



Neutral Citation Number: [2012] EWHC 603 (Admin)

Case No: CO/554/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 March 2012

Before :

LORD JUSTICE MOORE-BICK

and

MR. JUSTICE KING

Between :

ALAN DOUGLAS KIND

Appellant

- and -

NORTHUMBERLAND COUNTY COUNCIL

Respondent

Mr. Adrian Pay (instructed by **Brain Chase Coles**) for the **appellant**
Miss Ruth Stockley (instructed by **Northumberland County Council Legal Services**) for the
respondent

Hearing dates 1st December 2011

Approved Judgment

Lord Justice Moore-Bick :

Background

1. This appeal concerns a cattle grid situated on a farm track over which the public has a right of way on foot and on horseback. The track is therefore a bridleway and it is common ground that it is a highway to which the Highways Act 1980 (“the Act”) applies.
2. The farm track gives access from the main road to a livestock farm and has been recorded on the definitive map and statement for the County of Northumberland as a bridleway since August 2008. Before that it had been recorded as a simple footpath. The cattle grid was installed many years before the track’s designation as a bridleway to prevent animals straying on to the road.
3. The cattle grid extends across the whole width of the track. In order to avoid crossing it it is necessary to pass through a gate provided by the landowner, proceed around the cattle grid on private land and re-join the track through another gate. The landowner has provided the gates at her own expense and is content to allow members of the public to make use of the bypass on foot or on horseback, but the land over which it runs has not been dedicated as part of the highway and the public has no legally enforceable rights in relation to it.
4. Sections 130 of the Act imposes on the highway authority a duty to assert and protect the rights of the public to the use and enjoyment of any highway for which it is responsible and sections 130A-130D contain provisions which enable any person who considers that a relevant highway is affected by an unauthorised obstruction to take steps to require the authority to carry out its duty. The first step is for the applicant to serve on the highway authority pursuant to section 130A a notice requesting it to secure the removal of the obstruction. If the applicant is not satisfied that the obstruction has been removed he may apply to the magistrates’ court pursuant to section 130B for an order requiring the authority to take steps for securing the removal of the obstruction. Section 130B(4) provides that the court may make such an order if certain conditions are satisfied, the only two of any relevance to the present case being that the obstruction significantly interferes with the exercise of public rights of way and is unauthorised.
5. It was common ground that the cattle grid significantly interfered with the exercise of the public’s right to use the bridleway. It was also common ground that section 130B(4), which provides that “. . . the court may make an order under this section . . .”, gives the court a discretion whether to exercise its power to grant an order against the highway authority.
6. On 20th April 2009 the appellant, Mr. Alan Kind, served a notice on the Council under section 130A requesting it to secure the removal of the cattle grid on the grounds that it constituted an unlawful obstruction of the bridleway. The Council failed to comply with that request and so on 14th October 2009 Mr. Kind applied to the South Eastern Northumberland magistrates under section 130B for an order requiring it to take steps for securing the removal of the cattle grid. In a written decision District Judge Earl

found that the bridleway was obstructed by the cattle grid, which significantly interfered with the exercise by the public of its right of way, but he declined to exercise his discretion to order the Council to secure its removal because the bypass was satisfactory for riders and walkers and because making an order would have adverse financial consequences for the Council.

7. On 31st March 2010 Mr. Kind appealed to the Crown Court. The appeal was heard on 21st June 2010 by His Honour Judge Brian Forster Q.C. sitting with Mr. D. Coleman J.P. and Mr. A. Griffin J.P. The appeal was by way of re-hearing. In the meantime, however, on 21st April 2010 the Council had authorised the cattle grid in the purported exercise of its powers under section 147 of the Act on condition that the by-pass remained available for use by the public. In a written judgment delivered on 9th August 2010 the court held that the cattle grid had been lawfully authorised and that therefore one of the necessary conditions for the exercise of the jurisdiction under section 130B had not been satisfied. That was sufficient to dispose of the appeal, but the court also stated that even if all the necessary conditions had been satisfied it would have declined to exercise its discretion in favour of granting an order since the bypass enabled the right of way to be fully exercised without any significant interference, either on horseback or on foot.

8. On 12th January 2011 at the request of Mr. Kind the Crown Court stated a case for the opinion of the High Court. The statement of case poses the following questions for decision:

“33.1 Did we err in finding that the cattle grid was lawfully authorised by the respondent under section 147 of the Highways Act 1980?

33.2 Did we err in holding that, if the cattle grid had not been lawfully authorised, we would not have exercised our discretion under section 130B of the Highways Act 1980? In particular, did we err

33.2.1 in finding that, with the arrangement required by the authorisation under section 147 of the Highways Act 1980 in place, the right of way could be used fully and without any significant interference notwithstanding the existence of the cattle grid; and/or

33.2.2 in finding that the fact that members of the public could circumnavigate the cattle grid by deviating from the public right of way on to private land would have constituted a proper ground to decline to exercise our discretion to order the removal of the cattle grid?”

The power to authorise obstructions

9. The material parts of section 147 of the Act provide as follows:

“147 – Power to authorise erection of stiles etc. on footpath or bridleway.

(1) The following provisions of this section apply where the owner, lessee or occupier of agricultural land . . . represents to a competent authority, as respects a footpath or bridleway that crosses the land, that for securing that the use, or any particular use, of the land for agriculture shall be efficiently carried on, it is expedient that stiles, gates or other works for preventing the ingress or egress of animals should be erected on the path or way. . . .

(2) Where such a representation is made the authority to whom it is made may, subject to such conditions as they may impose for maintenance and for enabling the right of way to be exercised without undue inconvenience to the public, authorise the erection of the stiles, gates or other works.”

10. It was not seriously disputed that cattle grids fall within the expression “other works” in subsection (2), or that the Council had the power to authorise the installation or retention of a cattle grid if the other requirements were satisfied, but Mr. Pay submitted that the section does not give a highway authority power to authorise an obstruction which has the effect of closing off the entire width of the bridleway. He argued that the expression “enabling the right of way to be exercised without undue inconvenience to the public” in subsection (2) shows that the section is concerned with the partial obstruction of the bridleway and does not contemplate its stopping up, even if alternative arrangements are made to enable the obstruction to be by-passed without inconvenience.
11. Miss Stockley submitted that it is necessary to take a broader view of section 147 and that the words of subsection (2) are to be understood as referring to the bridleway as a whole. In the present case, she argued, the by-pass arrangements enable the right of way to be exercised without undue inconvenience to the public, notwithstanding the existence of the cattle grid. She also submitted that the interpretation put forward by the appellant was too uncertain in its effect to be workable in practice.
12. Before considering the proper interpretation of section 147 it is necessary to mention one other point that arose in the course of argument, namely, whether it was open to the appellant on an appeal to the Crown Court to challenge the legality, and therefore the efficacy, of the Council’s order authorising the cattle grid. On one view of the matter the order could be challenged only by proceedings for judicial review and must be accepted as effective unless and until it was quashed. An alternative view is that if the Council had no power to make the order it was a nullity. That is a question that may have to be confronted in another case, but I do not think that it would be appropriate at this stage in the proceedings for this court to decide it. The Council did not raise that question when the matter was before the Crown Court and it is not raised by the case stated. Nor did the Council seek to raise it in argument before this court, with the result that neither party was in a position to deal properly with the question in argument. In my view the right course now is for this court to hear the

appeal on the terms in which it has been presented in the case stated and leave that question for determination on another occasion.

13. The conclusion, reflected in the Crown Court's finding in paragraph 32.2 of the case, that the by-pass arrangements enable the right of way to be fully used without any significant interference, accords with practical common sense if one looks at it from the point of view of a pedestrian or rider seeking to make use of the bridleway as a whole. Mr. Pay sought to criticise that finding on the grounds that it is inconsistent with the finding in paragraph 29 that the cattle grid significantly interferes with the exercise of public rights of way over the bridleway, but the court there was dealing with a different question, namely, whether at the particular place where it was situated the cattle grid constituted an obstruction which was more than minimal. Clearly it did. As the court said, however, in reality, any user, whether proceeding on horse or on foot, would find the by-pass arrangement a good one giving rise to no practical difficulty. I find it surprising and regrettable, therefore, that so much time and money should have been spent seeking to establish an outcome that is unlikely to produce any practical benefit to the local community. However, that cannot have any bearing on the proper interpretation of the statutory provisions and it may be that in some other case it will be useful for both highway authorities and potential applicants to know where they stand.
14. The nature of a highway and of the public's right to the use and enjoyment of it were considered in some detail by Cranston J. in *Herrick v Kidner* [2010] EWHC 269 (Admin), [2010] 3 All E.R. 771. Having considered a number of authorities, including *Director of Public Prosecutions v Jones* [1999] 2 A.C. 240 and *Hampshire County Council v Gillingham* (unreported, 5th April 2000), he summarised the principles to be derived from them in paragraph 33 of his judgment as follows:

“. . . first, members of the public are in general entitled to unrestricted access to the whole and each part of a highway; secondly, their right to such access is principally to pass and repass but it is also to enjoy other amenity rights; thirdly, those other amenity rights must be reasonable and usual and will depend on the particular circumstances; fourthly, any encroachment upon the highway which prevents members of the public from the enjoyment of these access and amenity rights is an unlawful obstruction; fifthly, the law ignores *de minimis*, or fractional obstructions; and sixthly, a highway authority cannot deprive itself of the power to act against an unlawful obstruction by refraining from exercising its statutory powers against it, or by purporting to give it consent.”
15. In the present case the Council did not seek to persuade the court that that summary of the relevant principles was incorrect and in any event I respectfully agree with it. The very nature of a public highway is such that the right to use and enjoy it extends to the whole of its width at every point along it. Accordingly, anything that interferes with that right to more than a minimal extent constitutes an obstruction which the highway authority may be called upon to have removed. In section 130 of the Act and elsewhere a distinction is drawn between “stopping up” and “obstructing” the

highway, the former being used to describe steps taken to close off the whole width of the highway so as to render passage impossible.

16. Under section 130 of the Act the highway authority has a duty to assert and protect the rights of the public to use and enjoy the highway and section 147(2) clearly contemplates that when authorising the erection of stiles, gates or other works the authority will impose whatever conditions are required to enable the right of way to be exercised without undue inconvenience. Although the power extends to authorising works such as cattle grids with bypass gates which restrict the usable width for those on horseback, I do not think that the language of section 147 permits the erection of works which force riders, and indeed some walkers, off the bridleway altogether, even for a short distance. Stiles, which are designed for walkers to cross, and gates, which are designed to be opened by walkers or riders, in each case without leaving the highway, may be authorised provided they do not cause *undue* inconvenience. The clear implication is that such obstructions must not interfere to an undue extent with the right to pass along the highway at the point where they are installed.
17. Although I have some sympathy for the argument that a broader approach should be taken to the interpretation of section 147(2), I am unable to accept it. Section 147(1) refers to a “footpath or bridleway that crosses the land”, an expression that is apt to refer to the whole line of the route. By contrast section 147(2) refers to the exercise of “the right of way”, an expression which naturally directs attention to the nature of that right. If in section 147(2) Parliament had intended to refer to the path or bridleway as a whole, I have little doubt that it would have used the expression “for enabling the footpath or bridleway to be used”, or some similar words. Moreover, I am unable to accept Miss Stockley’s submission that the appellant’s interpretation of section 147 is unworkable in practice. What constitutes “undue inconvenience to the public” will vary from case to case, depending, no doubt on the nature and location of the footpath or bridleway in question. Each case has to be considered on its own facts and the highway authority must make its own judgment when deciding what conditions to impose.
18. For these reasons I have reached the conclusion that the Council did not have the power to authorise the cattle grid in this case and that questions posed by the Crown Court in paragraphs 33.1 and 33.2.1 of the case stated must both be answered ‘Yes’.

Exercise of the discretion

19. The relevant parts of Section 130B of the Act provide as follows:

“130B.— Orders following notice under section 130A

(1) Where a notice under section 130A(1) above has been served on a highway authority in relation to any obstruction, the person who served it, if not satisfied that the obstruction has been removed, may apply to a magistrates’ court in accordance with section 130C below for an order under this section.

(2) An order under this section is an order requiring the highway authority to take, within such reasonable period as may be fixed by the order, such steps as may be specified in the order for securing the removal of the obstruction.

...

(4) . . . the court may make an order under this section if it is satisfied—

(a) that the obstruction is one to which section 130A above applies . . . ”

20. Although under section 130B the court has a discretion whether to make the order sought, provided the necessary conditions are satisfied, the Crown Court held that the cattle grid had been lawfully authorised. Accordingly, although it represented an obstruction, it did not, in its view, fall within section 130A. The court therefore had no jurisdiction to make an order under section 130B and no question as to the exercise of the discretion arose. The court’s statement that it would not have exercised its discretion in favour of granting an order against the Council must be understood as nothing more than an indication of how it would have acted if it had held that the obstruction was unlawful.
21. On the view that I take of section 147, however, the obstruction could not properly be authorised and therefore must be treated for present purposes as unauthorised. It follows that the court has a discretion whether to make the order sought by Mr. Kind. In my view that discretion is one to be exercised by the Crown Court itself and accordingly the matter will have to be remitted to that court to enable it to make its own decision. For that reason I would decline to answer the question posed in paragraph 33.2.2 of the case stated. However, since the court has made it clear how it would have exercised its discretion and has asked this court to say whether such a decision would have been lawful, I think we should grapple with the question and express our conclusion on the point.
22. A number of factors have a particular bearing on the exercise of the discretion in this case, some of which are of general application and some of which are peculiar to the arrangements affecting this particular bridleway. The starting point is the duty imposed on the Council as the highway authority by section 130 of the Act to assert and protect the rights of the public to the use and enjoyment of the bridleway and to prevent, as far as possible, its stopping up or obstruction. The section as a whole is drafted in a way which reflects the fundamental importance of the right to use and enjoy the highway, an importance which is emphasised by subsection (2), which empowers any council to assert and protect those rights in relation to any highway within its area, even though it is not itself the highway authority. If the obstruction in question is partial, questions of convenience in the use and enjoyment of the highway may arise, but where, as here, the obstruction is to the whole width of the highway its effect is to stop up the highway at that point. Clearly, that is far more serious than a partial obstruction or an obstruction such as a stile that can be surmounted, albeit with some effort. In my view where the obstruction has the effect of stopping up the

highway very powerful considerations indeed are required to justify the refusal of an order to take steps to secure its removal.

23. In the present case it is said that the provision of the by-pass and the attachment to the authorisation of a condition that it be properly maintained and made available for use by the public at all times is sufficient to outweigh the importance of keeping the highway itself open, since it enables the public to travel the whole length of the bridleway without any real inconvenience. Moreover, any failure to comply with the condition would render the cattle grid an unlawful obstruction and entitle the Council to take steps to have it removed. To that extent the authorisation is not irrevocable. It is also said that the cost to the landowner and the Council of securing the removal of the cattle grid would be out of all proportion to the benefit that the public would derive from it.
24. The practical effect of allowing the present arrangements to remain in place would be to divert the bridleway around the cattle grid, but without creating any legal rights over the diversion in favour of the public. The public's rights could be preserved by dedicating as a highway the land over which the diversion passes, but the landowner has not offered to take that step and the Council has not requested it. Section 116 of the Act contains provisions under which a highway authority can seek an order from the magistrates allowing it to stop up or divert a highway, subject to compliance with a procedure which includes giving formal notice of the proposal to the local council. Under that procedure anyone who uses the highway and anyone who would be aggrieved by the making of the order are among those who have a right to appear before the magistrates and be heard. In addition, section 119 gives local councils the power to divert footpaths and bridleways if they consider that it is in the interests of the landowner to do so, but that power can only be exercised in accordance with the procedure set out in the Act. Both types of order require the consent of the landowner over whose land the diversion would pass and the order, once made, creates a highway along the line of the diversion which the public has the same right to use and enjoy as over the remainder of the highway. In my view the existence of those provisions is an important factor to take into consideration, since, if the court were to exercise its discretion against granting the order which Mr. Kind seeks, it would effectively allow the Council to achieve a similar outcome without complying with the statutory procedures and without obtaining for the public the rights that they would normally enjoy over that section of the bridleway.
25. As I have already indicated, it is for the Crown Court to weigh up the competing considerations and to decide how it should exercise its discretion, but for my own part I do not think that the balance can lie in favour of declining to make the order. The right of the public to use and enjoy the highway and the informal nature of the diversion seem to me to make that an impossible conclusion to sustain.
26. For these reasons I would allow the appeal and remit the matter to the Crown Court at Newcastle-upon-Tyne for it to make a decision. If, as I assume it will, the court makes an order requiring the Council to take steps to secure the removal of the obstruction further costs are likely to be incurred by the Council and the landowner in implementing it. I think it is worth recording at this point, therefore, that the appellant indicated through his counsel that, if an order of that kind were made, he would not

oppose an application for it to be stayed for sufficient time to enable discussions to take place between the Council and the landowner with a view to dedicating as part of the bridleway the land over which the diversion passes.

Mr. Justice King:

27. I too would allow this appeal for the reasons given by Moore-Bick L.J. and would remit the matter to the Crown Court for it to make a decision whether to make an order under section 130B. I also think that, although it is for the Crown Court to exercise its own discretion, the balance of the competing considerations applicable in this case cannot be in favour of declining an order given that the obstruction closes off the entire width of the bridleway and in effect stops up the highway at the material part. The condition for the continuous availability and proper maintenance of the off-highway by-pass attached to the purported authorisation under section 147 cannot be put into the balance, since the court will necessarily be proceeding on the basis that no valid authorisation and hence no enforceable condition exists.