Neutral Citation Number: [2020] EWHC 1814 (Admin)

Case No: CO/3695/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 July 2020

Before :

Timothy Mould QC (sitting as a Deputy High Court Judge)

- -

Between :

PAUL GARLAND and HAROUN SALAMAN	**Claimants**
- and –	
THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**
-and-	
SURREY COUNTY COUNCIL	**Interested Party**

- -
- -

The Claimants in person
Ned Westaway (instructed by **the Government Legal Department**) for the **Defendant**
The **Interested Party** did not attend and was not represented

Hearing date: 5 December 2019

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Approved Judgment

Timothy Mould QC:

1. This claim is an application made under paragraph 12 of schedule 15 to the Wildlife and Countryside Act 1981 ['the WCA'] to quash the Surrey County Council Footpath No. 129 Byfleet, 3 Wisley (Part) and 566 (Wisley) Definitive Map Modification Order 2016 ['the Order']. The Interested Party made the Order on 20 July 2016 under the powers conferred by section 53(2)(b) of the WCA. Following a public inquiry into objections to the Order, including those made by the Claimants, the inspector appointed by the Defendant decided that the Order should be confirmed for the reasons given in his decision letter ['the DL'] dated 22 July 2019. On 9 August 2019 the Interested Party gave notice of confirmation of the Order.

The modification order

2. The effect of the Order is to change the status of the sections of highway that together form the Order Route, namely FP129 Byfleet, part of FP3 Wisley and FP566 Wisley, from footpath to bridleway. The Order Route is known locally as Muddy Lane. It consists of a track that runs between Sanway Road in Byfleet and Wisley Lane in Wisley. The Order Route passes under the M25 motorway, through an underpass provided for that purpose when the relevant section of the M25 was constructed in the early 1980s. At that time, the Order Route was shown on the Definitive Map and Statement ['the DMS'] with the status of a footpath. The M25 Motorway (Chertsey – South of Byfleet Section Side Roads) Order 1978 authorised the diversion of the footpath along the Order Route through the newly constructed underpass.

3. On 1 June 2013 two local cycling groups, the Woking Cycle Users Group and the Elmbridge Cycle Group, applied to the Interested Party for an order modifying the DMS so as to show the Order Route as a bridleway. The application was supported by user evidence whose principal assertion was that the Order Route had long been used by cyclists. It was on the basis of this alleged use that the application for modification of the DMS was put forward.

4. Since 2006 the Claimants have been the joint owners and occupiers of a dwelling known as Bayan which fronts onto the western section of the Order Route. The Claimants own the land over which the Order Route runs between Wisley Lane and the M25, namely FP 566 (Wisley) and part of FP3 (Wisley). The Claimants wrote a number of letters to the Interested Party setting out their objections to the application for a modification order. They were joined by other objectors, including a Mr Drummond. The Interested Party's Countryside Access Officer wrote a detailed report in which she concluded that the evidence of use of the Order Route by the public on bicycles was sufficient reasonably to allege that the Order Route should be recorded as a bridleway. The Claimants submitted a detailed written critique of the officer's report and on 8 June 2016 both appeared before the Interested Party's Planning and Regulatory Committee to speak in opposition to the officer's recommendation. Nevertheless, the Interested Party's Committee resolved to make the Order.

5. The Order was made on 20 July 2016. 11 objections were made to the Order. Both Claimants were amongst those who objected. In accordance with paragraph 7 of schedule 15 to the WCA, the Order was submitted to the Defendant for confirmation.

The Defendant appointed the inspector who opened a public inquiry on 22 May 2018. As the inspector records in a footnote on the first page of the DL, the Claimants appeared throughout the inquiry (which sat for 5 days between 22 May 2018 and 20 March 2019) and presented the case in opposition to the Order, speaking as joint owners of land crossed by the claimed route to the south west of the M25 motorway. The Claimants were able to cross-examine witnesses who gave evidence in support of confirmation of the Order and to give their own evidence in opposition. The Claimants (one of whom is a retired solicitor and the other a non-practising barrister) presented detailed and closely argued closing submissions, which they had reduced to writing. The legal issues that the Claimants raised before me had in substance also been raised before the inspector.

6. The inspector made an unaccompanied inspection of the Order Route on 21 May 2018. On 20 March 2019 he carried out an accompanied site inspection, just before the parties delivered their closing submissions.

The Inspector's decision

7. In DL5, the inspector said that the Order had been made under section 53(2)(b) of the WCA, relying on an event specified in section 53(3)(c)(ii) of the WCA. If he was to confirm the Order, therefore, he needed to be satisfied that the evidence discovered showed that highways shown in the DMS as highways of a particular description ought to be shown there as highways of a different description. The evidential test to be applied was the balance of probabilities.

8. In DL6 the inspector referred to deemed dedication under section 31 of the Highways Act 1980 ['the HA'], which requires consideration of whether there has been use of a way by the public as of right and without interruption for a period of twenty years prior to its status being brought into question; and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

9. In DL7 the inspector said that if dedication under section 31 of the HA was not applicable, it was necessary for him to consider whether there had been a dedication of the Order Route as a bridleway at common law. Dedication at common law required consideration of three main questions: firstly, whether the owner of the land over which the alleged way ran had the capacity to dedicate a highway; secondly, whether there was express or implied dedication by the landowner; and thirdly, whether there had been acceptance of the dedication by the public. Evidence of the use of the way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

10. The Inspector first addressed the issue of deemed dedication of the Order Route as a bridleway under section 31 of the HA. In DL9 he found that the Order Route would have been obstructed physically for a period of time during the construction of the M25 and prior to the opening of the M25 to the public in the local area in late 1983. In DL11 to DL36, in the light if the oral and written evidence before him, the inspector addressed in detail the question when the status of the Order Route as a bridleway was first brought into question. In DL36, he found that the status of the Order Route as a bridleway was brought into question by 'no entry' signs that were erected in the latter

part of 1999 at the earliest. He stated that he did not find that there was evidence to show that any earlier action was sufficient to challenge use of the Order Route by cyclists or horse riders. In the light of his finding in DL36, in DL37 the inspector concluded that the it could not be shown that there had been use for a continuous period of 20 years following the interruption caused by works to construct the M25 in 1983 (and the realignment of the Order Route at that time). Moreover, as a matter of law, deemed dedication could not have arisen during the relevant 20 year period in relation to that section of the Order Route that had been owned by the Ministry of Transport, since section 31 of the HA does not ordinarily apply to Crown land. Accordingly, the inspector turned to consider whether the evidence of use of the Order Route by cyclists and horse riders nevertheless justified the inference of a dedication and acceptance as a bridleway at common law.

11. The inspector addressed that decisive question in DL38 to DL49. In DL49 he concluded on the balance of probabilities that the dedication of a public bridleway over the Order Route at common law was to be implied from the evidence of use and the conduct of the landowners prior to the erection of the "no entry" signs in late 1999. In DL50 and DL51, the inspector rejected a submission advanced by the Claimants that use of the Order Route as a bridleway constituted a public nuisance with the result that there could be no dedication at common law. In DL52 and DL53 he addressed issues raised by the Claimants in relation to the physical character of the Order Route, its width and whether its dedication as a bridleway was compatible with the statutory functions of Highways England as strategic highway authority with responsibility for the M25 motorway.

12. In DL55, the Inspector reached his overall conclusion that the Order should be confirmed. His formal decision is recorded in DL56.

The relevant legislation

13. The statutory procedure for modification of the DMS is set out in section 53 of and schedules 14 and 15 to the WCA.

14. Section 53(2)(b) of the WCA requires the surveying authority (in this case, the Interested Party) to –

> *"…keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence…of [any of the events specified in subsection (3)], by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event".*

15. Section 53(3)(c)(ii) of the WCA specifies the following event –

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

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

16. Section 53(4)(a) of the WCA states that the modifications that may be made by an order under section 53(2) shall include the addition to the statement of particulars as to the position and width of any public path.

17. Section 53(5) of the WCA provides that any person may apply to the surveying authority for an order under section 53(2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within section 53(3)(b) or (c). Schedule 14 to the WCA provides the procedure for the making and determination of such an application.

18. By virtue of section 53(6), schedule 15 sets out the arrangements for the making and validity of an order modifying the DMS that appear to the surveying authority to be requisite in consequence of the occurrence of an event falling within subsections 53(3)(b) or (c) of the WCA; and for the date on which such an order comes into operation. Paragraph 3 of schedule 15 sets out the publicity requirements that the surveying authority is required to follow on making an order under section 53(2) of the WCA. Where an order is subject to a duly made objection or representation which has not been withdrawn, paragraph 7(1) of schedule 15 requires that the authority must submit the 'opposed order' to the Defendant for confirmation. By virtue of paragraph 2, an opposed order shall not take effect until confirmed by the Defendant under paragraph 7. Paragraph 7(2) requires the Defendant either to hold a public inquiry or to offer any person making a duly made objection or representation the opportunity of being heard by a person appointed by him for that purpose. By virtue of paragraph 7(3), on considering any duly made objections or representations and the report of the person appointed to hold the public inquiry or hearing, the Defendant may confirm the order with or without modifications. By virtue of paragraph 10 of schedule 15, the present case is one in which the powers of the Defendant under paragraph 7 fell to be exercised by an inspector appointed by him for that purpose. Paragraphs 11(1)-(3) of schedule 15 state the arrangements for giving notice of a decision made by the Defendant or an inspector appointed by him to confirm a modification order.

The principles upon which the Court acts

19. Paragraph 12 of schedule 15 to the WCA provides that a person aggrieved by an effective modification order, who wishes to challenge its validity on the ground that it is not within the powers of section 53 or that any of the requirements of schedule 15 have not been complied with in relation to it, may make an application to the High Court within 42 days of publication of the notice under paragraph 11. The powers of the Court on such an application are set out in paragraph 12(2) of schedule 15. The validity of an order is not to be questioned in any legal proceedings other than in accordance with paragraph 12 of schedule 15 to the WCA.

20. The nature of such a challenge was summarised by Charles J in R (Elveden Farms Limited) v Secretary of State for Environment Food and Rural Affairs [2012] EWHC 644 (Admin) at [3] –

> *"…the nature of the challenge is the one taken on judicial review. Therefore, it can be said that the Secretary of State, through an inspector, was not lawfully exercising the statutory powers, and the public law arguments for review or challenge to a decision made by a statutory decision maker would be available. In summary, those are well known and they are: was there an error of law; did the decision maker fail to apply the correct test: did the decision take all and only relevant factors into account, the weight to be given to them being a matter for the decision maker; fairness, both procedural and substantive; and a failure to give proper reasons. Additionally, there is a Wednesbury challenge in the sense of perversity, namely, absent the other grounds, and in particular when a decision maker has applied the correct legal test and taken all and only relevant factors into account, is the decision nonetheless perverse?"*

Creation of a highway at common law – legal principles

21. At common law, a highway is a way over which members of the public have the right of passage on foot, on horseback or in or on vehicles: see Transport for London v London Borough of Southwark [2018] UKSC 63 at [6]. At common law, dedication of a way as a highway and its acceptance as such by the public may be from the landowner's acquiescence in the public's use of the way in question. Lord Blackburn gave the classic statement of the principle in Mann v Brodie (1885) 10 App Cas 378, 386 –

> *"…where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, is it not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was".*

22. In R (Godmanchester Town Council) v Environment Secretary [2008] AC 221, 252, Lord Hoffmann said that the question whether the land owner had (in Lord Blackburn's words) "taken steps to disabuse the public of their belief that the way had been dedicated" was to be determined on an objective basis –

> *"[32]….The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie 10 App Cas 378, 386, to*

> *"disabuse [him]" of the notion that the way was a public highway".*

23. In the context of section 31(1) of the HA, Lord Hoffmann said (also at [32]) -

> *"... "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be".*

24. Section 30(1) of the Countryside Act 1968 states –

> *"(1) Any member of the public shall have, as a right of way, the right to ride a bicycle, (not being a mechanically propelled vehicle), on any bridleway, but in exercising that right cyclists shall give way to pedestrians and persons on horseback".*

25. In Whitworth v Secretary of State for Environment Food and Rural Affairs [2010] EWCA Civ 1468, at [42] Carnwath LJ said that regular use of a way by both horse riders and cyclists during a period since the enactment of section 30(1) of the Countryside Act 1968 would be consistent with an assumed dedication of that way as a bridleway, of which cyclists have been able to take advantage under the 1968 Act.

The Claimants' grounds of challenge

26. The Claimants appeared in person but, as one might expect given their professional background, argued their case with skill and clarity. Their grounds of challenge were succinctly stated in their claim form and developed in detail in their skeleton argument. Essentially, the grounds fall under three overarching criticisms of the validity of the inspector's decision –

(1) That the inspector failed to recognise that the Order Route was incapable in law of being dedicated as a bridleway, by virtue of the severe physical limitations to its use by horse riders resulting from the low headroom, length and width of the underpass beneath the M25 motorway through which any member of the public using the Order Route on horseback will have had to pass since the Order Route was diverted in late 1983.

(2) That the inspector failed to approach the question whether the land owner had taken steps to disabuse horse riders and cyclists using the Order Route of the belief that it had been dedicated as a bridleway on the correct, objective basis approved by the House of Lords in Godmanchester (see paragraphs 22 and 23 above). That error of approach invalidated the inspector's consideration of the evidence of, and the inferences to be drawn from, the presence of barriers and signs erected on the Order Route during the period between 1983 and 1999.

(3) That the inspector had failed properly to evaluate the oral and written evidence of use of the Order Route by horse riders and cyclists, and to take proper account of written representations from those persons (including persons who had lived in the local area for very many years) whose evidence presented a serious challenge to

the asserted user evidence upon which the claim for dedication of the Order Route as a bridleway at common law was founded.

Grounds of challenge (1) – capacity to dedicate

(1) Public nuisance

The Claimant's submissions

27. The Claimants pointed out that the underpass constructed in 1983 for the purpose of diverting the Order Route beneath the M25 motorway is 41 metres in length and was built with the required headroom of 2.3 metres to serve a public footpath. In their closing submissions at the public inquiry, they contended that the headroom was plainly inadequate to accommodate safe passage through the underpass by persons on horseback. Horse riders would accordingly have to dismount and lead their horses through the underpass, which was itself dangerous since horses are less easy to control while being led. There was anecdotal evidence from Mr Creswell that his teenage daughter had ridden through the underpass by bending and clinging to her horse's neck. That was a clear example of the inherent unsuitability of the underpass for passage by horse riders. Having to lean forward in that way would impede the rider's forward visibility and ability to keep the horse under proper control.

28. The Claimants said that there was an obvious and inescapable risk to pedestrians using the Order Route as a footpath if they had the misfortune to encounter a horse rider in, or in the approach to, the underpass. In short, if the underpass were to be used by horse riders and pedestrians, it constituted a dangerous trap to both. That danger was inevitable, since it arose by virtue of the physical dimensions of the underpass, particularly its limited headroom and length, at all times since it was constructed in 1983.

29. On the basis of these matters, the Claimants submitted that use of the Order Route through the underpass by horse riders would constitute a public nuisance. The danger posed by horse riders to pedestrians exercising their right of public passage on foot through the underpass led inexorably to that result.

30. Both before the inspector and in their case before this court, the Claimants relied upon three authorities. The first was R v Rimmington [2006] 1 AC 459. In his speech at [10], Lord Bingham of Cornhill referred to the definition of a "common" or public nuisance in paragraphs 31-40 of the 2005 edition of Archbold, Criminal Pleading, Evidence and Practice –

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects".

31. I understood the Claimants to place particular emphasis upon the reference in that definition to acts whose effect is to endanger the life or health of the public in the exercise or enjoyment of rights that they enjoy in common with other members of the public: in the present case, the public's right of passage on foot along the Order Route as a public footpath.

32. In relation to a public nuisance resulting from the obstruction of the public's enjoyment of rights of way on foot, the Claimants relied upon Sheringham UDC v Holsey (1904) LGR 744. In that case, the facts were that a narrow lane, about 6 feet in width, had been created for use by pedestrians. The lane was enclosed on both sides by buildings, which had to some degree encroached into it with the result that at its narrowest point, it was effectively no more than 4 feet 4 inches wide. At page 748, Joyce J found as a fact that –

> "…it would be highly inconvenient, if not positively dangerous, to allow a lane of that width to be used for wheeled traffic. If it were only a footway and user of it for wheeled traffic must be a public nuisance".

33. There was evidence that carts had been driven down the lane, and on the basis of that user evidence it was contended that the lane had been dedicated as a carriageway at common law. At page 748, Joyce J rejected that contention for the following reasons –

> "It is said that a right to use the lane for wheeled traffic has been acquired by a user. Upon the evidence I do not see my way to hold that there has been any such user as to convert the footway into a public highway for all purposes. The user for wheeled traffic was in its inception and has all along been a public nuisance and no length of time can legalise it".

34. The Claimants also drew attention to R v Mathias (1861) 2 F&F 574. In that case, the issue was whether the use of a public footpath in Bristol for the purpose of pushing a perambulator constituted a public nuisance by virtue of preventing the convenient use of the footpath by other pedestrians. Byles J put that issue to the jury on the basis that it was a question of fact.

35. Here, the Claimants submitted, it was clear on the facts that riding a horse through the underpass would be a public nuisance. It would be a danger to the safety of pedestrians using the Order Route for its lawful purpose. The facts here were essentially similar to those in Sheringham. There, as here, the physical limitations gave rise the likelihood of danger or inconvenience to pedestrians on the Order Route. It was likely that any pedestrian encountering a horse rider in the underpass would be forced to take evasive action and jump out of the way. In these circumstances, there could be no presumption of dedication of bridleway rights along the Order Route at common law. The principle identified by Lord Scott of Foscote in Bakewell Management Limited v Brandwood [2004] 2 AC 519 at [41] –[42] was engaged. It was not open to a landowner to dedicate a public footpath as a public bridleway, if use by horse riders would constitute a public nuisance to pedestrians lawfully using the footpath.

36. That conclusion, the Claimants submitted, was further supported by the deficiencies of the underpass for safe passage by horse riders when measured against the Guidance published by the British Horse Society. The Claimants relied upon page 5 of the BHS Advice on Dimensions of Width, Area and Height (2016) which states –

> *"The average height of a mounted rider is 2.55 metres above ground level, tall riders on large horses will be close to three metres.*
>
> *….*
>
> *Where underpasses are constructed to enable riders to cross below a road or railway, the ideal height is at least 3.7 metres (minimum 3.4 metres) preferably higher…"*

37. The Claimants also pointed to Technical Standards published by the Highways Agency. Paragraph 4.10 of TD 36/93, part of the Design Manual for Roads and Bridges states that where a bridleway is to be incorporated into a subway, the minimum headroom should be 3.7 metres, except where suitable facilities are provided for riders to dismount and remount, in which case the headroom may be reduced to 2.7 metres. That technical standard supported the conclusion that the underpass on the Order Route was unsafe for horse riders even assuming that they sought to lead their horses through on foot, having dismounted.

38. Paragraph 8.6 of a more recent technical design standard published by the Highways Agency, TA 90/05, was to similar effect. It specified a desirable headroom for ridden horses of 3.4 metres, with an "absolute minimum headroom" for ridden use of 2.8 metres over short distances, such as at momentary obstructions. It stated that if horses are required to be led rather than ridden, the headroom may be reduced to 2.8 metres over longer distances. However, it continued that "this should be avoided wherever possible, as horses can be difficult to control when led".

39. The Claimants point out that these published design standards are safety standards published by the forerunner of the strategic highway authority, Highways England, and intended to ensure that all highways provide for the safety of all users. It would, accordingly, be a public nuisance for a horse rider to ride, or for a horse to be led, through an underpass that was so markedly deficient when measured against the applicable technical standards and guidance.

Discussion

40. As the Claimants themselves have emphasised in their written submissions both to the inspector and to the Court, the question whether use of the Order Route by horse riders and cyclists constituted a public nuisance was to be determined by the inspector on the basis of the particular facts in evidence before him. As they point out, that was established at least as long ago as the hearing of R v Mathias at the Bristol Summer Assizes in 1861.

41. The inspector set out his conclusions on the issue of public nuisance in DL50 and DL51 –

> *"50. The granting of higher public rights over an existing footpath might constitute a public nuisance to pedestrians using the path. Such a grant would not be lawful if it gave rise to a public nuisance. This is distinct from the allegation that the recording of the route as a bridleway would mean that it is unsafe for cyclists or horse riders, which is not relevant to my decision.*
>
> *51. There is a lack of evidence to substantiate the objectors claim that the designation of the route as a bridleway will constitute a nuisance for pedestrians. The concerns expressed in the written submissions of people opposed to the Order generally relate to the potential use by motor cycles. There is scope for the Council to maintain the route in a manner that would accommodate the different types of lawful user. It follows in my view that there is no merit in the objectors' submissions on this matter".*

42. It is also necessary to refer to DL52, in which the inspector said –

> *"52. The objectors have also referred to the issue of safety when making submissions on the physical character of the route and statutory incompatibility. In terms of the statutory incompatibility issue, there is nothing to show that the use of the subway by cyclists and horse riders will be incompatible with the statutory functions of Highways England".*

43. The question raised by the Claimants for the inspector to answer was whether, on the evidence before him, the use of the Order Route for passage on horseback and on bicycles constituted (or might constitute) a public nuisance to pedestrians using the footpath. In the light of DL50 and DL51, it is beyond reasonable argument that the inspector sought to answer that question.

44. There is nothing in the inspector's reasoning in DL50 and DL51 to support the contention that he failed to approach that question on a correct understanding of the law. On the contrary, in DL50 he correctly identified the relevant question, which was whether the use of the Order Route by horse riders and cyclists would cause it to be unsafe for passage by pedestrians. It is clear from the first sentence of DL52 that the inspector had in mind the physical characteristics of the Order Route upon which the Claimants relied in support of their case that horse riders would present a dangerous obstacle or an obstruction to pedestrians using the footpath.

45. Moreover, it is clear from the first sentence of DL51 that the inspector approached that question as being one of fact for him to determine the evidence before him. For these reasons, I must proceed on the basis that the inspector's approach to the question whether use of the Order Route by horse riders and cyclists gave rise to a public nuisance was correct in law.

46. It follows that this Court may only interfere with his conclusion that use of the Order Route as a bridleway did (or would) constitute a public nuisance to pedestrians on the *Wednesbury* grounds stated by Charles J in the Elveden Farms case to which I have referred in paragraph 20 of this judgment.

47. In order to examine whether the Claimant's criticisms of the inspector's conclusion are well founded on that narrow basis, it is helpful to set out the case that the Claimants put to the Inspector on page 9 of their closing submissions –

> *"It would be a public nuisance for a horse rider to ride, or for a horse to be led, under the underpass. The height is 2.5/3 metres, and the underpass has a maximum headroom of 2.3 metres. Applying the safety standards detailed above, of 3.4 metres, it would not be safe to ride through the underpass. The absolute minimum is for a headroom of 2.8 metres for a momentary obstruction. The underpass is a long tunnel, 41 metres, so it is not a case of a momentary obstruction. There is not even enough headroom to lead a horse through the underpass.*
>
> *Mr Williams stated that it was possible to ride through the tunnel with care. There is no evidence to show what care used on how safe it was. Evidence was heard that Mr Wilson, Byfleet Residents' former footpath officer, had written in their magazine that he would not like to ride through the underpass. Mr Cresswell gave a hearsay account of his teenage daughters going through the tunnel by bending and clinging onto the horse's neck. He did not think it was safe. Having to lean forward in this way would affect the rider's visibility ahead of other path users and would also affect the rider's ability to control the horse properly. The Highway Code requires horse riders to make sure that can control the horse, and to have hold of the reins at all times except when giving hand signals.*
>
> *The inadequate headroom gives no leeway if the horse goes out of control or is startled.*
>
> *Mr Williams accepted that the lack of headroom was not de minimis. Clearly riding a horse through the underpass would be a public nuisance and would be a danger to the safety of any other path user, as in Sheringham v Holsey and the other nuisance cases cited above. A likelihood of a pedestrian having to jump out of the way would be sufficient".*

48. The question for this Court is whether, in the face of these contentions, the inspector was in a position reasonably to conclude as he did in DL51 that –

> *"There is a lack of evidence to substantiate the objectors' claim that the designation of the route as a bridleway will constitute a nuisance for pedestrians".*

49. In my judgment, the inspector was entitled reasonably to reach that conclusion. The Claimants were plainly correct to point out that the physical characteristics of the underpass were such that a horse rider needed to approach and to pass through it with care. Both the guidance given by the British Horse Society and the anecdotal evidence of Mr Cresswell lent clear support to that view, as did the evidence of the Interested Party's Countryside Access Officer, Mr Daniel Williams.

50. However, it was also Mr Williams' evidence that horse riders were able with care to ride their horses through the underpass, notwithstanding its limited headroom and length. Mr Williams gave his evidence as a member of the Institute of Public Rights of Way and with the advantage of 16 years' experience as a Countryside Access Officer with the local highway authority, the Interested Party. The inspector was reasonably entitled to give substantial weight to Mr Williams' evidence.

51. Moreover, as the Claimants acknowledged, in order to avoid having to bend down whilst passing through the underpass horse riders were able to dismount and lead their horses along that short section of the Order Route. The Claimants asserted that this was itself inherently unsafe and liable to create conflict with pedestrians. However, the British Horse Society's guidance upon which the Claimants relied did not support that assertion. The Society's guidance was that the "absolute minimum" design height for an underpass to enable horse riders to pass beneath a road or railway is 2 metres. The Society continued –

> *"When a lower height for an underpass is locally agreed as acceptable, riders would be expected to dismount although those on smaller horses may choose not to do if they are comfortable with the clearance".*

52. In short, in the light both of Mr Williams's evidence and the published guidance and advice of the British Horse Society (and no doubt the Inspector's own judgment with the benefit of having visited the Order Route and viewed the underpass), I am unable to accept that the inspector's conclusion in DL51 was unlawful. On the contrary, in my view it was open to the Inspector reasonably to conclude that neither the evidence of use of nor the physical character of the Order Route substantiated the Claimants' contentions on the issue of public nuisance.

53. On the evidence, the inspector was able reasonably to find that this was not a case that was comparable on its facts to Sheringham UDC v Holsey (1904) LGR 744. He was also able reasonably to conclude that the evidence did not support the contention that the potential for conflict between horse riders and pedestrians passing through the underpass was such as to render the Order Route so unsafe for the latter as to give rise to a public nuisance. In that regard, it is relevant to recall that the most substantial body of evidence of use as a bridleway was that of cyclists passing along the Order Route. By contrast, the actual evidence of use of the Order Route by horse riders was limited. I did not understand the Claimants to suggest that the use of the underpass by cyclists would give rise to a public nuisance. Of course, it is possible that use of the Order Route by pedestrians, cyclists and horse riders may intensify in future to such a degree that some regulatory action on the part of the Interested Party may be thought appropriate. The inspector had that point in mind in the final sentence of DL51. That consideration, however, does not affect the legitimacy of the Inspector's conclusions

in DL50 and DL51, that the evidence did not support a conclusion that designation of the Order Route as a bridleway constituted a public nuisance.

54. I do not find any assistance in either Thornhill v Weeks (1914) JP 154 or Yetkin v Mahmood [2011] QB 827. The former case concerned the allegation that a public footpath had come into existence at common law through a stable yard. Astbury J rejected that allegation on the grounds that the user evidence lacked the quality and character to justify the necessary inference of dedication: see page 156 (left hand column). The character of the locality through which the alleged public right of way ran was one of a number of facts that impressed the judge. It was a case decided on its facts. It has no useful bearing on the issues in the present case. Yetkin v Mahmood was a negligence claim.

55. The legitimacy of the inspector's conclusions at DL50 and DL51 is not properly to be called into question by invoking the various highway engineering design standards to which the Claimants referred in their closing submissions to the inspector (and to which I have referred in paragraphs 37 to 39 above). It may be that the Claimants would have a powerful argument for greater headroom to be provided, were the underpass now to be constructed with a view to accommodating not only pedestrians but also horse riders and cyclists. As the Inspector records in DL47, there was some debate during the inquiry as to whether, when it was constructed in the early 1980s, the underpass had in fact conformed to the prevailing standards at that time. Be that as it may, it is clear to me that the inspector was correct in concluding (in DL48) that the uncertainty over whether the underpass conformed to the relevant design standard for pedestrians and cyclists in 1983 was immaterial in itself to the question that he had to decide: that is to say, whether the inference of dedication of the Order Route as a bridleway could be drawn from the evidence of actual use of that route during the years following construction of the underpass.

(2) Statutory incompatibility

The Claimants' submissions

56. In their closing submissions to the inspector, the Claimants also contended that the inherent unsuitability of the Order Route, in particular the underpass, for use by horse riders as well as pedestrians, and the resulting risks to the safety of those using the Order Route for passage on foot, engaged the well-established principle stated by Parke J in R v Inhabitants of Leake (1833) 5 B & Ad 469, 478 –

> *"If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for special purposes, 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".*

57. That principle was both approved and applied by the House of Lords in British Transport Commission v Westmorland County Council [1958] AC 126, 142. The

question whether the statutory purposes for which the land is held are incompatible with its use by the public as a public highway is one of fact (page 142) and to be determined on the basis of the facts as they are and can reasonably be foreseen to be (page 145).

58. The Claimants relied upon the application of that principle in Ramblers Association v Secretary of State for Environment Food and Rural Affairs [2017] EWHC 716 (Admin). That case concerned a claim for deemed dedication of a footpath along a route that crossed at grade over an operational railway line. The inspector concluded that 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. The Court (Dove J) applied the Leake principle in the manner approved by the House of Lords in British Transport Commission. He held that the question fell to be considered on the basis of the facts as they were found to be and as was reasonably to be foreseen as at the date of examination of the order, i.e. the date of the public inquiry. On that basis, he held that the inspector's conclusions were open to him on the facts: see [46] and [52].

59. In the present case, the inspector stated his conclusion in relation to the issue of statutory incompatibility in DL52 –

> *"52. The objectors have also referred to the issue of safety when making submissions on the physical character of the route and statutory incompatibility. In terms of the statutory incompatibility issue, there is nothing to show that the use of the subway by cyclists and horse riders will be incompatible with the statutory functions of Highways England".*

60. The Claimants submit that this conclusion is perverse. They contend that dedication of the Order Route as a bridleway would be incompatible with Highways England's statutory functions as strategic highway authority. The underpass did not comply with the former Highways Agency's highway design engineering standards and was unsafe for passage by horse riders. Highways England has a statutory duty to maintain highway safety under section 5(2) of the Infrastructure Act 2015 –

> *"5(2) A strategic highways company must also, in exercising its functions, have regard to the effect of the exercise of those functions on –*
>
> *....*
>
> *(b) the safety of users of highways".*

The Claimants argue that it would be incompatible with that duty for Highways England to dedicate the Order Route as a bridleway, given the serious shortcomings of the underpass in point of both design and safety.

Discussion

61. Mr Ned Westaway, who appeared for the Defendant, submitted that the relevant statutory functions and duties of Highways England as strategic highway authority (and of the Ministry of Transport and later the Highways Agency from the date of construction of the underpass as part of the relevant section of the M25 in the early 1980s) were those that concerned the safe design and operation of the M25 motorway as part of the strategic highway network. I accept that submission. Indeed, it appeared to me that statutory responsibility for the Order Route as a public right of way passing through the underpass would have been transferred from the Transport Secretary to the Interested Party following the completion of its construction in 1983. Mr Westaway kindly undertook some further research into that question following the hearing of this claim. It is now agreed by the parties that the Interested Party assumed the function of highway authority in relation to the footpath passing beneath the M25 through the underpass in December 1983.

62. It follows that the question for the Inspector was whether the use of that underpass by horse riders and cyclists was incompatible with Highway England's statutory duties as strategic highway authority to maintain the safe and efficient operation of the M25 Motorway. That was to be determined in the light of the facts as they were and could reasonably be foreseen, as at the date of the public inquiry into the Order.

63. Viewing matters in that way, I am unable to accept the Claimants' contention that the conclusion reached by the inspector in the final sentence of DL52 was "perverse". There was no evidence to support the assertion that use of the underpass by horse riders and cyclists gave rise to any material impact on the safe and efficient operation of the M25 Motorway. Nor was there any evidence before the inspector to support the argument that some such impact was reasonably to be foreseen as arising at a future date. To be fair to the Claimants, it was not really their purpose to argue that the use of the underpass by horse riders and cyclists had or was likely to have any direct effect on the operation of the M25 motorway. Their argument was founded upon the asserted risks to pedestrians, horse riders and cyclists of shared use of the underpass as part of the public right of way comprising the Order Route. In my view, the inspector was reasonably entitled to conclude that those asserted risks did not affect the fulfilment by Highways England of its statutory duties as highway authority in respect the public highway for which it has responsibility, namely the M25.

64. In further written submissions made following the hearing before me, the Claimants sought to argue that the use of the underpass by horse riders and cyclists was nevertheless incompatible with Highways England's functions as owner of part of the land through which the Order Route passes. I am afraid that this argument seems to me to be without any substance at all. There is no evidence to suggest that any statutory functions of Highways England as land owner are or will be materially affected by the use of the underpass by cyclists and horse riders as well as pedestrians.

(3) Human rights

65. In their closing submissions to the inspector, the Claimants sought to resort to the Human Rights Act 1998, to counter any argument that considerations of the safety of the Order Route were circumscribed by the nature of the statutory inquiry into

whether the Order should be confirmed under section 53 of the WCA. They contended that to disregard such considerations would be contrary to article 2 of the European Convention of Human Rights (the right to life).

66. The inspector addressed this question in DL3. He said –

> *"3. The objectors have referred to Article 2 of the Human Rights Act 1998. However, confirmation of the Order would be lawful as it is not possible to interpret the 1981 Act in such a way that is compatible with the Convention rights".*

67. In their submissions in support of their claim, the Claimants again based their argument on the contention that, as the underpass beneath the M25 is unsafe for shared use by horse riders and cyclists as well as pedestrians, a finding that it forms part of a route (the Order Route) that has been dedicated as a bridleway at common law would by contrary to article 2 of the European Convention and so in breach of the Human Rights Act 1998.

68. Mr Westaway told me that the inspector's reasoning in DL3 follows guidance issued by the Planning Inspectorate (PINS Advice Note 19) which states that the WCA offers no scope for personal circumstances to affect the decision on a modification order; and advises inspectors to "turn away" any human rights representations.

69. It is unnecessary for me to express any view about the correctness of that advice since, as Mr Westaway submits, the Claimants have sought neither before the inspector nor before me to substantiate their contention that the decision to confirm the Order actually engages article 2 of the European Convention and gives rise to a lack of compliance with the Human Rights Act 1998.

70. In my view, moreover, there is a short answer to any argument that the statutory procedures under the WCA in the present case have resulted in a failure to give effect to article 2. As I understand that argument, it is that the question whether bridleway rights have come into existence, by operation of the common law principles mentioned in paragraph 21 above, must involve considerations of risks to the safety of lawful users of the way. To the degree that, on the facts, such risks might realistically engage article 2 of the European Convention, the common law already enables such consideration to be given through the application of the principle stated in Bakewell Management Limited v Brandwood [2004] 2 AC 519 (to which I refer in paragraph 35 above). Insofar as it is said that dedication of bridleway rights may give rise to future safety concerns, such as might arise as a result of intensification of shared use of the way, those concerns are able to be addressed by the traffic authority under powers conferred by the Road Traffic Regulation Acts. As I have explained in discussing the Claimants' contentions under the issue of public nuisance, in DL50 and DL51 the inspector approached the safety concerns raised by the Claimants in the present case in accordance with those principles. In my view, this analysis provides a complete answer to the Claimants' contentions in this case in relation to article 2 and the Human Rights Act 1998.

(4) Non-resident owners

71. In their closing submissions to the inspector, the Claimants argued that since the Order Route was diverted to pass through the underpass beneath the M25 Motorway in late 1983, any use of that part of the Order Route by horse riders and cyclists cannot realistically be said to have come to the notice of the Ministry of Transport, and more recently Highways England, as the land owner of that part of the Order Route. Both were non-resident owners, against whom no inference of an intention to dedicate can properly be drawn at common law in the absence of some evidence that the claimed use of the Order Route as a bridleway had come to their knowledge.

72. The inspector addressed the state of knowledge of the Ministry of Transport in DL44. He said –

> *"44. The user evidence outlined above would also be supportive of the dedication of a bridleway at common law for the section of the claimed route where it crossed the MOT land. I consider from the evidence of use provided that it would have been sufficient for a reasonable landowner to be aware that the route was being used by bridleway traffic. There is no evidence of action being taken by the MOT to challenge the use of the route by horse riders or cyclists".*

73. The matters addressed by the inspector in DL44 were quintessentially questions of fact for him to determine in the light of what he had seen, read and heard at the public inquiry. It is clear that he considered the question raised by the Claimants, that is to say, whether the use by cyclists and horse riders of that part of the Order Route which crossed land owned by the Ministry of Transport (and latterly by Highways England) was such that it would have come to the notice of those bodies, acting reasonably. He concluded that this was indeed the case; and that the Ministry of Transport had accordingly been on notice that its land was being used for passage by cyclists and horse riders as well as those lawfully passing through that land on foot.

74. The Claimants rely upon a paragraph (paragraph 5.9) in the 2010 edition of the Definitive Map Orders: Consistency Guidelines produced by the Planning Inspectorate, which they contend the inspector did not take into account in addressing this part of their case. Mr Westaway told me that the paragraph in question no longer forms part of the Consistency Guidelines. However that may be, the question for the Court is whether the Claimants are able to make good their contention that the inspector fell into legal error in the findings that he made in DL44. I do not consider that the Claimants are able to do so. On the contrary, in my view the Inspector has made findings that were plainly open to him on the evidence that was before him. The inspector's conclusions that the Ministry of Transport was on notice as land owner that the Order Route was being used by cyclists and horse riders but took no action to challenge such use were reasonably open to him.

(5) Overall conclusion on ground (1) issues

75. For the reasons given, I reject the Claimants' challenge to the inspector's decision on the various grounds relating to the alleged legal impediments to dedication at common law of bridleway rights along the Order Route.

Grounds of challenge (2) – lack of intention to dedicate

(1) Alleged failure to apply the correct legal test to evidence of challenges

76. The Claimants' second main area of challenge to the validity of the inspector's decision arises out of the inspector's detailed consideration in DL11 to DL37 of the question when the status of the Order Route as a bridleway was first brought into question. The focus of the Claimants' contentions is upon the inspector's rejection of their arguments for an earlier date than the latter part of 1999, which was the date found by the inspector for the reasons that he gave in DL34-DL36 (and see DL19).

77. It is convenient to begin with the Claimants' argument that the inspector failed to apply the correct legal test in his consideration of alleged challenges to use of the Order Route as a bridleway on earlier dates than late 1999. In DL12, the inspector referred to R (Godmanchester Town Council) v Secretary of State for the Environment [2008] 1 AC 221 at [32], where Lord Hoffmann said that in section 31(1) of the HA, "intention" means "what the relevant audience, namely the users of the way, would have reasonably understood the landowner's intention to be". The Claimants point out that Lord Hoffmann continued as follows –

> *"32. …The test is…objective; not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending…to "disabuse [him]" of the notion that the way was a public highway".*

78. The Claimants submission is that the inspector failed to follow that approach. Instead of asking himself what the reasonable user of the Order Route on bicycle or horseback would have understood of the land owner's intentions from the various barriers and signs on which the objectors relied, the inspector wrongly based his conclusions on what individual users reported that they took those barriers and signs to mean. This was the very subjective approach that Lord Hoffmann had declared to be unlawful in Godmanchester.

79. I cannot accept that the inspector has fallen into error in this way. Although in DL12 he did not set out the whole of Lord Hoffmann's statement of principle in Godmanchester, I have no doubt that the inspector understood clearly that he must approach the question of lack of intention on an objective basis. The inspector understood that he must form his own judgment, on the basis of the evidence, as to what the reasonable user of the Order Route would have understood of the land owner's intentions from the barriers and signs that were in place from time to time during the period between the coming into use of the diverted footpath under the M25

Motorway in 1983 (see DL9) and the erection of the "no entry" signs in late 1999 (see DL34-DL36).

80. That the inspector followed the correct, objective approach is amply demonstrated by the inspector's consideration of what land owners intended when they erected the locked gates and barriers during the mid-1990s along the Order Route: see DL26-DL29. Having summarised the evidence, in DL28 the inspector said –

> *"28. It is clear that the intention of the various structures was to prevent use by motor vehicles and other activities that had occurred on the route. Access was available at the side of the structures and the evidence is that the public continued to use the claimed route. None of the users interpreted their use on a cycle or horseback to have been challenged prior to action taken by the objectors after 2006. This contrasts with the [User Evidence Forms] submitted in 2000 from people claiming to have used the route in a motor vehicle. The structures clearly served to challenge use by motor vehicles".*

81. The Claimants criticise the first sentence of DL28 on the basis that it was unsupported by evidence. In my view, that is not a fair criticism. The inspector had read the contemporary documents that had been put before him by the Interested Party, the Claimants and other objectors. He been shown photographs. He had heard oral evidence at the public inquiry. He had inspected the Order Route.

82. DL16 to DL29 gives a detailed and reasoned account of his appraisal of the alleged presence and significance of gates and barriers along the Order Route in the years prior to and after 1999, based upon the written, documentary and oral evidence that was before him. During the course of their oral submissions, both the Claimants and Mr Westaway drew my attention to much of that evidence. As is to be expected, not at all of the evidence points to one conclusion. There are uncertainties, discrepancies, differing accounts and conflicting recollections as to what gates, barriers or bollards were in position along the Order Route, where and when, and as to the land owners' intentions in erecting those structures. Those were all matters for the inspector to resolve, insofar as he found it necessary to do so for the purpose of determining the question of intention in accordance with the correct objective approach.

83. In the first sentence of DL28, the inspector was doing precisely that. He was fulfilling the task that the Claimants themselves argue that he was required to do. He was testing on an objective basis what users of the Order Route would have understood to be the land owners' intention in erecting the various structures along the Order Route, including the locked barriers across the footpath in the mid 1990s. Having reviewed the documents drawn to my attention during oral submissions, I am in no doubt that the evidence before the inspector justified, as both lawful and reasonable, his conclusion that the land owners' intention in erecting the various structures along the Order Rote prior to 1999 had been to prevent its use by motor vehicles and for other antisocial activities such as fly tipping and car dumping.

84. Nor is it fair to read the third sentence of DL28 as indicative of the inspector simply accepting at face value individual users' subjective interpretations of the significance of those barriers. The objective approach approved by Lord Hoffmann in

Godmanchester does not require the decision maker to ignore evidence given by individual users as to what they understood barriers or signs erected along the route to signify. Such evidence will often provide the decision maker with a useful source of information upon which to found his or her objective assessment of what the reasonable user would have taken the land owner's intention to have been. In my view, that was the inspector's proper approach in DL28. Taking that user evidence into consideration along with other factors, such as the fact that both lawful users of the Order Route on foot and those on cycle or horseback were able to pass around the barriers, the inspector was able properly to conclude that the reasonable user would have understood the land owners' intention as being to prevent vehicular use of the Order Route, not its use by cyclists and horse riders. The inspector's reasoning is consistent with an objective assessment. It does not support the adverse inference argued for by the Claimants, that he lost sight of the objective approach approved in Godmanchester.

(2) The Blake case

85. The Claimants placed particular reliance in their closing submissions to the inspector on R v Secretary of State for the Environment ex parte Blake [1995] JPL 101. In that case, the Court (Walton J) upheld as lawful the conclusion that the presence of locked gates erected at each end of a footpath were clear evidence of the land owner's lack of intention to dedicate the way as a bridleway. The Secretary of State had found that the gates had been erected with the intention of preventing use of the footpath by other than walkers (page 103). At page 104, Walton J said –

> *"Throughout the vast bulk of the relevant period the Green Drive was barred at both ends. Of course, the barriers were capable of being by-passed and were by-passed, but the barriers themselves remained undisturbed. No attempt was made to remove them, to burn them, to break them down or to do any other act to show that [the land owner] was not fully justified and entitled in maintaining undisturbed this interruption to the path. In fact, [I can] scarcely think of a more eloquent statement of intention not to dedicate than that".*

86. In DL27, the inspector said that the objectors had drawn attention to Blake's case and relied in particular on the fact that, in that case, the gates had been held to demonstrate a lack of intention to dedicate a bridleway even though the public had been able to deviate around the gates. He recorded that the Interested Party had pointed to certain factual differences between that case and the present one. He then said this –

> *"However, as outlined above in Godmanchester, consideration needs to be given to what the users of the way would have understood the intention behind the structures to be".*

87. Having posed that question, the inspector then answered it in DL28, to which I have referred in paragraph 79 of this judgment. In the present case, he found it to be clear that the intention behind the various structures was not (as it had been in Blake's case), to prevent the use of the Order Route as a bridleway. Instead, the intention was to prevent use of the Order Route by motor vehicles (and other activities).

88. In their grounds of claim, the Claimants contend that the inspector failed to distinguish Blake's case. In their written and oral submissions, the Claimants argued that Blake's case was indistinguishable on its facts from the present case; that the inspector erred in law and failed to explain why he had not reached essentially the same conclusion as to the significance of the locked barriers on the Order Route.

89. I do not accept these submissions. In my judgment, in DL27-DL28 the inspector gave a principled and clear explanation for the distinction on its facts between Blake's case and the case before him. As he said, the distinction lay in the objective assessment in each case of how users of the way would have understood the land owner's intention in erecting the barriers. In Blake's case the Court upheld, as lawful and reasonable, the Secretary of State's conclusion that users of the footpath would have understood the locked barriers as a clear demonstration of the land owner's lack of intention to dedicate the way as a bridleway. Whereas in the present case, I am satisfied that the inspector was both lawful and reasonable in concluding that users of the footpath would have understood the presence of the locked barriers to indicate a quite different intention, namely, to prohibit and prevent the use of the Order Route by motor vehicles. Therein lay the distinction between the two cases, a distinction that the inspector was properly entitled to draw in DL27 and DL28.

(3) Other criticisms of the inspector's findings on barriers and signs

90. In paragraph 4 of their detailed statement of grounds, the Claimants advance the contention that the inspector acted unreasonably and unlawfully in not finding that a number of events prior to late 1999 brought the use of the Order Route as a bridleway into question. The Claimants further contend that the inspector gave no reasons to justify his contrary conclusions. I shall consider each of these earlier events in turn.

91. The Claimants say that Mr Davis gave evidence of a locked gate on the Order Route between 1985 and 1989 over which he had to lift his bicycle. In DL17, the inspector records that his note of Mr Davis' evidence at the inquiry was that he recalled a wooden gate at around point F which was rarely closed. In DL25, the inspector says that the evidence of Mr Davis "does not suggest that another gate was locked". In their skeleton argument, the Claimants maintained their contention that Mr Davis said that he had to lift his bicycle over a locked gate at various times between 1985 and 1989. On 12 November 2019, the inspector signed a witness statement in which, at paragraph 12, he produced his contemporary note in which he wrote down Mr Davis' answers to questions put to him cross examination by Mr Salaman. The inspector's note clearly records Mr Davis having said that there was a wooden gate which was very rarely closed.

92. In the light of the inspector's contemporary note of Mr Davis' evidence, I am unable to accept the Claimant's contention that the inspector's findings in DL17 and DL25 were unreasonable or unlawful. On the evidence that he heard from Mr Davis about the presence of a gate at point F on the Order Route, it was reasonably open to the inspector to conclude that any gate that was in existence at that point during the mid to late 1980s was not such as to call the public's right to cycle along the Order Route into question.

93. The Claimants' say that Mr Casemore referred to a trench being dug and also to a gate. The inspector addressed Mr Casemore's evidence in DL22 and DL26. Mr Casemore stated in writing that a trench had been dug in an attempt to obstruct the Order Route. He also mentioned an attempt to erect a gate. In DL26, the inspector considered the significance of these matters. He said that information was limited and, on the evidence, neither appeared to have prevented access by both cyclists and horse riders. In my view, neither of those findings can properly be impugned as being unlawful or unreasonable.

94. The Claimants say that Mr Cresswell gave evidence that there was a "no cycle" sign on the Order Route in the 1980s. Having heard the evidence of Mr Cresswell at the public inquiry, the inspector said in DL33 that he did not agree with the objectors that Mr Cresswell's evidence was indicative of 'no cycling" signs being on the Order Route prior to 2005 or 2006. Having read the Claimants' skeleton argument on this point, the inspector signed a second witness statement on 20 November 2019, in which he said that he had checked his contemporary notes of Mr Cresswell's evidence given at the inquiry. His notes recorded that that Mr Cresswell stated three times in response to questions posed in cross examination that there had been no signs on the Order Route prior to 1997. He produced a copy of his notes which record those answers.

95. In the light of the inspector's production of his contemporary note confirming the accuracy of his account of Mr Cresswell's evidence in DL33, I cannot accept that he acted unlawfully or unreasonably in concluding that "no cycling" signs did not appear along the Order Route before 2005 or 2006.

96. Finally, the Claimants refer to a photograph taken in 1999 at the latest showing a "no through way" sign. The inspector referred to that photograph in DL36. He said that "the no through route signage at point H would not have challenged users". The Claimants submit that the sign could reasonably be found to indicate to a reasonable user that there was no access, other than access to properties along the Order Route. No doubt the sign could reasonably be interpreted in that way, but it is also the case that it could reasonably be read in the way that the inspector read it in DL36. There is no error of law in either interpretation, and this was a matter for the inspector to judge. It is also important to have well in mind that the Order Route was a dedicated public footpath throughout the period between 1983 and 1999. That context lends support to the inspector's finding in DL36.

97. In paragraph 6 of their detailed statement of grounds, the Claimants contend that the inspector acted unreasonably in DL30, in finding that "no horse riding" signs referred to by Mrs Boardman in her letter of 23 June 1999 and by Mr Salaman did not seek to challenge people riding horses along the Order Route. That letter is hardly compelling evidence in support of the effectiveness of those signs as an expression of the land owners' intentions, since Mrs Boardman herself doubted that "even the most law-abiding rider would see them". As regards Mrs Boardman's description of the location of those signs, the inspector says that the "…description of a footpath between the river and the sewage works corresponds to the branch of Wisley Footpath No. 3 to the east of point F, which is not part of the claimed route". As regards the sign mentioned by Mr Salaman, the inspector said that "The same applies…most notably the sign in the tree visible on one of the photographs supplied".

98. These were findings of fact made by the inspector on the basis of his evaluation of the evidence that was before him, and no doubt informed by his inspection of the Order Route. In DL30 he provides a clear explanation for his finding that these "no horse riding" signs did not challenge the use by horse riders of the Order Route. Having read Mrs Boardman's letter and seen Mr Salaman's photograph, it is clear to me that neither his findings nor his explanation for those findings can be criticised as unreasonable. It follows from those findings that the Claimants submission in their skeleton argument based on the words 'or otherwise' in section 31(2) of the HA is without foundation: on the inspector's findings, the signs simply did not seek to engage horse riders using the Order Route.

99. In their skeleton argument, the Claimants raise further detailed criticisms of the inspector's findings and consideration of the evidence before him, including objectors' letters, photographs and mention of other barriers installed to control unlawful activities such as fly tipping. See DL24 (barriers), DL31 (signs) and DL18 (the 1995 file note – locked gates). These points were developed to some extent during oral submissions by reference to the documents that were in evidence before the inspector at the public inquiry. In each of these paragraphs, the inspector explained why he did not find the evidence relied upon by the objectors to be sufficient to show that the barrier or sign, to which reference was made, had been sufficient to amount to an effective challenge to users of the Order Route on horseback or cycles.

100. It is particularly important to have well in mind that the inspector is the fact finding tribunal. This Court is not hearing an appeal from the inspector's decision. The grounds upon which the Court may entertain a challenge to the inspector decision are those summarised by Charles J in the Elveden Farms case (paragraph 20 above).

101. In DL18, the inspector referred to a file note dated 6 June 1995 prepared by a Council officer (Mr Powles) following a visit to the Order Route. That note recorded that the Order Route had been partially gated off in the approaches to the underpass beneath the M25. However, it also recorded that the raised footpath remained open for public passage, albeit that its use was proving difficult for wheel chair users and cyclists. The note provides contemporary evidence that, at that time, the Order Route was indeed in active use by cyclists as well as by pedestrians. These matters are reported by the inspector in DL18. Having considered them, he found that, in the absence of further information about the gates seen by Mr Powles other than they reportedly made the footpath difficult for cyclists to use, he was unable conclude that the presence of the gates at that time was sufficient to bring the status of the Order Route as a bridleway into question. I find it impossible to say that this careful and clear process of reasoning was an unreasonable response to the evidence that the inspector was called upon to consider.

102. In DL24 the inspector considers the presence and purpose of a gate at point G. He drew upon the written evidence of Mrs Boardman, who had been clerk to the Wisley Parish Meeting during the late 1990s and early 2000s. Mrs Boardman's evidence was that gates were installed on the Order Route as part of the Safer Guildford Initiative (SGI) in 1999 "to stop cars going through". Her stated recollection was that "before our gates went in there were no gates or obstructions along Muddy Lane at all". She also stated that the gates that were installed nearest to Wisley Land "left a gap to one side that was big enough for walkers/cyclists and I suppose horse riders as well". In

the light of Mrs Boardman's evidence, the Claimants cannot sustain their submission that the inspector was not able reasonably to find that the gates discussed in DL24 had been erected for the purpose of stopping misuse of the Order Route by motor vehicles and fly tippers. The reasonableness of that finding is not affected by the fact that there was a dispute about that point at the public inquiry. I also note that the inspector addressed in DL25 the significance of the earlier written evidence dating from the 1960s upon which the objectors relied.

103. DL31 forms part of a series of paragraphs (DL30-DL36) in which the inspector set out his reasoned findings in relation to written and oral evidence of signs that had been seen or photographed from time to time both along and in the vicinity of the Order Route. None of those findings may properly be said to have been unreasonable. On the contrary, they reflect the careful, objective testing of the evidence in accordance with the correct approach that the inspector had directed himself to follow in DL12 and reminded himself of in DL27.

(4) Overall conclusion on ground (2) issues

104. For the reasons given, I reject the Claimants' challenge to the inspector's decision on the various grounds relating to the lawfulness and reasonableness of his findings and conclusions on the question when the status of the Order Route was first brought into question; and the related question of whether barriers and signs relied upon by the objectors constituted a lack of intention on the part of land owners to dedicate the Order Route as a bridleway.

Grounds of challenge (3) – evaluation of the user evidence

105. Having concluded that the status of the Order Route as a bridleway for passage on bicycle and horseback was first brought into question in late 1999 (DL36) and that deemed dedication could not be established over a 20 year under section 31 of the HA (DL37), in DL 38 the inspector turned to consider whether dedication and acceptance of the Order Route as a bridleway was to be inferred on the application of the common law principles that I have summarised in paragraph 21 of this judgment.

106. For the purpose of that part of his inquiry, in DL38 to DL41 the inspector examined the extent and quality, on the evidence before him, of alleged use of the Order Route by cyclists and horse riders during period between 1983 and 1999.

107. In paragraph 7 of their detailed statement of grounds, the Claimants advance a number of criticisms of the inspector's consideration of the user evidence. The Claimants developed those criticisms in detail in both their skeleton argument and their oral submissions. However, they essentially break down to the following points –

(1) The inspector failed reasonably to scrutinise the user evidence forms for inconsistencies and errors. Instead, he "accepts that evidence without question".

(2) The inspector gave no details of what he accepted and what he rejected in respect of evidence of use of the Order Route by horse riders.

(3) The inspector failed to account for the unreliable evidence of Mr Jeggo and Mrs Woodroffe.

(4) The inspector failed to take proper account of the fact that the application for the Order was the result of a campaign by cycle groups.

108. I shall address each point in turn.

109. The contention that the inspector accepted the user evidence without question is unsustainable. It is obvious from DL38 to DL41 that the inspector carefully sifted both the written and oral evidence of use of the Order Route by cyclists and horse riders in order to identify that which was relevant to the period under consideration. Those paragraphs show that the inspector looked critically at the written evidence It is also clear that he assessed the quality of the evidence in the light of the criticisms made by the Claimants of its adequacy and reliability. DL41 records that he found the oral evidence of use of the Order Route given at the public inquiry to stand up well to cross examination.

110. In paragraphs 73 and 74 of their skeleton argument, the Claimants undertook an exercise of seeking to exclude a number of the user evidence forms identified as relating to the relevant period (1983-1999) by the inspector in DL38. It is unclear to me whether that analysis was presented to the inspector. In any event, I am not persuaded by it. It was the inspector's responsibility to evaluate the user evidence, whether given in writing or orally at the public inquiry. It is clear to me from DL38 to DL41 that the inspector properly discharged that responsibility. Moreover, the Claimants' exercise only serves to demonstrate the propriety of the inspector's own findings that there remained a body of user evidence which established that the Order Route had been well used by cyclists throughout the relevant period, and to a far lesser extent, by horse riders (DL40 and DL41).

111. I do not find any deficiency in the inspector's reasoning in relation to use of the Order Route by horse riders. He referred to the evidence of the Woodruff family of Holly Bush Stables in DL39. Mrs Woodruff gave oral evidence of use of the Order Route by horse riders at the public inquiry. During the hearing, my attention was drawn to her letter of 28 February 2014, which provided some further evidence of equestrian use of the Order Route. Members of the Woodruff family submitted written user evidence, as did the Cresswells. The inspector's finding in DL41 that it was clear from the evidence that "use by cyclists far outweighs the evidence of equestrian use" was amply justified as a response to the evidence before him.

112. In their closing submissions to the inspector, the Claimants were critical of Mrs Woodruff's evidence in a number of respects, but the inspector found the user evidence at the inquiry to stand up well to cross examination (DL41). That was a matter for his judgment having both seen and heard the witnesses give their evidence. I am wholly unpersuaded that the inspector's evaluation of Mrs Woodruff's evidence in the context of DL41 is perverse. The same applies to the evidence of Mr Jeggo, albeit that there is no indication in the decision that the inspector attached any particular significance to his evidence.

113. The inspector was well aware of the procedural history of the application for the Order and that the impetus for it came from cyclists and local cycling groups. His task was to consider and to evaluate the written and oral evidence of use of the Order Route and to form his own judgment as to whether that use was of such a character and extent as to justify the inference of dedication of the Order Route as a bridleway on common law principles: see paragraphs 21 to 25 of this judgment. In my view, in DL38-DL49 the inspector fulfilled that task on the basis of a proper and reasonable response to the evidence before him.

114. Finally, in their skeleton argument the Claimants advances certain criticisms of DL43, in which the inspector considered the reaction of landowners to the SGI initiative undertaken by the local authorities in 1999/2000. None of those criticisms amounts to an alleged error of law on the part of the inspector. In any event, the overall conclusion drawn by the inspector in DL43, that he was unable to determine the reaction of the then land owners to the SGI works along the Order Route, is plainly one that he was entitled reasonably to reach on the evidence.

Overall conclusion on ground (3) issues

115. For the reasons given, I reject the Claimants' challenge to the inspector's decision on the various grounds relating to his evaluation of the user evidence.

Widths

116. In their closing submissions to the inspector, the Claimants drew attention to the width of 20 feet attributed to FP 566 in the Definitive Statement. The Claimants submission was that the stated width lacked any evidential support and should be deleted.

117. The inspector addressed that issue in DL53. Whilst he undoubtedly had the power to confirm the order with modifications, he gave clear reasons why he was not prepared to exercise that power to delete the widths shown in the Definitive Statement in the present case. It cannot arguably be said that the reasons that he gave in DL53 for declining to make that modification to the Definitive Statement were irrational. On the contrary, they were clear and obviously justified.

The Interested Party's decision to make the Order

118. In paragraphs 2 and 3 of their detailed statement of grounds, the Claimants contend that the Interested Party's decision to make the Order was unlawful. In particular, the Claimants argue that the Interested Party failed to undertake a proper investigation of the available evidence in order properly to establish whether there were reasonable grounds to justify the making of the Order under section 53 of the WCA.

119. In a supplement to their skeleton argument, the Claimants refer to R v Cornwall County Council ex parte Huntington [1994] 1 All ER 694. At page 701j, Simon Brown LJ said –

> *"…in so far as [objectors] desire also to raise matters of legal complaint regarding the process whereby the county councils… came to their decisions to make modification orders in the first place (necessarily provisional as these are until confirmation) the applicants will be able to do so under the express provisions of para 12(1) [of schedule 15 to the WCA]".*

120. It follows, so the Claimants submit, that the Interested Party's alleged failure to fulfil its duty to investigate under section 53 of the WCA is amenable to review by this Court following confirmation of the Order.

121. I am of course bound by the principle stated by the Court of Appeal in Huntington's case. However, the Claimants' submission begs the question as to the gravamen of their complaint about the Interested Party's acts or omissions; and the degree to which any failure alleged against the Interested Party at the order making stage has since been overcome through the subsequent statutory process culminating in the inspector's decision to confirm the Order. In support of that approach, I draw attention to the observations of Simon Brown LJ at page 701h of Ex parte Huntington –

> *"The applicants' central quarrel with their respective county council is, as they frankly recognise, upon the facts of the cases and clearly these facts can and will be investigated in full at the public local inquiries yet to be held".*

122. In the present case, in paragraph 3 of their detailed statement of grounds the Claimants essentially complained that the Interested Party had failed properly to investigate and to consider whether bridleway rights were capable in law of being dedicated over the Order Route, raising the same arguments about public nuisance, statutory capacity to dedicate, the physical character of the underpass and the Human Rights Act 1998 as they pursued in detail before the inspector. It is beyond reasonable argument that, in so far as the Claimants have legal complaints about the failure of the Interested Party to address those issues when it made the Order, the Claimant has been able to pursue those issues as objectors under the statutory confirmation and review procedure, both at the public inquiry before the inspector and before this Court.

123. That leaves paragraph 2 of the Claimants' detailed statement of grounds, in which they complain that the Interested Party did not pursue inquiries with those (other than the Claimants) who had objected to the order being made. The Claimants mention specifically a Mr Drummond, who has lived on the Order Route for over 40 years but who was not interviewed.

124. It was the alleged failure to contact Mr Drummond that was the basis for the Claimants' oral submissions on this particular complaint at the hearing before me. As to that issue, I note the following matters –

(1) The substance of Mr Drummond's evidence was reported by the Countryside Access Officer to the Interested Party's Planning and Regulatory Committee in paragraph 5.65 of her report on the proposed modification order.

(2) The Countryside Access Officer drew that Committee's attention specifically to Mr Drummond's evidence in her speaking note at the meeting held on 8 June 2016 (at which the Committee considered whether the Order should be made).

(3) It was not in dispute before me that both the making of the Order, the opportunity to lodge objections to its confirmation and the holding of the public inquiry had all been publicised in accordance with the statutory requirements laid down by the WCA.

(4) Section 6 of the Interested Party's Statement of Grounds for the decision to make the Order provided details of responses received from land owners and occupiers of adjacent land affected by the Order, including the Claimants and (at paragraph 6.13) Mr Drummond. Paragraph 6.11 of that Statement recorded that adjacent land owners had been consulted.

(5) In their closing submissions to the inspector, under the heading "Objectors' evidence" the Claimants drew attention to Mr Drummond's written evidence and indeed to that of other persons who had written to object to the Order.

125. In the light of these considerations, I am satisfied that any alleged failure on the part of the Interested Party to inquire into or to investigate objections at the order making stage was remedied through the statutory confirmation process. The written evidence of Mr Drummond and other objectors was before the inspector and had been drawn to his attention by the Claimants at the public inquiry. The making of the Order, and the opportunity to participate in the confirmation procedure and attend the public inquiry, had been properly publicised. Mr Drummond had a fair opportunity to supplement his written objection with oral evidence at the public inquiry, had he chosen to take that course. The same was true of any other objector to the making of confirmation of the Order.

126. For these reasons, I conclude that the deficiencies that the Claimants allege against the Interested Party at the order making stage have been remedied through the operation of the statutory confirmation procedure. There is no need for any further intervention by this Court.

Disposal

127. I wish to record my thanks to both the Claimants and to Mr Westaway for their clear and helpful submissions in this case. For the reasons that I have given, this claim must be dismissed.