**NEW SQUARE CHAMBERS**

**PUBLIC RIGHTS OVER LAND CONFERENCE
13 May 2025**

**THE LATEST IN THE ROXLENA LITIGATION: HOW FOOT AND MOUTH INTERACTS WITH PUBLIC RIGHTS OF WAY CLAIMS**

***R(on the application of The Ramblers’ Association) v Secretary of State for Environment, Food and Rural Affairs and others* [2025] EWHC 537 (Admin)**

**Part 2**

The focus of Mrs Justice Lang’s judgment is the requirement in section 31(1) of the Highways Act 1980 for a way to have been “actually enjoyed … for a full period of 20 years” if dedication as a highway is to be presumed. That followed from the Inspector’s rejecting Roxlena’s other arguments against the application of section 31, and the claimant’s limiting its grounds of challenge to her Decision accordingly.

It was, however, necessary for her to say something about the expression “without interruption” in section 31(1) because of the potential for confusion arising from the ambiguity in the word “interruption”. As a matter of ordinary English language, it could be interpreted as referring to a mere break in the continuity of use. But the Court of Appeal had read it in the alternative sense, involving deliberate physical interference with the ability to make use of the way, in cases on the predecessor of section 31(1), i.e. section 1(1) of the Rights of Way Act 1932 (“the 1932 Act”): *Jones v Bates* [1938] 2 All ER 237 and *Lewis v Thomas* [1950] 1 KB 438. Having quoted from those authorities earlier in her judgment, Lang J said (paragraph 78):

*“‘Interruption’ … requires a positive act, a ‘physical and actual’ interruption, which interferes with the enjoyment of the way. It is not a mere intermission in use by the public. The circumstances of the interruption are relevant to the question whether there is an intention by the landowner to challenge the public’s enjoyment of the way. In the case of foot and mouth restrictions, it is likely to be highly relevant if restrictive notices were put in place, not with the intention on the part of the landowner to prevent the public from using the way, but in observance of the legal restrictions being put in place temporarily for public health reasons.”*

In so saying, she effectively endorsed by implication the Inspector’s conclusion that the facts found by her did not warrant a finding of “interruption” within the meaning of section 31(1) notwithstanding that the practical effect of the public path closure orders had been that use of the Order routes stopped, because 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 (Decision paragraphs 128-129).

The Inspector recognised that there was a separate question to be addressed and answered arising out of her finding that there had been a cessation of public use for at least four months during the 20 year period, and the judge agreed with that too.

She further accepted Roxlena’s submission that determination of the question of “actual enjoyment” was a matter of fact for inspectors (paragraph 80). However, she added, inspectors had to evaluate the facts against the applicable legal test – and in her opinion, this Inspector had got the test wrong.

In the absence of previous authority on the meaning of “actual enjoyment … for a full period of 20 years” in the highway context, the judge drew on cases concerning private prescriptive easements and applied them by analogy. Was that a legitimate thing to do? Yes, she said, because section 2 of the Prescription Act 1832, section 1(1) of the 1932 Act and section 31(1) of the 1980 Act all contain the same requirement that the subject-matter of the claimed right should have been “*actually enjoyed*”, “*without interruption*”, for a “*full period of twenty years*”. The identical language in the different statutes falls to be interpreted consistently, according to Hilbery J in *Merstham Manor Ltd v Coulsdon and Purley UDC* [1937] 2 KB 77. Lord Hoffmann said something similar in *R v Oxfordshire County Council ex p Sunningwell Parish Council*  [2000] 1 AC 335 at p 353 D-E. He also noted that in introducing the Rights of Way Bill into the House of Lords on 7 June 1932, Lord Buckmaster had said that the purpose was to assimilate the law on public rights of way to that of private rights of way.

Lang J’s review of the authorities and the propositions to be derived from them begins at paragraph 62 of the judgment with an 1842 case, *Carr v Foster* 3 QB 581. That concerned a right of common to graze cattle. The jury had found that non-user for two out of 30 years (while the commoner had no cattle) did not defeat his prescriptive claim based on the 1832 Act.

The Divisional Court saw nothing wrong with that. The propositions that Lang J took from that decision were (i) an “interruption” within the statute was different from a mere “intermission” and involved an obstruction indicating a challenge to the right; (ii) the explanation for an intermission was relevant when considering whether actual enjoyment had been continuous; and (iii) whether actual enjoyment had continued for the full period was to be assessed by reference to the period as a whole. In the words of Denman CJ: “*… the intermission must be a matter open, in every case, to explanation … where actual enjoyment is shown before and after the period of intermission, it may be inferred from that evidence that the right continued during the whole time.*”

*Hollins v Verney* (1884) 13 QBD 304concerned a private prescriptive claim to a right of way. The way had been used for the purpose of cutting wood at intervals of approximately 12 years. Although the claim was unsuccessful, Lindley LJ (delivering the judgment of the Court of Appeal) reviewed previous authorities decided under the 1832 Act, and said that it was not appropriate to draw a sharp line between long and short periods of non-user, or hold that non-user for a year or more was necessarily fatal, or attempt to define that which the statute had left indefinite. He continued:

“*It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended.”*

Fast forward to 2014, when *Carr v Foster* wascited in the Supreme Court with apparent approval. *Lawrence v Fen Tigers Ltd* [2014] AC 822 concerned a claimed right to carry on motor sports involving noise levels that would otherwise be actionable in nuisance. At paragraphs 140-142, Lord Neuberger said that the first instance judge had been correct to hold that no such prescriptive right had been established, but

“*for the wrong reason. I do not consider that he was entitled to hold that the interruption for two years prevented the respondents obtaining the right to create what would otherwise be a nuisance of noise if they had otherwise satisfied the requirements for establishing such a right. If a person regularly causes a nuisance by noise through holding motocross events more than 20 times a year for a period of 20 years, save that during two years of that period, there are no such events, I consider that the requirements of a prescriptive right would be satisfied (subject, of course, to there being any of the normal defences).*

*141. In that connection, I have already referred in para 37 above to the judgments in Carr v Foster … Mere non-use, or inactivity, for two out of 20 years, at least in the absence of other evidence, would be insufficient to justify a court concluding that an action which has been carried out for the other 18 years fairly consistently and to a significant extent in each of those years failed to justify the conclusion that a prescriptive right had been established. It is a question of degree, and that is shown by contrasting the facts of the present case and of Carr with those of White v Taylor (No 2) [1969] 1 Ch 160, where non-use for two periods, each more than five years, did defeat a prescription claim.*

*142. The essential question in a prescription case has been said to be whether the nature and degree of the activity of the putative dominant owner over the period of 20 years, taken as a whole, should make a reasonable person in the position of the putative servient owner aware that a continuous right to enjoyment is being asserted and ought to be challenged if it is intended to be resisted: see Gale, para 4-54, and per Lord Walker JSC in R(Lewis) v Redcar and Cleveland Borough Council [2010] 2 AC 70, para 30.”*

Those dicta, while strictly unnecessary for the decision and therefore obiter, were plainly of considerable persuasive authority. Lang J accepted the claimant’s submissions that they were to be applied by analogy in the highway context and that the Inspector’s approach was inconsistent with them. (To be fair to the Inspector, none of those cases had been cited to her.) The two principal errors on the Inspector’s part identified by the judge were as follows.

First (judgment paragraphs 112-118), while the Inspector had correctly directed herself that a mere cessation of use might not break continuity of actual enjoyment, she had wrongly assessed the length of the period of non-use against a *de minimis* benchmark for which there was no warrant in the caselaw, saying (Decision paragraph 126) “*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*.” But, said Lang J, the expression “*de minimis*” was not to be found in any of the previous decisions on “actual enjoyment” or “interruption”.

Lang J described Kerr J’s obiter observations at paragraph 73 of his *Roxlena* judgment [2017] EWHC 2651 (Admin) as *“liable to mislead”.* What he had said was this: *“I do not agree with the proposition in the Advice Note,[[1]](#footnote-1) and that derived from the Marble Quarry decision,[[2]](#footnote-2) that an interruption which is more than de minimis but caused by measures taken against foot and mouth disease, is incapable in law of amounting to an interruption in use of a footpath or other way. I see no basis for that proposition. Use or non-use is a question of fact; the cause of any non-use is not the issue.”*

Further, according to Lang J, the reason for non-use is not irrelevant. She was quite clear that in considering the fundamental underlying question how the conduct of the public would appear to the reasonable landowner, objectively ascertainable facts placing their conduct in context (e.g. that their use of a way was prevented by a flood) would be relevant in answering that objective question (judgment paragraphs 86-88). The answer would be fact-sensitive; for example, a finding that the way had always been available for use but the public chose not to use it would point to a conclusion that it had not been actually enjoyed for the full period. But the question would always be the same and the reasons for non-user would always be relevant information for the purposes of answering it.

The second main error on the Inspector’s part, according to Lang J, was that she had focused on the four-month period of non-use instead of making an evaluative judgment as to whether there was nevertheless an actual enjoyment of the ways over the 20 year period looked at as a whole (judgment paragraphs 119-123). She had rightly had regard (at Decision paragraph 126) to the question whether the landowner would reasonably have known that a continuous right to enjoyment was being asserted that ought to be resisted, but her answer was wrongly framed by reference to that part of the 20 year period when use had stopped, not the entire 20 year period viewed as a whole which included an aggregate of over 19 years’ use before and after that period (“*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*”).

Identifying errors of law in the Inspector’s approach would have sufficed for the Decision to be quashed and the matter remitted for redetermination, but Lang J went further and in effect held that the Inspector’s conclusion was perverse. She accepted the submission on behalf of The Ramblers’ Association that, in light of the Inspector’s findings, “*no reasonable landowner would conclude, from the absence of public use in the period of restrictions, that the public assertion of the right (as demonstrated by public use in the rest of the period) had been withdrawn*” (judgment paragraph 126). She also agreed (paragraph 127) with the Secretary of State’s concession that it was not reasonably open to the Inspector to find that the reasonable landowner could not know that a continuous right to enjoyment was being asserted that ought to be resisted; the non-use was referable to the foot and mouth restrictions in the view of any reasonable landowner.

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1. The Advice Note referred to was the version of Planning Inspectorate Rights of Way Section Advice Note 15 (“Breaks in User caused by Foot and Mouth Disease”) dated November 2012, including at paragraph 9: “*it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an ‘interruption’ under section 31(1)*”. A revised version of Advice Note 15 (issued August 2023 and said to have taken Kerr J’s comments into consideration) reached a similar conclusion: “*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.*” It included, however, the following new paragraph: “*During the relevant 20 years before a way is brought into question, section 31(1) requires use to have continued ‘without interruption’. Whilst the frequency of use will vary in every case, a 3-month period where use by the public ceases is unlikely to be regarded as de minimis in terms of the length of time of non-use*.” [↑](#footnote-ref-1)
2. “The Marble Quarry decision” was a reference to an inspector’s decision described by Kerr J as having been to the effect that a temporary cessation of use due to the foot and mouth outbreak, even if more than *de minimis*, would not in law amount to an interruption in use. [↑](#footnote-ref-2)