irwinmitchell

Your Ref: **DEV/SJH/D105-150**
Our Ref: **JSW/JSW/04869717-1/18973917-1**

BY SPECIAL DELIVERY

Kirklees Metropolitan Borough Council
Legal Services
High Street Buildings
High Street
Huddersfield
HD1 2ND

[redacted]

2 August 2019

Dear Sirs

(1) MR ROBERT EDWARD BRADLEY AND (2) MRS ANGELA BRADLEY -v- (1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS ("SECRETARY") AND (2) KIRKLEES METROPOLITAN BOROUGH COUNCIL ("KIRKLEES")
CLAIM NUMBER: 00/3060/2019

We act for Mr and Mrs Bradley, the Claimants in the above proceedings, which have been issued pursuant to Paragraph 12 of Schedule 15 of the Wildlife and Countryside Act 1981 (**"1981 Act"**).

As you will be aware, our clients were Objectors to the Kirklees Council (Huddersfield Public Bridleway 231 – Sandy Lane to Nether Moor Road, South Crosland) Public Path Modification Order 2018 (**"Order"**) made by you on 24 January 2018 and confirmed by an Inspector appointed by the Secretary (subject to modifications) on 17 June 2019 after a Public Inquiry in January/February 2019. Notice of the confirmation of the Order was published by Kirklees on 26 June 2019.

Our clients contend that the Order is not within the powers contained in section 53 of the 1981 Act and/or has not been carried out in accordance with procedural requirements and is accordingly invalid and should be quashed. Our clients have issued the above proceedings to seek an order that (among other things) the Order be quashed.

We **enclose**, by way of service, the following documents:

1. Claim form (Part 8 claim);
2. Acknowledgement of service (Part 8 claim);
3. Notes for the defendant (Part 8 claim form); and

4. Note to the defendant from the court.

Please confirm receipt.

Yours faithfully

Irwin Mitchell.

IRWIN MITCHELL LLP

Enc.

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NOTE TO DEFENDANT/RESPONDENT AND

INTERESTED PARTY(IES)

Our ref: CO/3060/2019

02 August 2019

This matter has been commenced and is currently proceeding in the **Administrative Court at Leeds**. Please note that such proceedings may also be administered and determined at one of the following Administrative Court venues:

Birmingham Civil Justice Centre – Priory Courts, 33 Bull Street, Birmingham, B4 6DS;

Cardiff Civil Justice Centre – 2 Park Street, Cardiff, CF10 1ET;

Manchester Civil Justice Centre – 1 Bridge Street West, Manchester, M60 9DJ;

Royal Courts of Justice – Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

Certain matters may only be heard in the Administrative Court in London (see Practice Direction 54D for details of the types of cases excepted from regional hearings). The Court will transfer such cases to London for hearing, where appropriate.

Should this matter not be one that is excepted by PD 54D and you wish to seek a direction that any hearings in this matter be heard at another of the Administrative Court regional venues, you should complete, lodge with the Administrative Court in **Leeds** (address at the top of this letter) and serve on all parties to this claim, a Form N464, Application for Directions as to venue for administration and determination, within 21 days of service of the claim form upon you. There is a fee payable for such application.

Form N464 and Practice Direction 54D can be obtained from any of the Administrative Court Offices or downloaded from the HMCTS website at www.justice.gov.uk/about/hmcts/index.htm.

For Regional Manager

Claim Form (CPR Part 8)

In the
High Court of Justice **Queens Bench Division** **Planning Court** **Leeds District Registry**
Claim no. CO/3060/2019
Fee Account no. PBA0089052
Help with Fees - Ref no. (if applicable) HWF - -

HIGH COURT OF JUSTICE SEAL 02 AUG 2019 LEEDS PLANNING COURT

Claimant

(1) Mr Robert Edward Bradley
Nether Moor Farm
Sandy Lane
South Crosland
Huddersfield
HD4 7BX

(2) Mrs Angela Bradley
Nether Moor Farm
Sandy Lane
South Crosland
Huddersfield
HD4 7BX

Defendant(s)

(1) Secretary of State for Environment, Food and Rural Affairs of Government Legal Department, One Kemble Street, London, WC2B 4TS

(2) Kirklees Metropolitan Borough Council of Legal Services, High Street Buildings, High Street, Huddersfield, HD1 2ND

Does your claim include any issues under the Human Rights Act 1998? ☐ Yes ☑ No

Details of claim *(see also overleaf)*

Please see the Details of Claim attached at pages 2 to 22 of this Claim Form.

Defendant's name and address

(1) Secretary of State for Environment, Food and Rural Affairs, Government Legal Department, One Kemble Street, London, WC2B 4TS

(2) Kirklees Metropolitan Borough Council, Legal Services, High Street Buildings, High Street, Huddersfield, HD1 2ND

	£
Court fee	528.00
Legal representative's costs	TBA
Issue date	

For further details of the courts www.gov.uk/find-court-tribunal.
When corresponding with the Court, please address forms or letters to the Manager and always quote the claim number.

Case No:

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

PLANNING COURT

LEEDS DISTRICT REGISTRY

IN THE MATTER OF A CLAIM UNDER PARAGRAPH 12 OF SCHEDULE 15 TO THE WILDLIFE AND COUNTRYSIDE ACT 1981

BETWEEN:

ROBERT EDWARD BRADLEY AND ANGELA BRADLEY

Claimants

and

SECRETARY OF STATE FOR ENVIRONMENT,

FOOD AND RURAL AFFAIRS

First Defendant

and

KIRKLEES METROPOLITAN BOROUGH COUNCIL

Second Defendant

DETAILS OF CLAIM

INTRODUCTION

1. This Claim is made under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 ("the 1981 Act"). Part 8 of the Civil Procedure Rules applies to this Claim by virtue of paragraph 22 of Practice Direction 8A.

2. The Claimants seek to quash the Kirklees Council (Huddersfield Public Bridleway 231 – Sandy Lane to Nether Moor Road, South Crosland) Public Path Modification Order 2018 ("the Order") made by the Second Defendant on 24 January 2018 and

confirmed by an Inspector appointed by the First Defendant, subject to modifications, on 17 June 2019, after a Public Inquiry at which the Claimants objected to the Order. Notice of the confirmation of the Order was published by the Second Defendant on 26 June 2019.

3. The effect of the Order is to modify the Second Defendant's Definitive Map and Statement by downgrading part of a byway open to all traffic ("BOAT") known as Huddersfield 231 to a bridleway from its junction with Sandy Lane running in a north easterly direction to its junction with Nether Moor Road in South Crosland, Huddersfield ("the Order Route"). The Claimants are the owners and occupiers of Nether Moor Farm, a working farm and the Claimants' residence, over which the Order Route runs.

RELEVANT FACTS

4. The matter has somewhat of a protracted history. However, the essential facts can be summarised as follows. .

5. The Claimants' family have resided and held a tenancy at Nether Moor Farm since the 1800's, and in 1954, it was purchased by the Claimants' family. It is operated by the Claimant Robert Edward Bradley as a working dairy farm. The Order Route forms an access track to and from the Farm from both Sandy Lane to the west and Nether Moor Road to the east, and it runs through the farm yard itself. It is regularly used for the operation of the Farm on a daily basis, particularly for agricultural machinery and the movement of cattle.

6. The Order Route was initially recorded on the Definitive Map prepared by the then West Yorkshire County Council in 1975 as a Road used as a Public Path ("RUPP"). The relevant date was 20 April 1966. Subsequently, in 1985, the Second Defendant undertook a wholesale review of its Definitive Map by way of an Omnibus Definitive Map Modification Order and creating a new relevant date for the Definitive Map of 30 April 1985. The Order Route was not included within that Order. However, despite the lack of any supporting Modification Order, a route in the location of the Order Route was marked on the Definitive Map as HUD/231 by way of a solid black line,

and the Definitive Statement was modified to refer to that route as a "Byway open to all traffic".

7. Due to unfortunate erroneous advice received from the Second Defendant, in reliance upon such advice, the Claimants made an application in 2009 to downgrade the Order Route to a bridleway. That application was amended in 2012 to downgrade the Order Route to a footpath, and upon receiving independent advice that the advice provided by the Second Defendant had been erroneous, the application was withdrawn in 2016. A fresh application had been made in 2014 to record only a section of the Order Route as a footpath, namely that between the junction of Sandy Lane and definitive footpath 233.

8. Despite the withdrawal of the amended application, the Second Defendant proceeded to make a Modification Order on 24 January 2018 to downgrade the Order Route to a bridleway. The Claimants objected to that Order contending that the Order Route should be deleted from the Definitive Map.

9. In the meantime, from around 2009 onwards, the Claimants obstructed the Order Route, specifically to preclude its vehicular use which had commenced. Such obstruction resulted in the Second Defendant serving various notices on the Claimants under section 143 of the Highways Act 1980 ("the 1980 Act") requiring the removal of the obstructions. The notices contended that as the Order Route was shown on the Definitive Map as a BOAT, that was conclusive evidence that it was such a public right of way over which the public had rights of way for all forms of traffic and the obstructions were accordingly required to be removed. Due to the ongoing Definitive Map Modification process, the Second Defendant agreed not to enforce the latest extant section 143 notice without advance notice.

10. The Order was the subject of a public inquiry before the First Defendant's Inspector from 29 January until 1 February 2019 and on 12 February 2019. At that Inquiry, the Second Defendant's position was that the documentary evidence supported the Order Route being a public footpath, but that the user evidence over a 20 year period from 1989 onwards supported the Order Route becoming a bridleway pursuant to section 31 of the 1980 Act. In response to a specific question from the Inspector, the Second

Defendant expressly informed the Inquiry that it did not rely upon the Order Route having been dedicated at common law for that same or any other period, and no such contention was made or raised by any person during the course of the Inquiry, including the Inspector.

11. Following the close of the Inquiry, on 12 March 2019, the Inspector's agent wrote to the Claimants and the Second Defendant *"to seek their views as to whether the evidence presented at the inquiry, for any period covered by the user evidence, could support an inference of dedication at common law"*. The Claimants and the Second Defendant provided a written response to the request, and the Claimants thereafter sent a reply to the Second Defendant's response.

12. The First Defendant's Inspector's Decision dated 17 June 2019 concluded that the Order should be confirmed subject to modifications. His overall conclusions were:
    a. The documentary evidence was supportive of the Order Route being a public footpath;
    b. There had been no statutory dedication of the Order Route as a public right of way as it had been used "by right" and not "as of right" during the relevant 20 year period; and
    c. The Order Route had been impliedly dedicated as a public bridleway at common law on an unspecified date prior to 1985.

RELEVANT STATUTORY FRAMEWORK

13. The main elements of the relevant statutory framework are as follows.

14. Modification Orders to the Definitive Map and Statement are governed by the 1981 Act. There is a statutory duty on the Second Defendant as the surveying authority for the purposes of that Act to keep the Definitive Map and Statement under continuous review and up to date. Section 53(2) provides:

    "As regards every definitive map and statement, the surveying authority shall—

    (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and

statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

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

Those "events" are set out in section 53(3). The "events" of relevance to the Modification Order in question are contained in section 53(3)(c)(ii) and section 53(3)(c)(iii), namely:

"*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—*

...

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

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

The Second Defendant made the Order under section 53(3)(c)(ii) contending that the Order Route should be shown as a bridleway rather than as a BOAT; the Claimants contended that section 53(3)(c)(iii) applied and that there should be no public right of way shown along the Order Route.

15. The effect of the Definitive Map and Statement is contained in section 56. In particular, section 56(1)(c) provides:

"*A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely—*

(c) *where the map shows a byway open to all traffic, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic*".

Further, the predecessor to that provision is of further relevance. Section 32(4)(b) of the National Parks and Access to the Countryside Act 1949 provided in relation to the Definitive Map that:

"*where the map shows a bridleway, or a road used as a public path, the map shall be conclusive evidence that there was at the said date a highway as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights aforesaid*".

16. Paragraph 12 of Schedule 15 to the 1981 Act sets out the procedure for the questioning of such modification orders under which the Claim is made. It provides:

"*(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.*

(2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.

(3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

17. In relation to statutory dedication, section 31(1) of the 1980 Act sets out the relevant statutory presumption of dedication which was applied by the First Defendant's Inspector in his Decision. That provides:

> "*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.*"

GROUNDS OF CLAIM

18. By this Claim, the Claimants challenge the validity of the Order on the grounds that it is not within the powers of section 53 of the 1981 Act, and that procedural requirements have not been complied with causing the interests of the Claimants to have been substantially prejudiced. The Claimants rely specifically on the following four Grounds of Claim.

Ground (i)

19. The first Ground is that the First Defendant's Inspector erred in law in his application of the law relating to "as of right" use in reaching his decision on implied dedication at common law. Alternatively, as a second part to this Ground, the Inspector failed to provide any or any adequate reasons for determining that the use relied upon in his finding that common law dedication had occurred was "as of right" rather than "by right".

20. In order for dedication to occur either pursuant to section 31 of the 1980 Act or by means of implied dedication at common law, the use must be "as of right". It is trite law that a fundamental and critical element of any implied dedication through long use is that the character of the usage must have been "as of right", namely *nec vi, nec clam, nec precario* (without force, secrecy or permission). That is evident from the origins of the doctrine of implied dedication at common law being from the law relating to the acquisition of easements by prescription.

21. Further, it has been clearly established by the Supreme Court that in order for use to be "as of right", it must not be "by right": see ***R. (on the application of Barkas) v. North Yorkshire County Council*** [2015] A.C. 195. As made clear in that case, a use is "by right" if the public has an enforceable existing right to use a route. The use must instead be by the public as trespassers in order to be "as of right". In other words, if the public have an existing right to use the route so that the landowner is unable to lawfully remove them from the land, they are using the route with permission. As stated by Lord Neuberger in ***Barkas*** at paragraph 27:

> *"As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a "tolerated trespasser" is still a trespasser."*

22. Applying that legal framework to the Order Route, during the relevant 20 year period for statutory dedication, namely 1989 to 2009 as found by the Inspector at paragraph 30 of his Decision, the Route was shown on the Definitive Map as a BOAT. The effect was that the Definitive Map amounted to conclusive evidence that the Order Route was a BOAT at the relevant date of 30 April 1985 AND that "*the public had thereover at that date a right of way for vehicular and all other kinds of traffic*": see section 56(1)(c) of the 1981 Act. Hence, as there had been no legal events since 1985 affecting the Route's status, the public had a "right of way" for vehicular and other use by virtue of that statutory provision and the Definitive Map amounted to conclusive evidence of that right. In such circumstances, the Claimants could not lawfully exclude or obstruct the users unless and until the Definitive Map was modified accordingly. Instead, the public had a right to use the Order Route during that 20 year period and were not trespassers. Indeed, that follows from the Second Defendant's approach in serving section 143 notices against the Claimants to remove

the obstructions on the basis of the conclusive provisions in the 1981 Act. By those notices, the Second Defendant sought to enforce the public's statutory right to use the Order Route as the Council was entitled to do. It follows that the use was "by right" and not "as of right" during the relevant 20 year period.

23. Significantly, the First Defendant's Inspector expressly so found in relation to the issue of statutory dedication of the Order Route on the basis of the application of the law set out above. He stated at paragraph 57 of his Decision (with my emphasis):

> "*The Order Route is recorded in the definitive statement with a relevant date of 30 April 1985 and I have accepted that there is an error with the notation on the definitive map.* ***This means that a right of way for the public was recorded at the relevant date for vehicular and all other kinds of traffic.*** *I note that some of the users have stated that they used the route because it was a public right of way.*"

He then went on to state in the following paragraph:

> "*As outlined by Lord Neuberger at paragraph 21 of Barkas if the public had a statutory right to use the land it would be user 'by right' and not as a trespasser. The latter would enable the user to be 'as of right'.* ***I therefore agree with the objectors that for the duration of the relevant period the user was 'by right'.***"

On the basis of those findings, he concluded in paragraph 59 of his Decision that "*statutory dedication fails as the user was not as of right*".

24. However, having made those express findings in relation to statutory dedication, the Inspector erroneously failed to proceed to apply that relevant law in the same way in his consideration of implied dedication at common law, or indeed at all. Instead, he failed entirely to apply that relevant law to the issue of common law dedication.

25. He dealt with common law dedication in his Decision at paragraphs 60 to 64 inclusive. In the first instance, there is no reference to "as of right" anywhere in those paragraphs.

26. Next, applying the correct legal approach set out above, and accepted by the Inspector, to the use relied upon to support common law dedication prior to 1985, the Order Route was also shown on the 1975 Definitive Map as a RUPP (Road Used as a Public Path), as found by the Inspector at paragraph 20 of his Decision and which was the agreed position of the Second Defendant. The relevant date was 20 April 1966. As set out above, section 32(4)(b) of the National Parks and Access to the Countryside Act 1949 then provided in relation to the 1975 Definitive Map that:

> "*where the map shows a bridleway, **or a road used as a public path**, the map shall be **conclusive evidence** that there was at the said date a highway **as shown on the map, and that the public had thereover at that date a right of way on foot and a right of way on horseback** or leading a horse, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than the rights aforesaid*" (My emphasis).

Hence, the 1975 Definitive Map was **conclusive** evidence that as of 20 April 1966, the Order Route was a RUPP **and** that the public had a right of way on foot and on horseback.

27. It follows that horseriders were not using the Order Route as trespassers from 1966 onwards as they were instead exercising a public right of way over the Order Route of which the 1975 Definitive Map was conclusive evidence. Notably, the Inspector found at paragraph 60 of his Decision that prior to 1985, "*the use predominantly occurred during the 1970s and 1980s*", namely post the relevant date.

28. Applying the legal position to "as of right" use in the context of common law dedication, the use referred to by the Inspector was "by right" and not "as of right" use for the very same reasons as the First Defendant's Inspector so found in relation to statutory dedication. Yet, the First Defendant's Inspector not only does not apply

the law in that way, he does not apply that law at all and simply does not engage with the issue. The First Defendant's Inspector's decision in relation to common law dedication is accordingly wrong in law.

29. Further, and in any event, the First Defendant's Inspector failed to provide proper, adequate or intelligible reasons as to why he took a different approach to as of right use for common law dedication in contrast to statutory dedication. The Claimants are wholly unaware as to the Inspector's reasons for that use not also being by right. Alternatively, for the above reasons, his decision was perverse in the ***Wednesbury*** sense.

30. Finally, that issue goes to the heart of the Decision given that it was solely on the basis of common law dedication that the Order Route was found to have become a bridleway. Had the error of law not occurred, the Decision would have been fundamentally different in that common law dedication could not have been established. Hence, the Court's discretion should be exercised in favour of quashing the Order.

Ground (ii)

31. The second Ground is that the First Defendant's Inspector erred in law in his application of the law to the issue of implied dedication at common law generally.

32. It is apparent from the Inspector's consideration of common law dedication at paragraphs 60 to 64 of his Decision that, for the most part, he relies on, and refers back to, his previous findings in relation to statutory dedication. However, in doing so, he fails to apply, or even acknowledge, the wholly different legal basis on which dedication may be implied at common law. There is no presumption involved as with statutory dedication under section 31 of the 1980 Act, and the burden of proof is instead on an applicant to establish that the landowner intended to dedicate the public right of way. As such, the evidence must be assessed on that different legal premise as to whether it demonstrates on the balance of probabilities that the landowner intended to dedicate the Order Route as a bridleway. Moreover, a different time period is in issue in relation to the common law dedication considered.

33. Hence, in relation to interruptions, he addresses that crucial issue in two sentences in paragraph 62 of his Decision:

> *"Nor have I found that implied permission can be taken to arise from the agricultural activities or motor cycle events. Further, I find it unlikely that they would have served as a significant interruption to the user."*

Yet, interruptions for the purposes of demonstrating implied permission or lack of continuous use for the purposes of statutory dedication are to be assessed entirely differently for common law dedication, and each and every act of interruption should instead be considered in the specific context of whether it has been demonstrated that the landowner intended to dedicate the route. As stated by Parke B. in ***Poole v. Huskinson*** (1843) 11 M. & W. 827 at 830:

> *"a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."*

The Inspector did not assess the numerous interruptions in that legal context, namely the frequent obstruction of the Order Route by livestock and by agricultural vehicles parked on the Order Route for lengthy periods, and the regular events of the Huddersfield Falcons Motor Cycle Club which were found to take place two or three times a year throughout the period of common law dedication during which the Order Route was taped off to preclude public access. Instead, not only was account not taken of the letter produced to the Inquiry from that body indicating in terms that the Order Route was taped off to prevent its use by the public, but the Inspector's conclusion at paragraph 53 of his Decision was:

> *"Having regard to the matters outlined above I do not find on balance that permission can be implied from the temporary obstructions arising from agricultural activities or the motor cycle events that periodically took place in the area."*

In contrast, the relevant test in relation to common law dedication is not whether "*permission can be implied*" from such temporary obstructions but, rather, the wholly different consideration of the relevance of such obstructions in relation to the landowner's intention which is nowhere assessed in his Decision.

34. Had that error of law not occurred, there is a reasonable likelihood that the Decision would have been fundamentally different in that common law dedication was the sole basis on which dedication was found to have been established. Hence, the Court's discretion should be exercised in favour of quashing the Order.

Ground (iii)

35. The third Ground is that the First Defendant's Inspector erred in law in his application of the ***Trevelyan*** presumption to the original 1975 Definitive Map in his assessment of the documentary evidence from which he concluded that it supported a finding that the Order Route was a public footpath. There are three elements to this Ground, namely:

    a. The Inspector erroneously applied the ***Trevelyan*** presumption to a right of way that was not marked on the Definitive Map, namely a footpath;
    b. The Inspector did not apply the correct standard of proof to his assessment of the documentary evidence, namely the application of a balance of probabilities to the evidence as a whole; and
    c. In purporting to apply the ***Trevelyan*** presumption, the Inspector failed to properly consider all the material evidence, particularly in relation to a memorandum of West Yorkshire Metropolitan County Council dated 5 June 1974, and his decision in relation to the documentary evidence was perverse in the ***Wednesbury*** sense.

36. Throughout his assessment of the documentary evidence, the Inspector sought to apply the presumption arising from ***Trevelyan v. Secretary of State for the Environment, Transport & the Regions*** [2001] 1 WLR 1264. The Court of Appeal's statement of principle was set out by Lord Phillips at paragraph 38, namely:

> *"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way* ***that is marked on a definitive map*** *in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that* ***such*** *a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists* ***is no more than the balance of probabilities.*** *But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."* (My emphasis).

37. In relation to the first element of this Ground, it follows from the above that the initial presumption arises in respect of "*a right of way that is marked on a definitive map*". Therefore, the presumption arises only in relation to:

    a. The inclusion of a route marked on a definitive map, and not to a route shown on a draft map or statement or a draft schedule or any other document; and
    b. The existence of the particular right of way which is marked on the definitive map.

38. Yet, the First Defendant's Inspector erroneously applied that initial presumption throughout his assessment of the documentary evidence. The Order Route was marked on the 1975 Definitive Map as a RUPP. Hence, it is acknowledged the ***Trevelyan*** presumption was engaged in relation to the existence of the RUPP. Nonetheless, the Inspector found at paragraph 21 of his Decision that such an initial presumption in relation to the Order Route being a RUPP was rebutted by virtue of the 1974 memorandum. That being so, the ***Trevelyan*** presumption was no longer engaged in relation to the 1975 Definitive Map. The documentary evidence should

thus have then been considered by applying the balance of probabilities approach without the application of the presumption.

39. However, instead, the Inspector erroneously went on to regard the ***Trevelyan*** presumption as further applicable to the existence of the Order Route as a footpath. That was a wholly incorrect approach given that the Order Route was not marked on the Definitive Map as a footpath but as a RUPP, and the application of a second and additional presumption in relation to a right of way not marked on the Definitive Map was flawed in law.

40. Secondly, the Inspector did not apply the correct standard of proof, namely the balance of probabilities, to his determination of whether all the available evidence outweighed the initial presumption. As Lord Phillips stated in ***Trevelyan***:

> "*At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities.*"

It is thus necessary to consider all the evidence in its entirety to determine whether, on the balance of probabilities, the initial presumption is outweighed.

41. In contrast, the Inspector did not consider the evidence in its entirety, but rather assessed each piece of evidence individually to ascertain whether it outweighed the presumption; and further, he did not apply the balance of probabilities approach.

42. Hence, at paragraph 21 of his Decision in considering the 1974 memorandum, he found that "*it does not **necessarily** show that routes were included in the map and statement in error*". A "necessity" test is far higher than a balance of probabilities. Similarly, in relation to the evidence that the land was in settlement from 1887 until around 1950, in paragraph 24 of his Decision he referred to the presumption and then went on to state: "*It cannot be said that dedication under common law was **impossible** either before or after the land was in settlement.*" The issue was not whether common law dedication prior to 1887 or post 1950 (but prior to 1952 when the Order Route

was shown on the 1952 draft schedule of rights of way as a footpath) was "impossible", but merely whether or not it was likely on the balance of probabilities.

43. Further, having considered each piece of evidence individually against the presumption, the Inspector failed in his Decision to apply the correct approach set out in ***Trevelyan***, namely to consider all the evidence together to determine whether, on the balance of probabilities, it outweighs the initial presumption. That assessment has simply not been undertaken anywhere in the Decision.

44. Thirdly, the Inspector failed to consider all the relevant evidence, namely the full content of the 1974 memorandum, and his decision on the application of the ***Trevelyan*** presumption in relation to both that memorandum and in relation to the issue of settlement was perverse.

45. As to the memorandum, that was written by the body responsible for preparing the 1975 Definitive Map. The inclusion of the Order Route on that Definitive Map derived from the recording of the Route in the 1952 Draft Schedule as a footpath. There is no available evidence to justify the Route's inclusion in that Draft Schedule. No Parish surveys were undertaken; there is no documentary evidence in support; the Route had been subject to quarrying; the land had been in strict settlement for a lengthy period during which its dedication could not have occurred; and there was no evidence of its long use. Further, in relation to the inclusion of the Order Route on the 1966 Provisional Map based on that Draft Schedule, and which in turn led to the Route being recorded on the 1975 Definitive Map, the County Council's internal memorandum dated 5 June 1974 refers to a number of significant flaws in the process. In particular, it states:

> *"The classifications of routes as between F.P., F.P. (CRF) & B.W. appear to depend purely on the physical characteristics with no regard to historical use either probable or actual."*

It then goes on:

> *"To enable an accurate assessment to be made of the likely past use of each way it would be essential to walk at least 20% of the 595 paths listed and to try to get much more local information thereon."*

The following paragraph nonetheless continues:

> *"However, as such a course is impracticable at present, it is proposed that a reasonable assessment be made on a logical basis and then await the outcome of the deposit."*

46. It is apparent from that memorandum, written by the body in the course of preparing the 1975 Definitive Map, that there were a number of significant concerns over its preparation. The document questions the methodology used for the depiction of the routes, the grounds for their selection and the accuracy of the assessments made. Indeed, it states in terms that there had been "*no regard to historical use either probable or actual.*" Given that the Order Route could only have been dedicated pursuant to historical use in the absence of any express dedication, that memorandum was highly cogent evidence to weigh in the balance against the initial presumption. It was "*evidence of some substance*" capable of outweighing the initial presumption.

47. Yet, the Inspector fails to take into account the full contents of that memorandum. Moreover, he wholly fails to weigh it in the overall balance against the presumption. Instead, he merely dismisses it in one sentence in paragraph 21 of his Decision stating:

> *"I take this statement to indicate that routes could have been recorded with the incorrect designation, but it does not necessarily show that routes were included in the map and statement in error."*

That is a wholly flawed approach. Further, that conclusion is perverse given that the memorandum is a clear statement of the County Council's acknowledgment that the routes were recorded without proper procedures having been followed. A clear statement made by the very body preparing the Definitive Map that proper procedures were not followed must be evidence of substance capable of outweighing the initial

presumption that proper procedures were followed. A finding to the contrary is, with respect, perverse.

48. In addition, the Inspector's findings at paragraph 24 of his Decision in relation to the land being subject to settlement are, with respect, perverse. As noted at paragraph 22 of the Decision, dedication can only arise where there is a landowner with capacity to dedicate a public right of way in perpetuity. When the land is in settlement, no one has the capacity to so dedicate.

49. However, at paragraph 24 the Inspector stated:

> *"The issue to be determined is whether an error occurred when the Order Route was first included on the definitive map due to the land being in settlement. The absence of user evidence for the period involved does not mean than an error occurred as it should be presumed there was some evidence at the time that warranted the inclusion of the route. It cannot be said that dedication under common law was impossible either before or after the land was in settlement. In particular, the Council draws attention to the retrospective effect of Section 1 of the Rights of Way Act 1932 which removed the barrier to dedication over settled land."*

50. That paragraph contains a number of fundamental errors:

    a. The ***Trevelyan*** presumption referred to in the second sentence takes no account of the accepted evidence of lack of any user evidence at the time as expressly stated in the 1974 memorandum.
    b. The issue was not whether dedication at common law was impossible but, rather, whether all the evidence outweighed the initial presumption on the balance of probabilities.
    c. The reference to section 1 of the Rights of Way Act 1932 is of no relevance to common law dedication but only to statutory dedication.

51. Instead, having found that dedication at common law could only have occurred prior to 1887, of which there was no evidence whatsoever, or between 1950 and 1952, of

which there was no evidence of any use and the County Council had expressly stated that no historical use had been considered, it was perverse to then find on the balance of probabilities that the initial presumption was not outweighed.

52. Given the extent and nature of the above errors, it is reasonably likely that the Decision would have been fundamentally different had those errors not occurred. Hence, the Court's discretion should be exercised in favour of quashing the Order on that further Ground.

Ground (iv)

53. The fourth Ground is that there were material procedural failings in the procedure adopted by the First Defendant's Inspector in requesting observations from the Parties on common law dedication post the Inquiry, which failings unfairly and substantially prejudiced the Claimants.

54. No reliance was placed upon common law dedication by the Council or any other person in any of their evidence, whether oral or written. Further, the Inspector did not raise the issue at the Inquiry. Indeed, the Inspector specifically asked the Second Defendant during the course of the Inquiry whether any reliance was being placed on common law dedication to which they responded in the negative. The Inspector did not indicate that he wished to hear any evidence in relation to dedication at common law.

55. Instead, the issue was only raised by the Inspector a month after the close of the Inquiry by way of a request for written submissions. The letter simply requested the Claimants' and Council's "*views as to whether the evidence presented at the inquiry, for any period covered by the user evidence, could support an inference of dedication at common law*", and went on to state that any responses would be circulated to other parties with an opportunity for them to comment.

56. That approach was procedurally unfair to the Claimants for the following reasons:

a. The Inspector did not identify in his request for further submissions the time period being considered, namely prior to 1985. There was no reason for the Claimants to assume that a different period was being considered by the Inspector than the period which had been in issue at the Inquiry. The Claimants were thereby substantially prejudiced in that they would have provided detailed submissions in response to the evidence of claimed use during that particular earlier different period had they been aware that such was the period in issue.

b. The Inspector did not provide the Claimants with an opportunity to cross examine witnesses of use in relation to that earlier period despite such factual evidence being heavily disputed. Again, as it was expressly stated to be not in issue at the Inquiry, there was no cross examination in relation to that earlier period.

57. By taking the above approach, the Claimants have not had a fair hearing, particularly as they have not been provided with an opportunity to cross examine witnesses of fact on the disputed issue of use prior to 1985 and that was the very issue on which the First Defendant's Inspector based his overall decision. They have thereby been substantially prejudiced.

CONCLUSION

58. In conclusion, on each of the above Grounds, the Claimants contend that the Order is not within the powers contained in section 53 of the 1981 Act and/or has not been carried out in accordance with procedural requirements and is accordingly invalid and should be quashed.

59. Consequently, the Claimants seek an order that:-

(i) The Order be quashed; and

(ii) The Claimants' costs of and occasioned by this Claim be paid by the First and/or the Second Defendant.

RUTH A. STOCKLEY

2 August 2019

Kings Chambers
36 Young Street
Manchester
M3 3FT

STATEMENT OF TRUTH

The Claimants believe that the facts stated in these particulars of claim are true.

I am duly authorised by the Claimants to sign this statement.

Signed: .[redacted]

Name: ...[redacted].

Position: ....Solicitor for and on behalf of Irwin Mitchell LLP

Date: ....2nd August 2019.....

Claim no.	

Details of claim *(continued)*

Statement of Truth

The Claimants believe that the facts stated in these particulars of claim are true.

I am duly authorised by the Claimants to sign this statement.

Full name [redacted]

Name of claimant's legal representative's firm Irwin Mitchell LLP

signed [redacted]

Claimants' legal representative

position or office held Solicitor

(if signing on behalf of firm or company)

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Reference: JSW/JHBRADLEYANDS 4869717-1

Claimant's or claimant's legal representative's address to which documents should be sent if different from overleaf. If you are prepared to accept service by DX, fax or e-mail, please add details.

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