

Neutral Citation Number: [2026] EWCA Civ 534

Case No: CA-2025-000794

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE KING'S BENCH DIVISION
PLANNING COURT

Mrs Justice Lang

[2025] EWHC 537 (Admin)

Royal Courts of Justice Strand, London, WC2A 2LL

Date:

07/05/2026 Before:

LORD JUSTICE LEWISON

LORD JUSTICE LEWIS and

LADY JUSTICE YIP

Between:

ROXLENA LIMITED

Appellant

- and -

THE KING (on the application of THE
RAMBLERS' ASSOCIATION)

1st Respondent

SECRETARY OF STATE FOR ENVIRONMENT,
FOOD AND RURAL AFFAIRS

2nd Respondent

CUMBERLAND COUNCIL

3rd Respondent

Dr Ashley Bowes and Edwin Simpson (instructed by Ansons Solicitors Limited) for the

Appellant

Tim Buley KC (instructed by Bevan Brittan LLP) for the 1st Respondent The 2nd
and 3rd Respondents did not attend and were not represented.

Hearing date: 21/04/2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 07/05/2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. Section 31 (1) of the Highways Act 1981 relevantly provides:

“Where a way over any land... 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 issues on this appeal relate to the meaning of the phrase “actually enjoyed by the public as of right and without interruption for a full period of 20 years”.

The essential facts

3. On 19 January 2021 Cumbria County Council made the Cumbria County Council (Parish of Hayton: District of Carlisle) Definitive Map Modification Order (No 1) 2021 (“the Order”) in the exercise of powers under section 53(2)(b) of the Wildlife and Countryside Act 1981. That order, subject to confirmation, added 18 new footpaths and a bridleway over Hayton Wood, which was land belonging to Roxlena Ltd.
4. Roxlena objected to the Order with the consequence that the Secretary of State appointed an inspector (Ms Saward) to hold a public inquiry in order to decide whether or not the Order should be confirmed. She decided that it should not be confirmed. She took the relevant period of 20 years as being the period from 1990 to 2010, 2010 being the year in which the existence of the claimed rights was challenged: Highways Act 1981 s. 31 (2). At the heart of her reasoning was that there had been a break in public use for a period of some four months in 2001 as a consequence of an outbreak of foot and mouth disease. That meant that it had not been shown that the ways had been actually enjoyed for the full period of 20 years.
5. The Ramblers’ Association challenged that decision by judicial review. Having considered the grounds of challenge the Secretary of State was prepared to consent to the quashing of the decision; but Roxlena maintained its support of the decision. The order making authority (which had become Cumberland Council) took no part in the proceedings.

6. The judicial review challenge came before Lang J who upheld it. Her judgment is at [2025] EWHC 537 (Admin). With my permission, Roxlena now appeal. The underlying reason for my grant of permission to appeal was the existence of a potential conflict of authority at High Court level. Consistently with her stance below, the Secretary of State has taken no part in this appeal.

The Order decision

7. The Order decision was given on 10 April 2024, following both a site visit and a hearing. The Order decision recorded at [86] that Roxlena accepted that members of

the public used all the routes shown in the Order over the relevant 20-year period and with the regularity claimed but raised two main points of which only the first is relevant to this appeal. That is that the use was not for a full period of 20 years and that the use was interrupted so as not to be continuous. Roxlena's argument was augmented at [104] in which the Inspector explained that Roxlena contended that (i) continuity of public use of the paths was broken while restrictions were in place during the foot and mouth disease outbreak, and (ii) in consequence of the period of non-use there had not been public use for a full 20 years over the requisite period.

8. She made her findings about the outbreak of foot and mouth disease at [106] to [110]. In summary, Cumbria was badly affected by the outbreak of the disease in 2001. On 28 February 2001 an order was made by Cumbria County Council prohibiting public access to three public footpaths crossing Hayton Wood, but they did not apply to the ways under consideration. She concluded on this point:

“[109] Whether or not that is so, use of the Order routes must have been affected by the closures where they connect with the existing paths. For instance, both red and green routes connect with recorded paths meaning that a circular walk could not have been available during the restrictions. Use of many of the paths would necessitate a person re-tracing their steps. Some sections lying in between the public paths would have been inaccessible altogether.

[110] Given the network of inter-linking paths, the availability of the Order routes for walkers would have been limited. In all likelihood, the passage along most of them would have been prevented by the closure of the three public paths.”

9. The Inspector then set out the test to be applied as follows:

“[116] The crux of the matter here is whether as a matter of fact there was a break in continuity of use which was more than de minimis so that there had not been actual enjoyment of the claimed routes for the full 20 years. Whether there was an interruption in use is a different point albeit capable of arising from the same facts. A use could cease without an interruption occurring but result in less than 20 years use being shown. Of course, it will depend on the circumstances.

[117] For the routes to be 'actually enjoyed' for the purposes of section 31(1) requires sufficient use of the way over the required 20-year period. This is a matter of fact to be determined in each case. The motive for using the ways is irrelevant. It is undisputed that a short period of non-use which is de minimis (i.e., too small to be considered) would not affect the running of time.”

10. At [121] to [126] the Inspector made further findings about the use of the ways. In short, she found that during the duration of the foot and mouth disease outbreak all but one person stopped using the ways. Even then, the practicalities meant that such

use could not have extended across all the Order paths without contravening the restrictions in place for the public paths. The period of non-use was of the order of four months. Once the restrictions were lifted in September or October 2001 people used the paths as before; that is for a period of 9 or 10 years before the end of the 20 year period. At [126] she said:

“To some extent use will be intermittent depending on when people choose to walk the paths. A mere cessation of use may not break continuity of actual enjoyment. In my judgement, as a matter of fact and degree, this was not a short break that can be regarded as de minimis. It was a prolonged period where the Order paths were not actually enjoyed by the public. Closure of the three public paths clearly had a deterrent effect and people kept out of the woodland. Moreover, from the landowner's perspective the public use had stopped and so they could not reasonably know that a continuous right to enjoyment was being asserted that ought to be resisted.”

11. It was on that basis that the Inspector concluded that at [127]:

“All things considered, it leads me to conclude that, in the particular circumstances of this case, the Order routes had not been actually enjoyed by the public for a full period of 20 years before the date of bringing into question. This alone means that the requirements of section 31 of the 1980 Act are not met for the presumption of statutory dedication to arise.”

12. She did not, however, find that there had been an “interruption” within the meaning of section 31.

What test did the Inspector apply?

13. Although Mr Bowes argued his points in a different order, it is in my view logical to begin by considering what legal test the Inspector applied. In my judgment (and to some extent contrary to the view taken by the judge) it is clear that the Inspector applied a de minimis test. That is made plain by the first sentence of [116] quoted above (“the crux of the matter”). The combination of [117] and [126] repeats that approach. Although it is true to say that the Inspector said that a mere cessation of use would not break continuity of actual use, her conclusion was that since the four month break could not be regarded as de minimis, it had that effect.

Why did the inspector apply that test?

14. The origin of the test that the Inspector applied appears to be the observations of Kerr J in *R (Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin) (“*Roxlena 1*”). That challenge concerned an earlier stage in determining what footpaths existed in Hayton Woods. The challenge was dismissed by Kerr J, and his dismissal was upheld on appeal to this court. Cumbria relied on, among other things, Advice Note 15 issued by the Planning Inspectorate in November 2012. Paragraph 1 of that Note explained that it was dealing with the question whether restrictions on access to claimed rights of

way under foot and mouth legislation would constitute an “interruption” in use for the purposes of section 31 (1). Paragraph 8 stated:

“Over a period of 20 years or more there may well be periods when, for a variety of reasons, a way has not been used. In cases where a landowner’s ability to dedicate has not been removed it would be reasonable for an Inspector to take the view that, in a period of 20 years or more, periods of non-use of a way may occur.”

15. That advice note concluded in paragraph 9:

“... it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Order 1983 could be classified as an “interruption” under section 31 (1).”

16. Kerr J commented on that Advice Note as follows:

“[73] I do not agree with the proposition in the Advice Note, and that derived from the *Marble Quarry* decision, that an interruption which is more than *de minimis* but caused by measures taken against foot and mouth disease, is incapable in law of amounting to an interruption in use of a footpath or other way. I see no basis for that proposition. Use or non-use is a question of fact; the cause of any non-use is not the issue.”

17. I agree with the judge that this part of Kerr J’s judgment was muddled and potentially misleading. It conflated two separate questions: (1) whether there was actual enjoyment for the full period of 20 years and (2) whether that enjoyment had been interrupted. The Advice Note dealt only with the question of interruption. As I will explain, an intermission in use (or “non-use”) and an interruption in use are different concepts. As I will also explain, Kerr J was wrong to dismiss the relevance of the cause of any non-use.
18. Nevertheless, and not surprisingly given that the Advice Note had been criticised by a High Court Judge, the Planning Inspectorate reconsidered the advice and issued a new Advice Note 15 in August 2023. The new version stated in terms that it had taken into account Kerr J’s observations in *Roxlena 1*. Under the heading “Consideration” that Advice Note stated:

“3.1 The essential issue here is whether the use of a way claimed by the public during a 20-year period can be described as continuous and without interruption when it includes a period of non-use as a result of closure by order.

3.2 During the relevant 20 years before a way is brought into question section 31 (1) requires use to have continued “without interruption”. Whilst the frequency of use will vary in every case, a 3-month period where use by the public ceases is unlikely to be regarded as *de minimis* in terms of the length of time of non-use.”

19. Thus paragraph 3.2 could be read as suggesting that (as the Inspector thought) the “crux of the matter” is whether the period of non-use can be regarded as *de minimis*.
20. This version of the Advice Note has since been withdrawn.

Approach to interpretation of section 31

21. Section 31 (1) of the Highways Act 1981 is the direct descendant of the Rights of Way Act 1932, which in turn adopted language first found in the Prescription Act 1832. It is sufficient for present purposes to quote part of section 2 of the 1832 Act which enabled a right of way to be acquired by prescription where that right:

“shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years.”

22. Dr Bowes submitted that although there was a parallel between the language used in these Acts, there was significant difference in the nature of the right acquired. Under the Prescription Act 1832 all that was acquired was a private right, whereas under section 31, what is acquired is a public right. Accordingly, cases decided under the 1832 Act are not a reliable guide to the application of section 31.
23. I disagree. As Hilbery J pointed out in *Merstham Manor Ltd v Coulsdon and Purley UDC* [1937] 2 KB 77, 81 the words of the Act (in that case the 1932 Act) are reproductions of the language used in the 1832 Act; with the consequence that in considering the 1932 Act he applied authority on the 1832 Act. Lord Hoffmann identified the same pedigree in *R (Sunningwell PC) v Oxford CC* [2000] 1 AC 335 and *R (Godmanchester Town Council) v Secretary of State* [2007] UKHL 28, [2008] 1 AC 221. In *Sunningwell* he explained at 353 that in introducing what became the 1932 Act Lord Buckmaster said that its purpose was to assimilate the law on public rights of way to that of private rights of way. In *Godmanchester* he said at [8]:

“The law of private rights of way and certain other easements was reformed by the 1832 Act and since this provided a model for the 1932 Act, it is helpful to see how it worked.”

24. In *DPP v Instone* [2022] EWHC 1840 (Admin), [2022] 1 WLR 5358 Holgate J, discussing section 31, said at [34]:

“Parliament enacted the words “actually enjoyed by the public as of right and without interruption for a full period of 20 years” to assimilate the law on public rights of way to that of private rights of way.”

25. Accordingly, in my judgment the judge was correct in saying at [58] that the same statutory test was adopted for all three Acts with the consequence that the case law interpreting the test under the earlier Acts informs the interpretation of section 31.
26. Dr Bowes had another string to his bow on the question of the approach to interpretation of section 31. He referred to section 15 of the Commons Act 2006

which deals with the right to apply to register a town or village green. It relevantly provides:

“(2) This subsection applies where—

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

- (b) they continue to do so at the time of the application.

...

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.”

27. It follows, so the argument goes, that where Parliament wishes a period of non-use to be disregarded, it says so expressly. There is no similar provision in section 31. Accordingly, the judge was wrong to include in her consideration whether there was a cause or explanation for the period of non-use during the foot and mouth outbreak.
28. There are a number of flaws in this argument. First, it is only permissible to look at later legislation to interpret earlier legislation where (a) the earlier legislation is ambiguous and (b) the later legislation is legislation on the same subject. Neither of those conditions is satisfied in this case. Section 31 is not ambiguous; and the Commons Act is concerned with a different species of public rights. Second, the legislative scheme enacted by the Commons Act is wholly different to the simple words of section 31. Third, in a case to which section 15 (6) applies, the period of non-use does not count towards the period of 20 years. It simply drops out of the picture, so that the starting point of the 20 year period is simply pushed back. As Mr Buley KC submitted, Parliament must have considered that, absent section 15 (6), a period of non-use would count towards the establishment of the 20 year period.

The nature of the use

29. Lord Neuberger explained in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822 (a case of prescription at common law) at [142] that:

“The essential question in a prescription case has been said to be whether the nature and degree of the activity of the putative dominant owner over the period of 20 years, taken as a whole, should make a reasonable person in the position of the putative servient owner aware that a continuous right to enjoyment is being asserted and ought to be challenged if it is intended to be resisted.”

30. The same test applies to section 31, as Ousley J said in *Wright v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 1053 (Admin) at [21]:

“The relevant law is not contentious. *Mann v Brodie* (1885) 10 App Cas 378 shows that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 AC 70, and others cited in it, deal with

the quality of the user. The use had to be sufficient to bring home to the mind of the reasonable nonabsentee landowner that the public were asserting a continuous right to use each route in question. The user over the twenty year period did not have to be by the same people.”

31. At [86] of the Order decision the Inspector recorded that Roxlena accepted that the public used all the routes in the Order over the 20 year period and on the regularity claimed, subject to the gap when foot and mouth restrictions were in force. I understand that concession to have been a concession that, subject to the four month gap and any question of interruption, the quality of the use met the legal test I have set out.

Interruption or intermission?

32. It is obvious common sense that a way may not be used for every minute of every day, but may nevertheless be a public right of way. Dr Bowes accepted that as a general proposition, but nevertheless stressed that the language of section 31 required it to be demonstrated that the use must have been “actual enjoyment” for the “full period” of 20 years. In evaluating that point it is necessary to consider how the same concept was explained in earlier cases both under the 1832 Act and the 1932 Act. In *Carr v Foster* (1842) 3 QB 581 Lord Denman CJ said at 586-7:

“There must be some interval in the enjoyment of all such rights; and it must be a question for the jury, in each case, whether the right was, substantially, enjoyed for the requisite period. It has been ingeniously argued that a thirty years’ enjoyment cannot have taken place where there has been a two years’ intermission. But the words of sect. 1 are “without interruption,” not “without intermission.”... where actual enjoyment is shewn before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.”

33. In the same case Patteson J said at 588:

“It is always for the jury to say whether, during any intermediate part of the period, an actual enjoyment has been had. How many times the right has been exercised is not the material question, if the jury are satisfied that the claimant exercised it as often as he chose. It is suggested that the argument for the plaintiff might apply equally if there were a cesser for seven years. I am not prepared to say that it would not. It might be that, under the circumstances, the party had no occasion to use the right. The question would always be for the

jury. So long an intermission would be a strong piece of evidence against the continued right: but it would be for them to determine.”

34. Williams J emphasised the difference between an interruption and an intermission.
35. The judge correctly said at [65] that these judgments:
- “... emphasise the distinction between an “interruption” and an “intermission”. The length of the intermissions considered in the judgments are measured in years not months. They expressly refer to the relevance of the explanation for the intermission when considering whether actual enjoyment has been continuous. They confirm that “actual enjoyment” is to be assessed by reference to the relevant time period as a whole, both before and after the intermission. It is not disputed that Lord Denman and Patterson J make it clear that determining the question of “actual enjoyment” is a matter of fact for the jury.”
36. In *Jones v Bates* [1938] 2 All ER 237, dealing with the Rights of Way Act 1932, Scott LJ said at 246 that a mere absence of continuity in the *de facto* user proved will not prevent the statute from running. Scott Baker J applied that observation when considering section 31 in *Fernlee Estates Ltd v City & County of Swansea* [2001] EWHC 360 (Admin) at [16]. In *Lawrence v Fen Tigers Ltd* Lord Neuberger approved *Carr v Foster* at [37] and [141] holding that the trial judge was not entitled to find that an intermission for two years in the prescriptive right claimed would have prevented the acquisition of the claimed easement by prescription.
37. The word “interruption” which appears in section 31 is also the subject of some caselaw. In *Carr v Foster* Williams J said:
- ““Interruption” means an obstruction, not a cesser or intermission, or any thing denoting a mere breach in time. There must be an overt act, indicating that the right is disputed.”
38. In *Merstham Manor* Hilbery J said that an interruption means an “actual and physical stopping of the enjoyment”. In *Jones v Bates* Scott LJ said that:
- “No interruption comes within the statute unless it is shown to have been an interference with the enjoyment of the right of passage.”
39. Thus, in *Lewis v Thomas* [1950] 1 KB 438 Sir Raymond Evershed MR, applying *Jones v Bates* said that an interruption “means interruption in fact”.
40. What is clear from the case-law is that an intermission in use and an interruption of use are two quite different concepts.

Why has there been an intermission in use?

41. In his written argument Dr Bowes submitted that if there has been an intermission in use, the reason for that intermission is irrelevant. He relied on the statement of Kerr J in *Roxlena* 1 at [73] that:

“Use or non-use is a question of fact; the cause of any non-use is not the issue.”

42. In support of this submission, he drew attention to the decision of the Divisional Court in *De Rothschild v Buckinghamshire CC* (1957) 8 P & CR 317. That is not a case that is entirely easy to understand. There were two potential dates at which the existence of the claimed right was brought into question: one in 1911 and the other in 1948. I think that it is the latter date which is relevant to this appeal. As regards that date the facts appear to have been as follows. The way was used by the public between 1911 and 1940, when the land over which it ran was requisitioned as a munitions factory. Thereupon the use of the way ceased, and following the derequisitioning of the land at some point after 1945 the landowner posted notices stating “No right of way” at each end of the way. Slade J gave the leading judgment. On the basis that 1948 was the relevant date when the right was called into question, he said:

“... the case finds user by the public for an uninterrupted period only from 1914 to 1940, with no evidence of user from 1940 to 1948, so that although it is twenty-six years from 1914 to 1940, it is not twenty-six years next before the time when the right of the public to use the way shall have been brought into question as required by section 1(6). Therefore, no statutory presumption of dedication could arise at all on the facts of this case as found by the justices.”

43. In other words, the use of the way had not been exercised for eight years before the end of the period. It was not a case in which there had been an intermission in use during the course of use for a period both before and after the intermission. It gives no support to the argument that an explanation for an intermission in use is irrelevant.
44. In *Hollins v Verney* (1884) 13 QBD 304 Lindley LJ considered the question of cessation of use. He said at 311, after referring to previous cases:

“These two cases, however, seem to establish that if user before the statutory period is proved and user for eighteen or nineteen years next before action is also proved, the mere fact of nonuser for some time immediately after the commencement of the statutory period is not necessarily fatal; and this we consider good law, if the non-user

is capable of explanation consistently with continued actual enjoyment as of right.”

45. He went on to say at 314:

“... the total absence of user for any year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user.”

46. In his oral submissions Dr Bowes adopted a less absolutist approach. He accepted that an explanation for non-use may be relevant, but that it was a question for the decisionmaker to determine. At one stage he seemed to suggest that this was a matter of public law discretion. But as Lewis LJ pointed out in argument, whether a public right of way has been established has nothing to do with discretion. It is a fact-finding exercise which, under the Prescription Act 1832, would in the nineteenth century have been a matter for the jury.

47. His final position in oral submissions was that if there is a gap in use it is necessary to inquire into the reason for the gap, but whether the reason is relevant to the question whether there has been actual use for the full period or whether there has been an interruption of use is a question for the decision maker.

48. It is, with all respect, clear that if there is a gap in use, and an explanation for it, the explanation will be relevant. Whether the gap is an intermission or an interruption will depend on the reason for the gap. Whether a gap is consistent with the continued assertion of a right of way will also depend on the explanation for the gap.

49. Although Dr Bowes argued that the judge departed from previous case law, it was in fact Kerr J who did so. Whether the cause of the non-use is mere intermission or an interruption is dependent on the cause; and in deciding whether it is consistent with the continued assertion of the claimed right the cause of the non-use is of critical importance.

50. In my judgment, the judge was entirely correct in saying that an explanation for an intermission in use is relevant to the overall question of fact; and that it is important to survey the extent and nature of the use over the whole of the relevant 20 year period.

51. In paragraph 4 of their skeleton argument Roxlena say:

“The effect of the Judge’s judgment is that, provided there is an explanation for the non-use, an intermission in public use of 10 years would still not lawfully be sufficient to preclude a finding that the public had “actually enjoyed” a way for a “... full period of 20-years”. Such a finding has obvious and farreaching consequences for landowners across the country and the steps which they should take to prevent the acquisition of public rights over their land, during a

twenty-year period which may well, as it did here, involve periods of ownership by different landowners.”

52. That is a mischaracterisation of the judge’s judgment. She did not say anything of the kind. At [86] she accepted the submission that:

“The Claimant correctly submits that the question is how the conduct of the person asserting the right would appear to the putative landowner. In considering that question, objectively ascertainable facts which place the public’s conduct in context (e.g. that there was a flood which prevented them from using the way) will be relevant to answer the objective question of how the reasonable landowner would consider the matter. There is no rational reason to exclude such evidence, and the Inspector did not do so in the Inquiry.”

53. She added at [88]:

“Roxlena drew a distinction between situations where the land is not available for enjoyment for practical reasons, such as flooding, and where the land is available for enjoyment, but members of the public choose not to enjoy it. Where the way is available for use, the intermission in user may lawfully inform a finding that the way has not been actually enjoyed. In my judgment, the authorities do not support any such distinction in law. The reason for an intermission in the user of the way, including whether or not the way is available, is likely to be relevant information in determining whether or not the way has been actually enjoyed for the prescribed period and whether there has been an interruption. Each case will be determined on its own facts.”

54. All that she said is that the reason for any intermission in use is “likely to be relevant information”. In so saying she was entirely correct.

Did the Inspector properly consider the reason for the intermission?

55. There is no doubt that the Inspector made factual findings about the reason for the gap in use which the judge accurately summarised at [124]. Dr Bowes submitted that the Inspector had properly considered the reason for the intermission and whether it was consistent with the continued assertion of the claimed right.

56. But the only consideration of the effect of that reason was a single sentence at [126] of the Order decision in which the Inspector said:

“Moreover, from the landowner’s perspective the public use had stopped and so they could not reasonably know that a continuous right to enjoyment was being asserted that ought to be resisted.”

57. It is clear from the Inspector’s statement that the public use “had stopped” that she was only considering the relevance of the reason for the non-use during the period of non-use itself. I agree with the judge at [123] that the Inspector asked herself the wrong question. It is clear that the question whether a gap in use is inconsistent with the continuing assertion of the claimed right is a retrospective exercise, to be conducted at the time when the right is brought into question and looking back over the whole period of 20 years. That is why the resumption of use after an intermission is of such importance in considering whether a claimed right has been continuously asserted. In saying what she did, the Inspector simply failed to consider the fact that after the ending of the four month gap the public use of the ways resumed and continued for a further eight or nine years before the existence of the way was brought into question. That was, to my mind, a clear error of law.

58. The judge said at [123]:

“The Inspector asked herself the wrong question, by focussing on the landowner’s objective state of knowledge during the 4 month intermission, instead of his objective state of knowledge over the whole 20 year period. The reason why a “mere absence of continuity” or an intermission does not defeat the claim under section 31(1) HA 1980 is precisely that it is not necessary to show that the use during the period of an intermission is in and of itself sufficient to alert the landowner. It is only necessary to show that the overall use in the 20 year period is sufficient to have this effect, taking account of such breaks as may have occurred.”

59. I agree.

Summary of the law

60. Mr Buley summarised the law in eight crisp propositions each of which I accept and which I quote (omitting citations):
- i) Section 31 of the 1980 Act provides that a public right of way will be deemed to have been dedicated by 20 years continuous enjoyment of a way by the public.
 - ii) “Continuous enjoyment” will be established by public “use” over the 20 year period. In the case of a footpath, such use will be by walking, in the case of a bridleway, by walking and riding, and so on.

- iii) The use in question must be “as of right”, which is interpreted to mean without force, stealth, or permission. The question is objective rather than subjective, as to whether the public conduct presented itself as “as of right” rather than whether particular members of the public subjectively believed that they enjoyed the right in question.
- iv) For the presumption to arise, the public use over the 20-year period must be sufficient to bring home to the mind of the reasonable non-absentee landowner that the public are asserting a continuous right of enjoyment. Again, the question is “objective”, as to how the use would appear to the putative reasonable landowner, not what the actual landowner believed.
- v) In considering whether the use is sufficient in this sense, the relevant question is whether the use over the period “taken as a whole” is sufficient, not whether the use in any particular sub-period is sufficient for that period seen in isolation.
- vi) As a corollary of the previous proposition, the “use” in question need not be “continuous”, and “mere absence of continuity” or “intermission” does not stop time running to establish the 20-year period. The use in question need not

be continuous throughout the 20-year period. However, an intermission in use may be relevant in considering whether, seen as a whole, the use over the 20 year period is sufficient. So, intermission in use is *relevant*, but not necessarily *fatal*.
- vii) In considering the effect on the mind of the reasonable landowner of an intermission in use, it will be relevant to consider any “explanation” for that intermission which would have been apparent, so as to consider whether the non-use in a given period is consistent with the public’s assertion of a right in that period.
- viii) The question of whether the use is sufficient in the above sense is to be distinguished from the question of whether the “enjoyment” has been “without interruption” within the meaning of section 31(1). An “interruption” in this sense requires, not mere cessation of use, but “an obstruction”, an “overt act”, or an “interference with the enjoyment of the right”.

Was the judge entitled to interfere with the Inspector’s conclusion?

- 61. Whether there had been actual enjoyment as of right for the full period of 20 years is a question of fact (or, possibly, an evaluative judgment). But in arriving at a decision on the facts, the decision-maker must apply the right legal test.
- 62. In the present case it is clear, in my view, that the Inspector did not apply the right legal test. Probably led astray by *Roxlena 1* and the revised Advice Note, she approached the statutory

question with tunnel vision, looking only at the question whether the intermission in use was more than *de minimis*.

63. Dr Bowes submitted that it was rationally open to the Inspector to find that a four month intermission in use was sufficient to preclude actual enjoyment for the full period of 20 years. In support of this submission, he relied on *Betterment Properties (Weymouth) Ltd v Dorset CC* [2012] EWCA Civ 250, [2012] 2 P & CR 3, and *Naylor v Essex CC* [2014] EWHC 2560 (Admin), [2015] JPL 217.
64. Both those cases concerned the question whether there had been use “as of right for not less than twenty years” for the purposes of the registration of a town or village green under the Commons Act 2006. In both cases the public were physically prevented for a period of some months from using part of the land claimed to be a town or village green for lawful pastimes. Both cases approached the question as one of interruption, even though that is not a word that is used in the Commons Act itself. As I have said, whether something amounts to an interruption is not the same question as whether an intermission in use can defeat a claim that there has been actual enjoyment over the full period. Moreover, as I have said, the scheme under the Commons Act is quite different from the statutory test under section 31.
65. In the Order decision in this case the Inspector considered whether there had been an interruption and concluded at [128] to [130] that there had not been. Roxlena does not challenge that conclusion. In those circumstances, I do not consider that decisions under different legislation with a different structure advance Roxlena’s case.
66. In my judgment, the judge was fully entitled to interfere with the Inspector’s conclusion.

Did the judge go too far?

67. Dr Bowes’ final complaint was that the judge went too far in stating her conclusions at the end of the judgment. What she said was this:

“[126] In the light of the Inspector’s findings, summarised above, I accept the submission made by the Claimant that no reasonable landowner would conclude, from the absence of public use in the period of restrictions, that the public assertion of the right (as demonstrated by public use in the rest of the period) had been withdrawn.

[127] I also agree with the Defendant’s concession that it was not reasonably open to the Inspector to find that the reasonable landowner could not know that a continuous right to enjoyment was being asserted that ought to be resisted. The Defendant accepts that, in all the circumstances, a reasonable landowner would consider that the period of non-use was due, directly or indirectly, to the foot and mouth restrictions.”

68. The first of these paragraphs is based on the Inspector's findings that there had been public use of the requisite nature from 1990 to (approximately) February 2001 and from (approximately) the summer of 2001 to 2010 separated by a four month gap while foot and mouth restrictions were in force. On the basis of those findings, I consider that the judge was fully entitled to accept the submission recorded at [126]. Any other conclusion would have been perverse. For the same reason I consider that the judge was entitled to accept the concession of the Secretary of State (who was the statutory decision maker) recorded at [127].

Relief

69. Finally, Dr Bowes submitted that even if the Inspector had not committed the legal error that she did, it was "highly likely" that she would have reached the same conclusion, with the result that relief should have been refused under section 31 (3C) of the Senior Courts Act 1981.
70. The argument seems to be that the order for confirmation before the Inspector was not subject to any limitation (such as a limitation to periods where there was no national emergency in force), whereas the evidence was that the claimed right was not asserted during the foot and mouth emergency. Thus, there was a mismatch between the right claimed and the use proved.
71. I reject this argument. The right both claimed and established was actual use as of right for the 20 year period (once the nature of the test is properly understood). If, at some time in the future, restrictions on use of the ways were to be imposed under public health or other legislation, then any use would have to comply with such restrictions. But that is no basis for concluding that in the absence of the legal errors
- that the Inspector made, it was highly likely that she would have concluded that no rights existed at all.

Result

72. In my judgment, the judge came to the right answer for the right reasons. I would dismiss the appeal.
73. The question whether the Order should be confirmed is therefore remitted to the Secretary of State. It is a matter for her how she deals with the remitted question and what procedure she adopts.

Lord Justice Lewis:

74. I agree.

Lady Justice Yip:

75. I also agree.