



Overview | **[2017] EWHC 716 (Admin)**

Ramblers Association v Secretary of State for Environment Food and Rural Affairs [2017] EWHC 716 (Admin)

Queen's Bench Division, Planning Court

Dove J

7 April 2017

Judgment

George Laurence QC & Luke Wilcox (instructed by **Bates Wells Braithwaite LLP**) for the **Claimant**

Tim Buley (instructed by **Government Legal Department**) for the **Defendant**

Juan Lopez & Charles Forrest (instructed by **Network Rail Infrastructure LTD**) for the **Second Interested Party**

The first and third interested parties were not represented and did not appear

Hearing dates: 14th & 15th February 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This is an application for judicial review in relation to the decision of an Inspector appointed by the defendant dated 26th October 2015, whereby he refused to confirm the Nottinghamshire County Council (Burton Joyce Footpath No.17 and Stoke Bardolph footpath No.6) Modification Order 2013 ("the Order"). On 1st May 2006 the claimant made an application to the first interested party ("NCC"), who are the highway authority, to add the footpath to the Definitive Map and Statement for which they have responsibility. The application was made under section 53(5) of the Wildlife and Countryside Act 1981. On 5th October 2011 the application was refused and the claimant appealed to the defendant. That appeal was allowed on 21st February 2012 by the defendant's duly appointed Inspector, and NCC were directed to modify the Definitive Map and Statement to include the footpath, leading to NCC (having concluded that they would accept the decision and not seek to challenge it by way of judicial review) to make the Order on

1st February 2013. The second interested party (“NR”) objected to the making of the Order for reasons which are set out below, leading to the convening of a public inquiry in relation to whether or not the Order should be confirmed and the decision under challenge.

The facts

2. The claimant's application related to a claimed footpath passing from Nottingham Road, Burton Joyce in the north-west, passing in a south-easterly direction across country and over a level crossing of the railway line running from Nottingham to Lincoln, until it intersected with the Stoke Bardolph Footpath No.1. The proposed footpath passed over land belonging to the third interested party (“STW”), and also, obviously, railway land operated by NR. The footpath was claimed on the basis of 20 years' usage, and evidence of user forms were submitted from people who had used the route to establish that the requirements of section 31 of the Highways Act 1980 (as set out below) were met. In all, 33 evidence forms were ultimately provided to NCC describing use of the way. In the analysis of the forms provided by the Inspector who considered the appeal against the refusal of NCC to grant the application for modification she describes the evidence as follows:

“14. A total of 33 user evidence forms...provide evidence of claimed use, the earliest use dating from 1956. Fifteen forms indicate for the full 20 year period 1986-2006, with 13 people claiming use weekly and 15 people claiming use monthly, mostly for recreational purposes. Of the 19 forms relating to the 20 year period 1970 to 1990, 3 people claim use for the full 20 year period with a further 16 claiming use for periods of 5 to 15 years. Frequency of use during this earlier period varies from 2 or 3 times a year to daily, with 6 claiming monthly use, 3 claiming use twice a month, and 4 claiming use more than twice a week. None of the users refer to notices or challenges to their use prior to 2006, suggesting that the use was as of right...Some mention warning signs carrying instructions, but these were directed at those crossing the railway with vehicles or animals.”

3. The objections raised by NR were both legal and factual. Dealing firstly with the factual points, an analysis was presented of the private Act of Parliament, the Midland Railway (Nottingham and Lincoln) Act 1845 and its accompanying material in the form of the Deposited Plan and Book of Reference detailing the survey of affected land interests at the time of the Act receiving assent. This material did not show the existence of any public right of way at that time. It showed that the land either side of the present level crossing was in the same ownership and at the point of the level crossing there was in existence at that time an “occupation road”. It was therefore concluded that the level crossing was created to enable continued access along this private road for the benefit of the landowner. This reflected the position of STW, who owned the land either side of the railway lines at the point of the level crossing and who had the benefit of a right of way across it over the level crossing. In addition to this point, NR's witness gave evidence of a photograph from 1993 showing that the gates at the level crossing were chained and locked at that time. NR also relied upon the evidence of STW, and in particular Mr Jackson (one of their estate managers for the land either side of the level crossing over which the proposed footpath ran) that the gates at the level crossing were chained and padlocked, cross-referencing this to evidence from the claimant's user forms which alluded to gates at the level crossing being padlocked.

4. In relation to their legal objections, NR contended that there were three separate reasons in law why the Order should not be confirmed. These arguments are more fully developed below, as they form a significant part of the subject matter of this case. The first reason was that it was contended that NR had no capacity to dedicate a new public right of way on the basis that dedication would be inconsistent with its obligations to operate a safe and efficient railway network.

5. The second reason relied upon was the contention that the Licence under which NR operate the rail network would not permit the creation of new rights over railway land without the consent of the Office of

Rail and Road ("ORR"). The terms of the licence which were in issue were contained in the version of the Licence dated 1 April 2014 as follows:

"7 Land Disposal

7.1 The licence holder shall not dispose of any land otherwise than in accordance with this condition.

7.2 The licence holder may dispose of any land where:

(a) ORR consents to such disposal; or

(b) The disposal is required by or under any enactment...

"disposal" includes any sale, assignment, gift, lease, licence, the grant of any right of possession, loan, security, mortgage, charge or the grant of any other encumbrance to subsist (other than an encumbrance subsisting on the date when the land was acquired by the licence holder or on 15th November 2001) or any other disposition to a third party, and "dispose" shall be construed accordingly;"

6. The third legal issue raised by NR was the contention that since trespass on the railway was rendered a criminal offence by section 55 of the British Transport Commission Act 1949 the footpath could not be the subject of dedication. The claimant sought to refute this argument through reliance upon the case of Bakewell Management Ltd v Brandwood and others [2004] UKHL 14. The claimant submitted that the principle should not be given effect in the present case so as to deprive the public of the benefit of the right of way which would otherwise be established.

7. Having heard the evidence and the arguments at the inquiry, and having conducted a site visit, the Inspector reached conclusions in relation to the merits of confirming the Order. It is necessary in order to understand the arguments raised in this judicial review to set out the Inspector's findings and conclusions at some length. He dealt first with the issues that arose in respect of whether or not the Order should be confirmed in so far as it affected NR's land and the level crossing. At the outset he addressed the arguments about incompatibility with NR's statutory objects and the point about the ORR Licence as follows:

"8. The RA submit that for the purposes of the statutory scheme there is no requirement for the applicants to demonstrate that there was anyone with the legal capacity to dedicate. The RA says that the purpose of section 1(2) of the Rights of Way Act 1932 was to eradicate the need for capacity to be demonstrated once use had been established for a period of 40 years. That specific section was repealed under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) so that since the coming into operation of the 1949 Act a way can be deemed to have been dedicated irrespective of whether there was a person or body with the capacity to dedicate.

9. However, for the statutory scheme to be engaged in the first place, the clause 'whether the way is of such a character that use of it could not give rise at common law to a presumption of dedication' must be addressed. At common law, there remains a requirement for the person or body against whom dedication is inferred to have the capacity to dedicate. Whilst section 1 of the Rights of Way Act 1932 established a statutory framework whereby the capacity to dedicate requirements could be dispensed with following a necessary period of use, the common law principle involving the capacity to dedicate remains relevant in certain circumstances. If Network Rail does not have the capacity to dedicate a public right of way over its operational land either because such a dedication would be inconsistent with its statutory duties or

because it could not authorise use which would otherwise be criminal, a public right of way could not come into being at common law or under the statutory scheme.

10. Network Rail drew support from the case of *British Transport Commission v Westmoreland County Council* [1958] (the *Westmoreland* case). As contested by Network Rail, this case established a number of principles:

(i) A statutory undertaker (such as Network Rail) cannot voluntarily release or otherwise abandon a statutory power that has been conferred upon it by special Act of Parliament and that concerns the manner in which that statutory undertaker may permissibly deal with land acquired for the purposes of that Act;

(ii) A statutory undertaker cannot, in the absence of an express statutory power, grant any easement over land acquired for the purposes of its special Act if the existence of such an easement – in any possible circumstances and at any future time – would undermine the statutory undertaker's satisfaction of the purposes of the special Act;

(iii) a statutory company has no power to grant a public right of way where the enjoyment thereof by the public *is incompatible* with the statutory objects of the company; and

(iv) for the purposes of adjudging *incompatibility*, it is a question of fact whether, at the date when the question is considered by a tribunal of fact, that there is any likelihood that the existence of an alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duty.

11. In the *Westmoreland* case, the route at issue ran over a bridge spanning the railway; the court found that the existence of the bridge did not endanger the running of trains upon the lines. In that case, statutory incompatibility did not arise, nor did the issue of criminal trespass under section 55 of the British Transport Commission Act 1949 (BTCA). The question of incompatibility is therefore a question of fact in each case. The circumstances in the *Westmoreland* case are different from that at Zulus Crossing where it is claimed a public right of way has come into existence crossing the live rails of the railway on the level.

12. Mr Jones's evidence was that an assessment had been made of the risk to users of the crossing using Networks Rail's ALCRM model. The assessment gave the crossing a score of C6, which reflected the number of vehicular traverses by the private rights holder against the number and speed of the trains passing over the crossing. The risk assessment did not take into account public use of the crossing as there was no empirical data for public use of the crossing to insert into the model.

13. A covert camera installed at Zulus Crossing for a period of 9 days in August 2015 had revealed around 60 crossings of the tracks by members of the public. The photographs showed single pedestrians crossing the railway, cyclists, dog walkers and families with small children and / or pushchairs. In Mr Jones' view, those members of the public encumbered with children, dogs or other accompaniments placed themselves at greater risk in crossing the railway as their primary attention may not be upon looking and listening for approaching trains. Factoring in 20 pedestrian crossings per day into the ALCRM model raised the crossing risk assessment to C5. Based on the ALCRM model, it was Mr Jones' view that public use of Zulus Crossing increased the level of risk to crossing users and train passengers with a corresponding reduction in safety at the crossing.

14. Mr Greenwood's evidence was that Network Rail's licence included conditions under which the railway must operate and is the primary tool which the Office of Rail and Road (ORR) has for holding Network Rail to account in respect of safety and operational efficiency. The Licence contained conditions which govern Network Rail's competence to grant new rights which affect operational land; the grant of any such rights

would require the consent of the ORR. Mr Greenwood said that Network Rail would not receive such consent from ORR to grant a new public right of way over the railway as the grant would undermine the business of operating and improving the network. Condition 7 of the licence prevented the disposal of railway land without ORR consent and 'disposal' for the purposes of condition 7 included the 'grant of any other encumbrance or knowingly permitting any encumbrance to subsist'. It was submitted that a change of the status of the crossing from a private vehicular crossing to one which also carried public rights was a 'disposal' of the land which given the implications regarding safety and risk would not be consented to by ORR.

15. Although there had been no fatalities at Zulus Crossing, an increase in pedestrian use of the crossing as a result of the existence of a public right of way is likely to increase the risk of an accident or fatality occurring. Such increase in risk and danger to both crossing users and passengers on the railway is reflected in the revised ALCRM risk assessment. In my view, use by the public of Zulus Crossing would be incompatible with Network Rail's ability to undertake and execute its statutory objectives as set out by the legislation governing the operation of the railway network."

16. Section 55 (1) of the BTCA provides that 'Any person who shall trespass any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty...'.

17. The claimed footpath crosses the Nottingham – Newark railway on the level and it is clear that the land is part of the operational railway. The crossing therefore satisfies the description of land found in section 55 as being 'the lines of the railway'. Use of Zulus Crossing by the public therefore constitutes an offence under section 55 of the 1949 Act.

18. It was argued by the RA that the principles established in Bakewell Management Ltd v Brandwood [2004] (Bakewell) could be applied to pedestrian use of Zulus Crossing. In Bakewell the House of Lords found that rights could be acquired over land through unlawful long use if that unlawful use could have had been authorised. The RA contended that although section 55 of the 1949 Act makes trespass over '*the lines of the railway*' a criminal offence, it must be within Network Rail's power to authorise what would otherwise be a trespass since customers have to go '*in dangerous proximity to lines of railway*' in the ordinary course of using the railway.

19. At issue in Bakewell was whether the use prohibited by statute could have been authorised and therefore not be a criminal act. In that case the offence of driving across a common was committed when done '*without lawful authority*'. The House of Lords found that authority to drive over the common could have been given and therefore no offence would have been committed. The Road Traffic Act 1988 and the Law of Property Act 1925 both prohibit the driving on a common '*without lawful authority*'. The RA contends that although section 55 of the BTCA does not include the term '*without lawful authority*', the concept of trespass is such that it implies that authority could be given by the landowner. The RA notes that rail passengers are regularly in '*close proximity to lines of railway*' when they stand on platforms waiting for their train; these people must be trespassers under the provisions of section 55 but are permitted to remain by Network Rail.

20. I am not persuaded by the RA's line of argument on this point for a number of reasons. First, Bakewell concerned criminality because the landowner could give, but had not given lawful authority to drive over the common. This is in direct contrast to section 55 of the BTCA which makes trespass on the railway a criminal act and where there is no provision for the network operator to give 'lawful authority' for such acts. Secondly, Network Rail cannot grant such authority as it would be contrary to the terms of the license

under which it operates. Finally, the analogy drawn by the RA regarding passengers standing on a platform as engaging in 'authorised trespass' when they are in 'close proximity of the rails' is incorrect; any passenger present on a platform is an invitee or client of the railway company and is therefore not a trespasser.

21. Furthermore, passengers standing on platforms are presented with a number of safety related messages regarding where not to stand so that they are not placed at risk; notices such as 'keep away from the platform edge' and the line painted on the platform edge to mark out where it is safe to stand prevent passengers from being in 'close proximity of the rails'. Trespass on the railway at railway stations is committed when and if passengers contravene those notices which warn against trespass which are usually located at the ends of the platform.

22. In any event, in Bakewell the House of Lords drew a distinction between those cases where it was possible to authorise use and remove the element of criminality and those in which it was not; *"It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant of the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the owner to grant."* Zulus Crossing falls into this latter category as it is not possible for Network Rail to authorise the use which the public have made of the crossing.

23. There can be no doubt that the action of members of the public walking over Zulus Crossing is a trespass 'over the lines of railway' in contravention of section 55 of the BTCA. The only persons authorised to use Zulus Crossing are Severn Trent Water as successors in title to the owner whose land were bisected by the construction of the railway and for whom the crossing was constructed.

24. For a penalty of trespass to be applicable under section 55 of the 1949 Act it is necessary that notice to not trespass on the railway has been given at the railway station nearest to the point where the trespass is alleged to have taken place and that such notices have been renewed when defaced or destroyed.

25. Network Rail submitted copies of photographs of signs at Burton Joyce and Carlton stations taken in June 2015 and September 2015 respectively. I viewed the signs at Burton Joyce station myself as part of my unaccompanied site visit. The photographs show signs located at the ends of the platform which give warning to pedestrians not to cross the line or pass beyond the sign. It was Miss Bedford's evidence that the signs at Burton Joyce and Carlton stations had always been in place and that although the current signs did not mention the word 'trespass', their meaning was clear and unambiguous. It was Miss Bedford's understanding that the required signs had always been in place and although there was no photographic evidence to that effect from the 1950's to the 1990's, Miss Bedford considered it to be more likely than not that the required signs had been maintained in place at all material times.

26. There is no direct evidence that the relevant signs have been in place at Burton Joyce or Carlton stations since 1949 but equally no evidence has been submitted to demonstrate that such notices had not been present. In the absence of any contrary evidence I attach some weight to Miss Bedford's evidence which was subject to cross-examination and was not demonstrated to be incorrect. Given that the network operator has a statutory duty to prevent trespass on the railway, I consider it more likely than not that the required prohibitory notices have been present at Burton Joyce and Carlton stations to give effect to section 55 of the 1949 Act in respect of pedestrian use of Zulus Crossing.

27. Notices and signage has also been present at Zulus Crossing to advise authorised users on the safe use of a 'user-worked' crossing. A photograph of the site taken in 1993 shows a sign which is headed 'Stop Look Listen'; other words are also present on the sign but the quality of the photograph and the graffiti on the sign makes the remaining wording illegible. The Council stated in its report to the Rights of Way Committee that the additional wording was 'Notify local British Rail Manager before crossing with a vehicle which is unusually long, wide, low, heavy or slow moving. 1. Open both gates quickly and look in both directions before crossing. 2 Cross quickly. 3. Close and secure gates after use. Penalty for not doing so £100'. This same signage appears to have remained in place until at least 2006 and is shown in a photograph taken in July of that year.

28. Currently present at Zulus Crossing is a large sign on each gate which reads 'Private level crossing authorised users only'; further signs on the gates warn of a 'penalty for not closing gates £1000'. There are other signs which give advice on the safe use of the crossing with vehicles and animals and a sign with the legend 'warning do not trespass on the railway penalty £1000'. I accept that the signs currently in place were not present in 2006 when the RA's application was made and that the signs which were present during that period were not as comprehensive as they are today.

29. The witnesses I heard from at the inquiry confirmed that there had been signs present on site although recollections about the precise wording of those signs was mixed. Mrs Wollacott recalled a sign saying '*please close the gate*' but no other signs; Mrs Gretton recalled a sign on the gate which read '*failure to close gate penalty*'; Mr Wright had seen a sign near the gate but he could not recall the wording. Mr Bethell had used the crossing as part of his duties for Severn Trent Water and recalled cast iron signs being present at the crossing prior to the printed steel signs which had been present since at least 1993; he recalled signs along the lines of '*keep gate closed*' or '*close gate after use*'. Mr Parkes recalled the existence of signs but not the wording.

30. The RA submit that to all intents and purposes the signage present during the 20-year period did not convey to the user that the crossing was a private accommodation crossing; the absence of appropriate signage meant that the user had deduce from the physical characteristics of the crossing as to whether it could be used. It was submitted that at many crossings there are signs which say 'do not trespass on the railway' which is likely to be understood by users not to turn left or right to walk along the tracks. In the RAs view, Zulus Crossing was not dissimilar to the other crossings of the Nottingham – Newark line that the public were used to using.

31. It was Network Rail's case that appropriate signage had been erected and maintained at all times at Zulus Crossing and that the signage was directed at the authorised users of the crossing; that is, those who held a private vehicular right of way - the signage which had been present prior to 2006 could not be construed as implying a licence to the public to use the crossing.

32. The photographic evidence demonstrates that signage was present at Zulus Crossing. I agree with Network Rail that the wording of the signs present from at least 1993 until at least 2006 was directed at the private user of the crossing; the public having no rights over the crossing, let alone rights with large, wide, low, heavy or slow vehicles. These signs clearly offer advice to the private rights holder on how to safely cross the railway. There does not appear to have been any signs which specifically warned against trespass on the railway at Zulus Crossing until after 2006. However, the absence of such signage is immaterial given that I have concluded that signs which complied with section 55 (3) of the BTCA were present at Burton Joyce and Carlton stations during the relevant period; in such circumstances any use by the public of Zulus Crossing would have amounted to criminal trespass."

8. The Inspector then went on to consider the factual questions which had been raised as to whether the requirements as to user had been met. His factual findings in relation to the evidence before him were expressed in the following terms:

“33. It is apparent from the images recorded by the covert camera during August 2015 that public use of Zulus Crossing is continuing despite the existence of signs warning against trespass and despite both gates being locked to prevent unauthorised use. Although the RA submits that there are good sight lines at Zulus Crossing which allows pedestrians to cross in safety, the ALCRM methodology employed by Network Rail suggests that there is a high risk of accidents occurring at this crossing; just because there has been no fatality at the crossing does not mean it is safe to use.

34. I only heard from 5 user witnesses as the inquiry and a total of 33 user evidence forms were submitted in support of the application. The user evidence collectively demonstrates that the public has habitually crossed the rails at Zulus Crossing throughout the 20 years prior to 2006, with some users claiming to have walked over the rails on a weekly basis and others on a monthly basis.

35. Some of this use must have involved climbing over a locked gate at the Stoke Bardolph side of the railway prior to 2002 when Mr Jackson replaced the padlock with a hook and eye fastening. The locking of the gate to prevent unauthorised use of the crossing would effectively interrupt the public's enjoyment of the way and the action of climbing over a gate which has been specifically locked to prevent access can be regarded as use with force. In such circumstances, at least some of the claimed use during the 20 years prior to 2006 would have been interrupted and some would have been use which was not 'as of right' if the provisions of section 31 (1) were applicable to this case. However, any of the use by the public after 1949 is negated by the continuing effect of section 55 of the BTCA.”

9. The Inspector drew together all of his conclusions in relation to these issues and whether or not the Order should be confirmed, in so far as it affected the railway land and the level crossing, as follows:

“36. The claimed footpath crosses an operational railway on level and the dedication of a public right of way in such a location would be incompatible with the statutory objectives of Network Rail with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. Under the provisions of previous and current legislation governing the operation of the railway network, Network Rail and its predecessors lacked the capacity to dedicate new public rights of way over the live rails at Zulus Crossing. As Network Rail lacks the capacity to dedicate a public right of way, the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.

37. As dedication of a public right of way at common law cannot have occurred at Zulus Crossing, it follows that the provisions of section 31 of the 1980 Act are not engaged. Furthermore, at all material times during the relevant 20-year period Zulus Crossing has been subject to the provisions of section 55 of the 1949 Act. Any use of the crossing by the public has been unlawful and it is not possible for Network Rail to grant lawful authority for such use. I conclude that as it is not possible for dedication of a public right of way to have occurred at common law the Order should not be confirmed with regard to Zulus Crossing.”

10. The Inspector then turned to consider the question of whether the Order should be confirmed in relation to the STW land. This aspect of the case involved consideration both of the question of the evidence in relation to use of the parts of the footpath in question on the STW land, and also the question of whether those parts of the footpath should be confirmed when they had the effect of forming two culs-de-sac. The Inspector's conclusions were as follows:

“38. The remainder of the Order route crosses land owned by Severn Trent Water and that land is not subject to the same statutory restrictions as the land owned by Network Rail. The available user evidence is of use of the path throughout the 20 years prior to 2006 and other than the challenges to use said to have been made by Mr Jackson in around 2007, there is little evidence to suggest that use was interrupted or was by stealth, force or with the permission of the owner. In addition, no evidence was presented to demonstrate that Severn Trent Water took active steps to inform the public that there was no intention to dedicate a right of way over what is an internal access road. Mr Jackson spoke of signs being present around the estate at the time when waste treatment took place in large open lagoons, but modern methods meant that the estate now had the appearance of a normal farm estate.

39. Whilst there is nothing to prevent a public right of way being a cul-de-sac at one end, the result of the section over Zulus Crossing not being recorded as a public right of way would be the recording of two culs-de-sac each one ending at the railway. These footpaths would not connect with any other path in the network in the vicinity of the railway and would only lead to the railway at Zulus Crossing. To use the 'missing link' between these two paths would constitute a criminal trespass, and the 'missing link' cannot therefore be regarded as a legitimate point of termination sufficient to justify public rights leading directly to either side of the railway.

40. I consider that as there is no legitimate place of public resort at either cul-de-sac, the remainder of the Order route could not be lawfully established as a public highway at common law. It follows that the Order should not be confirmed to show the residual part of the Order route as two cul-de-sac paths.”

11. In the light of the conclusions that the Inspector had reached his decision was that the Order should not be confirmed.

The issues in the case

12. As originally formulated the judicial review proceeded on 13 Grounds ranged across several forms of allegation that there were errors in the Inspector's decision. As the arguments (both written and oral) emerged, the positions on both sides of the case were clarified and refined. Some issues fell away. In short, in the final analysis the claimant relies upon three reasons why the Inspector erred in law in concluding that the Order should not be confirmed.

13. Firstly, the Inspector was wrong to conclude that the confirmation of the Order would conflict with NR's statutory duties, and therefore that they did not have capacity to give rise to the right of way. In essence, the claimant's arguments are that firstly, the Inspector assessed the issue at the wrong date, secondly, that he assessed it as part of the assessment of the “character” exception under section 31(1) of the Highways Act 1980 and should have assessed it under the “incompatibility” exception in section 31(8) of that Act, and thirdly, that the conclusions which he reached in relation to the assessment of risk were irrational. This latter point, is in my view, not at all evident from the claimant's Statement of Facts and Grounds, and objection was taken to it being raised for the first time at the hearing by both the defendant and NR. The claimant applied for permission to raise this argument at the hearing and I heard submissions from all sides about it. I shall assess those submissions below and in that context conclude whether permission to amend should be granted and express my conclusions on the points raised.

14. The second reason why it is said that the Inspector erred in law relates to his consideration of the issues raised under section 55 of the 1949 Act. The claimant contends that the Inspector was wrong to conclude that the signs which were relied upon in this case could properly give rise to criminal trespass. Furthermore, the claimant submits that in any event the illegality principle was not available in this case and that the Inspector was wrong to dismiss the argument which was raised under Bakewell Management, in particular in the light of the further guidance provided by the Court of Appeal in R(Best) v Chief Land Registrar [2015] EWCA Civ 17. The claimant accepts that it is necessary for them to succeed in relation to

both the first and second reason for the Inspector's decision to be quashed. Either one of the Inspector's conclusions in relation to these issues would be sufficient to lead to the Order not being confirmed, and his decision upheld.

15. The third reason relied upon by the claimant relates to the treatment by the Inspector of the STW land and in particular the conclusion that he could not confirm the footpath in the form of the two culs-de-sac which would remain if he were correct about the inability to confirm the Order over NR's land and the level crossing.

16. It is right that I should record that there are some matters which were originally raised in the case, but which as the matter was finally argued did not need to be pursued, and which it is not necessary for me to form conclusions about. Whilst written submissions were made in detail about the ORR Licence, and whether or not it had the effect of preventing NR through statutory incompatibility from dedicating a footpath, the parties accepted that it is clear from the Inspector's decision that he did not found his conclusions in relation to statutory incompatibility on the terms of the Licence, and therefore this point was not pursued at the hearing. All parties reserved their position in relation to it. Further, the defendant accepted that in so far as the Inspector had only considered the 20-year period from 1986 to 2006, and not other potential alternative periods for which the claimant could have contended, the conclusions reached by the Inspector in paragraphs 35 and 36 were not a complete answer to the claimant's case in the form of an alternative basis upon which the decision not to confirm the Order could be upheld. The claimant's criticisms of that part of the decision related to the reasons given by the Inspector for concluding that on the facts the user was not sufficient were, therefore, not pursued.

17. I propose to examine each of the three reasons, and the arguments advanced on either side of the case, separately before reaching my overall conclusions as to whether or not relief should be granted.

Reason 1: errors of law in relation to the "incompatibility" exception

18. Before examining the arguments in detail it is necessary to set out a little of the statutory history which provides the background to the argument. At common law it was possible to defeat dedication of a public right of way through proof that the landowner was under an incapacity. Such an incapacity could arise from legal obligations such as a mortgage over the land, or that the land was the subject of a settlement, or that the landowner was a public body and dedication would be incompatible with its statutory powers and duties.

19. As the Inspector observed, this position in relation to capacity was revised by statute. The Rights of Way Act 1932 as originally enacted provided as follows at section 1.

"1 (1) Where a way, not being of such a character that user thereof by the public could give rise at common law to any presumption of dedication had been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such a way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way.

(2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such a way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.

...

(7) Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate such way where such way would be incompatible with such public or statutory purposes.”(emphasis added)

20. As can be seen, the statute amended the position at common law in relation to the relevance of capacity as a means of defeating the allegation that there had been dedication of a right of way. The words underlined in the section above were deleted by section 58 of the National Parks and Access to Countryside Act 1949, thereby further amending the position in relation to the role of capacity in the consideration of whether there could be held to have been a dedication of a way. The position at common law in relation to incapacity as a consequence of statutory incompatibility was retained and restated in section 1(7) of the 1932 Act. In due course this section was replaced by section 31 of the Highways Act 1980 as follows:

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

(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.

(3)Where the owner of the land over which any such way as aforesaid passes—

(a)has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b)has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

...

(8)Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”

21. The question which arises in the present case is the time at which the issue in relation to section 31(8) is to be determined. That section reiterated the restatement of the common law set out in s1(7) of the 1932 Act. The first case in time to which I was referred was the decision of Farwell J in A-G ex rel Barnes Urban District Council and London and South Western Railway (1905) 69 JP 110. The facts of that case were that in March 1847 an agreement had been made between Mortlake Vestry and the predecessors in title of the plaintiff council and the defendant railway company whereby a path, which had been closed, was to be replaced with a path across the railway with a level crossing with gates and a watchman. In October 1903 the defendant railway company prevented the use of the footpath over the railway line and provided a footbridge which they compelled the public to use to cross the line. The defendant contended that the agreement was ultra vires and void. The report records Farwell J's judgement in the following terms:

"The defendant company has closed the gates and abolished the level crossing, thereby compelling the users of the footway to cross by the bridge, and by that alone. In my opinion the bridge is not convenient for such foot traffic as takes place, with handcarts and perambulators, etc. The defendants contend that the dedication of a footpath under the agreement of March 1847 was ultra vires ab initio, for the reason that it was not compatible with the statutory objects of the company. This contention is not in its entirety supported by authority. In R v Leake (1833) 5 B & Ad 469, cited by Esher MR in Grand Junction Canal v Petty (1888) 21 QBD 273,275, 52 JP 692 it was said by Parke B at p478: "If the land was vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public is not incompatible with the objects prescribed by the Act, then it is clear that the commissioners have that power"...In a case like the present a limited dedication is taken by the public, a responsibility being cast of the users of the path to look out for themselves, and this apart from the common law liability of the railway company for negligence. A statutory company can dedicate a footway so long as its user is not inconsistent with the objects and obligations of the company. This being so, the question is really reduced to one of fact. The evidence has been adduced to two points-the public safety and that of the traffic on the line. I find that no danger has been proved either to the user of the line or to the safety of the public who use the trains; if there is danger to any one, it is to the public who come and take what the company has given them. I think that the public use their rights by virtue of the dedication and subsequent user, subject to any inconvenience and risk arising from the use of the railway; they cannot claim that the railway shall not be used at all. It might, of course, be possible to show such a user by the public-as if streams of people were continually passing over a crossing-as would seriously hamper the railway service, and in such case it might be held that the dedication was of a very limited character; but in the present case the principal user of the level crossing was by the passage of children to and from school, and I cannot say that the possible risk is sufficient ground for allowing the company to avoid the duty that it undertook by the agreement arrived at in 1847. In my opinion no case has been made out by the company..."

22. The next case where the question of statutory incompatibility arose for consideration was South East Railway Company Limited v Warr (1923) 21 LGR 669. This was an action for trespass for climbing over a wicket gate at a level crossing, to which the defence was that a public right of way ran through the crossing. It is a curious case on the facts, since it appears from the judgment that the right of way did not in fact cross the lines of the railway. However, notwithstanding this, the railway company argued that as a railway company it was not possible for a footpath to be dedicated across their land as any such dedication would be ultra vires. The Court of Appeal did not agree. Lord Sterndale MR observed:

But, at the expiration of a very long argument, another point was raised, which is the only point that has given me any difficulty at all, and that is this : There is a decision in Great Central Railway Co. v. Balby with Hexthorpe Urban District Council (1912), 2 Ch. 112; 10 L. G. R. 687 ; 81 L. J. Ch. 596, and I think it must be taken to be the opinion of the learned Judge who gave that decision, that a railway company has not got the power to dedicate a public highway across its lines. I doubt if the learned Judge meant more than this: that if all you know is that the railway company is proposing to dedicate, or is said to have dedicated, a public highway across its lines of metals, and the conclusion is obvious that it must interfere with the working of the railway, then it is beyond the powers of the company to make such a dedication, because, as I have said, nobody disputes that a railway company cannot grant a public or private right in such a way as to interfere with the carrying out of its statutory powers. That being so, it is said that the company here have no power to dedicate this strip, or whatever you call it, this infinitesimal piece of ground, to dedicate that as a public highway, because it would be dedicating a highway across its metals. In the first place, it is not anything of the sort; it does not dedicate anything across the line at all, the highway is there before, and what is more, it is not necessary that the person who comes over this gate, or through this gate at A, should go across the line at all. He is upon another highway, another public footpath going to the westwards, and, therefore, the dedication of a highway over or through that gate is not a dedication of a highway across the lines at all.

A person coming that way need not cross the lines, he may go to the westwards, and not cross the lines at all, but undoubtedly the effect of the dedication is to give access to the public highway which does go across the lines from a direction in which there was not access before that dedication, that is to say, from the eastwards and north wards. The argument before us was this: the result of that is exactly the same as a dedication in the first instance of a footpath or public highway across the line. It does not seem to me that it is anything of the sort. If it could be shown that the result of the dedication which gives access to the footpath across the line by a large number of persons would be such as to interfere with the statutory powers of the company, then the company could not gate that access. That does not seem to me to be doubted. It seems to me that must be shown in some way. I do not care to discuss now of Way stile bad notice to the Judge and it lies with his conduct care elusions. Joint was faulty at Railway, a Ch. be taken that than 'oposieg sross its interfere 5 of the said, iblic or ' out of ny here it, this ghway, In the te any- I what s gate, He is west- trough atpsel. upon whom the onus is, because when you have got evidence on both sides the matter of the question of onus does not become as a rule very important. There must be disclosed by the evidence, such as it is, something which shows that the company cannot dedicate because to do so would be to interfere with its statutory powers. There is here no such evidence given on either side, and I decline entirely to say that, apart from evidence, the giving of access to an unknown number of persons, who may be few or may be many, to cross an existing highway is prima facie doing something that will interfere with the statutory working of the railway. The evidence discloses nothing of the kind."

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23. Warrington LJ delivered a concurring judgment.

"So far as the actual findings of the learned Judge are concerned, I see no reason whatever for disagreeing with the conclusions at which he arrived that a public way had, prior to some year in the nineties which is immaterial, been acquired by the public as far as the northern boundary of the railway company's land. Further than that, I think, so far as the facts are concerned, that the learned Judge was justified in coming to the conclusion that, treating the company for the moment as an individual, under no statutory restrictions, the public way extended over the two or three inches in question. But now it is said that the plaintiffs are not an ordinary individual, but that they are a statutory company, subject to the restrictions which are applicable to any person of that nature, and that that person is incompetent to create a public right of footway, I say nothing about a cart or carriage way, over land which is traversed by its rails, and that this is a case in which it is sought to establish against the railway company such a right of way.

Now this, I think, is really indisputable and established by a long line of authorities, that in the case of a statutory body such as a railway company which has acquired land for the purposes of its undertaking, it is not competent for a company to deal with its land by way of partial alienation in such a way that the result may be in compatible with the use by the company of the land which was so acquired for the purposes for which it was acquired. But the appellants here go further, and they say that in the case of a right of way over the metals it is enough to prove that what is claimed is a public right of way in that place to establish that such a dedication would be ultra vires the railway company and that, therefore, such a public way cannot exist: in the first place, even if that proposition were made out, it would not, in my opinion, apply to the facts of the present case, because at the point of the railway company's property immediately south of the strip of land of two or three inches wide there were, and always have been, two public ways, one running east and west along the northern boundary of the company's property and not crossing the lines, and one running south and crossing the lines. There is, therefore, no question of a fresh dedication of a public way across the line or on any part of the line of the railway company which could, or is even intended to be, used for lines; therefore, strictly, the proposition I have referred to, if it could be supported,

would not be applicable to the present case, but, in my opinion, that proposition in its wide terms is not capable of being supported if it be alleged that it is a presumption of law, quite irrespective of the facts of the present case, that a railway company cannot create a public footpath across its rails. If that is put forward as a proposition of law, I venture, with all respect, to disagree with it."

24. These two cases, decided at common law, were the backdrop to the centrepiece of the authorities in this part of the case: British Transport Commission v Westmorland County Council 1958 AC 126. The facts of that case were that the County Council had prepared a provisional map under the 1949 Act which marked a footpath across a bridge spanning a railway which had been constructed under statutory powers conferred by a private Act of Parliament in 1845. The railway owners applied to the Quarter Sessions under section 31 of the 1949 Act for a declaration that no right of way existed over the bridge. The Quarter Sessions held that although the bridge had not been expressly dedicated to the public as a right of way, its use by the public for a period of over more than 20 years had been such as to raise a presumption that it had been dedicated. They went on to find that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway and that, thus, a footpath had been dedicated and was properly marked on the provisional map.

25. During the course of argument counsel representing the railway owner submitted that the test of incompatibility with statutory powers was not to be examined solely at the time of the alleged dedication. He submitted that "one must ask whether it is remotely possible that in the future the dedication might interfere with the purposes of the railway, and, if it is even remotely possible there can be no dedication". By contrast counsel on behalf of the County Council submitted that the correct approach to the question of incompatibility, having accepted that the duty of a railway operator to the public was to run its train safely and efficiently, was "whether, at the date when the question is considered by the tribunal of fact, there was any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties".

26. All five members of the Committee provided opinions which concurred in the result that the decision of the Quarter Sessions should be upheld. In order to provide the context for the submissions made by all parties it is necessary to set out relevant extracts from each of the speeches given. The first speech was given by Viscount Simonds and the relevant passages are as follows:

"Any examination of this question must begin with the case of *Rex v. Inhabitants of Leake*, <http://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=i0ad6ada60000015accf4a935c0e1b125&docguid=I7B9794C0E42711DA8FC2A0F0355337E9&hitguid=I7B976DB0E42711DA8FC2A0F0355337E9&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=4&resolvein=true> - targetfn83 which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J. in that case. "If," he said, "the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though, on the one hand, it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose, it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?...

If I am right in saying that the principle of *Leake's* case must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be incompatibility, or, perhaps I should here say, compatibility, if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

My Lords, I am satisfied that this argument is misconceived. In the first place, in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. Parke J.'s use of the word "never" in *Leake's* case was clearly not intended to have so dramatic an effect. But in the second place, to give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. and it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired...

I should upon this part of the case add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question."

27. The next speech came from Lord Morton and he observed as follows

"My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *Rex v. Inhabitants of Leake* and has been recognized by this House in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*.

It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Sir Andrew Clark submitted that the question should be "whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out to the best advantage the purposes of its special Act." Mr. Rowe, for the respondent council, submitted that the question should be "whether at the date when the question is considered by the tribunal

of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of Sir Andrew Clark's version, and I find several cases in which the court appears to have acted upon the view that Mr. Rowe's version is the right one. As examples I would mention *Grand Junction Canal Co. v. Petty* and *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*"

Having accepted the formulation of the test put forward by the County Council Lord Morton then went on to apply that test to the facts and was satisfied that the conclusions which had been reached by the Quarter Sessions were appropriate.

28. Lord Radcliffe was in particular troubled by how subsequent authorities had treated the decision of Sir George Jessel MR's judgment in *Mulliner v Midland Railway Company* [1879] 11 Ch.D 611. The effect of the proposition laid down by Sir George Jessel is described by Lord Radcliffe as being "to the effect that a railway company, which operates under statutory powers of managing its railway conferred upon it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do". He reviewed the authorities in which the decision in *Mulliner* was considered. In the course of doing so he observed that "few authorities can have been explained so often with such little fidelity to the original source". This concern about the treatment of Sir George Jessel's proposition in subsequent authorities led him to express his opinion in the following terms:

"In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of Sir George Jessel's proposition that a railway company lacks legal capacity to grant an easement over railway land "except ... with a view to the traffic of their railway." Side by side with this proposition and without explicitly rejecting it they have in fact been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *Rex v. Inhabitants of Leake*. I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today I should feel much doubt about that. But I think that we are bound to recognize that for very many years and on many occasions courts have taken as their test the words of Parke J. : "... if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power," and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognize this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance upon what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works - railway lines, reservoirs, canals, towpaths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and therefore necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, although the test derived from *Rex v. Inhabitants of Leake* has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an

effective grant. A possible exception is the case of *South Eastern Railway Co. v. Cooper*: but the judgments delivered by the Court of Appeal in that case are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that Mulliner cannot stand today as a binding decision in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way."

29. In his speech Lord Cohen observed that counsel on behalf of the railway owners had submitted reasons to distinguish the case of Leake on the basis that it did not lay down as the test of incompatibility whether there was any likelihood of dedication of a right of way materially hindering the statutory undertaker from an appropriate and efficient discharge of its duties. Addressing that second reason Lord Cohen stated as follows:

"If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Sir Andrew, however, says that his proposition is supported by the language of Parke J. in *Rex v. Inhabitants of Leake*, where he says: "I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public." Sir Andrew stresses the word "never." The sentence, divorced from its context, lends some support to his argument, but reading the judgment as a whole, and having regard in particular to the next following paragraph thereof, I think it is clear that Parke J. regards the question as one of fact, to be determined, no doubt not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes."

30. Lastly, Lord Keith agreed that the appeal by the railway owners should be dismissed and expressed his opinions briefly in the following terms:

"On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*, though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases."

31. Against the background of these authorities Mr Laurence forged the following submissions. Firstly, he submitted that the question of the date at which statutory incompatibility under section 31(8) of the 1980 Act was not settled by the British Transport Commission case. Viscount Simonds expressly left open the date at which the tribunal of fact should make the assessment as to whether or not there was incompatibility. The decision was confined to the evaluation of the competing submissions in relation to the standard of proof of incompatibility with statutory purposes, whether merely a likelihood of interference, or

whether a remote possibility of interference would be sufficient. Mr Laurence submitted, therefore, that this was the first occasion at which the question of the date at which the assessment should occur was in point. He submitted that at common law the presumed dedication was at the start of the period. In Turner v Walsh (1881) 6 App Cas 636 (which was applied in the context of section 31 of the 1980 Act by Lightman J in Oxfordshire County Council v Oxfordshire City Council [2004] Ch 253 at paragraph 98) the following was observed by the court as to the approach to the evidence of dedication:

“Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this Act? This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses.”

Thus Mr Laurence submitted that the appropriate time for the assessment under section 31(8) to be undertaken is the point at which dedication is deemed to have occurred, namely the start of the 20 year period under section 31(1). He submitted that there is no reason for adopting a different timescale for the assessment of deemed dedication to the assessment of incompatibility. Indeed, he submitted that there is very good reason based upon the deeming of the dedication to take the same date for the assessment of both. As a fall-back, he submitted that at the very least the assessment should be undertaken at the end of the 20-year period, were he wrong in his submissions that the start of the 20-year period is the appropriate point in time to make the appraisal.

32. Bringing these submissions back to the circumstances of the present case, he therefore submitted that the Inspector erred in law when at paragraph 10(4) and paragraph 15 and 36 of the decision the Inspector adopted the date of his decision as being the time at which he undertook the assessment. Mr Laurence's submission was that the assessment should have been made as at the start of the 20-year period. For the purposes of these submissions he contended that the way had been called into question at a time in or around 1990 when there was evidence that a gate had been locked. That would lead to the assessment being made as at 1970. Alternatively, on the facts before the Inspector the relevant date for assessment applying Mr Laurence's contention could not in any event be later than 1986.

33. Mr Laurence made further submissions in relation to the Inspector's treatment of this issue. He submitted that when the Inspector addresses this question in paragraph 9 of his decision he treats the incompatibility point as being an aspect of the “character” exception, namely the exception that “the ways of such a character that use of it could not give rise in common law to a presumption of dedication” which is included within section 31(1). Mr Laurence observed that nowhere does the Inspector allude to section 31(8), which was in truth the exception which he was being encouraged to apply by the objector. Thus Mr Laurence submitted that the Inspector erred in law as he treated the question of incompatibility as being a feature of the “character” exception rather than under the correct limb of section 31, namely the “incompatibility” exception provided by section 31(8).

34. Mr Laurence also submitted that the Inspector erred in that he failed to examine the question of whether or not there was any limitation which could be imposed upon the Order which would respect the statutory duties of the objector, to the extent that it was proper for the Inspector to have held that the objector's statutory duties were incompatible with the Order. During the course of the hearing, and in order to illustrate this limb of his argument, Mr Lawrence produced a draft limitation which provided that the exercise of the right of way should only be limited to occasions when no train was approaching or on the

level crossing. He submitted that it was open to the Inspector to address the concerns of the objector under section 31(8) and resolve them by the creation of such a limitation, which would operate so as to ensure that the right of way could exist alongside the satisfactory discharge of NR's statutory duties. The draft limitation which he proffered was in the following terms:

"The lawful exercise of the right of way over land belonging to Network Rail and lying between the gates which bound Network Rail's operational land on either side of the railway ("the crossing") is limited to occasions when no train is approaching or on the crossing."

35. Finally, and in what was as set out above effectively a fresh Ground, Mr Laurence submitted that it was irrational for the Inspector to have concluded that the existence of the right of way on the level crossing would be incompatible with NR's statutory duties. It was common ground that those statutory duties, as in the British Transport Commission case, were related to the need for NR to ensure public safety whilst operating the railway and also to ensure that the railway operated efficiently. Mr Laurence submitted that the evidence which was before the Inspector could not sustain any conclusion that those objects would be imperilled by the making of the Order.

36. Firstly, he noted that there are a significant number of level crossings which accommodate rights of way across NR's railway network, including in particular a number of crossings of the railway lines in question (of the order of 12 or so) between the level crossing concerned in the present case and Newark. In relation to the evidence which was before the Inspector Mr Laurence noted that the increased volume of pedestrians using the right of way, namely 20 crossings per day, which led to the increase in the crossing risk assessment from C5 to C6 (see paragraph 13 of the decision) was not demonstrated by any of the empirical evidence as to the number of people who were crossing at the height of summer in August 2015 (an average of 6-7 per day). Thus, the conclusion that there would be an increase in the risk assessment score was not founded on the evidence. In any event, he submitted that a mere increase in risk does not equate to statutory incompatibility. Mr Laurence submitted that there had to be a real and material increase in risk for statutory incompatibility to be made out and thus he contended that on the basis of the material before the Inspector it was not open to the Inspector to find that there was statutory incompatibility.

37. In response to these submissions Mr Buley, on behalf of the defendant, contended that the question of the date at which the assessment under section 31(8) of the 1980 Act fell to be determined had been settled in the British Transport Commission case and that whilst Viscount Simonds had left the point open, a proper analysis of the other speeches in the House of Lords demonstrated that Lords Morton, Radcliffe and Cohen all formulated the test as one which had to be assessed at the date at which the question of fact as to whether or not there was incompatibility fell to be determined. He therefore submitted that this question as to the proper date for the appraisal had been settled in the British Transport Commission case. He submitted it formed part of the ratio of that case. In any event, he submitted that the adoption of the date of the fact-finding exercise in three of the five judgments in the House of Lords provided compelling obiter dicta, even if he was wrong as to the ratio of that case, indicating that the right answer was that the date was as at the date of the factual findings. Thus, he submitted that Mr Laurence's concerns about the potential mismatch between the date at which dedication of the way was assumed under section 31(1) and the date at which incompatibility was considered did not arise, in the sense that it was already settled law that the date was the date of the factual assessment. In any event, he submitted that use of the date of the fact-finding exercise for the purpose of assessing the question under section 31(8) was not a strange mismatch on the basis that the question under section 31(8) was a forward looking exercise, and thus it was not appropriate or proper to confine that enquiry to the claim period.

38. As a fall back, he submitted that the proper construction of section 31(1) meant that the date at which dedication should be presumed was at the end of the 20-year period, rather than its beginning. He submitted that Lightman J was wrong in the Oxfordshire County Council case to adopt the common law

position from Turner v Walsh. He submitted that the deemed dedication should be at the end of the 20-year period on the basis of the statutory language of section 31(1) ("has been enjoyed") which made clear that the deeming of the existence of the way was at the end of the 20 year period. Thus it was his fall back submission that in any event the assessment should not occur at the start of the 20 year period which is the basis of the dedication but rather at its conclusion.

39. Dealing with the submissions made in relation to paragraph 9 of the decision letter and the suggestion that the Inspector had erroneously applied the "character" exception, Mr Buley submitted that there was no error at all in anything that the Inspector had stated in paragraph 9. The Inspector's text sets out the requirement at common law to have capacity to dedicate, and then goes on to explain the basis upon which statutory incapacity or incompatibility arose to be considered in the case before him. The absence of mention of section 31(8) was wholly inconsequential when the Inspector accurately set out the relevant principles, observing that section 1 of the 1932 Act preserved "the common law principle involving the capacity to dedicate" with it remaining "relevant in certain circumstances". Thus Mr Buley's submission was firstly there was no error of law in the Inspector's paragraph 9. Even if the Inspector had treated the "incompatibility" exception incorrectly as being part of the "character" exception there was no respect in which it could be said that he had misapplied the appropriate legal test or applied a legal test which was in error. In substance he had applied the test under section 31(8) and therefore there was no reason to consider that the decision would be other than highly likely to be the same and the principles in section 31(2)(a) of the Senior Courts Act 1981 should apply so as to deprive the claimant of relief.

40. Turning to the question of the suggested limitation Mr Buley contended that the limitation could not in truth address the problem raised in relation to incompatibility. The question is not related to the extent of the care used by the public, but rather that the answer should be not to have the right of way at all.

41. In respect of the rationality argument, Mr Buley complained that there was no pleaded Ground on this basis and therefore permission had not been granted to raise the point. In any event, he submitted that the reality was that the only evidence before the Inspector, certainly of any technical character, was that produced by NR. The evidence from August 2015 was of the number of users when there was a locked gate in place, and the existence of a right of access was not advertised on the definitive map and statement. The predicate of NR's case, namely that the existence of the path made it clearly foreseeable that there would be greater public use and therefore greater potential conflict between pedestrian and rail movements, was self-evident and thus the decision which the Inspector reached was entirely rational and based on the evidence before him.

42. The defendant was supported in these submissions by Mr Lopes on behalf of NR. He submitted that there were insurmountable difficulties in drafting a limitation on the Order of the kind posited by Mr Laurence. Quite apart from the fact that there appeared to be no positive invitation to the Inspector to seek to identify any limitation, the drafting proposed by Mr Laurence to illustrate his submission was said by Mr Lopes to effectively make NR's case. It did not deal, for instance, with vulnerable users who would be slower to cross the level crossing. Further, it failed to engage with what might be meant by a train approaching and thus when the limitation might or might not apply. In reality, Mr Lopes submitted, any material increase in the use of the level crossing created a lack of safety which led to the overarching statutory powers being brought into play and the question of incompatibility arising.

43. My conclusions in relation to these competing submissions are as follows. Firstly, I am entirely satisfied that the question of when the assessment of statutory incompatibility under section 31(8) of the 1980 Act falls for determination was settled in the British Transport Commission case. It is clear to me from an analysis of the speeches which I have set out above that whilst Viscount Simonds expressly reserved his position, firstly, there was argument on the point in the case as he observed and secondly, that at least three of the members of the Committee accepted the formulation which was provided by counsel on behalf

of the County Council, namely that the assessment was to be made at the date when the fact finding tribunal was considering the question. Thus, the British Transport Commission case is in my view binding authority at the highest level to the effect that the Inspector in the present case was correct to undertake his determination in relation to section 31(8) at the time when he was reaching his decision on the Order. Even were I wrong in concluding that the British Transport Commission case was binding in relation to this point, nonetheless I would accept and endorse Mr Buley's submission that the adoption of counsel for the County Council's formulation of the test by three of the members of the Committee in that case is very persuasive authority in support of that proposition. I have no difficulty in accepting that persuasive authority and concluding that the correct date for the examination of the issues in respect of section 31(8) is the date on which the fact finding exercise is occurring and the order is being examined.

44. At first sight there is some force in Mr Laurence's submission that this conclusion creates something of a mismatch between the assessment of whether or not dedication is possible under section 31(8), and the assessment of the evidence in relation to the 20-year period relied upon under section 31(1). However, further reflection in my view underlines the good sense and practicality of adopting the date of decision-making in relation to the order as the date when the assessment of statutory incompatibility should occur. As Lord Radcliffe observed, the test itself from the case of Leake is essentially a pragmatic one. There are in my view sound practical reasons why the facts should be assessed at the point in time when the question arises. Firstly, the consideration of whether or not the recognition of the right of way would be incompatible with the statutory undertaker's statutory duties is in large part going to be a forward-looking exercise. It is an examination of the position at the time when the order is being considered, but against facts and forecasts which consider the question not simply at that moment, but also looking forward to consider whether on the balance of probabilities it is likely that in future the statutory undertaker's statutory duties would be compromised and there would be incompatibility between the operator's statutory objects and the existence of the way. The fact that it is a forward-looking exercise would render it peculiar for that test to be applied at some point in the past.

45. Secondly, it would be a curious factual enquiry for an examination to be made as to the safe and efficient operation of the railway, for instance, in the present case either at 1970 or 1986. Such an enquiry would have to be taken on the basis of technical standards and engineering knowledge at that point in time in the past (assuming that could be reliably ascertained). Evidence of accidents or near misses or other difficulties in operating the railway after the date in 1970 or 1986 would be inadmissible or at least arguably irrelevant. The artificiality of such an enquiry is in my judgment a strong pointer towards it being inappropriate to examine the question under section 31(8) at some earlier date than the date of determination. Mr Laurence recognised the force of the difficulties created by the exclusion of supervening events bearing directly upon the safe and efficient operation of the railway, and in his reply he sought to develop a hybrid approach whereby it would be possible for the Inspector to take account of such evidence, albeit still reaching a conclusion based upon a date at the start of the relevant 20 year period. In my view, whilst respecting Mr Laurence's endeavour to try to find a solution to the problem created by adopting an earlier date for examination of the question, this hybrid approach throws into sharper focus the practical problems created by taking the earlier date as the date for assessment. How such a hybrid approach could operate in practice is, in my view, very unclear and uncertain. Whilst there may be a mismatch between the timescales for the questions posed under section 31(1) and 31(8) when considering whether an order should be made or confirmed, the nature of those enquiries (retrospective under section 31(1), and both retrospective and importantly prospective under section 31(8)) and the practical issues with which they are engaged justify the difference in the times at which those questions are to be assessed.

46. It follows that not only am I satisfied that the British Transport Commission case settled that the question of fact under section 31(8) is to be examined at the point in time when the order is being examined, I am also satisfied that there is very good reason for taking that as the appropriate date for consideration of that particular forward-looking question.

47. The conclusions which I have reached effectively dispose of the subsidiary issue (which was in any event academic, on the basis that if I found that the date was not the date when the order was being examined the decision would be unlawful in any event) as to whether the presumed date of dedication is at the start of the period in accordance with the common law rule established by Turner v Walsh or, alternatively, as Mr Buley submitted at the end of the 20-year period in accordance with his construction of section 31(1). On the findings which I have made there was no error of law in the Inspector's decision and therefore this point does not arise for my determination. With due deference to the arguments which I heard, I prefer to leave the resolution of this issue to another case in which it is material and in point.

48. The next question is whether the Inspector fell into error in paragraph 9 of the decision by thinking that he was applying the "character" exception, when he should properly have been applying the "incompatibility" exception. I am not persuaded that there is any error of the kind claimed by the claimant in the Inspector's decision. In paragraph 9 the Inspector accurately sets out the law, starting by introducing the statutory scheme in the first sentence, then setting out the common law requirement for capacity to dedicate in the second sentence, before in the remainder of the paragraph explaining that whilst there had been adjustments to that requirement by the 1932 Act "in certain circumstances", the requirement that dedication should not be inconsistent with NR's statutory duties both at common law and under the statutory scheme remained a basis on which the Order could not be confirmed derived from capacity. This was an accurate statement of the law. As set out above section 1(7) of the 1932 Act and section 31(8) of the 1980 Act make clear that the common law in relation to statutory incompatibility have been preserved as part of the statutory scheme. Thus, whilst it is true that the Inspector did not specifically reference section 31(8) he did not need to do so. He had carefully set out the relevant law and no cross-reference was necessary to show that he was correctly directing himself to the issue which he had to decide. I do not accept, therefore, that the Inspector misdirected himself as the claimant alleges. Whilst Mr Buley and Mr Lopez raised the question as to whether in the event that I concluded there had been a misdirection of law, the provisions of section 31(2A) of the Senior Courts Act 1981 would operate so as to deprive the claimant of the benefit of relief, in the light of the conclusions which I have reached this point does not arise.

49. I turn then to the question of whether or not the Inspector ought, notwithstanding his conclusions, to have contemplated the imposition of a limitation on the order so as to enable it to be made and the statutory duties of the railway operator to be accommodated. I share the view given in his submissions by Mr Lopez that there are formidable difficulties in drafting any such limitation. Whilst respecting the spirit in which Mr Laurence's draft limitation was offered, the debate around it demonstrated how difficult it would be to identify when, in particular, a train on the railway lines was to have precedence such that the right of way over the level crossing was effectively suspended.

50. In my view there is a further, more significant, objection to this approach. In reality any person using the level crossing as a pedestrian as a trespasser at present will no doubt exercise circumspection and not wish to find themselves on the railway lines at any point when a train is on its approach or actually crossing. The existence of that natural desire for self-preservation, which is in truth no more or less than what is reflected in the limitation, is not a complete answer to resolving the safety issues which arise or the instances which may occur affecting the efficiency of the railway. With the best will in the world human error occurs. It is the existence of conflict, and the increased extent of such conflict, between pedestrian movements and train movements that increases the chance of human error and the number of times when there is a danger to public safety. Thus, the limitation is not an answer to the conclusions reached by the Inspector under section 31(8) because the limitation cannot itself avoid the impact on public safety and the efficiency of the railway which would arise with an increase in use of the level crossing caused by its recognition as a public right of way. There is force in the submission made by Mr Lopez that in fact the Inspector could not properly be criticised in this respect since the possibility of such a limitation was never raised with him. However, notwithstanding that point, even had it been raised I am satisfied that it would not have provided a conclusive answer to the findings which he made in respect of the impact of making the Order upon the statutory duties of the second interested party.

51. I turn then to the rationality Ground which was raised by Mr Laurence. Whilst I recognise that the matters raised were essentially matters of argument based on material which was already before the court, nevertheless in my view seeking to amend pleadings and argue new points at the hearing of a judicial review is in principle inappropriate. I allowed the argument to be heard and will offer my conclusions upon it, simply because I have been able to form conclusions upon the point with relative ease and for the assistance of the parties who engaged with the point. I am not, however, minded to allow the claimant to amend at the very late stage which it sought to since, as Mr Buley rightly points out, to do so would enable the claimant to avoid all of the disciplines and strictures of formal responses by the defendant and NR, and the necessary examination of arguability at the permission stage. Without prejudice to that position my conclusions are as follows.

52. I am satisfied that the Inspector's conclusions on the question of whether or not the safe and efficient operation of the railway would be affected so as to interfere with NR's statutory duties were entirely rational and open to him. As was observed in the course of argument, the reality in this case was that the Inspector only had technical evidence from NR on this point. That evidence addressed in detail objective engineering modelling of the risk presented by an increase in the number of persons using the way in the event that the order was confirmed. Paragraphs 12 and 13 of the Inspector's decision record that evidence, which forecast that were pedestrian movements across the railway line to increase to 20 crossings per day there would be an identifiable increase in the risk which use of the level crossing presented to the public and therefore, as the Inspector noted, a corresponding reduction in the safety of the crossing.

53. In my view Mr Laurence's point in relation to the CCTV survey recorded in paragraph 13 of the decision does not provide any argument that this analysis was fundamentally flawed or irrational. The CCTV survey provided some indication of the present level of usage. It was not presented on the basis that that would be the level of usage after the Order had been made and the right of way recognised. The CCTV survey enabled two conclusions to be reached. Firstly, the level of pedestrian usage was such at present that it would be likely to increase (and the forecast was to 20 pedestrians per day) if the Order was made. That led to the conclusion that safety at the crossing would be materially reduced. Secondly, it demonstrated that there were vulnerable users using the crossing who, if the right of way were recognised and the use persisted, would be at particular risk in using the level crossing as a right of way. It follows that the conclusions which the Inspector reached in paragraph 15 of his decision were securely founded upon the evidence before him, and conclusions that were clearly open to him on the evidence which he received at the inquiry. Thus, even had I permitted an amendment to allow this argument to be presented I would have concluded that the point was not arguable and refused permission for it to be raised as part of this judicial review.

Reason 2: the issues in respect of section 55 of the British Transport Commission Act 1949

54. Whilst the relevant text of section 55 of the British Transport Commission Act 1949 was set out by the Inspector in his decision, it is worthwhile for reference purposes to set out the full text relevant to these arguments which (as originally enacted) is as follows:

"55.— For better prevention of trespass on railways &c.

(1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings...

(3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed.”

55. All parties accept that the doctrine of illegality operates as a free-standing principle upon which the Order could be defeated, as opposed to being a factor which is part and parcel of the considerations under section 31(1) of the 1980 Act. In essence, as set out above, the Inspector concluded that on the basis that the use of the level crossing by pedestrians amounted to a trespass which was rendered criminal by section 55 of the 1949 Act, the Order should not be confirmed. This contention is the subject of challenge in these proceedings, as it was at the inquiry before the Inspector.

56. On behalf of the claimant Mr Luke Wilcox, who advanced this part of the claimant's case, made his submissions on essentially two bases. Firstly, he submitted that on the facts of this particular case the offence under section 55 of the 1949 Act did not in fact arise. Secondly, he submitted that even if it did, the principle of illegality was not engaged in the context of this particular offence, and therefore any crime which might have been committed under section 55 of the 1949 Act could not operate so as to defeat the Order. This latter submission was based upon an examination of two authorities which were key to the claimant's case: firstly, Bakewell Management Limited v Brandwood [2004] UKHL 14; [2004] 2 AC 519 and secondly R (Best) v Chief Land Registrar [2015] 3 WLR 1505.

57. Under section 55(3) of the 1949 Act it is in effect a defence to a charge under section 55 that no “public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such an offence is alleged to have been committed”. It will be recalled that in paragraphs 25 and 26 of the decision the Inspector found that there had been signs in place at the nearest stations, namely Burton Joyce and Carlton, since 1949 and that such notices as were found by the Inspector “give warning to pedestrians not to cross the line or pass beyond the sign”. In fact the full text of those signs as exhibited in the trial bundle are as follows:

“Passengers must not pass this point or cross the line”

It appears from the photographs that the signs are situated at the end of the platforms at the stations.

58. Mr Wilcox submitted that the signs are not adequate to give rise to criminal liability under section 55. He submitted that where criminal liability was to be imposed it was essential that such was made clear in any relevant notice. He further submitted that since the 1949 Act was a private Act of Parliament there was a particular need for clarity in relation to the creation of the offence. He contended that it was particularly pertinent that the sign was directed only towards passengers at the station, and further did not clearly identify that failure to comply with the sign would amount to a criminal offence. In all of these circumstances he submitted that the requirement that a notice should be provided had not been met, in particular in terms of the contents of these signs, and therefore they were incapable of satisfying the requirements necessary in order to give rise to criminal liability under section 55.

59. To understand Mr Wilcox's submissions in relation to his second point as to the application of the principle of illegality it is necessary to set out the substance of the authorities upon which he relied as set out above, starting with the Bakewell Management case. That case concerned the owners of property who accessed their homes by driving vehicles from the public highway along tracks or roads over common land.

A deed had been deposited on 31st December 1927 pursuant to section 193(2) of the Law of Property Act 1925 by the owner of the common land declaring it to be common land to which section 193 of the 1925 Act applied. As a consequence of that declaration section 193(4) created a statutory prohibition upon vehicular use of the common in the following terms:

“(4) any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence.”

60. No lawful authority was granted by the owner of the common land, but the occupiers of the homes who were accessing them upon the common land claimed entitlement to an easement by virtue of evidence of protracted use and the effluxion of time under section 2 of the Prescription Act 1832 or, alternatively, under the doctrine of lost modern grant. The claims were resisted by the land owner on the basis that since the use of the accesses over the common land was a criminal offence the doctrine of illegality applied so as to prevent the establishment of the easements claimed. In advancing the case on behalf of the owner of the common land reliance was placed on the case of Hanning v Top Deck Travel Group Limited 68 P&CR 14. In his speech Lord Scott identified that in the leading judgment of the case of Hanning Dillon LJ, having analysed the relevant authorities, concluded that they established the rule that:

“an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute.”

Lord Scott concluded that the cases did not establish that rule. He stated that instead:

“what they establish is a rather different rule, namely, that an easement cannot be acquired to do something the doing of which is prohibited by a public statute. ”

The distinction between those two propositions is made clear in paragraph 39 of his speech in the following terms:

“The feature of Hanning's case, and the present case, that distinguishes them from such cases as Legge's case and *Cargill v Gotts* is that the servient owner was able, notwithstanding the statutory prohibition, indeed by the very terms of section 193(4) , to make a lawful grant of the easement. A statutory prohibition forbidding some particular use of land that is expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority is an unusual type of prohibition. It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant by the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the landowner to grant. It is difficult to see why, in the former class of case, the long and uninterrupted user should not be capable of supporting the presumed grant by the landowner of an easement that if granted would have been lawful and effective notwithstanding that the user was contrary to a statutory prohibition. I can see no requirement of public policy that would prevent the presumption of a grant that it would have been lawful to grant. On the contrary, the remarks of Lord Denning MR and Stamp LJ in *Davis v Whitby* [1974] Ch 186 , 192 and of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349

to which I have referred provide sound public policy reasons why, if a grant of the right could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed."

61. This analysis led Lord Scott to his conclusions at paragraph 46 in the following terms:

"My Lords, in my opinion, the decision in Hanning's case and the subsequent justifications of that decision are wrong and ought not to be followed. I accept that, at the end of the day, the issue is one of public policy. It is accepted, however, that a prescriptive right, or a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of being tortious. That is how prescription operates. Public policy does not prevent conduct illegal in that sense from leading to the acquisition of property rights. The decision in Hanning's case can only be justified on the footing that conduct illegal in a criminal sense is, for public policy purposes, different in kind from conduct illegal in a tortious sense. Why should that necessarily be so? Why, in particular, should it be so where the conduct in question is use of land that is not a criminal use of land against which the public law sets its face in all cases? It is criminal only because it is a user of land for which the landowner has given no "lawful authority". In that respect, the use of land made criminal by section 193(4) of the 1925 Act, or by section 34(1) of the 1988 Act, has much more in common with use of land that is illegal because it is tortious than with use of land that is illegal because it is criminal."

62. Lord Walker also emphasised the dispensing power of the land owner in the case of a criminal offence under section 193(4) of the 1925 Act in his speech. Like Lord Scott, he made reference to the public policy dimension of the illegality principle. His conclusions were expressed as follows:

"56. The present case is exceptional because of the unusual nature of the offence created by section 193(4) of the Law of Property Act 1925. It creates a criminal offence but it is, most unusually, an offence in respect of which the owner of the soil of the common has a dispensing power. It is common ground that that is the effect of the words "without lawful authority" in subsection (4). Moreover the landowner does not hold his dispensing power in any sort of fiduciary capacity. He is not bound to exercise it in the public interest. He can if he thinks fit exercise his dispensing power in his own private interest, by levying a charge for the grant of his authority. Miss Williamson (for the claimants) candidly agreed that from her clients' point of view the appeal is ultimately about money...

59. My Lords, in my view this House should not readily conclude that the decision of the Court of Appeal in Hanning's case was mistaken, especially as it has been followed, not only by the Court of Appeal in this case, but also on other occasions. Nevertheless I am satisfied that the wide formulations of the principle by Templeman LJ in *Cargill v Gotts* [1981] 1 WLR 441 and by the Court of Appeal in Hanning's case, although producing the right result in the generality of cases, are too wide in a case like the present. That is not to say that the residents of houses near Newtown Common did not commit a criminal offence (of a fairly venial nature) when they drove across the common to and from their houses. The principle of legal certainty requires the criminality or lawfulness of an act to be determined at the time when it takes place, and not with the advantage (or disadvantage) of hindsight. Nevertheless the prior authority of the owner of the common would have provided a complete defence to any criminal charge. In the ordinary case of prescription of a private right of way, the prior authority of the landowner (in the solemn form of a grant by deed) is presumed or inferred from long user, even though every act of user during the prescription period takes place without his actual prior authority and is a tortious (though not a criminal) act. I cannot see that any public interest would be served by holding that the absence of the landowner's actual prior authority should produce a completely different result in cases where section 193(4) is in play.

60. I do not see this as reintroducing the "public conscience" test which this House disapproved in *Tinsley v Milligan* [1994] 1 AC 340. It is merely a recognition that the maxim *ex turpi causa* must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest: see for

instance *National Coal Board v England* [1954] AC 403. In my opinion it is the landowner's unfettered power of dispensing from criminal liability, exercisable at his own discretion and if he thinks fit for his own private profit, which is the key to the disposal of this appeal. Since a dispensing power of that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality."

63. Against the backdrop of these conclusions Mr Wilcox submitted that in the present case the second interested party had a dispensing power in respect of any offence under section 55. It was perfectly possible for NR to authorise the use of the level crossing without being in breach of their statutory powers, and by doing so they would have obviated any offence under section 55 since they had authorised the pedestrian use of the level crossing. In those circumstances there would be no trespass upon which section 55(1) of the 1949 Act could bite. He submitted that the Inspector was therefore in error in paragraph 37 of his decision when he concluded that "it is not possible for network rail to grant lawful authority for such use". NR could have granted permission for the level crossing to be used. The offence under section 55 is analogous to that under section 193(4) of the 1925 Act and thus the principle of illegality should not have been deployed so as to defeat the Order.

64. Turning to the second authority upon which the claimant relies, it is important to note that this decision was not made available to the Inspector. The case of Best concerned the claimant's application to the Land Registry to have himself entered on the Register as the registered proprietor of a property which he had entered as a vacant residential building without the registered proprietor's consent, and to which he had carried out building and other works of repair so as to make it his permanent residence. His evidence was that he had treated it as his own property since 2001. The Chief Land Registrar rejected the application on the basis that his occupation from 1st September 2012 (when section 144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force) had been a criminal trespass and could not therefore give rise to a claim for adverse possession. The Court of Appeal concluded that section 144 of the 2012 Act did not affect the settled law of adverse possession in relation to registered or unregistered land, and therefore the existence of section 144 did not prevent the claimant from having acquired a possessory title which should be registered.

65. The relevant offence under section 144 is established as follows:

"144(1) a person commits an offence if:

(a) the person is in a residential building as a trespasser having entered as a trespasser

(b) the person knows or ought to know that he or she is a trespasser, and

(c) the person is living in the building or intends to live there for any period"

66. In giving the leading judgment in the Court of Appeal Sales LJ identified in paragraph 51 of his judgment that the best guidance on the question of the operation of illegality is to be found in the speech of Lord Wilson JSC in Hounga v Allen (Anti-Slavery International intervening) [2014] 1 WLR 2889. Sales LJ set out his analysis of the decision in Hounga in the following terms:

"52. In doing so, the Supreme Court confirmed the position arrived at in *Tinsley v Milligan* [1994] 1 AC 340: the law of illegality does not operate to confer a broad discretion on a court to take any illegal actions on the part of a claimant into account when deciding the extent to which such illegality has an impact upon the relief sought by the claimant. Rather, the task for the court is to identify in the specific context in question a particular rule which reflects in an appropriate way the relevant underlying policy in that area: see *Hounga*, paras. [42] et seq.; also *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339, paras. [30]-[31] per

Lord Hoffmann; *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [\[2009\] 1 AC 1391](#) , paras. [20]-[25] per Lord Phillips of Worth Matravers; and now *Les Laboratoires Servier v Apotex Inc.*, supra, paras. [13]-[22] per Lord Sumption JSC. Although in each case a rule is to be identified, rather than just taking a discretionary approach of a kind disapproved in *Tinsley v Milligan*, *Hounga* and *Les Laboratoires Servier*, there is not one single rule with blanket effect across all areas of the law. Instead, there are a number of rules which may be identified, each tailored to the particular context in which the illegality principle is said to apply: see *Gray v Thames Trains Ltd* (para. [30]: the *ex turpi causa* policy is based “on a group of reasons, which vary in different situations”; and para. [32]: as between rules applicable in different contexts, “the questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation”) and *Les Laboratoires Servier*, paras. [19] and [22].

53. The issue in *Hounga* was, “In what circumstances should the defence of illegality defeat a complaint by an employee that an employer has discriminated against him by dismissing him contrary to section 4(2)(c) of the Race Relations Act 1976?” (para. [1]). In a significant respect, therefore, the question was similar to that before us, depending as it did on the extent to which the Supreme Court considered that the rights conferred by the 1976 Act should be treated as impliedly qualified so as to be subject to a defence of illegality. At paras. [42]-[44] of his judgment in *Hounga*, Lord Wilson said this:

“42. The defence of illegality rests on the foundation of public policy. “The principle of public policy is this ...” said Lord Mansfield by way of preface to his classic exposition of the defence in *Holman v Johnson* (1775) 1 Cowp 341, 343. “Rules which rest on the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification”: *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask “What is the aspect of public policy which founds the defence?” and, second, to ask “But is there another aspect of public policy to which application of the defence would run counter?”

43. An answer to the first question is provided in the decision of the Canadian Supreme Court in *Hall v Hebert* [1993] 2 SCR 159. After they had been drinking heavily together, Mr Hebert, who owned a car, allowed Mr Hall to drive it, including initially to give it a rolling start down a road on one side of which there was a steep slope. The car careered down the slope and Mr Hall was seriously injured. The Supreme Court held that the illegality of his driving did not bar his claim against Mr Hebert but that he was contributorily negligent as to 50%. At the outset of her judgment on behalf of the majority, McLachlin J, at p 169, announced her conclusion about the basis of the power to bar recovery in tort on the ground of illegality, which later she substantiated in convincing terms by reference to authority. Her conclusion was as follows:

'The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage[s] award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.'

44. Concern to preserve the integrity of the legal system is a helpful rationale of the aspect of policy which founds the defence even if the instance given by McLachlin J of where that concern is in issue may best be taken as an example of it rather than as the only conceivable instance of it. I therefore pose and answer the following questions: (a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent on her dismissal, in particular the abusive nature of it. (b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed on her, it would not represent evasion of

it. (c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Houna to enter into illegal contracts of employment? No, the idea is fanciful. (d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity.”

54. Lord Wilson's assessment was that the considerations of public policy militating in favour of applying the *ex turpi causa* defence to defeat the claim were very slight: para. [45]. He then went on to consider the countervailing public policy considerations which were in play, in favour of allowing the claimant to rely on the Race Relations Act and to bring her claim. He concluded that these outweighed the public policy considerations in favour of allowing an illegality defence to the claim and that therefore the claim should proceed: paras. [46]-[52]. Lord Hughes JSC (with whom Lord Carnwath JSC agreed) agreed “that the claim of statutory tort in the present case was set in the context of the claimant's unlawful immigration, but that there was not a sufficiently close connection between the illegality and the tort to bar her claim”: para. [59].”

67. Sales LJ applied the guidance given in Houna to the particular circumstances of Best as follows:

“69. Following this approach, I accept Mr Rainey's submission that the relevant balance of public policy considerations shows clearly that the fact that a relevant period of adverse possession for the purposes of the LRA included times during which the possessor's actions constituted a criminal offence under section 144 of LASPOA does not prevent his conduct throughout from qualifying as relevant adverse possession for the purposes of the LRA.

70. For these purposes, what is required, following the guidance given by Lord Wilson in *Houna* at para. [42], is an amalgamated approach, balancing the public policy considerations which underlie and find expression in the provisions of the LRA governing acquisition of title by adverse possession against the public policy considerations which underlie and find expression in section 144 of LASPOA. Addressing that focused issue, I consider that it is clear that in enacting section 144 of LASPOA, Parliament did not intend that it should have any impact on the law of adverse possession set out in the LRA. The mischief which section 144 was intended to address and the objective it was intended to achieve had nothing to do with the operation of the law of adverse possession. (I would add that, in my opinion, each of the authorities relied upon by Mr Rainey for his wide submission is capable of being explained by application of the same approach).

71. The object of section 144 appears both from its own terms and from the Government's stated reasons for seeking its enactment by Parliament, as set out in the Response to Consultation. Although that response was not in formal terms a White Paper, in substance it fulfilled the same role of explaining the background to a legislative proposal introduced by the Government. In my view, therefore, the consultation paper has similar status to a White Paper as a legitimate aid to interpretation of section 144, and in particular as a legitimate source for guidance as to the policy objective which was sought to be achieved by section 144 (cf *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591). The stated objective of section 144 was to provide deterrence and practical, on the ground assistance for home-owners in removing squatters from their property. Disruption of the law of adverse possession was not mentioned as an intended effect of the provision, nor was it suggested that it was being introduced to try to re-balance the rights of property owners as against those of adverse possessors with respect to the entitlement to be treated as title-holder in relation to property.”

68. In his submissions Mr Wilcox drew parallels with the case of Best and sought to apply the balancing of public policy interests required by paragraph 42 of Lord Wilson's judgment in the following way. He submitted that like Best the provisions of section 31 of the 1980 Act are grounded in principles akin to

adverse possession in terms of the requirement for long usage, and he drew attention to the public benefit to be derived from certainty as to the existence of rights of way, both in terms of the interests of land owners in knowing whether or not rights of way existed across their land, and also in terms of the public who might wish to use the right of way and the public benefits which were thereby provided. He submitted that the strong public interest in the secure and certain identification of rights of way provided by section 31 had to be balanced with the public policy interest of keeping trespassers off the railway, but contended that much more limited weight had to be given to that latter public policy consideration in the light of the fact that the sentence which the offence under section 55 attracts is very light, and far lighter than the sentence under section 144 of the 2012 Act. For these reasons he submitted that the doctrine of illegality ought not to apply in relation to section 31, which is premised on the tort of trespass in just the same way as were the easements in Bakewell Management and the adverse possession in Best. The acquisition of those rights should not, as a matter of public policy, be precluded by the section 55 offence.

69. In response to these submissions Mr Buley on behalf of the defendant submitted in response to the claimant's first point that in relation to the notices containing the prohibition upon entering onto the railway lines all that was required was the necessity of making clear that there was no lawful authority for persons to enter upon operational railway land and in particular to walk upon the railway lines. It was not necessary for the notice either to cite the word "trespass", or to identify that going on to the railway land would give rise to a criminal liability. He contended that the use of the word "passengers" was a perfectly sensible use of language bearing in mind the context that the notice appeared in a station. It was, he submitted, quite unrealistic to suggest that such a notice could not apply to any person who happened to be on the station who was not catching a train. In particular, he drew attention to the fact that section 55(3) is simply a defence to the crime created under section 55(1). In particular that defence does not require the offender to have seen the notice or even to have had access to the notice. All that is required is for notices to be exhibited at the station and that was what had occurred in the present case.

70. Turning to the submissions made by the claimant in relation to Bakewell Management, Mr Buley submitted that the factual circumstances of the present case were very different from that which pertained in that case. As Lord Walker had emphasised in paragraph 60 of his speech, the doctrine of illegality "must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest". In the present case Network Rail were serving the public interest by excluding trespassers from their land in the interests both of public safety and also the efficient operation of the railway. Thus, the present case engaged a wider and more important public interest, and the illegality doctrine was undoubtedly engaged. The public interest could not sensibly be measured in the present case simply by reference to the extent of the sentence which might be imposed for the crime concerned. Turning to the exercise of the principles set out in Best, Mr Buley accepted that the policy of section 31(1) was broadly similar to those legal principles associated with rights of prescription or adverse possession and that, as in Best, those principles are underpinned by a public interest which has to be afforded some weight in the overall balance. However, he submitted that on the other side of the balance was to be set the critically important public interest in the safe operation of the railway and the safety of the public, as well as the efficient operation of the railway as a piece of public transport infrastructure. He contended that the public interest in the safe and efficient operation of the railway will clearly outweigh any interest in the public policy lying behind section 31(1).

71. Mr Buley emphasised, further, that which had been observed by Lord Scott in paragraph 24 in his speech about the limitations upon what "lawful authority" could be granted by the owner of the common. In paragraph 24 Lord Scott observed as follows:

"24 The words in subsection (4) "without lawful authority" deserve careful attention. They have been taken, in cases like the present and like *Hanning v Top Deck Travel Group Ltd* 68 P & CR 14 , to refer to an authority given by the owner of the common. They might also, if proviso (a) is applicable, refer to an authority given by some public official or public body pursuant to the Act, scheme, byelaw or regulation in

question. But the ability of the owner of the common in question to give someone a "lawful authority" to do one or other of the things prohibited by subsection (4), or, indeed, to do one or other of those things himself, is subject, in my opinion, to an important qualification. The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners: see section 30 of the Commons Act 1876 (39 & 40 Vict c 56). To do so would be a nuisance: see Clerk & Lindsell on Torts, 18th ed (2000) para 31-27. Nor could the owner of a common lawfully authorise things to be done by others on the common that, if done, would constitute a nuisance. The reference to "lawful authority" in subsection (4) does not, therefore, mean that the owner of a common can authorise to be done whatever he pleases. Authority given to too many people to camp on the common and light too many fires could damage the sufficiency of grass on the common for the commoners' grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend on the facts. But, subject to that qualification, subsection (4) allows the owner of a common to which section 193 applies to authorise the doing of an act that if done without that authority would be an offence under the subsection."

Mr Buley submitted that this passage in the Bakewell Management case recognised that there was a limitation on the dispensing power of the land owner, namely that the land owner could not grant authority to a person to do whatever they pleased, and in particular could not grant authority to undertake acts which would harm the interests of the commoners. Thus, in the present case he submitted there were necessary limitations on the dispensing power of the second interested party founded upon the need for the second interested party to comply with its statutory duties in terms of operating the railway safely and efficiently. Mr Lopez supported Mr Buley's submissions on behalf of NR.

72. Having considered Mr Wilcox's submissions in relation to the form of the notice which was exhibited at the relevant stations from 1949 I am unable to accept his contention that, in substance, the notices were of no effect such that any person using the level crossing could have relied upon the defence under section 55(3) of the 1949 Act. In my view they provide a public warning to persons not to go onto the land occupied by the operational railway, and in particular the railway lines. I do not consider that it was necessary for the notice to specifically use the words "trespass", in circumstances where the obvious substance of the notice was to make clear that being present on the railway lines was prohibited (or not authorised) which is clearly the meaning of trespass as it is applied in section 55. The notice made clear that passing onto the railway lines was prohibited. Had it used the word "trespass" it would not have in any way changed the substance of the contents of the notice. As such it satisfied the requirements of section 55(3).

73. The notice is not required by section 55(3) to specify that going onto the railway lines when prohibited from doing so would amount to a criminal offence. I therefore do not accept that the failure of the notices in the present case to do so rendered them incompetent to preclude the defence under section 55(3). Thus I am satisfied that the Inspector was correct as a matter of law to conclude that the notices were adequate, and therefore on the factual findings which he made he was entitled to conclude that the use of the level crossing during the relevant period gave rise to a criminal offence.

74. Moving to consideration of the issues raised under the Bakewell Management and Best cases I accept the submission of Mr Buley that there is not, in substance, equivalence between the offence created by section 193(4) of the 1925 Act and that created by section 55(1) of the 1949 Act. When consideration is given to Mr Wilcox's suggestion that there is under section 55(1) a dispensing power whereby NR might grant an exemption by permitted pedestrian use of the level crossing, it has to be recognised immediately that such could only occur to the extent that it was consistent with the statutory duties of NR to preserve the safety and safeguard the efficiency of the operation of the railway. As is clear from NR's case and the findings of the Inspector in the present case, permitting public use of the level crossing as a right of way would both give rise to increased risk to public safety and also be inconsistent with the efficient operation of the railway. Thus any suggested power to grant exemption from the offence under section 55(1)

immediately runs across the same issues which are raised in relation to statutory incompatibility. Unlike Lord Walker's conclusions in paragraph 56 as to the dispensing power under section 193(4) of the 1925 Act, in the present case the public interest would be directly engaged in any exercise of any apparent dispensing power on behalf of NR. Thus Mr Wilcox's submission as to dispensing powers is not an answer to the issue in the present case.

75. It is necessary to undertake the exercise contemplated by Lord Wilson in paragraph 42 of Hounga and Sales LJ in paragraph 52 of Best. Firstly, it is necessary to ask what is the aspect of public policy which underpins section 31 of the 1980 Act. In that respect I accept that, akin to cases of adverse possession or prescription, section 31 is designed to provide clarity in respect of the rules relating to recognition of public rights of way where they have been the subject of long usage, and also to provide certainty and clarity for land owners and the public in respect of any public rights existing over land. As in the cases of Bakewell Management and Best the public interest in those factors is clear and obvious. Set against that must be such public interest as underlies the creation of the offence under section 55 of the 1949 Act. I have no doubt that the creation of an offence of preventing trespass on the railways had the objective of promoting and securing the safe and efficient operation of the railways. There is a clear public interest in excluding trespassers from the railway lines who may not only come to harm not only themselves, but also may give rise to health and safety risks for those working on the railway. Furthermore, the presence of trespassers on the railway line gives rise to obvious risks to the efficient operation of the railway and the provision of timely rail services.

76. Balancing those respective public interests I am in no doubt that the weightier public interests at stake in this case are those which are represented by section 55 of the 1949 Act and the safe and efficient operation of the railway. In my view the public safety objective of preventing people from trespassing on the railway by means of a criminal sanction is of particular weight in striking the balance. It follows that I am satisfied that it was appropriate for the Inspector to conclude that the principle of illegality did apply to the consideration of whether or not the Order should be made in this case, and his conclusion that the use of the level crossing had amounted to an offence under section 55(1) of the 1949 Act justified a finding that the Order should not be made.

Reason 3: The cul-de-sac

77. It will be apparent from paragraph 38 of the Inspector's decision set out above that he declined to make the Order on the basis of the objection of the NR. On behalf of the claimant it is submitted that even were the Inspector correct about that, and the inappropriateness of confirming the order in so far as it affected the level crossing, there was no reason why he could not have confirmed the order as, in effect, two cul-de-sacs, each running up to the railway lines and then terminating at the point where the level crossing commenced.

78. Issues of this kind were considered by Farwell J in the case of Attorney General v Antrobus [1905] 2 Ch 188. That case concerned an action brought against the land owner of Stonehenge. The land owner erected fences precluding the public from visiting the monument and an action was brought seeking the removal of the fences which had been erected. Part of the plaintiff's case was that there were public rights of way running up to and through Stonehenge which had been blocked by the land owner's fencing. Having heard evidence Farwell J found as a fact that there had for many years past been a large amount of traffic to Stonehenge as "the end and object of the journey". He concluded on the facts that there had in truth been no through traffic by any of these visitors but that the object of their journey had been to visit and enjoy the monument. He further concluded that on this basis permission must have been granted by the land owner for that activity and therefore no public right had in fact been created.

79. Part of the reasons for him concluding that the case should be dismissed related to the fact that the tracks relied upon as public rights of way simply led to the monument but did not pass through it. His conclusions were expressed in the following terms:

“Further, the tracks which lead into the circle cease there and do not cross, and the public have no jus spatiandi or manendi within the circle. The claim, therefore, is to use tracks which in fact lead nowhere. Now, the cases establish that a public road is *primâ facie* a road that leads from one public place to another public place (see per Lord Cranworth in *Campbell v. Lang* and *Young v. Cuthbertson*), or as Holmes L.J. suggests in the *Giants' Causeway* case, there cannot *primâ facie* be a right for the public to go to a place where the public have no right to be. But the want of a *terminus ad quem* is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient... In *Bourke v. Davis* Kay J. says: “But it is argued that a cul-de-sac may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended.” Eady J.'s decision in *Attorney-General v. Richmond Corporation* accords with this. I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road; but the mere transit of passengers to see a view or a house at the end will create no right, as Lord Cranworth says. But the landowner may by express words, or by conduct inducing the expenditure of money on the track in question, be shewn to have dedicated even a cul-de-sac to the public. There are doubtless drives in many seaside places and elsewhere which may have become public ways by this means. This explains the *Giants' Causeway Case*, for in that case the road in question had been “presented” by the Grand Jury in 1814, and had been repaired by the public authority.”

80. In the Oxfordshire County Council case Lightman J observed at paragraph 101 as follows:

“a cul-de-sac may be a public highway if there is some kind of attraction at the far end which might cause the public to wish to use the way.”

81. On the basis of these authorities Mr Laurence submits that at common law it was possible for a viewpoint, or point of particular resort as an attraction, to justify a cul-de-sac to being dedicated as a public right of way. At common law the land owner could evidence an intention to dedicate if the requirements under section 31 were satisfied. Furthermore, he submits that the railway line could properly be regarded as a point of resort or viewpoint which could properly lead to the dedication of the two cul-de-sacs running up to each side of the level crossing. As such the Inspector erred in law in failing to modify the order to reflect this submission and make the Order in those terms.

82. Mr Buley submits that the Inspector was perfectly entitled to reach the conclusion which he did in paragraphs 38-40 of the decision, namely that bearing in mind the missing link between the cul-de-sacs would involve a criminal trespass, and there was no “legitimate place of public resort” at the end of either cul-de-sac, the remainder of the route could not be established as a public highway at common law. Thus the Inspector was entitled to conclude that the Order should not be confirmed. He submitted that it was simply unrealistic to suggest that the railway line in and of itself amounted to a popular place of resort or local viewing attraction so as to amount to evidence of dedication.

83. I am satisfied that the conclusions which the Inspector reached in relation to the question of whether or not it would be lawful to confirm the Order in the form of two disconnected cul-de-sacs was entirely correct. As Farwell J in the Antrobus case observed, there cannot be any *prima facie* right for the public to pass

from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network or over which there is no other public right of use). Furthermore, as Farwell J emphasised, the question is one of evidence in each case. In the absence of any express dedication or public expenditure on the way claimed, mere use by the public without more of a cul-de-sac in the absence of some particular point of attraction could not amount to evidence justifying a finding that dedication had occurred. In the present case there was simply no evidence to suggest that people were using the two cul-de-sacs to gain access to the railway as a point of popular resort. Rather, all of the evidence suggested that the parts of the claimed right of way which formed the two cul-de-sacs were in fact being used as parts of a single journey traversing the whole length of the path identified in the order. There was not therefore in the present case the evidence necessary to demonstrate the dedication of two cul-de-sacs omitting the “missing link” identified by the Inspector. I am therefore satisfied there is no substance in the claimant’s contentions in this respect and that the Inspector’s conclusions on this part of the case were legally robust.

Conclusions

84. For all of the reasons which have been set out above, I am satisfied that the decision which was reached by the Inspector in relation to this Order was lawful and that there was no error of law in the decision which he reached in any of the respects which have been presented by the claimant. It follows that this claim must be dismissed.

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