WILDLIFE AND COUNTRYSIDE ACT 1981 - VEHICLES AND RIGHTS OF WAY
BAKEWELL MANAGEMENT LTD v BRANDWOOD
STEVENS v SECRETARY OF STATE FOR THE ENVIRONMENT

Introduction

1. On the 22 July 1997 the Department of the Environment, Transport and the Regions issued a circular letter to local authorities setting out its interpretation of the effect of the judgment in *Robinson v Adair*[1]. The judgment in that case, broadly speaking, related to the issue of whether the statutory prohibition against off-road driving, currently contained in section 34 of the Road Traffic Act 1988 ("the 1988 Act"), could prevent section 31 of the Highways Act 1980 ("the 1980 Act") from operating to create a public vehicular right of way. The judgment in *Robinson v Adair* had been based upon *Hanning v Top Deck Travel*[2]. In over-turning *Hanning*, the *Bakewell* judgement also overturned *Robinson v Adair* and provides valuable guidance on how evidence of vehicular use, both pre and post-1930, should be treated where claims are made on the basis of long user by motor vehicles.

2. This Note sets out the Planning Inspectorate's views on two important judgements. Whilst it is publicly available, it has no legal force.

Bakewell Management Ltd v Brandwood[3]

3. This case concerned a dispute over access to residential properties bordering a registered common where the only means of access to the houses from the nearest public road was over one or other of a number of tracks over the common. The owner of the common, Bakewell Management Ltd, had not given permission authorising vehicular use of the tracks and brought the action, relying on the decision in *Hanning,* to establish that the residents had no vehicular rights over the tracks.

4. *Hanning* was a case concerning an alleged easement based on the unlawful user of manorial waste and in which it was held that an easement could not be acquired by prescription in reliance of conduct which was prohibited by public statute when it took place. *Robinson v Adair* concerned a dispute over the alleged obstruction of a metalled road providing access to common land. It was argued that a carriageway existed over the road in question because it had been used by vehicular traffic for over 20 years to get access to the common land. Consequently, section 31(1) of the 1980 Act operated to raise a presumption of the dedication of the road as a carriageway. In applying *Hanning*, the court in *Robinson v Adair* found that no public vehicular right of way had been created because the use of the road had been for an unlawful purpose, namely to drive on common land. This was unlawful by virtue of section 34(1) (a) of the 1988 Act.

5. Section 34 of the 1988 Act re-enacts an offence which was first contained in section 14 of the Road Traffic Act 1930 ("the 1930 Act"). This latter section came into force on 1 December 1930. The 1988 Act (as now amended by schedule 7 to the Countryside and Rights of Way Act 2000) makes it an offence to drive a mechanically propelled vehicle, without lawful authority:

   (a) on to or upon any common land, moorland or land of any other description,

not being land forming part of a road, or

(b) on any road being a footpath or bridleway or restricted byway.

6. Section 193(4) of the Law of Property Act 1925 ("the 1925 Act") states that "any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence."

7. In *Bakewell*, Lord Scott considered that the phrase "without lawful authority" as found in section 193(4) of the 1925 Act and in section 34(1) of the 1988 Act, deserved careful attention. In his judgement a statutory prohibition forbidding some particular use of land that was expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority was an unusual type of prohibition, and he held that an owner of land could give "lawful authority" for the doing of an act that if done without that authority would be an offence under either section 193(4) or 34(1), providing that such activity would not give rise to a nuisance.

8. It was held that in *Hanning* the owner of the land was able, notwithstanding the statutory prohibition under section 193(4) of the 1925 Act, to make a lawful grant of the easement of access over the common. With regard to *Robinson v Adair*, it was held that it was:

"… open to Mr Adair or his predecessors in title to have dedicated the road as a public highway. Such a dedication would have constituted "lawful authority" for section 34(1) purposes. The dedication would have been effective. That being so, I can see no reason why public policy would prevent a presumption of dedication arising from long use."

9. It was Lord Scott's view that it would not be open to an owner to dedicate a public vehicular highway over an existing footpath if use by vehicles would have constituted a public nuisance to pedestrians using the footpath. In such cases, vehicular user could not give rise to the presumption of dedication, as such user, creating a nuisance, would have been without lawful authority. The case of *Hayling v Harper* [*2003] 39 EG 117*[4] which concerned long vehicular use of a footpath, held that use of the footpath by vehicles for a period of at least 20 years prior to 1930 enabled the establishment of a vehicular way before the advent of section 14 of the Road Traffic Act 1930.

10. The judgement in *Bakewell* provides that if the dedication of a way as a vehicular way by a landowner could be lawfully made, then dedication could also be presumed through long use where that use satisfied the provisions of section 31(1) of the 1980 Act. Providing that a public nuisance is not caused by such use, whether the claimed use occurred wholly or partly after 1930 would not be relevant, as use with "lawful authority" is not prohibited by section 34(1) of the 1988 Act.

Stevens v Secretary of State for the Environment[5]

11. In the Stevens case, the applicant sought to challenge a decision to confirm an order made under section 54 of the Wildlife and Countryside Act 1981 ("the 1981 Act") which reclassified a road used as a public path ("RUPP") as a bridleway. Part of the applicant's challenge related to whether documentary evidence had been dealt with properly by the Inspector. Other grounds, which are addressed here, related to the nature of RUPPs and the creation of carriageways through the use of

motor vehicles on them. The central issue to the case was whether the Inspector had been correct in deciding that no carriageway had been created, either at common law or by virtue of section 31 of the 1980 Act, by such use post-1930.

12. In particular, grounds of challenge were:

a) that considerable weight should be attached to the classification of a way as a RUPP and that such a classification is evidence of the status of the way being a carriageway. As the track had been shown as a RUPP, it must be evidence that it was not merely a footpath or bridleway. The Inspector had not given proper weight to this;

b) the offence under what is now section 34(1)(b) of the 1988 Act is committed by driving on any road being a footpath or bridleway. Under section 192(1) of the 1988 Act, a footpath is defined as a way over which the public have a right of way on foot only. Similarly, a bridleway means a way over which there are only public rights of way on foot and on horseback or leading a horse. The track in question was not a footpath or bridleway as so defined. Otherwise it would not have been classified as a RUPP. Therefore no offence is committed by driving on a RUPP and so post-1930 long user by motor vehicles on a RUPP may create a highway.

13. Mr Justice Sullivan decided that the mere classification of a way as a RUPP is not in itself evidence of the existence of any public vehicular right of way over such a way. Those who carried out the original surveys and mapped footpaths, bridleways and RUPPs did so on the basis that they subsisted or were reasonably alleged to subsist. Whether the public enjoyed any vehicular rights over a RUPP was deliberately left open by the 1949 Act. Mr Justice Sullivan went on to state that "... any inference ... that a RUPP classification points to the existence of a vehicular right of way would be contrary to the express terms of section 54 subsection (3) of the 1981 Act". He stated later on in his judgment:

"The fact that the track was classified as a RUPP tells one that it was used mainly for one or other of those purposes [i.e. for the purpose for which footpaths or bridleways are so used] ... it does not mean that there were any additional rights over the track. Such rights would have to be proved to exist by dedication or by prescription."

[1] *Robinson v Adair The Times, March 2, 1995.*
[2] *Hanning v Top Deck Travel Group Limited (1993) 68 P & CR 14*
[3] *Bakewell Management Ltd v Brandwood [2004] UKHL 14*
[4] *Hayling v Harper [2003] 39 EG 117*
[5] *Stevens v Secretary of State for the Environment (1998) 76 P&CR 503*