicial review application hearing in the summer of 2003, the matter reverted to the Planning Inspectorate for a redetermination of the costs application. That update was drafted on 11 November 2004.

Two weeks later (26 November 2004) PINS issued its redetermination of the costs application and ... with a slight reduction in the award ... merely rubber-stamped Inspector Laslett's original recommendation and its own original determination. This second decision letter simply failed to address the core heads of challenge in the first judicial review action as if they did not exist.

Alan Kind went back to his legal team for advice – and that advice was that the Secretary of State's position was no stronger (possibly weaker) than it had been at the time of the first judicial review challenge. A 'letter before action' went to the Secretary of State and a fresh case (essentially similar to the original – see B&B 2004/3/29&30 for an outline) was prepared with a view to a second judicial review application. Proceedings were issued on 8 February 2005 and the Secretary of State drafted a 'summary of grounds for contesting claim', which might reasonably be summarised as trying very hard to block the application from ever reaching the High Court, rather than addressing its merits and arguments. The Secretary of State also stated clearly that if Kind got a hearing, and lost, she would seek costs.

The application for judicial review went before Mr Justice Sullivan, who gave permission for the case to proceed on 21 April 2005, just two days shy of three years from the opening day of the original public inquiry. Sullivan J made two clear points in his order:

"If, by the end of the second day of the inquiry, the claimant [Kind] should reasonably have appreciated that he was flogging a dead horse, the Inspector and all the other parties present and legally represented at the inquiry must have had a similar appreciation; so why did the Inspector permit any, let alone in excess of **8 hours** [Judge's emphasis], cross examination of the claimant by leading

counsel on behalf of the applicant for the order?

"There is a very real danger that further litigating the issue of costs may well become disproportionate in terms of the additional costs incurred and time taken. The beneficiaries of the costs order do not intend to contest the application. If they agreed not to enforce the order made by the defendant [the Secretary of State] the proceedings would then become academic and the application could be withdrawn."

LETTERS

Tart on Bakewell?

Sir, the latest *consistency guidelines* from the planning inspectorate includes one on the *Bakewell* case. The guidance states that *Bakewell* overturns *Robinson v. Adair*. It does no such thing; rather it causes PINSto face up to the fact that their reading of *Robinson* had been wrong all along. It would never admit that in so many words, of course. The important finding in *Bakewell* was that where use of a way would be unlawful without authority of the owner, that authority can be presumed from the same use as, and in conjunction with, a presumption of dedication.

In *Robinson* the offence that prevented dedication was that of driving onto a

The Treasury Solicitor then wrote to the two beneficiaries of the costs award: the applicant for the order, and North Yorkshire County Council. The applicant agreed to the Judge's suggestion; NYCC declined. The Secretary of State considered for a few days more, then threw in her towel yet again and agreed to the costs order being quashed on the basis of Sullivan J's view of the "8 hours cross examination," (above).

So there it rests, for the moment, fast approaching three years from when the original costs determination dropped through letterboxes, with yet another redetermination by the Secretary of State to come (and on form, that will take well into 2006) and, who knows, perhaps yet another trip to the High Court if PINS gets it wrong again?

common. Although that is an offence capable of being negated by the authority of the owner, in *Robinson* the common was not the same piece of land over which the right of way was being claimed, but a piece of land all the users happened to be accessing via the road that was being claimed. So, the offence and the use of the road were separate acts involving different pieces of land. Because of this, the *Bakewell* finding does not contradict *Robinson*, rather the one confirms the other.

Our problem is that the PINS never understood this in the first place, and where it should have been shown the light by the House of Lords, it prefers the darkness.

Chris Padley
Market Rasen



And here is that road in 2005 - definitive BOAT, totally obstructed by this stile. Location: Salters' Gate (*aka* Five Lane Ends), *Landranger* 88/077426. About nine miles further north, another stretch of this once-major highway is subject to a DMMO application. The spin put on this by the local press: '60' byway will be driven through our farmhouse' [no, actually; it is a good distance away] has become one of the rural myths seeded into the national media and Parliament. Get these parts 'restored' and the potential for a lengthy equestrian and cycle route is considerable.