

a R v Secretary of State for Wales, ex parte Emery

COURT OF APPEAL, CIVIL DIVISION

NOURSE, ROCH AND PHILLIPS LJJ

25, 27 JUNE, 9 JULY 1997

- b** *Highway – Dedication – Evidence – Definitive map – Public right of way – Riverbank footpath – Private landowner refusing access – Application to local authority for order modifying definitive map of area to show public footpath – Local authority refusing order – Secretary of State dismissing appeal against refusal of order on conflicting documentary evidence alone – Whether Secretary of State entitled to do so – Wildlife and Countryside Act 1981, s 53(3)(c)(i)(5), Sch 14, para 4(2).*

- c** Following a private landowner's refusal to allow public access to a riverbank footpath which crossed his land, the applicant applied to the local authority under s 53(5) of the Wildlife and Countryside Act 1981 for an order under s 53(2) of the Act modifying the definitive survey map of its area to show the footpath as a public path. By virtue of s 53(3)(c)(i)^a of the Act, the local authority had to make such an order on the discovery by it of evidence showing that a right of way not shown in the map subsisted or was reasonably alleged to subsist over land in the area to which the map related. The local authority rejected the application and the applicant appealed to the Secretary of State, to whom over 100 statements in the form of questionnaires were submitted showing that the path had been used for access to the river for various activities over a number of years. The Secretary of State also had before him an undated statement by the former owner of the property, D, which stated that access to the riverbank had been strictly controlled and general public access had always been refused. The Secretary of State held that the evidence was not conclusive as to dedication as a public footpath and that **d** D's statement clearly demonstrated no such intention, thereby satisfying the proviso to s 31(1)^b of the Highways Act 1980. He accordingly concluded that the evidence submitted in support of the application was not such as to indicate that a right of way was reasonably alleged to subsist and dismissed the appeal and declined to exercise his powers under para 4(2) of Sch 14 to the 1981 Act to direct **e** the local authority to modify the definitive map of its area as sought. The applicant applied for judicial review of the Secretary of State's decision, and the deputy judge granted the application, holding that although the Secretary of State had not acted irrationally and his acceptance of D's statement was conclusive, in operating the statutory procedure, without due regard to the particular facts of the case, strictly in the manner envisaged by Parliament, and failing to hold a public inquiry, he had acted unfairly. The Secretary of State appealed.

- g** **Held** – In determining, for the purposes of s 53(3)(c)(i) of the 1981 Act, whether a right of way was reasonably alleged to subsist over land, the question to be considered by the local authority and, on appeal, by the Secretary of State, was **j** whether the evidence produced by the claimant together with all the other relevant evidence available showed that it was reasonable to allege a right of way. If the evidence from the witnesses as to user was conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown

^a Section 53(3), so far as material, is set out at p 370 *a b*, post

^b Section 31, so far as material, is set out at p 369 *d e*, post

to exist, it was reasonable to allege such a right. In the instant case, D's statement, far from being clear and unequivocal, left open the question whether persons using the path simply as a footpath and not for access to the riverbank were ever refused permission, and the answers given in the questionnaires demonstrated a fundamental conflict of evidence between those completing the questionnaires and D. Accordingly, since in his decision letter the Secretary of State gave no indication that he had turned his mind to that conflict, but had looked at D's statement in isolation, attributing to it a weight which it could not carry and had failed to weigh it against the answers in the questionnaires, it followed that his conclusion that the evidence was not such as to indicate that a right of way was reasonably alleged to subsist was not a reasonable one for him to reach. The appeal would therefore be dismissed (see p 377 h to p 379 d j to p 380 e and p 381 b, post).

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402 approved.

Decision of Sir Louis Blom-Cooper QC [1996] 4 All ER 1 affirmed on other grounds.

Notes

For the dedication of public paths and application by individuals for modification of definitive maps, see 21 *Halsbury's Laws* (4th edn reissue) paras 254, 270.

For the Highways Act 1980, s 31, see 20 *Halsbury's Statutes* (4th edn) (1992 reissue) 164.

For the Wildlife and Countryside Act 1981, s 53, Sch 14, para 4, see *ibid* 520, 535.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Doody v Secretary of State for the Home Dept [1993] 3 All ER 92, [1994] 1 AC 531, [1993] 3 WLR 154, HL.

Jaques v Secretary of State of the Environment [1995] JPL 1031.

Lloyd v McMahon [1987] 1 All ER 1118, [1987] AC 625, [1987] 2 WLR 821, HL.

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402.

R v Secretary of State for the Home Dept, ex p Fire Brigades Union [1995] 2 All ER 244, [1995] 2 AC 513, [1995] 2 WLR 464, HL.

Appeal

The Secretary of State for Wales appealed from the decision of Sir Louis Blom-Cooper QC sitting as a deputy judge of the High Court ([1996] 4 All ER 1) on 4 June 1996 granting the application of Gordon Michael Emery for an order of certiorari to quash the Secretary of State's decision by letter dated 16 May 1995 whereby he refused to direct the Clwyd County Council to make an order modifying its definitive map or alternatively for an order of mandamus that the Secretary of State hear and determine Mr Emery's appeal under para 4(1) of Sch 14 to the Wildlife and Countryside Act 1981. The facts are set out in the judgment of Roch LJ.

John Hobson (instructed by the *Treasury Solicitor*) for the Secretary of State.

George Laurence QC and *Edwin Simpson* (instructed by *Brooke North & Goodwin, Leeds*) for Mr Emery.

a 9 July 1997. The following judgments were delivered.

ROCH LJ (giving the first judgment at the invitation of Nourse LJ). This appeal concerns a decision by the Secretary of State for Wales not to direct the Clwyd County Council to modify its definitive map and statement of existing public rights of way by showing a claimed public footpath not shown on the map or described in the statement.

The legal framework

c There are two possible ways in which a public right of way can be created. First at common law by an act of dedication by the owner of the land over which the way passes. Second by an act of dedication being deemed to have occurred by statute. This appeal is concerned with the second method.

Parliament first intervened in the creation of public rights of ways in England and Wales in 1932 when it passed the Rights of Way Act 1932. The matter is now governed by s 31 of the Highways Act 1980, the section which is relevant to this appeal. Section 31 provides:

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

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise ...’

f The final words in sub-s (1) have been referred to as ‘the proviso’ and are of some importance in this appeal.

g Because of the public interest in the conservation of public rights of way Parliament in 1949, in the National Parks and Access to the Countryside Act, placed on county councils in England and Wales a statutory obligation to prepare and publish definitive maps and statements of footpaths, bridleways and certain other highways over which public rights of way existed. Those authorities were placed under an additional statutory duty to review the particulars contained in the maps and statements from time to time. The obligations of county councils in England and Wales in relation to the ascertainment of public rights of way and
h the keeping of definitive maps and statements of such ways are now set out in Pt III of the Wildlife and Countryside Act 1981. The section which places on the ‘surveying authority’ the duties relevant to this appeal is s 53 of the 1981 Act. The particular duty with which this case is concerned is that under sub-s (2)(b). That subsection provides:

j ‘As regards every definitive map and statement, the surveying authority shall ... (b) as from that date [the commencement 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.’

The events referred to are those set out in s 53(3). The particular event relevant to this case is that described in para (c) of sub-s (3) namely—

‘the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies ...’

Modifications to the map and statement may be initiated by members of the public. Section 53(5) provides:

‘Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.’

Under Sch 14 the surveying authority who has received an application to modify the map and statement has a duty to decide whether to make or not to make the order sought in the application. If the authority decides not to make an order the applicant can under para 4 of Sch 14 to the Act, serve notice of appeal against that decision on the Secretary of State and the authority. Paragraph 4(2) of Sch 14 provides:

‘If on considering the appeal the Secretary of State considers that an order should be made, he shall give to the authority such directions as appear to him necessary for the purpose.’

Schedule 14 contains no provision requiring the Secretary of State to follow any particular procedure when considering an appeal. It was accepted by both sides in this case that the normal practice of the Secretary of State in both England and Wales was to determine appeals under Sch 14 on a consideration of documentary evidence and materials submitted by the interested parties to the Secretary of State coupled with a site visit by the person to whom the Secretary of State had delegated his function under Sch 14, although very exceptionally a hearing of oral evidence would be held.

If both the authority and the Secretary of State decide that it would not be appropriate for the authority to make an order under s 53(2) modifying the definitive map and statement that is the end of the application. Where the authority makes an order under s 53(2), sub-s (6) of the section brings into operation the provisions of Sch 15 to the Act. Schedule 15 provides that an order shall not take effect until confirmed either by the authority or by the Secretary of State. Following the making of the order, certain further procedural steps have to be taken mainly to bring the order to the attention of local authorities, such as parish councils, the owners and occupiers of land affected and the public. If following those procedural steps no representation or objection is made to the order, then the authority can confirm the order without modification, or if they require any modification to be made submit the order to the Secretary of State for confirmation by him. In his turn the Secretary of State may confirm the order with or without modification: para 6(2) of Sch 15. If a representation or objection is made and is not withdrawn the authority has to submit the order to the Secretary of State for confirmation by him, under para 7 of that Schedule. In this

- a case the Schedule does make provision for the procedure which the Secretary of State must follow. Paragraph 7(2) provides:

- b 'Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.'

We were told that the invariable practice is to hold a public inquiry.

- c The Secretary of State's power is contained in sub-para (3). It is to confirm the order with or without modification, but only after considering any representations or objections duly made and the report of the person appointed to hold the inquiry and hear representations or objections. Paragraph 12 of Sch 15 allows any person who is aggrieved by an order and who wishes to question its validity on the ground that the order is not within the powers conferred by s 53, or that any of the requirements of Sch 15 have not been
- d complied with, to make application to the High Court for the quashing of the order or of a provision in the order.

The facts

- e There is in the county of Clwyd near the village of Trevor a property known as Llyn Madoc. That property is bounded on its north side by a public highway, on its southern side by the River Dee and on its eastern side by the B5434 where it turns from running east to west to the south to cross a bridge over the river, Pont-Cysyllte, that road coming from a small village of that name. The property has two parts, the part to the west containing the house and garden and to the east a long narrow pasture between the road and the river. In 1983 Llyn Madoc
- f was acquired by Mr and Mrs Bromilow. In 1992 Gordon Michael Emery, a self-employed publisher from Chester, applied to the county council for an order modifying the definitive map and statement to show on the map and describe in the statement a public footpath running from a point just to the east of the gardens of Llyn Madoc south to the bank of the River Dee and then along the
- g bank of the River Dee in an easterly direction ending at the abutments to the road bridge over the river at the eastern boundary of the pasture. The county council decided not to make an order. Mr Emery appealed to the Secretary of State for Wales. The Secretary of State received documentary evidence from the county council, Mr Emery and the landowners together with written representations
- h made on behalf of those parties and sent an officer to visit the site in company with representatives of the county council, Mr Emery and Mr and Mrs Bromilow. The Secretary of State gave his decision in a letter dated 16 May 1995. The decision was that Mr Emery's appeal be refused.

j The evidence before the Secretary of State

It was common ground that the landowners had started to take action to prevent access to the claimed footpath in 1986 and that the necessary 20-year period to found a deemed dedication under s 31 of the 1980 Act had to be calculated retrospectively from 1986.

The evidence before the Secretary of State submitted by Mr Emery included—

'well over 100 statements showing that the path had been used by the public for walking and for access to the river bank for bathing and other leisure activities for periods ranging from 1912 up to 1986.'

These statements were in the form of questionnaires of which some 17 were included in the core bundle for this appeal. The questionnaire having asked the dates between which the individual had used the path, the way in which he or she had used the path, the frequency of use and the person's belief regarding the status of the path went on to ask these questions:

'10. Were the owners and tenants aware of your use of the path? 11. Have you ever known any locked gates or other obstructions along the line of the path? 12. Have you ever been physically prevented from using the path or told not to use the path? 13. Have you ever known any notices on the route of the path?'

In the sample questionnaires in the core bundle in all but three the persons completing the forms state that the owners and tenants were aware of their use of the path. None of these persons speak of any attempt to prevent them using the path prior to 1986. Mr Emery's solicitor in his affidavit describes these questionnaires as 'sample witness statements from the more than 100 such statements considered by the council and the Secretary of State'.

Mr Hobson for the Secretary of State did not dispute that these 17 questionnaires were representative of the whole.

The evidence from the landowners consisted of this undated document by S J Diggory:

'LLYN MADOC: RIVER BANK BETWEEN HOUSE AND PONTCYSYLLTE BRIDGE The River Bank at Llyn Madoc has been in the control of my family for over the last century, until it was sold to Mr & Mrs Bromilow in 1983. Due to the very keen interest of my family in fishing, access to the riverbank was very strictly controlled, in order to maintain and preserve the standards of fishing. We were often approached by people enquiring about permission to fish which, in most cases, we refused. During warm weather, we waged a constant vendetta on people who considered our river bank and fishing to be a local swimming pool. Despite abuse we did, whenever possible, refuse permission for access to keep people away from the river bank. In later years from around 1970, we were regularly approached by canoeing clubs and in particular by the Outdoor Pursuits school at Llanwrst. These bodies fully acknowledged our complete ownership and control of the river bank when they applied for permission to use it to practice their white water canoeing. My Aunt Ginny, Mrs Martin was born in Llyn Madoc and lived there all her life. She died aged 93 years a few years before the property was sold to the present owners. In all that time general access to the river bank was expressly refused. Indeed Aunt Ginny would often telephone me to come and assist her when people went onto the river bank, but I was not always available to do this. Original access to the river bank was from the Llyn Madoc garden. Eventually the roadside wall crumbled giving the river bank access from the road and making it difficult to control. My grandparents grazed a horse on the river bank and broad steps were built for the horse to get down onto the bank. But these were definitely not for public use. I repeat, the river bank between Llyn Madoc and the bridge has been in my

- a family's possession for well over 100 years and general access to the public has always been refused.'

The application for judicial review

- b Following the Secretary of State's decision Mr Emery brought proceedings for judicial review of that decision seeking an order of certiorari to quash the decision and an order of mandamus to compel the Secretary of State to direct the county council to make an order modifying the definitive map and statement to show the claimed footpath across Llyn Madoc's pasture.

- c The case came before Sir Louis Blom-Cooper QC, sitting as a deputy judge of the High Court in the Queen's Bench Division, who gave judgment on 4 June 1996 ([1996] 4 All ER 1) and made an order quashing the Secretary of State's decision.

- d Sir Louis Blom-Cooper rejected the arguments of the applicant's counsel that the Secretary of State had not asked himself the right question or alternatively had reached a decision which was unreasonable. The deputy judge said that everything depended on the assessment of Mr Diggory's statement; that was a decision belonging exclusively to the Secretary of State and that the Secretary of State's acceptance of Mr Diggory's statement as satisfying the proviso to s 31(1) was conclusive. Further given the structure of the legislation the deputy judge did not see how it could be said that the Secretary of State had acted irrationally.
- e He was acting entirely within the four corners of the statutory framework.

Nevertheless, despite these findings the deputy judge decided in favour of the applicant, concluding (at 16):

- f '... the Secretary of State had in this case acted unfairly in operating the statutory procedure, without due regard to the peculiar facts of this case, strictly in the manner envisaged by Parliament.'

- The deputy judge went on to say that he would have been prepared had it been necessary to hold that there had been a legitimate expectation in May 1995 that the Secretary of State would act fairly to Mr Emery in subjecting the case to a public inquiry before coming to a decision.
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- The Secretary of State appeals that decision submitting in the notice of appeal that the deputy judge erred in reaching each of those conclusions. Counsel for the Secretary of State in his skeleton argument sets out his submissions why the judgment below could not be sustained on either of these grounds. We did not have oral argument from him on either ground because Mr Laurence QC for Mr Emery indicated that he did not propose to rely on either ground to uphold the decision below except to submit to this court that the deputy judge's reasoning in favour of Mr Emery on these grounds indicated the grave disquiet the deputy judge felt with the Secretary of State's decision. Mr Laurence asked us to uphold the decision below on the basis that the Secretary of State had not applied the correct test, that the Secretary of State had failed to take into account a relevant consideration namely those answers in the questionnaires which contradicted Mr Diggory's statement and the Secretary of State's decision that a public right of way was not reasonably alleged to subsist was on the material before the Secretary of State perverse.
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The Secretary of State's decision

The Secretary of State reached these conclusions when arriving at his decision. First: 'Given the weight of evidence in the statements (furnished by Mr Emery) the Secretary of State concludes that the path has been used for the purposes claimed for the period stated.' Second: 'The Secretary of State accepts that many of these people may have genuinely believed that their unchallenged use of the path had been because it had been dedicated as a public right of way.'

The Secretary of State pointed out, correctly, that that in itself was not conclusive evidence of presumed dedication. There also had to be an examination of the actions of the owners to establish whether or not they had manifested an intention not to dedicate the way. The owners had provided a statement by a Mr S J Diggory that was 'clear and unequivocal' to the effect that during the period that Llyn Madoc and the river bank had been in the ownership of his family access had been strictly controlled. In the statement Mr Diggory had described actions taken to prevent access which indicated that during the period that the land was in his family's ownership they sufficiently indicated that they had no intention of dedicating the path as a public right of way. The final conclusion was:

'The Secretary of State therefore concludes that while the public has had access to the area in question during the period claimed, the actions of the landowners over that period have been such as to demonstrate clearly that they had no intention to dedicate it as a public right of way. The Secretary of State has had regard to all other written representations but they do not outweigh the considerations leading to his decision. For the above reasons therefore the Secretary of State's conclusion is that the evidence submitted in support of the application made under section 53(5) of the 1981 Act is not such as to indicate that a right of way is reasonably alleged to subsist along, or in the immediate vicinity of the route. Accordingly, the Secretary of State's decision is that the appeal be refused.'

Legitimate expectation

Mr Hobson for the Secretary of State observes correctly that it is not clear whether the deputy judge was prepared to hold that Mr Emery had a legitimate expectation that he would be treated fairly or whether he had a legitimate expectation that the Secretary of State would hold a public inquiry before making his decision. I agree with Mr Hobson that if it is the former it adds nothing to the case. If it is the latter, then I can see no proper basis for such an expectation. For a legitimate expectation which has consequences to which effect will be given in public law to arise, the decision maker must have made some express promise, undertaking or representation to the person or group of persons who seek to rely upon the legitimate expectation. In this case the Secretary of State did nothing upon which Mr Emery could rely to found a legitimate expectation that a public inquiry would be held. That that was the law and the factual position in the case was accepted by the deputy judge. The deputy judge went on, correctly, in my view to remind himself that the doctrine of legitimate expectation on present authority cannot reasonably be extended to the public at large as opposed to particular individuals or bodies who are directly affected by the executive action under consideration see *R v Secretary of State for the Home Dept, ex p Fire Brigades Union* [1995] 2 All ER 244 at 248, [1995] 2 AC 513 at 545 per Lord Keith. The

- a deputy judge then cited a passage in de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th edn, 1995) p 426, para 8-058 that someone who is unaware of an express promise, representation or undertaking may still be able to rely on a legitimate expectation. The deputy judge progressed from that suggestion to a proposition that where there was a stark conflict between the claimants to a public right of way and the landowner it could be said that there
- b was an expectation that the particular case, exceptionally, called for a different and fairer procedure than the normal procedure followed by the Secretary of State under Sch 14. In such a case the decision maker 'has by implication promised' the fairer procedure. In my judgment this reasoning cannot be sustained. It is contrary to the developing case law on legitimate expectation, which, as the deputy judge himself acknowledged, has so far required some
- c express promise, undertaking, representation or published policy statement emanating from the decision maker made to a particular individual or group. In effect, the deputy judge's reasoning does away with the accepted basis of the principle of legitimate expectation altogether. With respect to the deputy judge, in my opinion the conclusion he reached on legitimate expectation in this case was clearly wrong.

- d I have reached a similar conclusion with regard to the deputy judge's decision on procedural fairness. In his written submissions on this point, Mr Hobson on behalf of the Secretary of State concedes that courts may legitimately supplement statutory procedures with requirements over and above those specified in order to achieve fairness, citing Lord Bridge in *Lloyd v McMahon* [1987] 1 All ER 1118 at 1161, [1987] AC 625 at 702. What is not legitimate, submits Mr Hobson is for a court to supplant the statute. Mr Hobson submits that this is precisely the effect of the deputy judge's decision. The requirement the deputy judge has added is inconsistent with the statutory procedure. Mr Hobson's skeleton argument continues:

- f 'Further, any such requirement would subvert the filter system that Parliament has decided to impose. It is submitted that it is to be expected in footpath cases that evidence will be given by numerous witnesses, frequently conflicting. The effect of the deputy judge's decision would be that, despite
- g the existence throughout of cogent and convincing evidence that there was no intention to dedicate, many cases would be forced to go to a public enquiry. Land owners would be obliged to go to the trouble and expense of objecting, giving evidence at a public enquiry and possibly appealing to the Secretary of State, in order to protect their property rights, contrary to the legislative intent.'

- h Mr Laurence for the respondent accepted that the deputy judge's additional procedural safeguard could result in the holding of two public inquiries, because the Secretary of State would not be excused from his duty to hold a public inquiry under Sch 15 by the fact that he had in a particular case decided to have a public
- j hearing at the Sch 14 stage.

The deputy judge began this section of his judgment by asking whether the Secretary of State was acting fairly in declining to put the rival claims of the public users of the footpath and of the landowner to the test of an oral examination when determining the appeal under para 4(2) of Sch 14. The deputy judge went on to state (at 14): '... the court is the author and sole judge to set procedural standards, and it may do so to supplement statutory procedures.' He cited three

authorities including this passage from the speech of Lord Bridge in *Lloyd v McMahon* [1987] 1 All ER 1118 at 1161, [1987] AC 625 at 702–703: a

‘... it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the court will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.’ b

The deputy judge went on to observe that the duty to act fairly depends on the construction of the particular statute; and, that where the statute has omitted to supply a procedure that will be fair to all claimants to a public right of way as well as to landowners who might wish to resist such claims, any implication that such omission is deliberate cannot operate exclusively to all situations. The deputy judge reminded himself that the court may supplement the statutory procedure but must not supplant. And then this passage appears in the judgment of the deputy judge (at 16): c

‘It is not suggested by Mr Laurence that such a safeguard should be available in all cases; only those where (as here) there is a conflict of evidential material between public user and landowner. Although there appears to be no authority for the proposition that the court can supplement a legislative code even only on an *ad hominem* basis, picking and choosing the cases where the court would demand of the decision maker that he order a public inquiry on the grounds of fairness, I see nothing in the formula for testing the requirement of fairness in Lord Mustill’s speech in *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560 that would preclude the court’s intrusion, since the question is essentially one of “intuitive judgment” by the court. My intuition, that the procedural provisions of Schs 14 and 15 produce an imbalance, weighted in favour of private rights at that investigative stage of rival claims, is not displaced by what Parliament has stated so clearly. There is, in my view, room for concluding that the Secretary of State has in this case acted unfairly in operating the statutory procedure, without due regard to the peculiar facts of this case, strictly in the manner envisaged by Parliament. He could have ordered a public inquiry, *dehors* his statutory powers, as indeed on rare occasions, I am told, has happened.’ d
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This reasoning, in my opinion, places the Secretary of State in an impossible position. There will be cases with ‘peculiar facts’ which require the Secretary of State to adopt a procedure in addition to that ‘strictly envisaged by Parliament’ if his decision is not to be set aside on the ground of procedural unfairness. Whether such peculiar facts are present and whether it is such a special case will be ‘a matter of intuitive judgment by the court’ to whom an application for judicial review is made. Such an approach, if adopted by the courts would leave the Secretary of State in an impossible position and would in effect require him, as Mr Hobson points out, either to direct the making of an order in every case where there was a conflict of evidence or to hold a public inquiry at the Sch 14 stage, with the risk that there might have to be a second public inquiry at the Sch 15 stage. In my judgment, this approach is quite wrong in principle and would be disastrous in practice. h
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It is quite wrong in principle, because it is not a case of supplementing the regime laid down by statute. When the court supplements a statutory procedure,

- a the additional safeguard which the court requires will apply in every case. The additional safeguard that the deputy judge envisaged would apply in some cases but not in others. This, with respect to the deputy judge, must be wrong. He himself acknowledged that there appeared to be no authority for the proposition that the court can supplement a legislative code on an ad hoc basis. Moreover, it cannot in my opinion be argued that the normal procedure followed by the Secretary of State at the Sch 14 stage is unfair, when it is remembered the issues that the Secretary of State is having to decide. There is nothing intrinsically unfair about resolving at a preliminary stage, Mr Hobson's 'filter system', the issues whether a right of way exists or can reasonably be alleged to subsist by resort to documentary evidence, written submissions and a view of the claimed way provided that each interested party knows the case being made by the other and has the opportunity not merely to advance their own positive case but to make comment on the other parties' case or cases.

The test that the Secretary of State should apply at the Sch 14 stage

- d Section 53(3)(c)(i) relates to discovery by the authority of evidence of two separate things. First, evidence that a right of way which is not shown on the maps subsists and, second, evidence that a right of way which is not shown on the map is reasonably alleged to subsist. Difficulty is caused by these two limbs of this subsection. There can only be discovery by the authority of evidence that a right of way which is not shown on the map subsists if there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public.

- e Where there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s 31(6) of the 1980 Act (deposit of a map and statement by the landowner and the lodgement of a statutory declaration and the absence of proof of contrary intention) then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists.

- g The problem arises where there is conflicting evidence on one or other or both issues. In approaching such cases, the authority and the Secretary of State must bear in mind that an order under s 53(2) made following a Sch 14 procedure still leaves both the applicant objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following a public inquiry. The question of the correct approach arose in *R v Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402 heard by Owen J in April 1994. In *Ex p Bagshaw* Mr Bagshaw sought an order modifying the definitive map and statement to show a former mine track as a public right of way. The county council decided: 'The evidence of use ... is thus completely irreconcilable and makes it difficult to be satisfied that a public right of way is reasonably alleged to exist.' The Secretary of State decided: '... that the evidence is irreconcilable and as such no right of way can reasonably be alleged to subsist, on the basis that unimpeded public use of the route ceased in 1982.' In the course of his judgment Owen J said (at 407–408):

'The common question which is raised by these two applications is the construction of section 53(3)(c)(i). It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing

“that a right of way which is not shown in the map and statement subsists”^a and showing that a right of way which is not shown in the map and statement “is reasonably alleged to subsist”. Accordingly the questions for the council and subsequently for the Secretary of State were: does the evidence produced by the claimant together with all the other evidence available show that either—(a) a right of way subsists? (I shall call this test “A”), or (b) it is reasonable to allege that a right of way subsists? (I shall call this test “B”).^b To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. The first of those possibilities does not apply here. Accordingly the question which was for decision by the councils and also by the Secretary of State is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence available to the council. The question is not: was it reasonable for the claimant so to allege?—since the claimant is not to be the judge of that. At this stage the authority is to be the judge. At a later stage it is to be the Secretary of State. Even less is it for me to be the judge of that. Subject to an allegation of *Wednesbury* unreasonableness [see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223], which may have been in part alleged here (although I think that in the end it was not), the decision of the Secretary of State must be final if he asked himself the right question. The wording of the section indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right of way does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under section 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of inquiry with either confirmation or refusal to confirm.’^c

Owen J went on to examine cases which indicated that in disputes over rights of way judges had in the past indicated the importance and advantage of oral testimony. The judgment continues (at 409):^d

‘Mr Hobson argues that “if the decision maker accepts the evidence of the objectors, which he may do without rejecting the evidence of the claimants as untruthful, he is entitled to conclude that the right of way cannot reasonably be alleged to exist”. However, this cannot be an answer in Mr Bagshaw’s case since the conflict is said to be irreconcilable, at least on paper, and there would then seem to be only one way to resolve that conflict. If, on the other hand, the evidence were to be wholly documentary it might be possible, satisfactorily and reliably, to evaluate that evidence without any necessity for a hearing, and in these circumstances answer the question whether a reasonable person could reasonably allege a right of way to subsist. In argument Mr Laurence did not wish to accept this proposition and argued that inquiries frequently lead to the discovery of yet more unknown evidence which may affect the answer to questions. This may be true. However, as the question which has to be answered is: “Does the

- a evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?", it would be difficult to take into account unknown evidence. Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.'
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- c I respectfully agree with these passages in the judgment of Owen J, in particular with his formulation of the question that arises in a case such as the present, namely 'Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?' and the approach to be adopted in answering that question in the last paragraph cited from his judgment.
- d Where documents can be decisive of either Owen J's tests 'A' or 'B', for example where a landowner has taken the steps required by the provisions of s 31(3) and (5) or s 31(6), then the Secretary of State can reject the claim as an unreasonable allegation, because a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail. But where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.
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The present appeal

- g The Secretary of State found that the actions of the landowners had been such as to demonstrate clearly that they had no intention to dedicate the path as a public right of way. That was based on the undated statement of Mr S J Diggory, which the Secretary of State considered to be a clear and unequivocal statement. That statement was to the effect that access to the river bank was very strictly controlled; that the statement maker's family waged a constant vendetta; that whenever possible permission for access was refused; that 'in all that time general access to the river bank was expressly refused', and that general access to the public has always been refused. In my judgment, far from being clear and unequivocal, the statement of Mr Diggory leaves open the question whether persons using the path simply as a footpath and not for access to the river and the river bank were ever refused permission. Moreover the answers given in the questionnaires to questions 10 to 13 demonstrate a fundamental conflict of evidence between those completing the questionnaire on the one hand and Mr Diggory on the other. Mr Hobson sought to circumvent this conflict by saying that the landowners could have tried to prevent access, and indeed refused access but by chance not to have done that to the knowledge of any of those completing
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the questionnaires. If the refusals of which Mr Diggory speaks in his statement were refusals to use the path as a footpath, and were as constant as he claims, it would to my mind be inconceivable that all of those answering the questionnaires would have escaped challenge. a

It is true that the Secretary of State says that he has had regard 'to all other written representations' but there is no other indication in the decision letter that the Secretary of State has turned his mind to the very real conflict between the statement of Mr Diggory and the answers given by those completing the questionnaires. It is of some significance that the Secretary of State did not feel able to decide that no right of way existed in this case, which is the conclusion to which he should logically have come if he was persuaded there was sufficient evidence that there was no intention by the landowner during that period to dedicate the way. His failure to conclude that there was no such right of way contradicts his finding that the actions of the landowners over that period had been such as to demonstrate clearly that they had no intention to dedicate it as a public right of way. For these reasons, in my judgment, the Secretary of State did not follow the guidance provided by Owen J in those passages of his judgment which I have cited. He has looked at the statement of Mr Diggory in isolation and has attributed to it a weight which it cannot carry and he has failed to weigh that statement against the answers in the questionnaires to questions 10 to 13 inclusive. On the material available to the Secretary of State summarised in his decision letter, it was not, in my judgment a reasonable conclusion for the Secretary of State to reach that the evidence submitted in support of the application made under s 53(5) was not such as to indicate that a right of way was reasonably alleged to subsist. b
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In reaching this decision I have borne in mind the observation of Laws J in *Jaques v Secretary of State of the Environment* [1995] JPL 1031 at 1037–1038, where he said:

'Quite plainly, the second part of section 31(1) imported a further requirement. It meant that *even if* use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate. The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to have made it clear to the public that they had *no* right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part. That was not a very satisfactory state of affairs. It was plain that the landowner had to disprove an intention to dedicate by overt acts directed to the members of the public in question, but equally plain that they need not actually bring home to the public that there was no right to use the way. He [Laws J] could only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private would be enough for the landowner's purposes in relation to the second part of the subsection, though they did not in fact bring home to the public his objection to their using his land.' (Laws J's emphasis.) f
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I would accept this as a logical exposition of the law but it does not disturb my conclusions in the present case because Mr Diggory's statement spoke of overt acts directed to members of the public using the way which must, had they been

a performed with the frequency and constancy suggested in the statement have brought home to the public that there was no right to use the way. That conflicted with the evidence of the more than 100 persons who completed the questionnaires.

For these reasons I would uphold the order made by the deputy judge quashing the decision of the Secretary of State.

b **PHILLIPS LJ.** I agree.

NOURSE LJ. I also agree.

Appeal dismissed.

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Kate O'Hanlon Barrister.

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