GLEAM

Green Lanes Environmental Action Movement
Patron: HRH The Duke of Edinburgh KG KT

A NEWSLETTER for those interested in protecting ancient ways from the ravages of use by motorised recreational vehicles.
AUTUMN 2004

Bakewell Management Ltd v Brandwood

(or how to open a can of worms)

Members will recall the Defra Consultation Document Use of mechanically propelled vehicles on Rights of Way and GLEAM s response to it, which were reported at length in our Spring 2004 Newsletter.

The consultation period for this document closed on 19 March. Thirteen days after this period closed, on 1 April the House of Lords handed down their judgement in the case of *Bakewell Management Ltd v Brandwood*. As this judgement severely undermined not only the Defra Consultation Document, but also GLEAM s response to it, we made a supplementary response to Defra.

As many members will not be familiar with this case, we will briefly describe the historical background to it. It concerns Newtown Common, a 144-acre wooded common south of Newbury, but just in Hampshire, owned until 1986 by successive Earls of Carnarvon. Around this common are 28 dwellings which are accessed by car across the common. 24 of these could claim over 40 years of such use, with 4 claiming 20 years. Lord Carnarvon had never given permission for such use, and had never charged any payment for it.

The key issue is that under s.34(1) *Road Traffic Act 1988* it is an offence to drive a mechanically propelled vehicle on any common land, moorland or land not forming part of a road, or on any road being a footpath, bridleway or restricted byway. This legislation originated as s14 *Road Traffic Act 1930*, and has been updated in several Acts since then. Thus in 1930 was ended the ruling that 20 years of motorised use, openly, without force and without asking permission (i.e. as of right), would create a motorised right of way (as still applies today for pedestrian or equestrian use under s31 *Highways Act 1980*). For the 20 years to have been completed by 1930, the motorised use would have had to have started by 1910, when there were not many motors on the road.

We must go back to 1993 and the case of *Hanning v Top Deck Travel Ltd*. The defendant (Top Deck) was driving double-decker buses across a wooded common, Horsell Common, near Woking, Surrey. The owners of the common (Hanning) could have granted the defendant a right of way for its vehicles, but did not do so. Instead they sought an injunction in order to preserve the amenity of the common, as they were entitled to do under s193 *Law of Property Act 1925*. As a result of the *Hanning* judgement in the Court of Appeal, the owners of Horsell Common were able to charge the defendants for using such access, because a prescriptive right of way could not be acquired by long use which was contrary to statute.

Following the precedent of *Hanning*, the owners of a number of commons around the country began to charge adjoining residents for accessing their dwellings over common land, some of them being charged a substantial sum. Bucklebury Common in Berkshire was an early example of this, to much local indignation. Bakewell Management Ltd went one better, and in 1997 bought Newtown Common with the sole intention, not of preventing the surrounding residents from using the tracks, but of making money by charging them for access (between £2,000 and £10,000 each).

Cont d Page 2.....

To this end the owners of the 28 properties (47 defendants) were sued by Bakewell. The *Hanning* judgement was applied in the *Bakewell* case, both by the trial judge and later by the Court of Appeal. The defendants (Brandwood and others), at risk of great financial cost to themselves, appealed against this judgement to the House of Lords.

In a long and complicated judgement, running to 22 pages, with multiple references to 26 judgements between 1775 and 2003 and to 14 Acts of Parliament and Statutory Regulations between 1832 and 2002, Their Lordships allowed this appeal, thereby overturning the *Hanning* judgement, and awarded costs against Bakewell. The most obvious and intended consequence of the *Bakewell* judgement, which was widely reported in the media, is that the residents around Newtown Common can no longer be charged for accessing their houses by car across the common. This might be described as a common sense decision.

What the media almost entirely failed to report were the deeper and more complex implications of this judgement for prior statute and case law. When combined with the Defra Consultation Document, these will have most serious consequences for certain areas of the law of Rights of Way.

The *Bakewell* judgement established that unlawful motor vehicular use of a bridleway or footpath in contravention of s34(1) *Road Traffic Act 1988* will count towards accrued use for the purpose of dedication, **where such use is capable of being made lawful by the owner** and causes no public nuisance. This ruling will cover dedication under both common law and s31 *Highways Act 1980*. It will embrace common land and land that is not part of a road. It will also catch restricted byways when they come into being, and therefore all RUPPs which RBs are to replace. All over the country there are many RUPPs that have been used for years by 4x4s, and increasingly bridleways and even footpaths that are being used by trail bikes. Under the *Bakewell* judgement, this use will count towards the required 20 years accrued use for presumed dedication as Byways Open to All Traffic.

As the *Bakewell* ruling reverses the *Hanning* ruling that since 1993 has been held to apply regarding post-1930 use, it also overrules later judgements (expressly or implicitly), notably *Robinson v Adair* (1995 — re common land) and *Timothy Stevens v SoS Environment* (1998 — re RUPPs), which rely on *Hanning*. As a consequence, parts of the Defra Consultation Document are invalidated, and many responses to it need to be reviewed.

One of the major difficulties facing objectors to motorised destruction of green lanes is lack of evidence of ownership. Although anyone can bring into question the right of motorists to use such tracks under s31 *Highways Act 1980*, it can be very difficult to show lack of intent to dedicate on the part of the landowner. Showing that the landowner did not intend to dedicate is almost tantamount to proving a negative, which is impossible. If the Government s intent is to protect the environment, this practical problem must be taken on board, because, unless the scope for unlawful use is reversed, many green lanes will be at mercy of the unscrupulous. It is no answer to say that criminal offences can be stopped, because repeal of s34A of the 1988 Act, as proposed in the Consultation Document, will create an unworkable situation. This is that magistrates do not have the jurisdiction, training or competence to decide what rights do exist. Hence it will be a simple matter for a defendant to raise a presumption of innocence, based on evidence that would not succeed in front of a trained inspector.

GLEAM has written to Defra urging them to rectify the effect of the *Bakewell* judgement by legislating against presumed dedication arising from unlawful use. We know that Defra lawyers are aware of this problem, and have been working on it for the last few months, but so far no further Consultation Document or proposed legislation has appeared. New legislation to reverse the undesirable aspects of *Bakewell* is the most likely outcome.

During April, Bakewell Management Ltd put Newtown Common on the market in five lots for a total asking price of £650,000. At the time of writing (mid-August) it was still unsold.

David Gardiner

Reproduced by kind permission of the Editor of THE COUNTRYMAN

Good Intentions confounded.

To put it very simply, post-war legislation on public rights of way was framed in large part with the intention of permitting as well as regulating greater access to the countryside for ordinary people. Parishes were expected to decide on the basis of local knowledge which lane fell into a particular category of right of way, often on the scarcest evidence or none. Nobody imagined that one day mechanical vehicles would make use of permitted or assumed right to access which would lead all too frequently to damage of such lanes to the detriment of other users. It is incomprehensible to ordinary people that environmental factors may not be taken into account when deciding which type of right of way a particular lane should carry. This is decided purely on whether, on a balance of probability, the lane has EVER been used by wheeled traffic of any sort.

The Law In Action

Todd v SoS EFRA (aka the Bramshill case) - by Graham Plumbe FRICS FCIArb

The story of Sandy Lane, Bramshill, Hants, which had been found by an inspector to be a bridleway rather than a BOAT, was reported in the Autumn 2002 Newsletter. At the AGM in October 2003 the sad news was reported that the inspector had reversed his decision following a second inquiry, in spite of recording that there was no new evidence — only whingeing by Hampshire County Council. It was however thought that the decision was appealable on a number of grounds.

The case reached the High Court in May 2004 as Todd and Bradley v SoS EFRA (Secretary of State, Dept. of the Environment, Farming & Rural Affairs). Of the four grounds pursued, three were wholly successful and the fourth was not decided as it had become unnecessary. Two of the issues were of considerable public importance.

The first of these was that the inspector had applied the wrong test. Civil proceedings are always decided on the **balance of probabilities** unless there is statutory provision to do otherwise. Under the *Wildlife & Countryside Act 1981*, provisional orders to modify the Definitive Map are made by highway authorities under s53, but the necessary tests differ according to the context of the order. Under s53(3)(c)(i), an order is made where a right of way which is not shown on the map (as applied at Bramshill) is **reasonably alleged to subsist** . Such orders are however always subject to objection procedures, so the question arose as to whether inspectors, in determining whether or not to confirm such an order, should apply the lower originating test or the higher normal test. The Act is silent on the point. The Inspectorate, an agency of DEFRA, has been vacillating in its guidance to inspectors on the point since 1997, but went firm on the lower test after the judge in another (Leicestershire) case held that the lower test was correct, and this was followed at Bramshill. The appeal therefore centred on the fact that the Leicestershire case judge was wrong, and that his decision on the point was in any case obiter (not central to the issues before him) and so was not binding. Counsel for DEFRA (Timothy Morshead) advocated in both cases, so he had a corner to defend. The Bramshill appellants engaged George Laurence QC who analysed the intention of Parliament in a case which overall took nearly four days. The judge very firmly found DEFRA to be wrong.

The second major issue, argued by Miss Ross Crail in support of George Laurence, was a matter of natural justice in that parties are entitled to a fair hearing. The inspector s second decision was founded on the concept that dedication had taken place in the process of the landowner making a claim for tax relief under the Finance Act 1910, implicitly on the grounds that a public right of way was thereby created along Sandy Lane. That concept, which ran contrary to virtually all the other evidence, had not been argued by the County Council and had not been exposed to the parties for comment. It was, in short, a frolic of his own by the inspector. The appellants argued that if it had been so exposed, there were many arguments to show that the concept was wrong in law, but no opportunity had been given to put them. The judge had no hesitation in finding that a breach of natural justice had occurred, notwithstanding convoluted arguments by DEFRA that the inspector s decision was in fact based on other evidence rather than the legal assumption made by, and clearly stated by, the inspector. The judge in the process agreed that the concept was in any case wrong in law, so that the third ground of appeal also succeeded. That left only a complaint (the fourth ground) that the inspector had wrongly interpreted material parts of the evidence,

or had contradicted himself in their application, and it was this element that the judge felt it was unnecessary to determine.

Determination of the which test? issue exposes the question as to how many other inspectors decisions have been wrongly based, and what happens in such cases. There is no provision for re-opening orders that have been confirmed (once past the appeal limitation date), and seemingly the only route available is to ask the County Council to start again in cases where it can be clearly shown that an inspector s decision has been founded on the lower test. Such an application would, however, depend on there being discovery of evidence which (when considered with all other relevant evidence) shows that an order ought to be made. It is a moot point as to whether a change in perceived law would be regarded by the highway authorities or by the courts as new evidence .

The question also arises as to whether the motorists could ask for a new order on Sandy Lane, given the technical nature of the quashing order. It is a fact however that none of the arguments put by HCC succeeded, so that it would be perverse in the extreme for the Council s Rights of Way Panel to authorise the making of another order. In fact, the principal arguments advanced by Hampshire County Council were said by the inspector to be so lacking in commonsense, and so obviously wrong, that he has recommended a partial award of costs in favour of the objectors. This has yet to be decided by the Inspectorate.

Taking this matter to court together with briefing leading and junior counsel was extremely expensive. The case was made possible by insurance against losing the case and being penalised on costs. The bigger risk, curiously, was in winning but in being unable to recover all, or even most, of the claimants costs in satisfaction of the award of costs which was made in the appellants favour. The outcome of that part of the story has yet to be told.

Correspondence.

Patricia Wilson, the Clerk to Slaley Parish Council in Northumberland, sent us a copy of a letter she wrote on behalf of her council. It concerned the proposed hearing of an application for a Modification Order as part of a Review of the Definitive Map & Statement of Public Rights of Way. She concludes her detailed criticism by saying:

The map presented by Northumberland County Council on January 6th 2004 is not correct. Or the Application for a modification Order by Mr. Kind is not correct. If we are discussing the law as it stood in 1771 with the Bulbec Common Enclosure Award document, then the Branch Road (U8081) is not part of this application. The east side of The Drift Road (U8080) however has land owners who have not been consulted in the process at the time of writing.

Until this situation is rectified, it is the view of Slaley Parish Council that any discussion on June 4th would be pointless because the evidence is not correct.

[It is hard to say with whom one should sympathise more in a case like this, symptomatic of many more up and down the country: the hard-pressed and often not over-well-informed local authority Rights of Way officers or Parish Councillors who are suddenly confronted by labyrinthine methods of assessing 18th Century Enclosure Awards, Dedications and assumed use of lanes, plus the complexities of more recent laws of the second half of the 20th century, notably the 1981 Wildlife & Countryside Act. - Ed]

Non-Progress towards Restricted Byways

The proposal to reclassify all remaining RUPPs as Restricted Byways was made in Part II of *Countryside and Rights of Way Act 2000*. This received the Royal Assent in November 2000. Part II was always intended to come into effect on such a date as the Secretary of State might appoint. Originally this was intended to be in April 2002, but this date has slipped and slipped — and slipped again. By autumn 2003 it was expected to be by August 2004, but still we do not have it.

Now a major setback has occurred. The judgement in the case of *Bakewell Management Ltd v Brandwood* (see p1 & p2) will have a great impact on restricted byways. This is because the unlawful use of RUPPs by mechanically propelled vehicles, which has been widespread for many years, will now count towards the required accrual of 20 years motorised use for presumed dedication as Byways Open to All Traffic. This is precisely the outcome which the creation of restricted byways was intended to avoid.

To get round this setback it is likely that Defra will have to defer the implementation of Part II still further. They will probably first have to introduce and have enacted new legislation to reverse the worst aspects of the *Bakewell* judgement. Only when this has been done will it be safe for the Secretary of State to bring Part II into effect.

Protect your Land from Unwanted Rights of Way

This is serious advice which we give to all landowner-members of GLEAM.

There has always been a risk to landowners that, if some member of the public can prove that a particular route across your land has been used for 20 years openly, without force and without asking permission by walkers or horse riders, they will claim presumed dedication of the route as a footpath or bridleway. This risk has now become far greater following the judgement in the case of *Bakewell Management Ltd v Brandwood* (see p1 & p2). The route claimed may now not be just a footpath or bridleway; it may be a Byway Open to All Traffic.

There is one protection you can take against this risk, which every landowner should take. You should deposit with your local highway authority (County or Unitary Council) a statement under s31(6) *Highways Act 1980* indicating what ways (if any) over your land you admit to having been dedicated as highways. This must be accompanied by a map of the land on a scale of not less than 6 inches to 1 mile. Your deposited statement must be renewed every 10 years. Depositing this statement will be evidence of your intention as a landowner not to dedicate any further Rights of Way on your land.

If you need help in preparing this statement, any competent firm of chartered surveyors or solicitors should be able to help you.

If you do **not** have the protection of a s31(6) deposited statement, and are faced with an unwelcome claim on your land for BOAT status, remember that the claimants will only succeed as a result of the *Bakewell* judgement if they can show

(a) that the way was in private ownership, and that the owner was able to dedicate it as a public vehicular highway, but did not do so, and

(b) that no public nuisance will arise.In these circumstances you are advised to play the public nuisance card as hard as you can.

Reflections on an Inquiry in Northumberland

by Jack Lindsay.

I arrived at Langley Village Hall for the BOAT Inquiry, briefed by material trailed in the press and on television. Within minutes of the opening I realised the object of the exercise had been radically misrepresented. The terms of reference announced specifically exclude not only issues raised by environmentalists but also the right of bikers to churn up the countryside: no locking of horns between these parties, then! In prospect was a more esoteric conflict between cartographers, concerned (superficially at least) merely to argue the merits of maps centuries old. The bone of contention was stunningly simple: had there or had there not ever been a highway over Mohope Moor? The cast of Three Men in a BOAT II comprised: on the port side, Mr. Kind (for); on the starboard side, Mr. Warner (against); and at the tiller, Mr. Beckett (referee). Since nothing except the distant past is admissible, the proceedings at times were sublimely surreal.

Mr. Kind s claim, in part, seemed to be as follows. There is evidence of a road from the east to one end of the track across Mohope Moor, and of a road from the west to the other end of the track. The track is mapped to this day as Carriers Way . On the western approach road is a farm called Corby Gates, which once was referred to as Corbrigg Gates. The inescapable conclusion, Mr. Kind suggested, is that travellers from Penrith to Corbridge would most likely pass by Corby Gates Farm and thence onwards via Carriers Way across the Moor, establishing it as a Highway. (Stone the crows, I reflected, what a shame Mrs. Sobell, Archivist, did not unearth a recipe for four and twenty blackbirds being baked in a pie!) Once a highway, always a highway, Mr. Kind went on to inform us, unless extinguished by due process. To crown it all, someone has mapped Carriers Way as a cart track.

The participants went into a huddle around the table, over which was spread an array of maps. In the absence of an overhead projector, the general public was unable to see the route advanced by Mr. Kind; and in the absence of microphones it was often difficult to hear what exactly was being said. I recollected the terrain along the tops, the sphagnum moss, some of it reputedly so rare it may have been there since before the last ice age. Unbridled, my thoughts began to wander lonely as a cloud and I began to daydream.

Wow! I thought. Institutional immortality, conferred by Act of Parliament, and created by contact with the established approach roads! Here we have legislation with most remarkable teeth. Local Roman place names notwithstanding, this road leads straight to Transylvania or cloud cuckoo land. Undead and buried, the law lurks below the surface awaiting exhumation. Resurrected, it will rise to wreak havoc on the immediate neighbourhood.

Mr. Warner countered this presentation by asserting that if Carriers Way were indeed a highway, it was the wrong kind of highway. He produced abundant evidence of packhorse traffic, especially associated with lead mining activity, and entirely consistent with its name. The archives had yielded up absolutely no reference to wheeled vehicles, a crucial distinction. Moreover, the name Corbrigg Gates was only recorded once over the centuries, which tips the balance of probability towards a slip of the quill.

On the second day we were treated to a scintillating sideshow in which Mr. Punch (played by Mr. Kind wielding road maps) set about Judy (represented by Mrs. Sobell) in a game to

Contd from Page 7.....

see who could split the most hairs. (I have to say this is a justly neglected sport, for it seriously lacks spectator appeal.) To liven things up, Mr. Kind kept pulling fresh rabbits out of his briefcase, but they had a distinct tendency to metamorphose into hares which, once started, scampered out of control across the countryside in all directions.

The lasting impression I am left with is a feeling of amazement that it took two whole days to cover the ground. As for wheeled traffic, the only firm evidence I could detect was a coach and horses being lined up ready to be driven through legislation designed to protect the environment, coupled to a nagging anxiety lest we be led up Kind s garden path by this latter day Pied Piper, mounted on a motorised hobby horse.

Correspondence contd.....

Jack Burling, writing from Cornwall, says:

I enclose a photograph of Byway No. 9, the Long Causeway , South Yorkshire, taken by my colleague who works there for the Ramblers Association. You may be able to use it as an example of the appalling damage caused by vehicles to this once pleasant track.

Byway No.9 Long Causeway
Looking south towards
Damage caused by
4WD and motorbikes

Byway No.9 Long Causeway
Looking south towards Convoy
of 5 - 4WD vehicles

GLEAM aims to protect public paths from unnecessary damage. If you would like more information or wish to assist please write to: GLEAM, P.O. Box 5206 Reading RG7 6YT

Published by GLEAM
Chairman: David Gardiner.
Executive Secretary and Editor: Elizabeth Still