



Order Decision

Inquiry held on 21, 22, 23, 28 November 2023 and 7 December 2023

Site visit made on 29 November 2023

by **K R Seward Solicitor, MIPROW**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 10 April 2024

Order Ref: ROW/3296708

- The application for the footpaths relies upon evidence of use whereas the application for the bridleway relies upon documentary material. The Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Cumbria County Council (Parish of Hayton: District of Carlisle) Definitive Map Modification Order (No 1) 2021.
- The Order is dated 19 January 2021 and proposes to modify the Definitive Map and Statement ('the DMS') for the area by adding footpaths and a bridleway as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Cumbria County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Background

1. The background warrants brief summary. An application was originally submitted to Cumbria County Council on 6 January 2011 for a definitive map modification order ('DMMO') to add footpaths and a bridleway to the 'DMS' in woodland known as 'Hayton Woods'. The Council did not progress the application 'as it did not conform to the statutory requirements'. A second application followed on 2 April 2013 made on the same terms but including other material in support. The applicant subsequently sought to withdraw this application.
 2. As there is no express right of withdrawal within Schedule 14 of the 1981 Act, the County Council proceeded to deal with the application in furtherance of its duty under section 53 to keep the DMS under continuous review. This resulted in a decision of the County Council's Development Control and Regulation Committee on 4 January 2017 to make an Order under section 53(3)(c)(i) of the 1981 Act to add a network of 44 sections of footpath to the DMS and to extend a bridleway. The decision to add the footpaths (although not the bridleway) was taken contrary to Officer recommendation.
 3. The decision authorising the making of a statutory order was subject to legal challenge by way of judicial review in the High Court (*Roxlena Limited v Cumbria County Council v Peter Lamb* [2017] EWHC 2651 (Admin)). The claim was dismissed and upheld on appeal to the Court of Appeal [2019] EWCA Civ 1639.
 4. A DMMO was subsequently made by Cumbria County Council, as the order
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making authority, on 19 January 2021 ('the Order'). It is the Order which is the subject of these proceedings. If confirmed, the Order will add to the DMS 18 public footpaths, plus 1 bridleway by extending the existing bridleway numbered 'BW 117004' to the quarry. As I understand it, the routes shown in the Order are unaltered from the time of the Council's original decision. The reduction in the number of routes results from the Council reviewing and revising the sections which it considered to constitute 'a way' for the purposes of section 31 of the Highways Act 1980 ('the 1980 Act').

5. The three statutory objectors are Boyd Holmes, Ken Fletcher and Roxlena Ltd ('Roxlena'). Most of the land affected by the Order routes is owned by Roxlena who purchased the land from Philip and Debra Day in August 2013.
6. There are three existing public rights of way through the woods. Footpath number FP 117005 extends in an easterly direction from point A to 'The Bothy'. Bridleway 'BW 117004' commences at point C (described as the 'Greystone' entrance due to a large grey stone in the centre of the road) and proceeds in an easterly/north-easterly direction, terminating in the woods at point D. Footpath number 'FP 417003' runs north to south through the woods bisecting both other public paths. Three sections of claimed footpath between points C-3-2 and 4-3, lying off the existing public rights of way to the west, fall outside Roxlena's ownership.
7. The affected woodland and areas within it are described in these proceedings by different names. I shall refer to the woodland as a whole lying to the west of the river as 'Hayton Woods'. This reflects the public notices advertising the Inquiry.

Procedural Matters

8. Since the Order was made, local government reorganisation has taken place. With effect from 1 April 2023 Cumbria County Council no longer exists. The Order routes now fall within the administrative area of Cumberland Council.
9. In an updated statement of case, the new Council stated that it has resolved to now take a neutral stance at this confirmation stage of proceedings. Having reassessed the historical evidence, the Council considers that on balance it does not satisfy the test for confirmation of a bridleway to extend BW 117004. In addition, the Council has "*not been able to muster a body of user evidence it could call at the inquiry to show that the routes were used during the foot and mouth outbreak and that use was thereby 'without interruption'.*"
10. Therefore, the Council considers that it cannot support that, on the balance of probabilities, the use of the Order paths was 'as of right' and 'without interruption' for the full period of 20 years. Furthermore, Officers are now authorised to express their view previously taken at order making stage that the routes are not identified with sufficient precision. This continues to be the case at confirmation stage with its higher standard of proof. Notwithstanding the Council's change of stance, it remained open for a supporter or supporters to promote the case for confirmation.
11. In preparation for this Inquiry two pre-inquiry meetings ('PIM') were conducted remotely on 25 July 2023 and 27 October 2023 pursuant to paragraph 15 of Part 4 of The Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007. Both the Council and Roxlena were represented by their Counsel. The purpose of each PIM was to consider measures to ensure that the Inquiry would

be conducted efficiently and expeditiously. No discussion took place on the merits of any case for or against the Order.

12. At the first PIM on 25 July 2023, I tasked the Council with securing the agreement of a supporter to take the lead in presenting the case in favour of the Order. Counsel for the Council and Roxlena agreed to liaise over the content of the letter. It was further agreed that the Council would enquire of supporters over promotion of the single claimed bridleway. A letter from the Council dated 28 July 2023 was circulated among user groups and those who had completed user evidence forms ('UEFs'). No-one came forward to promote the Order.
13. The central office of the Ramblers Association ('the Ramblers') made a written submission in support of two routes with focus on legal matters. However, the Ramblers declined to present the case having come late to the matter. Mr Vaux, Footpath Secretary of the local branch of the Ramblers also responded in support of the two routes on which evidence would be produced but without presenting the case in support. There followed letters of support for the same two routes from several other individuals. The two routes concerned are described by supporters as 'route 1 and 'route 2', coloured red and green respectively on the appended copy of the Order map. A third route (coloured blue) as mentioned by supporters is also shown. I refer to these as the red, green, and blue routes.
14. In a letter dated 19 October 2023, Roxlena's Solicitors raised the possibility of an application for costs being made at the Inquiry against those supporting the two aforementioned routes. This warning prompted the Ramblers, Mr Vaux and others to withdraw their proofs of evidence in support. This matter was a topic of discussion at the PIM on 27 October 2023. Clearly, I could not compromise my impartiality by giving any view on the likelihood of an award of costs but articulated concern if supporters had felt pressured or intimidated into withdrawing from the case. It was also unclear if those withdrawing had appreciated the limited circumstances in which a costs award may be made.
15. In view of the above, it was agreed at the PIM that the Planning Inspectorate would send a neutrally framed email to those who had withdrawn to alert them to the 'Guidance on Procedures for Considering Objections to Definitive Map and Public Path Orders'. Individuals were asked to advise the Inspectorate within 7 days if, having read the guidance and reflected, they wished to retract the withdrawal of their proof of evidence. One witness, Daphne Roberts, decided to reverse her decision to withdraw. There remained two others who had filed proofs of evidence in support of all the routes, namely Matthew King and Catherine Allan.
16. At the Inquiry, other witnesses who had retracted their evidence came forward at varying intervals requesting to speak. Two of those witnesses indicated that they were taking a neutral stance, seemingly to avoid the risk of costs. I explained that they were not neutral if speaking in support of any of the routes. I have treated those witnesses as supporters. Besides those persons entitled to appear at an Inquiry, under Rule 19(2) the Inspector may permit any other person to appear and such permission shall not be unreasonably withheld. The objectors did not oppose the giving of oral evidence by those who had withdrawn their proofs of evidence. The Inquiry proceeded to hear from all persons asking to speak, none of whom were legally represented.

17. To accommodate Mr King, Mr Laurence KC agreed to defer his opening statement for Roxlena until after Mr King's evidence. Usual convention would be to hear the case for the supporters first. Given the availability of witnesses, and with the agreement of the objectors, a flexible approach was taken to the sequence in which evidence was heard. Adjustments to the order of evidence were also made as more supporters came forward as the Inquiry progressed.
18. An accompanied site visit was undertaken on 29 November 2023 with representatives of the objectors, supporters and the Council. We did not walk the claimed paths falling outside Roxlena's ownership as the landowner's permission had not been secured. The general vicinity of those paths could be seen from public vantage points and from Roxlena's land. Not all claimed paths on Roxlena's land were evident on the ground or available to walk due to the extent of overgrowth.
19. Closing submissions were heard remotely on 7 December 2023 with opportunity for members of the public to observe proceedings. To assist the Inquiry, Roxlena's Solicitors collated a bundle of all documents in the Inquiry. Given the task involved and magnitude of material, I agreed that the updated bundle could be submitted electronically after the close of the Inquiry. It was received on 11 December 2023 and includes only those documents already in evidence.
20. Prior to the Inquiry opening Roxlena had taken issue with supporters advancing a case for two (or three) routes only. Mr Laurence described them as 'new routes' albeit already depicted on the Order map. They are only 'new' in the sense of connecting points on the map which are described as a series of shorter stretches in the Order schedule rather than complete ways. Roxlena suggested that the correct approach would be to withdraw the case and re-submit an application for the 2/3 routes. In principle, I see no procedural bar to my proposing confirmation of some routes only, if the evidence sufficed. Should I take that approach an interim order would be made and advertised in the usual way with scope for further submissions.
21. It so happened that the supporters appearing at the Inquiry reverted to their original UEF's for multiple routes or focused on two or three whilst still supporting others. That being so Roxlena did not press its 'jurisdictional point' over 'new' routes being claimed for which the case had not been fairly put. However, Roxlena cautioned that these arguments should be treated as resurrected in the event that my attention turns to 2 or 3 routes only. It is appropriate that I make it clear at the outset that I reject those arguments, which do not influence or inhibit my considerations in any way. All stretches of claimed path are clearly shown on the Order map and the legally representatives for Roxlena had plenty of advance notice of the claimed use to be able to respond.

Legal Context

22. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in section 53(3)(c)(i). In particular, the discovery by the authority of evidence which it considered to be sufficient to show that a series of rights of way which are not shown in the DMS are reasonably alleged to subsist over land in the area to which the map relates.

23. A higher standard of proof must be met to confirm an Order than was required when it was made. For the Order to be made it sufficed under section 53(3)(c)(i) for a public right of way to be 'reasonably alleged to subsist'. At this confirmation stage, evidence is required on the balance of probabilities that a public right of way subsists. The Order was made by applying the lesser test.

24. As a prerequisite to consideration of the above, Roxlena raises the following:

Accuracy of the Order map

25. One of the reasons given by the Council for its neutral stance was uncertainty over the accuracy of the alignment for routes shown on the Order map. A difficulty for the Council had been the thickness of pen line used by witnesses in marking on their maps where they had walked. The Council has no statutory right of entry to the land in an application for a DMMO. Roxlena refused the Council access to its land for surveying purposes to ensure accurate plotting of the claimed routes. It is evident from the submissions heard that this was done in a deliberate attempt to defeat the claim which "*is liable seriously to devalue its land and/or preclude its use for its intended purpose.*"

26. In deciding not to promote the case, the Council exercised its judgement as it was so entitled. It does not automatically follow that the Order is incapable of confirmation. Roxlena raises a 'jurisdictional point' over whether the Order can be confirmed where uncertainty exists over the accuracy of the Order. It points to the higher burden of proof required to confirm an Order than to make it.

27. It is asserted that the Order "*failed adequately to show or describe the position of the order routes.*" Yet, Roxlena does not flag up any inaccuracies to illustrate its point. Without a survey it is perhaps inevitable that there will be some margin of error. None of the users suggested that the routes depicted did not correspond with their recollections of the paths walked. Aside from my own observations on site in relation to point 28 being difficult to locate some 13 years after last use, there is no evidence beyond supposition that the Order map is flawed. The Council cannot be certain of the accuracy of its plotting in the absence of a survey, but absolute certainty is not required.

28. An Order map will often fail to achieve the highest levels of precision not least because of the scale and lapse of time between last user and Order making. In *Perkins v SSEFRA and Hertfordshire CC* (QBD)[2009] EWHC 658 (Admin) the Court had to consider whether the order (as confirmed with modifications) adequately and accurately identified the route of the footpath. The issue came down to a question as to what degree of detail is possible and required as a matter of law.

29. The Court noted that the effect of the DMS is prescribed by section 56 of the 1981 Act which provides that the DMS 'shall be conclusive evidence as to the particulars contained therein.' In the case of a footpath or bridleway, 'the map shall be conclusive evidence that there was at the relevant date a highway shown on the map, and that the public had thereover at that date a right of way...' (section 56(1)(a) and (b)). Further, that 'particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at that date...' (section 56(1)(e)).

30. Section 56 had been considered in *R v SSE, ex p Burrows and Simms* [1991] QB 394 where Purchas LJ stated that the 1981 Act recognises “*the importance of maintaining, as an up-to-date document, an authoritative map and statement of the highest attainable accuracy*”.
31. Upon considering section 56 in *Perkins*, Sir George Newman observed: “*The structure of section 56(1) of the 1981 Act shows that, in broad terms, the purpose of the map is to confirm the existence of the route and the purpose of the statement is to provide greater detail as to the particulars of its position or width.*” The thrust of the complaints in *Perkins* was that the Order should not have been made because, despite efforts to achieve clarity required by law, the route of the footpath is not shown with sufficient accuracy, let alone the highest attainable accuracy. A similar point is taken in this case.
32. Sir George Newman found the dictum of Purchas LJ in *Burrows* to be helpful, “*but is not to be taken in substitution for the standard set by the legislation. Purchas LJ can be taken as referring to the general intention of the legislation, namely that the map and statement should be kept under review and modified in the light of the most up-to-date evidence as to what rights of way are in existence so as to show, as accurately as possible, those rights of way. I do not take him to have been purporting to lay down a general requirement that the map and statement should attain some particularly high level of precision in the sense of showing the detail of the route in terms of its precise location on the ground to a manifestly high degree of particularity.*”
33. He continued at paragraph 14: “*I accept that if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question. Where, as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes...there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence*”.
34. The conclusion drawn was to agree with the Inspector that, on the material available, the description, when read with the map, would enable a reasonable person to understand where the footpath was depicted as being. It is not the task of the court to attempt to better the description. It was a matter for the planning judgment of the Inspector.
35. The judgment in *Perkins* is apt not least because it was cited by the Courts in *Roxlena*. In dismissing *Roxlena*’s attack on the accuracy of the map in the High Court, Mr Justice Kerr stated [at paragraphs 61 and 62]:
- “*The exacting standard of precision demanded by Mr Laurence is higher than the law requires and would frequently be, unjustly, impossible to meet; for example where, as in this case, a determined and hostile landowner exercises the right not to co-operate in the process by permitting access to the land.*”
- “*I respectfully agree with the remarks of Sir George Newman, albeit in a slightly different context, in the Perkins case. The obligation on the surveying authority is to make a judgment on the basis of the best evidence it has. I agree with Mr Evans that the issue is one of judgment and that this committee was entitled to*

take the view that the evidence of route alignment and width of the footpaths was sufficient.”

36. The Court of Appeal in *Roxlena* found the Judge's approach and reasoning at first instance to be correct. Of course, as noted by the Court of Appeal, under the 1981 Act the order-making part of the process is separate from confirmation and involves a different approach to the evidence as consistently recognised by the courts. The procedure under Schedule 14 to the 1981 Act was described by Roch L.J. in *ex p. Emery* as "preliminary". It still leaves [objectors] with the ability to object to the order under [Schedule] 15 when conflicting evidence can be heard, and those issues determined following a public inquiry.
37. *Perkins* did involve the confirmation of an Order under Schedule 15 and the Court of Appeal endorsed the view of Sir George Newman at paragraph 14 of that judgment, as set out above.
38. When this Order was made there was a lower threshold of evidence applicable. As the Court of Appeal observed, the real thrust was that the evidence of the location and alignment of the claimed routes, though by no means perfect, and not as good as it might have been had the land been surveyed, was still sufficiently clear. Now that we are at Schedule 15 confirmation stage, no conflicting evidence has come forward to undermine how the alignment of the routes are recorded in the Order. *Roxlena* has simply put supporters to proof.
39. If sufficient evidence is found to satisfy the provisions for dedication as a public right of way within section 31, or at common law, such that a public right of way exists, then it poses the question of whether a landowner can defeat the claim for a DMMO and prevent the recording of those public rights in the DMS by refusing entry onto their land for the purposes of a survey.
40. Mr Laurence asserted that a court declaration against the landowner could have been sought by the Council or supporters that the order routes had been dedicated as public highways. Had this occurred, an order permitting inspection and survey could have been sought through the civil procedure rules. No-one was prepared to take the financial risk of paying legal costs. When I queried whether a declaration could be secured in a case reliant upon user evidence when specific provision exists within the DMMO procedure, Mr Laurence cited *Shears Court (West Mersea) Management Co. Ltd. v Essex County Council* [85 LGR 479]. I do not see how this judgment particularly assists *Roxlena* for the reasons that follow.
41. In *Shears*, it was the landowner who issued a writ asking for a declaration that no public rights of way existed over its land. The Council's application to strike out the writ failed because the landowner had a private law right to apply to the court for its protection in circumstances where the statutory procedure for a DMMO under the 1981 Act was not yet complete. However, both proceedings involved the question of whether a public right of way existed where substantially, if not exactly the same, evidence would be examined. The Court proceeded to order a stay of the landowner's action to allow conclusion of the DMMO process. In the Court's judgment, it would be "*a vexatious use of the process of law to allow the plaintiff [i.e., the landowner] to proceed now with its writ.*"
42. In essence, a private law remedy could still be sought notwithstanding the DMMO

process, but the Court did not entertain it whilst those proceedings were active. It does not demonstrate that the Council could have pursued an application in the courts as a public law body or that it was the appropriate procedure to secure access to Roxlena's land. Moreover, none of this furthers the point in issue over whether the possibility of flaws in the Order map would be an impediment to confirmation.

43. The landowner was entitled to exercise the right to refuse entry to its land for mapping purposes. Even so, I am not satisfied from the arguments pursued that the landowner could use its own refusal as a means to defeat confirmation of the Order. The upshot of its refusal is that the accuracy of the Order map can only be adjudged on the available evidence which will invariably not be as precise as it would have been if surveyed. The level of precision strived for cannot be achieved but it is not necessarily fatal, as per *Perkins*. In my judgement, I can be satisfied from the available evidence that the information in the Order suffices, on the balance of probabilities, to identify with sufficient accuracy where the Order paths are aligned and that they reflect those claimed to be walked.
44. Should errors emerge once confirmed then there is a simple solution. The landowner and Council could liaise over the accuracy of the map and description and a further modification order made if corrections are required. This may be inconvenient to the landowner, but it is a situation created by its own doing and one entirely avoidable by permitting entry.

Existence of paths and alignment

45. Despite accepting that the paths were used over a 20-year period, Mr Laurence argued in closing submissions that users had made no attempt to prove that the Order routes existed and remained physically unaltered throughout the period 1990-2010. The onus is on those asserting rights to show that they used routes along the same alignment as claimed, and which remained unchanged for the requisite period.
46. However, it was not clearly put to supporters at any point that the alignment of the trodden paths they walked might have changed. Mr Laurence had announced to the Inquiry on day 2 (and confirmed on day 3) that Roxlena was not opposing the fact of use and that witnesses used particular paths or the regularity of use. Given that stance, supporters might well have been surprised to hear that they had failed to address matters seemingly not in issue. When I raised this with Mr Laurence, he directed me to the matter being implicit within paragraph 24 of his opening statement.
47. An implicit reference in a lengthy opening statement would not fairly and squarely alert unrepresented members of the public to points of dispute. That aside, paragraph 24 concerns a different procedural point taken over the accuracy of depiction on the Order map.
48. My attention was then drawn to paragraph 28 of the opening. Amongst other matters, this paragraph had indeed referred to the burden being on the party promoting the Order to prove that the path was at all times during the 20-year period available for use on the ground and remained in the same position. In setting out the legal burden of proof, the emphasis was again upon the accuracy of the map reflecting the alignment on the ground. It was not made plain that the

question of whether the paths remained in the same position throughout was contested. Nevertheless, I address the matter for completeness.

49. There was some suggestion from Mr Holmes that new paths cropped up after the foot and mouth outbreak in 2001 or the alignment may have changed. However, in answer to my questions he confirmed this was no more than an assumption. It is not evidence and I disregard it accordingly.
50. Mr Holmes had similarly stated that new routes emerged after the Boxing Day storm of 1998 when walkers took advantage of broken-down fencing to create new paths. Quite which paths is not identified. Sheila Cain, called by Roxlena, said that after the storm she began to notice new pathways “around the Crookbank area”. She thought these new paths were due to fallen trees blocking the public footpaths but does not identify any as being the Order routes. The accounts are too vague to influence my findings and are contradicted by users.
51. Roxlena suggested that some routes were not in use before tracks were created by Mr Lowther’s company from the late 1990s onwards in the exercise of forestry works and extraction involving the use of heavy-duty vehicles and machinery. Mike Lowther undertook forestry tasks in Hayton Woods between 1999 and 2010. To facilitate his work, including timber extraction, tracks were created by tractor, which Mr Lowther said the public began to use. Mr Lowther had also referred to inheriting long established tracks used by previous woodland managers that took the most sensible route to follow.
52. The evidence is generalised on the location of the new tracks in question, with one exception. Mr Lowther described a road created around the end of 2009 between points 32 and 33. He was sure the route did not follow an existing track, but it was eventually adopted by walkers. He thought the road roughly took the alignment of the green route before veering off at the field boundary. Bearing in mind this new road would have been created towards the end of the relevant period, I find it unlikely that so many users could be wrong over their period of use when claiming the green route from point 32. The most likely explanation is that they are not the same route.
53. It is difficult through user evidence for supporters to prove a negative i.e., that the alignment had not moved. From the evidence heard, walkers used the paths as existed on the ground. All users who gave live evidence did so with reference to the routes indicated on the Order map. They were all able to describe where they walked in varying detail. In the absence of any evidence whatsoever to the contrary, I am satisfied that the claimed routes existed, and the alignment remained unchanged to any material degree. A different point emerges over whether users stuck to the paths or ‘wandered at will’, to which I will return.

Town or village green

54. I am invited by Roxlena to find as a matter of fact that the woods were used by the public for recreational purposes, such that a town or village green (‘TVG’) should have been claimed instead. The line of argument is odd. On the one hand Roxlena argues that a claim under section 31 cannot succeed if there are rights of recreation, yet it strongly denies that such rights of recreation exist. If no rights of recreation exist, as Roxlena contends, then the point goes nowhere.
55. I shall not make any finding on the matter for the simple reason that I am not

looking to ascertain if recreational rights exist. My focus is, and must be, on whether the evidence supports the existence of public rights of way. I have not conducted a TVG Inquiry (which falls outside my jurisdiction) to form any view on the likelihood of recreational rights existing. As before, I will turn to in due course to the separate issue of whether users wandered at will to defeat the Order.

Whether documentary material can be considered

56. The decision to include a stretch of bridleway within the Order relied upon historical documents. Research and analysis of the historical material was undertaken by Drs Mather who both declined opportunity to give evidence at the Inquiry. Roxlena did not address the historical documents “*in the absence of evidence from any supporter*” and submitted that I should not examine the ‘bridleway material’ of my own motion. I queried the latter point in light of the requirements in section 32 of the 1980 Act which provides:
- ‘A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.’*
57. Mr Laurence maintained that the documentary material had not been ‘tendered in evidence’. I disagree. The material was submitted and formed the basis of the Council’s decision to include the bridleway within the Order route. It is tendered evidence much in the same way as the UEF’s fall for consideration irrespective of whether the author spoke at the Inquiry or indicated ongoing support. Notably, much of Mr Holmes’ evidence in opposition to the Order focussed on a critique of the historical evidence. Presumably he did so in the belief that the material was evidence before the Inquiry.
58. Moreover, supporters did raise issues over the bridleway. In particular, Joan Partington stated in her proof of evidence that she believed there to be an error in the printing of the bridleway on modern maps which was intended to go to the quarry. Whether there is an additional stretch of bridleway is squarely before the Inquiry and cannot be resolved without analysing the documentary material included within the bundles.
59. It would be wrong to disregard historical material produced at the outset merely because no-one wished to speak in support of it at confirmation stage. Unless and until the material is considered, I cannot gauge if it provides evidence of the existence of an historical highway. Simply because the Council now has doubts is not reason enough to conclude that the historical material does not suffice. Should the documentary evidence not suffice to support bridleway status, then consideration of the same stretch as a footpath arises from the user evidence.
60. Mr Laurence readily agreed that a distinction is to be drawn between evidence to be disregarded and the question of weight to be attributed to unsupported evidence. I must exercise judgement on how much weight the documentary evidence attracts and whether lesser weight should be attributed where matters of interpretation were untested in evidence.

Reasons

The claimed bridleway

61. The documentary material focusses on the claimed bridleway as an extension of existing bridleway BW 117004, which currently stops abruptly in the woods at point D. As presently recorded in the DMS, the bridleway is a cul-de-sac route without connecting to any other recorded highway. If confirmed, the claimed bridleway would still not connect with any other bridleway at its eastern end, but the bridleway would lead to (the disused) Watch Hill Quarry.
62. Mrs Partington drew attention to two current waymarker signs, one at point C and another at point 17, both of which say: "Public Bridleway" with "Watch Hill Quarry" beneath. These signs are not positioned along the claimed bridleway but at the Greystone entrance for BW 117004 and its point of intersection with FP 117003. The line of argument is that the existing bridleway stops short of the quarry and the signage reinforces that the bridleway extends as far as the quarry. In isolation that inference cannot be drawn. It would need to be founded on evidence of substance.
63. Whilst the Council was satisfied that the documentary material sufficed to meet the 'reasonable allegation' test at order making stage, it has withdrawn support at confirmation stage. This is because: "*With more recent further analysis Officers are not confident that the contents of Appendix C [to its committee report] show on balance that Bridleway 117004 should be extended to Point 23.*"
64. Drs Mather produced detailed notes on historical documents in a series of papers. There is a large degree of repetition, making them somewhat difficult to follow. I have considered the commentary but focussed below on factual records. I have been impeded in this task to some extent by poor quality copies and illegible text making it necessary to rely upon the summaries provided.
65. The first document featured is the 1814 Inclosure Award for Hayton Parish. Drs Mather say this provides early documentation of public access to the Public Freestone Quarry and adjacent Public Watering Place alongside the River Gelt. The track to the quarry (including D to 23) is said to be coloured yellow. The colouring cannot be gleaned from my copy although this seems uncontroversial.
66. In the Award, the Commissioners set out the land "*for and as a public Freestone Quarry*". The award is expressed to be "*for the Common use and Benefit of the Lord of the said Manor and the other Land Owners and Tenants within the same Manor for the Time being.... to be enjoyed by the Person in whose Allotment such Quarry is situate.*" It continues to "*further award order direct and appoint that all Persons shall use and enjoy the Same Roads as heretofore to the public Freestone Quarry and to their respective Shares of Moss Ground in the Allotments sold...*"
67. Whilst the word "public" is used, only the category of persons identified in the text were awarded use of the quarry and roads leading to it rather than the public at large. On closer inspection, the Council accepted that the Award does not say that the track to the quarry is a 'public carriageway, highway or occupation road' as it does for many other routes shaded yellow on the Award Map. I have no reason to come to a contrary view. The Award does not say that the general public have access to the public watering place (located at point 23). Thus, it

- cannot be concluded from the Inclosure Award that public rights of way over the claimed route existed. Indeed, the rights were limited to the Lord of the Manor and those within the manor.
68. By way of background material, reference is made to Inclosure Commissioners' papers of 1809 recording lot sales. A condition of sale of lot 7 (over which the Council identifies points D to 23 passes) there was reserved a "*Right for the public to have a Road through this allotment to Gelt Quarries...*", as well as private rights over the "*occupation Road*". Without further definition, there is nothing to indicate such rights for the public were any wider than those set out in the Inclosure Award. The same applies when the public newspaper notices of 1810 advertised that as part of the Hayton Inclosures, the Commissioners had set and appointed a "*public CARRIAGE ROAD, leading from the entrance of Hayton Crooks , to the public Free-stone Quarries, adjoining the river Gelt.*"
69. A small extract of the 1839 Tithe Map for Hayton Parish is photographed and "redrawn" by Drs Mather showing a brown coloured route on the broad alignment of the existing bridleway and continuing to loop around from points D-24-23 and past point G by the River Gelt. Other than showing the existence of a route to and around the quarry, the extract is of limited value alone to draw any conclusions on its status.
70. Donald's map of Cumberland 1770-71 is a detailed large-scale map. The Council points out that the detail includes a large part of the highways network most of which are considered public highways today. I do not share the Council's confidence that the track depicted as extending to the River Gelt corresponds with the alignment of the claimed bridleway. Even if it is the Order route, its status is unclear. Similarly, Cary's Map of 1789 shows a track crossing the river but it is difficult to reconcile the alignment with the Order route and the accuracy of this small-scale map appears questionable.
71. Due to the poor-quality reproduction of the small-scale Greenwood's Map (published 1823), I am reliant upon the Council's confirmation that a 'cross-road' is shown extending further towards the quarry than presently recorded as BW 117004. The depiction of a crossroad on such maps is not determinative of public rights. The Council notes a strong correlation between the roads shown on the map and highway network today. This may be indicative of public rights between points D to 23. It does not suffice in isolation.
72. An extract of Bell's Map 1892 was supplied without showing the document key but can be found in Mr Holmes' objection. The map was produced by George Bell, the County Surveyor. The Council states that its purpose was to record publicly maintainable highways. A black line is shown which appears to correspond with the alignment of BW 117004 and continues in a north-easterly direction (as per the claimed bridleway) to the quarry and then across the river. A black line denotes a 'District Road'. The Council found this to be good evidence of present public status. I have not had sight of the full document, but the key does not identify a district road as the maintenance responsibility of the Council, with which Mr Bell would be concerned.
73. Mr Holmes has produced a paper specifically on Bell's Map. Having seen the topography myself, it does appear rather unlikely that a road followed the extremely steep drop down to the river unless the landscape has changed

dramatically. Mr Holmes produces extracts of the Ordnance Survey Map 1st edition (scale 1:2500), 1864 and the 1900-01 edition on which no such feature proceeding north-east through the trees and across the river is shown. I consider that Bell's Map carries limited weight only in relation to the claimed bridleway.

74. The Council found the most significant evidence to be the 1950 Parish Survey Form completed for (what is now) BW 117004 in preparation for the first DMS. The Surveyor identifies the kind of path as B.R for bridleway beginning at "Grey Stone" and ending at "Quarry in Gelt Woods". The route is said to be well defined and "Repaired by Parish Council". In the entry for the names of owners, the words "*Parish Road to Quarry in Gelt Woods*" have been inserted.
75. On the face of it, this does indicate a bridleway between those two points. However, the associated marked up map, shows a footpath following a track extending north of point D (not east) and running parallel with the edge of the quarry as it proceeds north to point 22. It was the later First Review plans of 1967 which showed the bridleway between points C and D and not beyond. The Council suggested this must have been a mistake because public rights of way were supposed to be claimed from one highway to another or to a public place.

Summary and conclusion on the claimed bridleway

76. The Inclosure Award provides strong evidence that a road historically existed to the quarry, but it has been misinterpreted as documenting the existence of public rights. The 'public' use of the road was explicitly limited to those identified in the Award. The Tithe Map extract further supports that a route existed to and around the quarry. The physical existence of a road historically does not mean that public rights of way existed. The documentary evidence in support of public rights is limited overall.
77. The DMS records BW 117004 extending all the way from point C towards the quarry but stopping short of it. It is unclear why the route ends as a cul-de-sac. No further evidence has been produced to resolve the matter. Ultimately, the evidence falls short of being able to draw the conclusion that, on the balance of probabilities, the bridleway extended from points D-24-23.

Statutory dedication

78. The application for a DMMO was supported by around 70 UEFs. Since the time of completion, several witnesses have sadly passed away. Each user marked up a map to accompany their UEF with the routes they had walked. Whilst I have reviewed the UEF's and other written evidence submitted and not withdrawn, I do not refer to all the documents in detail in this Decision, it being impractical and unnecessary to do so. I have, however, taken account of all information submitted by the parties.

Main Issues

79. The main issue is whether the evidence as a whole suffices to show that, on the balance of probabilities, there are public rights of way that should be recorded on the DMS along the Order routes. The evidence adduced for the footpaths is of claimed use by the public. It is therefore necessary for me to consider whether dedication of the way as a public footpath has occurred through public use. This

may either be by presumed dedication as set out in the tests laid down in section 31 of the 1980 Act, or by implied dedication at common law.

80. The precise wording of section 31(1) is important and merits quoting in full:

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

81. Each component of section 31 must be met to raise a presumption that the routes have been dedicated as public footpaths. Thus, there must be a 'way' and the character of the way must be capable of dedication as a public footpath. The public must have used each way as a footpath. Such use had to be 'as of right' meaning without secrecy, force, or permission. Use by the public must have continued without interruption and over a full period of 20 years immediately prior to its status being brought into question.
82. Only if all criteria within the section is met does the statutory presumption of dedication arise. That presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner/s during the relevant 20-year period to dedicate the way/s for use by the public.
83. The burden of proof to demonstrate the requisite use lies with those who assert the existence of a public path. Mr Laurence accepted that the onus was on the objectors denying the existence of public rights to show that continuity of use was interrupted and had taken place with permission. Should the test for statutory dedication fail under section 31, then it may be appropriate to consider the dedication of any way at common law.

Bringing into question

84. The first matter to be established in relation to section 31 of the 1980 Act is when the right of the public to use the routes was brought into question. The 20-year period is calculated retrospectively from that date (section 31(2)).
85. When the Order was made, the Council took 2010 as the date of bringing into question, being the year when fences were erected across entry points, users were challenged, and the DMMO application was made. The statutory objectors agree that the date of bringing into question arose at some point in 2010, giving a relevant period of 1990 to 2010. Nothing turns on the precise time in 2010.
86. On the second day of the Inquiry Mr Laurence confirmed that Roxlena accepts that members of the public used all the routes shown in the Order over the relevant 20-year period and on the regularity claimed but raises two main points of contention. Firstly, Roxlena says that such use was not for a full period of 20 years and that the use was interrupted so as not to be continuous. Secondly, that the use of Roxlena's land during its predecessor's ownership became permissive after the death of the woodland manager in 1995 (excluding the foot and mouth period). For those reasons, Roxlena maintains that dedication of the Order paths cannot have occurred either by statute or at common law.

Character of the ways

87. Two lines of argument are advanced by Roxlena under the character exception. Firstly, the point is taken that 10 of the 18 footpaths as described in the Order end in an unexplained cul-de-sac and another 4 have no highway at either end, neither of which the law recognises. That leaves only 4 paths beginning and ending with an existing highway.
88. The Council confirmed that the Order schedule attempted to identify the 'ways'. I note that the red route is not described in the schedule as a complete way. It is formed of sections of route within other described ways including the claimed bridleway. Similarly, the green route is formed of sections of route falling within the description of three different ways identified in the schedule. Only the blue route corresponds with the schedule entry for a route between I-19-18. Of course, the schedule was prepared before users came forward identifying these three particular routes. The schedule is capable of modification if necessary.
89. The possibility of a highway being a cul-de-sac was not ruled out in *Attorney-General v Antrobus* [1905] 2 Ch 188: "...the want of a 'terminus ad quem' is not essential for the existence of a public road", and "a landowner may by express words, or by conduct...be shown to have dedicated even a cul-de-sac to the public". Also, Lord Justice Atkin in *Moser v Ambleside UDC*, 1925 found it too wide a proposition that you cannot have a highway except insofar as it connects two other highways. A highway can lead to a place of popular resort even though when you have got to the place you wish to see you have to return on your tracks by the same highway. The argument in this case is that it has not been shown that the cul-de-sacs lead to a place of popular resort.
90. *Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council* [2012] EWHC 1976 (Admin) is authority that a way to which the public has no right of entry at either end or at any point along its length cannot be a highway at common law.
91. Cul-de-sac paths or isolated highways would only result in this case if the Order was confirmed in part only. A single Order has been made. If confirmed in full, all the Order routes would be connected to another highway.
92. This leads on to the second line of argument that the ways claimed are merely used as an interlocking series of paths and not, in truth, as a means of passage. Even if users had confined themselves to the paths and had done so notwithstanding that they could easily veer off into the adjoining woodland, Roxlena says that the use was still akin to claiming a *jus spatiandi* i.e., a right to wander all over the land. I disagree. I read nothing in *Antrobus* to support the premise that users who stuck to a series of connected tracks and could, but did not, wander about were not following a right of passage.
93. In *Antrobus*, public rights of access to Stonehenge were claimed. People walked around and inspected the stones off the tracks leading to the circle. They had no *jus spatiandi* within the circle. That is not comparable with this case where the claim is solely for well-trodden tracks used for recreational walks. Simply because there is a network of paths does not in itself disqualify them as public rights of way.
94. To address the character question fully it is appropriate at this juncture to consider how the woodland was used by the public.

Wandering at will

95. Mr Laurence submits that the fact most people, most of the time, no doubt chose to walk along the paths, would still support a conclusion that their use was nevertheless referable to the land as a whole. As such, it excludes the application to register the paths as public rights of way.
96. There is some evidence of users wandering off the paths. Chris Haynes talked of “*a maze of footpaths over and above the formal footpaths, created by dogwalkers and ramblers*”. He “*sometimes walked off the footpaths*”. Terence Nichol did not always stick to the path as having a dog they “*tend to wander off*” but it later emerged that his use referred to the existing paths. Daphne Roberts acknowledged that “*You could walk more or less anywhere*” but did not say that she had personally done so although she had used other tracks not included within the Order.
97. Mr Cartwright identified 10 points of interest off the claimed routes, the approximate location of which he marked on an enlarged copy of the Order map. To reach most of those points of interest involved walking off the paths. One of those points is Abraham’s Cave. Several users referred to this attraction including Mr King who also described exploring “*all along the river banks enjoying its beauty.*” He also referred to being able to “*wander anywhere*”.
98. The paths marked by Sue Thomson on her UEF map included two routes leading to points between 32 and 33 from FP17003 at point F. Ms Thomson confirmed that these two paths are not on the Order map although they were clearly marked tracks. Ms Thomson stressed that this was the only example of her walking paths besides the Order routes. Whilst Ms Thomson “*stuck to the paths*”, she commented that the area was not fenced making it possible to “*walk anywhere*” with paths “*all over the place*”.
99. Ray Hinton had similarly marked a route on his UEF map that is not on the Order map veering off FP 117003 in a north-easterly direction to meet route 2 (the green route) at point 33. Once this was pointed out in cross-examination, Mr Hinton confirmed he had walked other tracks besides the Order routes.
100. When Catherine Allan was asked if she walked off the paths, her reply was that she did not think so. There were so many paths there was no need to. Mr Hinton thought that most people “*followed the tracks*” but if people wanted to deviate then they could.
101. Joan Partington did not think that she did go off the paths but agreed that she had claimed use of other “*well defined*” paths between points 33A to 33B besides those in the Order. Bridget Barling similarly referred to use of a track in the woods between points 1 and 7 that is not in the Order. Her UEF appears to show another route through the woods from point 33 terminating south-west of point 32. Ms Barling said a track existed there and she did not think she was veering off. This may be a mapping error, or another path not claimed. Ms Barling admitted that she probably came off the path near point 15 to watch wildlife. She also went to Abraham’s Cave, off point 22 but not often.
102. The Order map itself shows a network of inter-linking paths. The evidence points to some being used far more than others with most support for the blue, red and green paths. The picture emerging is of other paths in use besides those

claimed. This does not necessarily equate to wandering when witnesses also followed other tracks. A small proportion clearly did wander e.g., where their dogs strayed, or exploring the woods. There were others who occasionally diverted off to see a specific feature before returning to the path. That was by no means the evidence of all.

103. Most were insistent that they followed the paths. It meant using connecting sections with the option to follow another path at points of intersection. People were still using the trodden path and connecting with other paths depending on their destination. I do not agree that this is an impermissible claim to wander all about. I conclude that the routes do have the requisite essential characteristics of a highway.

Actual enjoyment over a full period of 20 years

104. Roxlena argues 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 has not been public use for a 'full' 20 years over the requisite period. In addition, the use was interrupted by reason of forestry operations throughout the period 1999 to 2010.
105. Roxlena accepts that the public need not prove continuous use as "*Nobody uses a right of way 24/7, 365 days a year.*" The point taken is that section 31 does nevertheless require proof of actual enjoyment for the 'full' period of 20 years. It is submitted that there is never any justification for reading 'full period' as meaning a lesser period than 20 years.
106. Cumbria was severely affected by the foot and mouth outbreak in 2001 resulting in a devastating loss of livestock. By all accounts the impact was acutely felt by the community of Hayton and surrounding area. Indeed, the Inquiry heard from Joan Partington who described the distress of mass culling taking place in fields close to her home. Boyd Holmes similarly referred to cattle cremated by bonfire nearby. In this climate, residents were highly conscious of the risks of disease spread through people movement in rural areas and keen to act responsibly.
107. Measures were imposed to stop the spread. The Foot-and-Mouth Disease (Amendment)(England) Order 2001 came into force on 27 February 2001. The Order gave power to inspectors appointed by the Ministry of Agriculture, Fisheries and Food (or a local authority) to close public footpaths and prohibit entry onto land by displaying, or causing to be displayed, a notice to that effect at every entrance to the land. Public access to the three existing public rights of way crossing Hayton Woods was prohibited by Order made by Cumbria County Council on 28 February 2001.
108. Such restrictions did not directly apply to the Order routes as they were not dedicated public highways. The woods remained accessible from the public highway at points 8 and 9. There is some conflict over whether the red and green routes were accessible from the public highway in How Street at points 31 and 32. Mr Lowther, the forestry contractor called by Roxlena, recalled the gate at point 31 being taped off and 'DEFRA' signs displayed along with tape and signs at point 32 also.
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.
111. In the *Roxlena* judgment, Mr Justice Kerr had commented in the High Court that he did not agree with the proposition that an interruption that was more than ‘*de minimis*’ 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. He said: “*Use or non-use is a question of fact; the cause of any non-use is not the issue.*” As it was, there was plenty of other evidence available to the Council entitling it to conclude that it was reasonable to allege a right of way.
112. ‘Advice Note 15 – Breaks in User Caused by Foot and Mouth Disease’ contains guidance on submissions that restrictions on access to claimed rights of way under foot and mouth disease control measures constituted an ‘interruption’ in user for the purposes of section 31. The Advice Note explains the Planning Inspectorate and DEFRA’s views on the issue taking into consideration comments made by the High Court in the *Roxlena* judgment. The Advice Note is publicly available, but it is not an authoritative interpretation of the law.
113. Whilst Mr Laurence was critical of various passages in the Advice Note, it is uncontroversial that paragraph 16 of *Fernlee Estates Ltd v City & County of Swansea, National Assembly for Wales* [2001] EWHC Admin 360 (as quoted within paragraph 3.5 of the Advice Note) reads:
- ‘In order to constitute an interruption for the purposes of section 31(1) of the Highways Act 1980 there must be some physical and actual interruption which prevents enjoyment of the way rather than merely acts which challenge the user while allowing it to go on: Merstham Manor Ltd v Coulsdon and Purley [1937] 2KB 77, 84–85. A mere absence of continuity in the de facto user will not stop time running, there must be interference with the enjoyment of a right of passage, Jones v Bates [1938] 2 All ER 237, 246. Thirdly, “interruption” means “interruption of fact.” However, the circumstances of and the intention with which the barring of the way takes place are relevant. For example, the blocking of a road by a broken down vehicle would not amount to a relevant interruption. Lewis v Thomas [1950] 1KB 438.’*
114. Paragraph 3.7 of Advice Note 15 explains that foot and mouth restrictions had applied to wide areas. Notices were placed around closure zones to inform the public of the restrictions. The Advice Note recognises such notices were not instigated by landowners. Paragraph 3.12 sets out DEFRA’s view that the intention of the landowner in posting a notice ‘*will be highly relevant and suggests that a short-term period of non-use in these circumstances is unlikely in many cases to amount to a sufficient interruption to the use of the way by the public.*’
115. The conclusion in paragraph 4.1 reads: ‘*The temporary cessation of use of ways resulting solely from the implementation of measures under the Foot and Mouth*

Disease Order 1983 should be considered on the basis of all the evidence available but, unless particular circumstances apply, is unlikely to be considered a relevant interruption under section 31(1) of the 1980 Act.'

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.
118. It is immaterial whether the warning notices and/or incident tape in this case were erected by the Council, or Ministry. The key point is that they were not erected by the landowner or on the landowner's behalf. As such, the posting of notices during the foot and mouth outbreak did not demonstrate any intention on the landowner's part to prevent public access. There is no evidence the landowners posted any form of notice that might have served that purpose including at other access points to the Order routes from the public highway shown as Wet Slack Lane and How Street (i.e., points 8,9,31 and 32). Indeed, none of the users could recall notices at these other access points.
119. The Court of Appeal in *Roxlena* did not make a finding on whether the cessation of use during foot and mouth restrictions amounted to an interruption in use. The issue before the Court was the approach the Council should take to evidence said to justify it making an order. At paragraph 54, the Court of Appeal agreed with Mr Justice Kerr in the High Court that evidence of interruption of use within the relevant 20-year period, contentious as it was, did not have to be more deeply investigated than it was before the Council decided to make the order.
120. There was no need for the Council to write to the 40 users to ask if they had inadvertently claimed use in their UEFs during the outbreak of foot and mouth disease. That evidence could reasonably be taken at face value at order making stage without investigating more fully. "*It might or might not withstand questioning at the confirmation stage.*"
121. Now that we are at confirmation stage, the question of whether use of the Order routes continued during the foot and mouth outbreak warrants closer scrutiny. Of the users who gave oral testimony, only Mr King maintained that he had continued to use Hayton Woods during the foot and mouth outbreak, except for the 'track' between points C and I. The only place he saw signs prohibiting entry were at the 'Greystone' entrance i.e., point C. This is the entry point for BW 117004 (and a claimed path providing a link to FP 117005). Mr King assumed the sign related solely to the track and not to other parts of the woods.
122. All other witnesses who gave oral evidence in support of the Order acknowledged there was incident tape and/or notices intended to stop public access at the entry points for all the existing public paths through the woods.

Those witnesses were emphatic that they did not enter the woods at all throughout the months that restrictions were in place.

123. This demonstrates that whilst many users stated on their UEF that there had not been any interruption to their use, they had not considered a period of non-use due to foot and mouth restrictions to amount to an 'interruption'. The upshot is that it cannot be reliably gleaned from the UEF's whether people whose evidence was untested had actually enjoyed use of the claimed paths throughout the period claimed.
124. No-one could recall precisely how long the foot and mouth restrictions lasted in the area but witnesses consistently referred to several months. It is known that Orders came into force at the end of February 2001 whereupon public paths in Cumbria were closed. Restrictions remained in place for at least 4 months, possibly much longer. Mr Holmes thought it was until September/October 2001. It is not essential to establish the precise period. Once the foot and mouth restrictions were lifted people continued to use paths through Hayton Woods as before.
125. From the tested evidence, the reality is that all but one person stopped using the Order routes whilst restrictions for foot and mouth disease were in place. 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 evidence of one person does not suffice to show that the routes were actually enjoyed by the public during the outbreak. That is particularly so when all other witnesses had stopped use. The evidence points firmly to a period of non-use over at least 4 months falling within the requisite 20-year period.
126. 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.
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.
128. Whether the break in public enjoyment also amounts to an interruption in use for the purposes of section 31 is another matter. The practical consequence of the public path closures in Hayton Woods was to render some Order paths inaccessible and the use of others impractical. The overall effect was that use stopped during the restrictions and to that extent the use was interrupted.
129. However, the closure orders were not directed at the Order routes. There was no physical stopping of their use, and the period of non-use did not occur because of any intent on the landowner's part to prevent public use of them. There is

nothing to indicate any steps were taken by the landowner to disabuse the public of any belief that the Order routes were public paths. From that viewpoint, there was not an operative interruption. Indeed, the oral evidence points to walkers choosing to keep away, being alert to the risks of spreading the disease.

130. As a failure to meet any part of section 31(1) is enough to defeat a claim under statute, nothing turns on the issue of interruption.
131. For completeness, I go on to address other points arising that may also be pertinent to a consideration of the position at common law.

Whether the use was interrupted

132. As set out above, public use will not be 'without interruption' as required by section 31(1) of the 1980 Act if there has been interference with the enjoyment of a right of passage with the intention to prevent public use of the way. 'Interruption' includes actual and physical stopping of the enjoyment of the public's use of the way, either by the landowner or someone acting lawfully on their behalf.
133. Caselaw has recognised that public user is essentially to some extent intermittent, occurring as it does only when individual members of the public make use of the way. It is 'actual enjoyment' which must be without interruption.
134. By 1998, consultants were appointed by the Trustees in the management of the Hayton Estate including Hayton Woods. Between 1999 and 2010 (and continuing), forestry work was sub-contracted to the Lowther family business. Mike Lowther was called by Roxlena.

Boxing Day storms

135. Several witnesses recalled the bad Boxing Day storm of 1998 affecting Hayton Woods with fallen trees across the woodland breaking down fences and causing obstruction to paths. Users consistently described finding another route if a path was blocked. As the damage was extensive it took some time to clear. Mr Lowther suggested it was months, possibly spread over a year or more.
136. I do not consider that obstructions caused by the storm damage, and which were systematically cleared, denoted any intention on the landowner's part to prevent public access. Those clearance works were widespread but fallen trees did not interrupt public use of the paths with people able to step over or around these temporary obstructions. Mr Lowther indicated that clearing overhanging branches or a fallen tree may take only hours to complete. Even if areas were cordoned off whilst storm damage was cleared, there is insufficient evidence that this affected the claimed paths for any duration in time that might interrupt use.

Forestry works

137. According to Mr Lowther, it soon became apparent that the public walked off the public paths creating a safety issue for both contractor and public. Much of the work was tree thinning and removal of timber involving use of chainsaws, shredders, and heavy machinery including tractors to pull felled trees.
138. The nature and scale of the commercial forestry operations is supported by documentary material, including compartment plans, timber specification

- schedules and invoices. The ongoing operations were more extensive than occasional and routine forestry management. Only land owned by Roxlena was affected and not the three sections (C-3-2 and 4-3) in separate ownership.
139. Much material was produced by Mr Lowther to evidence that forestry works were undertaken across most of the woods. Works took place within numbered 'compartments' identifying the locality, such as 'Priest's Wood', 'Watch Hill' and 'Peck O Big Ole'. Larger areas of woodland (e.g., Gelt Woods) were divided into multiple compartments. A map of compartments was produced.
140. Given the possible presence of the public, signs and plastic hazard tape were used to stop anyone going near to the areas of operation. Signage would be placed on the public paths and the tracks, car parks and other places where the public would likely gather. Despite those measures, Mr Lowther said that people would often walk straight past the signs ignoring them.
141. Mr Lowther described how measures to warn people to stay away from operations had changed over the years. In the 1990s into 2000 white plastic triangular 'Caution' signs were used. To my mind, such cautionary signs would send the message to take care/be alert rather than stopping further passage. It would not suffice to interrupt use and may well explain people ignoring signs.
142. From around 2001 Mr Lowther said that signs were used saying: '*Warning Forest operations*' and '*No unauthorised persons allowed beyond this point*'. Other general notices would be placed nearby advising that forestry operations were taking place. Hazard tape would also be placed near to where felling was taking place and machinery was being used.
143. Mr Lowther had specific recollection of such signs being placed in the vicinity of points E, 20, and I. All these points are along the existing paths, but the cordon would likely capture the linked claimed paths, such as the western end of the red route and points 20 to 21. Mr Lowther also recalled signs placed around point 21, being partway along the red route. All these signs were displayed in or around 2001 during works in compartment 1 following a risk assessment identifying public use of woodland tracks between all the aforementioned points.
144. Numerous other examples are provided across the woods of where Order paths would likely have been caught by a cordon during forestry works. They include signs placed along the green route at points 32, 33, B, and also at point 30.
145. The evidence of Mr Lowther over the placement and type of signs corresponds with examples of appropriate signage shown within a Practice Note on '*Managing public safety on harvesting sites*' published by the Forestry Commission in January 2013, having first been published in 2001. Signage is described in the Practice Note as either 'warning' or 'prohibition' signs. The 'warning' signs are advisory in nature whereas the 'prohibition' signs are instructive. The scenarios recommend warning and prohibition signs at the worksite entrances at the edge of the cordon and at access points.
146. Mr Lowther explained that a common-sense approach would be taken to the size of the cordon. If people encroached into the working area, they would be told to keep away and find an alternative route. To all intents and purposes, the tracks within a compartment were closed for the duration of works. He could not say the

precise duration as there are various influencing factors on how long a job might take. The work is weather dependant and seasonal.

147. When thinning and selective felling took place in widespread areas over 2000-2002, Mr Lowther thought it likely that warning signs and control measures would have been in place for the period November to April. Quite often works were undertaken by going from one compartment to another resulting in all the control area having signage in place and control measures for around 1 to 2 months at a time. Mr Lowther recalled that the major project in compartment 1 took maybe 2 to 3 months to complete in or around 2001.
148. Mr Lowther's documentary material is said to be incomplete. It does not record works within compartments 22 and 23. One Order route (points 8-7-6-5) running between Wet Slack Lane and FP 117005 crosses these compartments. During my site visit I saw several sawn-off tree stumps near to this route. I could not gauge more than a decade later whether the trees were felled between 1990 to 2010 especially as forestry works had continued thereafter.
149. However, correspondence from the managing agents provides a summary of expenditure and income to 30 September 2001 with reference to thinning and selective felling work 'during the winter'. The works were concentrated in five compartments including 22. This supports forestry works taking place late 2000/early 2001. Any interruption in use of the Order route in compartment 22 would affect use of the remainder of the route in compartment 23.
150. Mrs Allan had kept a diary in which she recorded her walks and points of interest along the way, including those in Hayton Woods. The diaries were produced at the Inquiry and inspected by Roxlena's legal team. The entry for 28 January 2001 notes 'a massive amount of tree felling' and that 'some tree felling had occurred' on 11 June 2010.
151. Mrs Roberts could not recall warnings of tree felling or large-scale felling but accepted that trees were felled and sometimes there were obstructions in which case she would find another route. In her UEF, in answer to the question 'Has the path always followed the same route'? Mrs Roberts had answered 'GENERALLY SPEAKING THOUGH THERE HAVE BEEN OCCASIONAL DETOURS (FALLEN TREES/TREE FELLING ETC)'. Elsewhere, Mrs Roberts again refers in her UEF to the route being obstructed 'very occasionally by trees (fallen/felled).'
152. Mr Cartwright had no memory of signs during forestry works but added that he obviously could not say that there were no such signs. Mr King also did not recollect any signs and went further by saying he never ever saw felling or warning signs. The only time he saw Mr Lowther was when chipping wood at Greystone.
153. It is striking that not a single person recollected signs across any path prohibiting access during forestry works. Of course, it was a long time ago but in UEFs completed in 2010 there is no mention of users seeing prohibitive signs for forestry works either. None of the supporters who gave evidence were interrupted in their use. This was because they either did not come across the forestry works, avoided the area once aware of the works or took another route.
154. The use of chainsaws and other machinery would have been audible from afar. A natural instinct would be to avoid walking in an area if forestry operations are

underway for practical and sensible reasons. This might explain why walkers were unaware of signs. Notably, Mr Lowther's records reveal a lot of work ongoing during the period 2000-2002. This coincides with the period of cessation of public use during the foot and mouth outbreak over 2001.

155. In principle, an interruption in public use could occur by an act resulting in a claimed route being taken out of use even if no-one tried to use it at the time of the activity. That approach is supported by the judgment of Lord Evershed M.R. in *Lewis v Thomas* (referenced above) "*that a barring, and particularly a deliberate barring of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period.*" The question is whether, as a matter of fact, an operative interruption occurred.

Findings on interruption of use

156. In effect I am invited to find that forestry works taking place in each compartment meant that the claimed routes laying within or nearby must have been closed to the public for safety reasons and that this was ongoing from 1999.
157. The fact forestry works took place in each compartment where claimed routes pass and that a cordon would need to be drawn during those works to keep the public out does not in itself mean that the public were interrupted in their use.
158. There was a rolling programme of forestry works from 1999. Until early 2001 signs across paths were advisory in nature rather than prohibitory. Advisory signs would not suffice to instruct the public that a path must not be used. Not all works would have been in the vicinity of an Order route, particularly given the large size of compartments. Only existing footpath FP 117003 is within compartment 17 for 'Peck O' Big Hole' although there are claimed paths nearby.
159. I recognise that in *Moser v Ambleside Urban District Council (CA)[1925]* Justice Mackinnon said on the topic of interruption "...*a single act is very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge*".
160. Mr Lowther was able to recollect works undertaken in various compartments and occasionally stopping members of the public. Whether those individuals were walking a claimed path is far less clear. Mr Lowther's focus was on health and safety. He would have no reason to distinguish between people walking on a recorded path and those on a claimed path. The fact people entered cordons may equally be indicative of it not being communicated clearly to walkers that passage was prohibited. Not all signage prohibited entry but warned of a hazard.
161. There is first-hand evidence from Mr Lowther indicating that the north-western section of the red route would have been within the cordon in around 2001 during the major forestry works in compartment 1, affecting points 21-20 also. The forestry works progressed to other compartments likely affecting the northern end of the blue route, the green route and connecting paths.
162. There probably were signs in place, but whether those signs made it clear that the public could not exercise a right of passage and how long for is far less clear. Mr Lowther emphasised how unpredictable the duration of works can be. Unsurprisingly, when asked how long works took, he could do no more than

estimate the possible timespan. The longest period for major works in a compartment was given as maybe 2-3 months. This was a broad approximation with the other works taking around 1-2 months. Yet it was also acknowledged that some works might take as little as a day. As the time taken for works varied considerably, Mr Lowther quite understandably could not say whether and, if so, how long particular claimed routes were closed to the public.

163. Notwithstanding my concerns over broad estimates for the timings of works and the possibility that any interference in actual enjoyment through routine forestry works was no more than *de minimis*, much of the evidence is generalised. There is insufficient clear information on when and where signs were, the type of sign, the area or of cordon and whether the use of Order routes was affected.
164. The message relayed from the signage was one of health and safety for both contractor and the public. It raises uncertainty over whether signs were in place that spelled out in clear terms to the public that the landowner sought to prevent their use of the paths. Moreover, if the public did not see the signs, then there was nothing to alert them to their onward passage being stopped.
165. The evidence is too generalised to reach the conclusion that Order routes were probably interrupted. I am reinforced in that view by those users who were aware of forestry works but maintained that their use was unaffected. By its very nature, user will be intermittent and that is particularly so when there were different options of paths to follow. Hayton Woods was used for recreational purposes and was popular with dog walkers. People had a choice of the walk they took. The evidence points to walkers simply choosing to use different routes if forestry works were in progress.
166. I am not satisfied that the objectors have demonstrated that there was actual interference with passage by the public of the Order routes.

'As of right'

Without secrecy

167. There is no suggestion that public use was anything other than open.

Without force

168. Fred Burrow was a gamekeeper who managed the woods on behalf of the owners of the Hayton Estate, The Trustees of the EC Graham Cumbria Charitable Settlement ('the Trustees'), until his death in 1995. It was put to supporters that Fred Burrow proactively and rigorously protected the woods from trespass, challenging anyone he encountered straying off the public paths. The gravestone of Frederick (Fred) Burrow shows that he died on 28 October 1995, aged 75 years.
169. In opening, Roxlena cast considerable doubt that anyone walked the Hayton Estate at all in the early 1990s except existing public rights of way. If anybody did walk along the Order routes in the years 1990-1994, it was claimed that they were either turned back by Fred Burrow or knew from his reputation that they had no business to be there. As such, it was asserted that the use was *vi* (i.e., with force) so not to be 'as of right'. Once a person knows there are objections to the

use of a route or that the use has become contentious, the exercise of such use would be undertaken by force.

170. The fact that Fred Burrow received a legacy in the will of Mr Graham as a token of his regard for the manner in which he has attended to the woods and to his Cumbrian Estate generally, confirms nothing more than Mr Burrow was engaged in the management of the woods.
171. Several witnesses called by Roxlena, knew Fred or by repute. Andrew Baker had recalled in his proof of evidence how he and his brother played in the woods as children. He stated that Fred and his brother Harry would chase after anyone who wandered away from the footpaths. When asked about this, Mr Baker described a time playing in the woods aged 8 or 9 years old during the 1970's when Fred told the children they should not be there as hens were nesting. Mr Baker had not personally witnessed Fred confronting anyone else.
172. Apart from this one incident (involving children playing), no-one had witnessed Fred challenging persons in the woods whilst walking other routes besides the recorded paths. There was general consensus among those who knew Fred that he had become less proactive in managing the woods in the latter years of his life. Mr Duers had known Fred well and could not say that Fred had continued policing the woods in the 5 years before his death i.e., from 1990 or thereabouts.
173. Of those in support, witnesses had either not heard of Fred, or known who he was but were never challenged. When asked about Fred Burrow in cross-examination, Euan Cartwright said he was "*completely unaware of his reputation*". Catherine Allan began using the routes in the 1980's and was firm in stating that she did not know of Fred Burrow. Chris Haynes use began in spring 1990. He had heard stories of Fred "*being a bit of a tartar*" and "*chasing children off*" but not during his period of use. Joan Partington had seen Fred, but he did not stop her from using the paths. Mr Holmes put it to Mrs Partington that she was describing Fred's brother Harry. Even if that is so, the point remains from Mrs Partington's evidence that she was not confronted by anyone over her use of the routes.
174. With no users able to recall Fred Burrow challenging use of the routes in any way, the simplest explanation is that is because it did not occur, or at least not in the 1990s. That corresponds with Fred having slowed up from around 1990 or so. On the evidence, if Fred had challenged walkers not following the officially recorded paths, it was prior to 1990 but even then there is a lack of evidence. The case that public use of the Order routes was not 'without force' in the early 1990's is unsubstantiated.

Whether use was permissive

175. Having concluded that use was not by force due to the actions of Fred Burrow, I have no difficulty in finding, as a matter of fact, that the Order routes were used from 1990 onwards by the public without opposition. If such use was with either the express or implied permission of the landowner, then the requirement that use was 'without permission' would not be met and the claim would be defeated.
176. A distinction is to be drawn between acquiescence and implied permission. For dedication to occur (by statute or common law) there is a need of acquiescence by the landowner. It is when the landowner knew of the public use and failed to

stop it that the landowner is presumed to intend to dedicate the way as public. The legal authorities are clear that mere acquiescence in, or tolerance of, the use by the landowner cannot prevent the user being 'as of right'.

177. It is uncontentional that following *R v Oxfordshire CC, Ex p Sunningwell Parish Council* [2000] 1 AC 335, tolerance is not to be equated with implied permission. Although raised in the context of an application to register a village green, the same principle applies that use must be 'as of right' for the acquisition of public rights over land.
178. In another TVG case, *R v City of Sunderland ex parte Beresford* [2003] UKHL 60, Lord Bingham saw no objection in principle to the implication of a licence where warranted by the facts. For example, "*by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.*"
179. However, a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put.
180. To establish that use was permissive there needs to be a positive act of granting a licence going beyond tolerance or acquiescence. Acts of encouragement do not establish that use was permissive. Permission must be temporary and revocable at any time.
181. For Roxlena to successfully argue that the public use was by leave and licence of the landowner, it requires something to alert the public to that fact so that they knew the route was being used only with landowner consent.
182. Mr Haynes had previously acknowledged trespassing in the woods but clarified that this was in the context of other proceedings, when pressed by an advocate about walking off the paths. All other users giving evidence in support believed they were allowed to walk the paths. When asked, witnesses said that they would not have done so had they been aware that their use was not permitted.
183. As Roxlena accepts, the belief of witnesses alone does not suffice to demonstrate permissive use. Indeed, if individual users knew they were trespassing their use would be 'by force'. Mrs Roberts agreed with Mr Laurence when it was put to her under cross-examination that she would have been surprised if told she was trespassing and felt there was no objection by the landowner. Whilst Mrs Roberts thought she must have had landowner consent this was because she believed the land was in public ownership. She did not say that it was for any other reason, such as the actions or conduct of the owner.
184. The mere fact that users were able to use the paths without challenge does not denote permissive use. The management of the woods had started to fall into decline once Fred Burrow was no longer able to continue the same tasks. From the evidence heard, users continued walking the paths as they had before oblivious of any change from Mr Burrow ceasing to be active. For the use to have become permissive, something had to be done to convey the message to the public that they had the owner's permission to use the land.

185. Roxlena argues that there are various factors consistent with the permissive attitude of the trustee landowners over many years. Kissing gates were erected in the 1980's in the part of the woods known as 'Priest's Wood'. Witnesses recollected these at point H. Two stiles were also located in this part of the woods. Mr King recalled stiles at points 14 and I. Roxlena submits that a clear message was being sent to those using the order routes that they were being assisted in their use because the landowners were perfectly happy for them to use those aids while enjoying their walk.
186. I do not accept this line of argument when so much focus and emphasis was placed by Roxlena on users being challenged by Fred Burrow over many years. As it is, I have found no evidence of challenge over the requisite period from 1990. If Fred Burrow had challenged users before that time whilst acting on behalf of the trustees, that is wholly inconsistent with the notion of landowner consensus to public use and the public being aided in their walks.
187. Correspondence indicates that the kissing gates were installed at the time of an arrangement by the then owner to offer a route across Priest's Wood in 'exchange' for the existing footpath. The arrangement was never formalised.
188. This might suggest a permissive path existed but where it was and how long the permission lasted is uncertain. Users, including Joan Partington, took it that the presence of kissing gates and stiles surely meant that the public were welcome to use the path. Whether the blue route was the proposed exchange route is unclear. Mr King recalled yellow arrows telling walkers "which way to go". Point H is marked on the Order map as just north of the intersection between the existing footpaths FP 117003 and 117005. This gives cause for uncertainty over whether the arrows mentioned related to the existing public paths rather than the blue route or any other route.
189. Sheila Cain was called by Roxlena to give evidence. Her use was never challenged and her recollection of an unlocked gate at point 31 corresponded with that of other witnesses.
190. The attitude of the landowner can be gauged from a letter from Mr Mactavish (the managing agent) of 23 November 2000. Under the heading of 'Footpaths on Hayton Estate', it says: "*we have not discouraged people from using any of the woodlands. As such they are still used by the public but informally.*"
191. In a letter dated 22 May 2003, Mr Mactavish refers to people currently using Whinhill and Watch Hill (both within Hayton Woods) "*fairly extensively for walking and whilst there are a few public rights of way they also use informal paths and extraction routes.*" He goes on to suggest seeking Forestry Commission funding to implement any work relating to public access and "*All paths would remain permissive rather than becoming legal rights of way...*". The last paragraph states: "*As it is unlikely that we will ever prevent access to the woodlands, mainly as they have been used for so long, I thought it might be a good time to consider formalising the access and utilising the available grants.*"
192. By letter of 3 September 2003 Mr Mactavish sought to discuss whether the estate wished to "*formally change the public right of way to Crookbank*" and also the possibility of creating more formal rights of way within the woodlands "*in*

order to control public access but also to draw down additional grant aid from the Forestry Commission.”

193. It is unclear where the substituted right of way might run and whether it reflects any of the Order routes. Roxlena accepts there is no need to resolve the matter. The point pursued is that Mr Mactavish was discussing the creation of a new public footpath and that it cannot have occurred to him that local people might have acquired legal rights over the paths they had been accustomed to use.
194. On my reading of the letter and other correspondence, it cannot be gleaned one way or another why the agent wrote as he did. Mr Mactavish had not been involved with the Hayton Estate until around 1998. If it did not occur to him that public rights might already exist, there could be multiple reasons. For instance, he may not have known how long public use had continued. It is tenuous to suggest that public rights cannot have become established because the creation of new rights are being discussed. It does not follow that use of the Order routes must have been permissive. There are other possible explanations.
195. It is plain from the correspondence written by Mr Mactavish that the Estate was aware of public use of unrecorded paths within the woods and there was a desire to seek to control the use. The manner of control being explored was to realign an existing path along a more favourable alignment and to create some permissive paths with grant funding being an incentive. These are the actions of someone looking to exercise control through management.
196. Whilst the letter of 22 May 2003 refers to paths remaining ‘permissive’, it is not determinative. The question arising from those references is whether the use of the Order routes was in fact permissive or mere acquiescence or tolerance.
197. Orienteering events had taken place annually over several years. In authorising an orienteering event by letter dated 13 January 1999, Mr Mactavish enclosed a map showing rights of way on or around Hayton and asked the organiser that if people used the area outside of the event they remain on the designated rights of way. This does not reflect the action of a landowner content to allow free access but one who wishes to ensure that people stuck to the existing rights of way.
198. Between 2008-2010 Ms Barling said her daughter had done orienteering in the woods as part of an organised event for children under 11 years of age, along A to B which was “always on trodden paths”. It is evident from the correspondence sent to the event organisers that orienteering events was with special permission of the owners. It does not demonstrate wider permission to the public.
199. Roxlena’s case proceeds along the lines of there being a grant of implied permission, the effect of which was to convert use which had hitherto been trespassory use, and thus ‘as of right’, into use which was ‘by permission’.
200. Analogies are drawn with the *Mann TVG* case to argue that the actions of the landowner were inconsistent with the acquisition of public rights when regular tree felling operations began at Hayton Woods in 1999 and continued to 2010. Applying *Beresford*, it is asserted that two separate messages were sent to the public. Firstly, that they were excluded from those parts of the woodlands during tree felling where warning applied signs, but they were permitted to use the rest of the woodlands. Secondly, once the felling was over they were free to continue to use the entire woodland and tracks traversing them, as they had before.

201. Upon my querying his use of language, Mr Laurence confirmed that it had been intentional when he said in closing submissions that public use 'became' permissive soon after tree felling operations began in 1999. I find this somewhat curious given the attempt to show permissive use prior to that point. I take it to mean the exclusion of the public during tree felling works was an act that made it clear to the public that their use was permissive.
202. The works were not quite the same as those in *Beresford* where regular grass cutting was problematical to the argument of an implied licence when the same conduct would be expected of the landowner if public rights existed. Nonetheless, forestry management works are clearly to be expected as a natural action of a responsible landowner of extensive woodland. The works could occur regardless of public rights albeit the closure of a public path could not simply be at the will of the landowner. In this case, both recorded and unrecorded paths were subject to the same control measures during forestry works.
203. Advising walkers to keep out of an area of woodland during temporary felling works would not overtly communicate the message to walkers that they had permission to enter other parts within the landholding or at all other times. Moreover, there was no clear communication of any message when users did not see the signage.
204. One of the supporters who gave evidence and was asked about the felling operations was Mr Haynes. When it was put to him in cross-examination that people were free to walk the paths so long as they kept out of the way when felling operations were taking place, he agreed that was a fair description. Although Mr Haynes concurred with the summary as prompted, it was too generalised to draw clear findings. I also note that Roxlena suggested on other matters that Mr Haynes' may have misremembered or given answers that appeared self-serving at times, yet no such reservations are expressed here.
205. To my mind, the message relayed to the public was no more than one of health and safety. The public were being warned against entry. They were not being informed by the sub-contractor that the landowner was content for people to walk elsewhere or at other times. Moreover, it is highly questionable that a sub-contractor was authorised to convey any such message and that is not how the position was construed. Users believed they were permitted to use the routes because these were well-trodden tracks in frequent use over many years, rather than any implicit messaging arising from forestry works.
206. I am not satisfied that there were overt acts or conduct sufficient to raise the inference that the use of the Order routes was by virtue of the landowner's licence such that the public use was permissive and not 'as of right'.

Conclusion on statutory dedication

207. At the outset there had been a lot of people claiming use of multiple paths. Relatively few attended the Inquiry for their evidence to be tested. What emerged was that different routes had been used at varying degrees of frequency and not for the whole period claimed due to the impact of the foot and mouth outbreak which prompted people to stay away from Hayton Woods.

208. On balance, I am not satisfied that the use by the public of has been enjoyed without interruption for the full 20-year period under consideration given the cessation in use over the foot and mouth outbreak.
209. No objection has been raised by the adjacent landowner whose land is affected by the routes between C-3-2 and points 4-3. However, those routes connect with the western end of existing BW 117004 making it improbable that they were used by the public during the foot and mouth outbreak.
210. Therefore, the tests in section 31 of the 1980 Act are not met for the Order routes to be deemed to have been dedicated as public rights of way.

Common law

211. Given my findings that statutory dedication has not taken place, the question turns to whether there has been dedication at common law. Roxlena suggests there is no case to answer as the Council had not purported to rely on common law in its reasons for making the order and nobody tendered evidence to support common law dedication. Even so, evidence of use has been tendered and it properly falls to be considered against the common law tests.
212. Demonstrating that a way has been dedicated for public use at common law is a more onerous task than deemed dedication under statute. It requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the affected landowners whose actions (or lack of action) indicate that they intended a way to be dedicated as a highway, and (iii) whether there was acceptance of the highway by the public.
213. There is no fixed period of use at common law. It may be longer or shorter than 20 years and depending upon the facts of the case it may range from a few years to several decades. Potentially quite a short period could suffice at common law depending on the circumstances and evidence. There is no particular date from which use must be calculated, but it must be 'as of right'.
214. At common law, the claimant of the public right of way must not only show that the landowner had evinced an intention to dedicate the way as a public highway, but that they had actually dedicated the way as a highway. The test of the evidence is the balance of probabilities. There is no presumption of intention to dedicate that applies once sufficient evidence of user has been demonstrated in the same way that occurs under section 31 of the 1980 Act.
215. No case has been advanced to suggest that any owner past or present did not have capacity to dedicate for the first criterion to be met. In the absence of evidence of express dedication, consideration turns to implied dedication. In *R (Godmanchester Town Council) v SSEFRA [2007] UKHL 28*, Lord Hope observed: "*Deemed dedication may be relied upon at common law where there has been evidence of a user by the public for so long and in such a manner that the owner of the fee, whoever he is, must have been aware that the public were acting under the belief that the way had been dedicated, and the owner has taken no steps to disabuse them of that belief.*"

216. The first issue to be examined is the public user that had taken place. Only if sufficient evidence of public use is demonstrated does the issue turn to acquiescence and finally dedication.
217. The position taken on behalf of Roxlena assumes that common law dedication could only be based, if at all, on use prior to 1999 when felling operations began. That approach pre-supposes the use of all claimed routes was interrupted from 1999 (or was otherwise permissive). I have made no such findings. Use ceased during the foot and mouth outbreak for at least 4 months from February 2001, but not because the Order routes were closed. There is not the same requirement as section 31 for a 'full period' of 20 years use and a mere absence of continuity does not stop time running.
218. The earliest claimed use began in 1948 by one person claiming use until 2008. There were 3 more users claiming use in the 1950s and the level of use steadily rose so that come 1981 there were around 17 users who went on to claim use. Thus, the levels of use were still low. From 1981 until the foot and mouth outbreak in 2001 around 53 of the 70 or so users claimed use. Of those 53, there were 17 users claiming a full 20 years or more use, another 20 people claiming between 11-20 years use and the remainder 10 years or less. Several in the latter category began their use in the late 1990s or 2000 and had only a short period of use pre-2001. All use was recreational and on foot apart from 2 users who also claimed use by horse and bicycle.
219. After the foot and mouth outbreak of 2001, public use of the Order paths resumed for 9 years up to the point of their closure in 2010. Around 53 people claimed use throughout the whole of this period. On the face of it, the use had intensified but it warrants closer examination.
220. In the passages that follow, I do not summarise the entirety of evidence heard. That would serve no purpose where the fact of use by witnesses of particular paths and their regularity is uncontested. Instead, I have recorded variances in evidence and points of clarification.
221. Unsurprisingly, not everyone had walked every single claimed route, and some had walked others besides. I recognise that it is not easy for witnesses when asked to recall dates and what happened many years ago. That is particularly so when people are going about routine activities. Memories fade and it is inevitable that errors can creep in. By their nature, UEFs are also limited in the information they extract, and some questions can be interpreted differently. This is where live oral evidence is important to clarify use and answers.
222. The benefit of hearing live evidence is well illustrated from the testimony of Terence Nichol. It emerged that Mr Nichol's use was mostly of the recorded public rights of way apart from occasional use of part of the red and green routes between 2007 to 2010.
223. Daphne Roberts completed a UEF on which she had marked the existing paths as well as the green, blue and part of the red routes and some linking paths. Her oral evidence focussed largely, but not entirely, on the red and green routes. Mrs Roberts came across as a reliable witness readily highlighting and correcting errors in her UEF and proof of evidence. Her UEF indicated use from 1994 but was updated orally to 1996 as the time she 'regularly' started use. The route she

- most regularly used, at least once a week, was the green route (32-B-H) from point F along How Street, combined with FP 17003 to return to point F. Mrs Roberts also walked “occasionally” (meaning 3 to 4 times per year) from point 31, where there was a gate to points 30-29-28 and returning to point 31.
224. Sue Thomson had found it difficult remembering when her use first began and gave the year 1995 in her statement whereas her UEF said from 2000. I am asked to record her use as “sporadic” until 2000.
225. Bridget Barling claimed use of all the routes starting in 1965 to 1970 and then 1980 to 2010 but did not see any gates or stiles. Ms Barling acknowledged in oral evidence that her use did not extend to all the paths on every occasion. That is unsurprising given the number of paths and time it would take to walk them all on a single occasion. In evidence Ms Barling said her use of A to B was “very frequent” and B to 22 was “less frequent, but quite often”. About twice a year Ms Barling said she would go from point B to point 31. In cross-examination, she agreed that her use overall had been about once a month.
226. Euan Cartwright supported all the routes and not just the red and green routes as indicated in his proof of evidence. His use began in 1983 and he described use by his young family in using the woodland paths as a ‘playground’. Mr Cartwright described his increasing interest in the history of the area and his explorations to locate several places of interest, most of which were off the Order routes. Whilst I am satisfied that Mr Cartwright did use the Order routes, the activity he described of his “*excursions over many years*” was also indicative of ‘wandering at will’. It went beyond an occasional departure from the trodden line before returning to the path. I therefore give very little weight to his evidence in support of the Order.
227. Mr Haynes has lived close to point A since 1989 and claims regular use from spring 1990. His UEF did not claim use of all paths, but it included the red, green and blue routes with other links and some routes in the western part of the woods. For some stretches his use was limited to 2 or 3 times per year.
228. Mr Hinton claimed use from 1989 until 1995 with a 5-year gap before resuming use in 2000. There was some confusion because Mr Hinton insisted the paths drawn on the map attached to his UEF was produced by the Council to show all the routes that people claimed and not just the ones he walked. After the Council Officer confirmed that the map was the one marked up by Mr and Mrs Hinton, it was established that Mr Hinton sought to claim use of all the routes but had also walked others. His frequency of claimed use had ranged from once a year for some paths up to monthly use for others.
229. Joan Partington’s UEF is one of the few referring to cessation of use during foot and mouth and her form is also specific in reference to the location of stiles and gates. Whilst pulled up by Mr Laurence for adding to her script to refer to her daughter’s use “*along the path network*”, Mrs Partington appeared clear and firm in recollecting her own personal use. That evidence is for all the routes except points 12-13 and she did not claim points 32-33 and 23-G-22 due to only using those stretches 2-3 times. Use is claimed from 1982 of varying frequency ranging from weekly up to monthly use depending on the stretch, as shown in a table attached to her UEF.

230. Not everyone filled in a UEF. Laurence King spoke at the Inquiry and claimed use of all the Order routes from 1970. Whilst claiming regular use, Mr King said he was away at boarding school from 1975 allowing only occasional use when returning home. After leaving school, he lived in Australia for a year in 1987-88 and then in London for 5 years. It was established that it was around the end of 1993 that Mr King returned to the area and walked his dogs in Hayton Woods 2 or 3 times per week. He worked away in London for 7-8 years but was unclear on dates. It was perhaps around 2000. His evidence was lacking in clarity over dates, frequency and the paths actually walked.
231. Catherine Allan had said in her statement that she had walked “*on all the paths*” in Hayton Woods from the late 1970s. She spoke of often using the Order paths having walked the area with her husband since the 1980s. They usually went to Hayton Townhead and used the existing paths from point C to reach the red route to walk along the river and then back up to point 25 (on BW 117004). Every occasion she walked in Hayton Woods was recorded in her diaries from 1998. The diary entries reveal occasional use of some parts of the Order routes. Mrs Allan clarified that her use was 3 to 4 times per year.
232. Gary Wilson wrote in support for the Order having lived in Hayton for 16 years. Colin Agnew also provided a statement of his “wanderings” over 18 years and repeatedly walking the paths at least twice a year. The dates of use for these users are unclear. Michael Aldersey wrote to say he had walked in some areas of the woodland in the 1960s and early 1970s before leaving the area and returning in 2000. None spoke at the Inquiry, and it is unclear which routes they had used. Their evidence attracts little weight in consequence.
233. I conclude that the evidence of use overall is not as strong as it might at first appear. The evidence of only 10 users was tested. Of those who spoke, 1 person had mostly used the existing recorded footpaths, another had not stuck to the paths and very few had used all the Order routes. It illustrates how misleading UEFs can be (through no fault of the author) when multiple routes are used, and the question being asked invites a single response. Witnesses had used a mix of paths and the level and frequency of use varied considerably.
234. Evidence in the UEFs carries less weight than tested evidence. It is necessary to treat the UEFs with a certain amount of caution given that some evidence was undermined or differed once it was tested at the Inquiry. The UEF’s provide an overview of use but do not deliver a high level of clarity for multiple paths of varying popularity making it difficult to gauge the reliability of content.
235. The tracks through the woodland clearly were well used over the latter years before use by the public was prevented in 2010 but that is not enough in itself for a case to be made out at common law. The evidence is not sufficiently clear, consistent, or demonstrating a level of use of such a high intensity that dedication at common law may be inferred.

Conclusions

236. Having regard to the totality of relevant evidence, I find that it does not suffice to show that a right of way which is not shown in the DMS subsists whether under statute or common law. I conclude that the Order should not be confirmed.

Formal Decision

237. I do not confirm the Order.



INSPECTOR

APPEARANCES

For Cumberland Council:

Alan Evans

Counsel, instructed by Ian Blinkho, Locum Solicitor

In Support:

Matthew King

Terence Nichol

Daphne Roberts

Chris Haynes

Euan Cartwright

Catherine Allan

Sue Thomson

Bridget Barling

Joan Partington

Ray Hinton

In Objection:

George Laurence KC

Edwin Simpson

Counsel for Roxlena Ltd

who called:

Martyn Hart

Local resident

Andrew Baker

Local resident

Mike Lowther

Forestry contractor

Sheila Cain

Local resident

Norman Duers

Local resident

Anthony Brown

Head Game Keeper, Hayton Estate

Michael Nelson

Local resident

Ian Meadows

Solicitor, Else Solicitors instructed by Roxlena Ltd

Boyd Holmes

Statutory objector

Material submitted at the Inquiry

MAPS

1. A2 sized copy of the Order Map scale 1:5000
2. A2 sized copy of the Order Map with 3 routes marked red, green and blue
3. A2 sized copy of the Order map with the Order routes coloured and numbered
4. As above with routes 1 and 2 marked.
5. A2 sized copy of the Order Map annotated to show existing public rights of way
6. A2 sized copy of the Order Map showing routes with a highway at each end, only at one end and without a highway at either end
7. A2 sized map showing compartments referenced in the witness statement and supplemental statement of Mike Lowther, plus replacement (corrected) table
8. Map marked by Euan Cartwright in evidence showing the approximate location of places of interest off the Order routes
9. Land Registry Title plan for Roxlena (Title number: CU281620)
10. Order map marked by Sue Thomson in evidence with approximate position of forestry works
11. Order map marked by Joan Partington in evidence to show an unclaimed route

DOCUMENTS

12. Second Supplemental bundle and index with handwritten references to dates
13. Opening statement for Roxlena
14. Alphabetical list of those who completed user evidence forms with page numbers within second supplemental bundle
15. Annotated index of routes claimed by users
16. Photograph of waymark at point F produced by Mr King
17. Script of oral evidence – Daphne Roberts
18. Photograph of the gravestone of Frederick Burrow
19. Script of oral evidence – Christopher Haynes
20. Script of oral evidence – Euan Cartwright
21. Script of oral evidence – Kate (Catherine) Allan
22. Script of oral evidence – Sue Thomson
23. Script of oral evidence (and revised copy) – Joan Partington
24. Extracts of the diaries of Catherine Allan.
25. Annual report of the Trustees of the E C Graham Cumbria Charitable Settlement for the year ended 5 April 2006 produced by Mr Hinton
26. Closing submissions for Roxlena Ltd with appended notes on the evidence
27. Closing submission by Boyd Holmes
28. Closing submission by Mr Chris Haynes on behalf of the supporters.

DOCUMENTS SUBMITTED AFTER THE INQUIRY

29. Revised Second Supplemental bundle of all documents before the Inquiry
30. Copy of *Shears Court (West Mersea) Management Co. Ltd. v Essex County Council* [85 LGR 479]
31. Indexed 'Authorities' bundle containing copies of caselaw, guidance and extracts of statutory provisions

Order Map - with red, blue & green routes marked - Copy Not To Scale

