



Neutral Citation Number: [2020] EWHC 1993 (Admin)

Case No: CO/3369/2019

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

Wrexham Law Courts  
Bodhyfryd, Wrexham, LLP 7BP

Date: 30/07/2020

**Before:**

**HIS HONOUR JUDGE JARMAN QC**

Sitting as a judge of the High Court

**Between:**

**NETWORK RAIL INFRASTRUCTURE LTD**

**- and -**

**WELSH MINISTERS**

**Claimant**

**Defendants**

**(1) CONWY COUNTY BOROUGH COUNCIL**

**(2) GUTO BEBB**

**(3) MIKE PRIESTLEY**

**(4) RAMBLERS**

**(5) ROGER AND GLENYS ARDEN**

**(6) J AND K PITT**

**Interested Parties**

**Mr Juan Lopez** (instructed by **Eversheds Sutherland (International) LLP**) for the **claimant**  
**Mr Gwion Lewis** (instructed by **Government Legal Department**) for the **defendants**

Hearing dates: 16-17 July 2020

## **Approved Judgment**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30 am Thursday 30 July 2020.**

## HH JUDGE JARMAN QC:

### *Introduction*

1. By a decision dated 18 July 2019 (the decision) an inspector appointed by the Welsh Ministers confirmed the Conwy County Borough Council (Footpath No 73 in the community of Conwy) Definitive Map Modification Order 2016 (which council and order I shall refer to as such) and the existence of a public footpath over land in Conwy owned by the claimant. The description of the footpath (the footpath) given in the order, which was made under the Wildlife and Countryside Act 1981 (the 1981 Act) is:

“A Public Footpath, that is a public right of way on foot in the Community of Conwy, beginning at a ladder stile adjacent to a bus shelter on the southern side of Glan-y-Mor Road at grid reference SH 78621 78495 and proceeds over the stile and over two sets of railway lines in a south easterly direction for approximately 30m then over a stone stile to terminate at the junction with the coastal/cycle path at grid reference SH 786257 as indicated by a broken black line on the Order Map.”
2. It is important to note at the outset the limited extent of the footpath so confirmed. It starts and ends at boundary features enclosing two railway branch lines from Llandudno Junction to Llandudno, which features are surmounted by the wooden and stone stiles referred to. The other side of the stone stile a cycle path runs along the top of sloping masonry, as annotated on the plan forming part of the order. This masonry was constructed to support the lines and encroaches over the high water mark of the River Conwy estuary. As is clear from the order and the plan, the footpath as confirmed stops short of the cycle path and the sloping masonry.
3. An application to record that route was made by the second and third interested parties. The claimant objected to the making of the order and so a three day hearing was held locally before the inspector, at which the first interested party (the council) took a neutral stance, but the making of the order was supported by the other interested parties in these proceedings.
4. The wooden stile was removed in 1992 and so called into question the use of the footpath. The inspector considered whether 20 years user of the footpath as of right, that is not by force or stealth or permission, was established immediately prior to 1992 so as to amount to dedication of a public way under section 31 of the Highways Act 1980 (the 1980 Act). That provides that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate.
5. The inspector also considered the claimant’s submission that pursuant to the Railway Regulation Act 1840 and the Regulation of Railways Act 1868 any such use would amount to a criminal offence. She decided that it was not possible to reach a firm conclusion on criminality given the period under consideration and the lack of

evidence regarding user and what occurred at the time. She had regard to the decision of Dove J in *Ramblers Association v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 716 (Admin), in which he upheld a decision of another inspector to the effect that dedication of a public right of way over an operational railway would be incompatible with the statutory objectives of the claimant to provide a safe and efficient railway and its duty to ensure the safety of the public and its passengers. The inspector in the present case said that if that was the totality of the evidence, she may have concluded that it was not possible for dedication of a public right of way to have occurred at common law.

6. However, the inspector then observed that the case she was dealing with differed from that of *Ramblers* in that she had substantial documentary evidence from before and at the time of creation of the railway, and that if that evidence supported the existence of a path on the claimed route prior to or at the time the railway was constructed, that would suggest that the claimed footpath pre-existed the railway and had been dedicated at some point in the pre railway age. In that case statutory incompatibility would be irrelevant as the right of way would pre-date the railway.

*The inspector's conclusion on a public right of way pre 1853*

7. The inspector then examined the documentary evidence in turn and dealt with OS maps, an 1840 Tithe map, railway plans, and other documents. Her core reasoning in confirming the order was that she was satisfied that the evidence pointed towards the order route being available on the ground and used by the public on foot before the statutory process necessary to construct the railway lines was commenced in 1853. The reasoning is summarised in paragraphs 61-63 of the decision as set out below, after a finding that the claimant's predecessor had indicated a lack of intent to dedicate a right of way since 1992.

“61. Nevertheless, bringing all the threads together, I find the evidence in relation to the Order route to be more probable than not of it being a historical footpath predating the railway. In particular the Tithe map and early OS mapping strongly confer a track leading to the foreshore and are suggestive but not determinative of a public road, This track provided the only access in the local area to the foreshore, ferry links and onwards travel to Conway. In later mapping this track became Pentywyn Road.

62. I have no evidence that this link between the track and the foreshore was severed other than during the construction of the railway. At this time the railway provided both a pedestrian and vehicular crossing over the rails and constructed a new slipway which did not preclude public use. This is most clearly shown on the 1882 Railway Plan, which was completed post construction of the original branch line. The newspaper article, dated 1899, suggests continued use of the foreshore from Tywyn towards Llandudno, accessed using a crossing at Tywyn.

63. Although finely balanced in this case, I am satisfied that the evidence points towards the Order route being available on the ground, pre railway, that was used by the public on foot. Accordingly, all subsequent use will be use pursuant of the pre-existing right and the submissions regarding statutory incompatibility are irrelevant, the right of way having pre-dated the railway.”

8. Unsurprisingly, as these passages demonstrate, the evidence as to use by the public of the order route prior to construction of the railway lines consisted largely of what could be taken from maps and plans and in particular Tithe and OS maps, and plans forming part of the enabling statutes for construction of the railway lines.
9. The lines were built as a branch line from the Chester and Holyhead Railway to connect with St George’s Harbour at Llandudno Bay to the north. The foreshore referred to is that of St George’s Channel where the River Conwy flows into the Irish Sea, just to the west of Tywyn. The town of Conwy lies opposite on the other side of the channel. The ferry referred to operated across the channel between these communities before the construction of the suspension bridge across the River Conwy from Conwy to the opposite part of the foreshore. The construction of the bridge, designed by Thomas Telford, commenced in 1822 and was completed in 1826.

*The nature of the challenge*

10. The claimant’s challenge to the inspector’s reasoning is made under schedule 15 paragraph 12 of the 1981 Act which provides as follows:

“Proceedings for questioning validity of orders”

12(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.

(2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.

(3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever.”

11. That statutory formulation is a familiar one in respect of the right to challenge orders made by inspectors under statutory powers, and it follows that the general principles

of judicial review are applicable to this challenge (see *R Durbin v Welsh Ministers* [2014] EWHC 4458 (Admin).)

12. Those principles were conveniently summarised in respect of decisions by or behalf of ministers in *Seddon Properties Ltd v. Secretary of State for the Environment* (1981) 42 P&CR 26 by Forbes J, which so far as presently material may be further distilled as follows:

“The Secretary of State must not act perversely. That is, if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion that he did reach, the decision may be overturned...

In reaching his conclusion the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant...

The Secretary of State must abide by the statutory procedures...

The Secretary of State in exercising his powers, which include reaching a decision such as that in this case, must not depart from the principles of natural justice...

Since the courts will only interfere if he acts beyond his powers (which is the foundation of all the above principles)...the courts will not entertain a submission that he gave undue weight to one argument or failed to give any weight at all to another. Again, in doing so he must, at any rate if substantial issues are involved, give clear reasons for his decision.

In approaching this task it is no part of the court's duty to subject that decision letter to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph.”

13. Further guidance on the adequacy of reasoning in this context was given by the House of Lords in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR 1953. Lord Brown at paragraph 36 said:

“The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration...A reasons challenge will only succeed if the party aggrieved can satisfy the court that he

has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

14. In *Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council* (1993) 66 P. & C.R. 263, Sir Thomas Bingham MR said that the question, when dealing with an allegation of inadequate reasoning, is whether the decision letter “leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication”.
15. The claimant accepts that the decision must be read fairly as a whole and that matters of weight and judgment were matters for the inspector. Nevertheless the challenge made on its behalf is put under five main heads, namely irrationality in the overall conclusion and the treatment of certain documents, material errors of fact, taking into account immaterial considerations and/or failing to take into account material considerations, inadequate reasons, and breach of natural justice or procedural or substantive unfairness.
16. The Welsh Ministers, in seeking to resist that challenge, do so on the basis that it is in essence an attempt to relitigate the merits of the claimant’s case before the inspector and amounts to no more than disagreement with conclusions to which the inspector was entitled to come on the evidence presented at the hearing. I shall deal with each of the grounds in turn.

*Ground 1: Irrationality*

17. Mr Lopez, for the claimant, emphasises that this ground applies to the overall conclusions of the inspector but also to her treatment of several different pieces of evidence. The overall conclusion is irrational he submits, as the evidence adduced on behalf of the claimant was that the railway lines over which the footpath runs were built on land reclaimed from the sea. Accordingly, any public use of a way before 1853 could not have been along the order route, but if anywhere along a pre-reclamation route. In his skeleton argument he claims that the decision is entirely silent on the reclamation point.
18. However, the inspector expressly records at paragraph 37 of the decision that the claimant asserted that the claimed footpath cannot have been in existence at any time before the railway was constructed given that the line of the railway as built was on land that had to be reclaimed from the sea.
19. That comes within a section headed “Railway plans” from paragraphs 34 to 44. In paragraph 35 the inspector observed that the statutory process required to authorise railway schemes was exacting and that the book of reference and deposited plans needed to be of a high standard, and ended the paragraph with this observation:

“Railway plans, which were normally specifically surveyed for the scheme, usually record topographical detail faithfully.”
20. In paragraphs 38 to 43 the inspector then dealt with the relevant plans from 1853 to 1882. The latter plan in particular shows the railway lines at points built on a stone

retaining wall or embankment which is situated beyond the high water mark but some way short of the low water mark.

21. Whilst these marks were not referred to by the inspector, earlier on in the decision at paragraph 27 she referred to evidence linking the ferry with Tywyn and the visits of non-conformist preachers visiting “Tywyn the Ferry” many times from 1771, and continued:

“Moreover, it would appear from the submitted Admiralty Charts that the location of the crossing here was dictated by the depth of the water and the location of sand bars within the estuary.”

22. The evidence given on behalf of the claimant at the hearing was that the sloping masonry dropped from rail level with its toe directly into the estuary waters, being below the water mark where there was not a beach or path. However, it is clear from the order plan that the footpath ends some distance from the toe of the masonry at this point. Moreover, as Mr Lopez had to accept and as is clear from some of the plans, including some of the railway plans, the water mark here referred to is the high water mark. The low water mark at this point shows that apart from the times of high tide, the footpath does lead to foreshore between the two water marks. I do not accept that this means that one end of the footpath would be under water for substantial times of the day, as submitted by Mr Lopez, and although clearly frequency of user may be affected by the high tide that is unlikely to have been significant.

23. Mr Lopez criticises the inspector’s treatment of each of the various pieces of documentary evidence, and so it is necessary to refer to this in some detail. I shall deal with them in the same order as the inspector did.

24. The first category of such evidence are early OS maps and an 1840 Tithe map. The oldest map before the inspector was the OS map for 1819. This shows the town of Conwy, and on the opposite shore across the estuary a building marked as Ferryhouse. A road or track runs from there to Pen-y-bont and Tal-y-sarn to the east and beyond. I shall refer to this as a road to avoid confusion with another track shown on later OS mapping which the inspector dealt with later on. She in places in the decision refers to this road also as a track, but it is clear enough from the context to what she referred. The community of Tywyn is not marked, although the community of Pen Towyn (this was spelt Pen Tywyn on later maps and in English means the top of or end of Tywyn) is shown further to the west, just to the west of Tyn-y-coed. The road is shown running from here right down to the foreshore, where further buildings are shown marked “Store houses.” Just to the west of this are shown a scattering of more buildings marked as Pen-y-bryn. It is where this road meets the foreshore that the footpath lies.

25. At paragraph 27 the inspector said this:

“27. The 1819 OS map clearly shows a route from the estuary foreshore close to ‘Store houses at Pen-y-bryn towards Tyn-y-coed. I was informed at the inquiry that the Store houses were historically used in conjunction with a ferry which operated from a point close to ‘Ferryhouse’ over the Conwy. The Ferry

was thought to have been in existence from c.1285. Goods (including stone to build Conwy Castle) and people were said to walk/be transported along the foreshore to either access the road towards Tyn-y-coed or the ferry. The following account is made by Fiona Richards in 'Tywyn in Victoria Times' revised in 2012, which links Tywyn to the ferry: "*Non conformity had taken hold in Tywyn and one of the first non-conformist preachers to visit the area was Thomas Hughes who lived in Mochdre. He visited 'Tywyn the Ferry' many times, the first probably in 1771.*"

26. There is then the reference to the Admiralty Charts cited above, and at paragraph 28 the inspector continued:

“28. No other routes other than that at Store houses and Ferryhouse provide direct access to the estuary foreshore. I see no reason to doubt that the public extensively used this route to access the foreshore and walk along it.”
27. Mr Lopez is critical of the inspector's treatment of the evidence regarding the ferry and submits that there was no evidence as to frequency, status, disembarkation points or timescale of the operation of the ferry. Given that it is likely that the ferry fell into disuse after the construction of the bridge in 1826, that is hardly surprising, and the inspector had to consider these matters on the basis of likelihood to be drawn from the available documentation.
28. Mr Lopez submits that the reference to Thomas Hughes cannot be taken to suggest that that particular preacher used the ferry. As it is said he came from Mochdre, and there is a place with that name to the north east near Colwyn Bay, that may well be right. But the inspector did not find otherwise. The importance of the reference is that Tywyn was linked with the ferry which gave the location. The precise point of disembarkation, which as the inspector observed was dependent on water depth, was not as important as the fact found by her that access to the foreshore was gained at Store houses over a route very similar to the order route to access the foreshore as a destination or for onward travel. Onward travel via the ferry was just one method and direction of onward travel, and in the context that the foreshore was also a destination.
29. Mr Lopez also criticizes the inspector for failing to deal with the possibility that the ferry may not have been used by the public as of right, but only by particular groups such as fishermen and miners and then only permissively. However, there was no hint in the documentation to suggest this might have been the case, and the inspector was entitled to have regard to the evidence of the Store houses and the Ferryhouse adjacent to the foreshore and to the link between the ferry and Tywyn in seeing no reason to doubt that the public extensively used this route to access the foreshore and walk along it.
30. Mr Lopez further submits that the inspector's reference to no other routes other than that at Store houses and Ferryhouse providing direct access to the foreshore is incorrect, as there are clearly such access points further to the south east, near to Pen-y-bont and Tal-y-sarn, for example. However, in my judgment paragraph 28 can only



sensibly be read as referring to the vicinity of the claimed footpath route rather than the estuary foreshore in any wider meaning.

31. The inspector then deals with later OS maps in these terms at paragraph 29 and 30:

“29. This route is again shown in the 1841 OS map, although at this time the route along the foreshore to Ferryhouse is shown as a formal track. At Ferryhouse the then newly constructed Conwy Bridge is shown. It is highly probable that a track was constructed to provide a more reliable link to and from the bridge. Network Rail stated that it was this track which severed the right of way and the public would have no longer needed access to the estuary at this point. However, the 1841 OS map shows a small spur towards the estuary, below the ‘Storehouses’ which may have provided a slipway for boats and access to the estuary for those walking towards Llandudno, Great Orme or for people foraging for seaweed or shellfish. However, I accept that given the construction of a track towards Conwy the public would no longer need to access the foreshore to reach Ferryhouse, but there would be nothing to prevent them from continuing to doing so.

30. The 1862 and 1889 OS maps shows the railway running along the seaward side of the routes described above. Whilst the scale of the map makes it difficult to assess in detail the construction of the railway was over the slipway. The railway authority constructed a new slipway, which is clearly shown on the 1889 map. These maps do not indicate a level crossing at this point. However, other level crossings indicated on the Railway Deposit Plans are also not shown.”

32. Mr Lopez submits that it is not clear which route the inspector says is again shown on the 1841 OS map. In my judgment it is tolerably clear from paragraphs 28-29 that this route is the one which provided direct access to the estuary foreshore at Store houses. That is still shown clearly on the 1841 OS map. The other direct access at Ferryhouse is not shown and Ferryhouse is not marked, because the bridge at this point connects with the road to the east and the new track to Store houses. Moreover, it is at Store houses that the footpath was confirmed.
33. Mr Lopez further submits that the inspector’s reference to a small spur at this point is unclear and was not canvassed at the hearing. This reference was made in the context of the claimant’s contention at the hearing that the new track from the bridge to Store houses would have severed the right of way. As the inspector acknowledges, the scale of the map makes it difficult to assess in detail. She alluded to the possibility of the small spur providing a slipway, but it is not clear where on the 1841 OS map that was. Mr Lewis for the Welsh Ministers suggests that it is a small spur to the west of Store houses serving scattered buildings and leading to the estuary at that point. The word used by the inspector - “below” Store houses - may also suggest the spur is a very small appendage in the direction of the estuary where the road from Pen-y-bryn to Tyn-y-coed meets the track.

34. Whichever it was, it is clear from these paragraphs and from paragraphs 61 and 62 that the inspector did not make a finding as to the likelihood of the spur providing a slipway or that this was along the order route but relied on the possibility in rejecting the claimant's contention that the track had severed that link. It is clear from paragraph 61 that it was the road leading to the foreshore shown on the OS mapping, and not the slipway on the foreshore, which the inspector found was suggestive but not determinative of a public road. That was not irrational. Moreover, it is clear that the later OS mapping referred to in paragraph 30 showed that the railway was constructed over this slipway (whichever route it took) and that a new slipway on a different line to the east had been constructed with the railway.
35. The next criticism made by Mr Lopez was that the inspector in paragraph 33 said that overall, the Tithe and OS maps do not show conclusively whether the routes depicted were public or private but may assist in conjunction with other information. He submits that this is equivocal and the proper conclusion is that such mapping provides no evidence of the status of a way (see *Maltbridge Island Management Company v SSE (2) Herefordshire CC* [1998] EWHC Admin 820 and *R (Elveden Farms Limited) v SSEFRA* [2012] EWHC 644 (Admin)).
36. However, this point was expressly acknowledged by the inspector in paragraph 26, where she went into detail about the formulation of OS maps and the disclaimer they carry to the effect that a track or way shown on them is not evidence of the existence of a public right of way. In paragraph 31 she made a similar point in relation to Tithe maps, which as she observed were drawn up to show the productiveness of land for tithe assessment and that a private, as well as a public, right of way can diminish such productiveness.
37. After dealing with the OS maps and Tithe map, the inspector went on to deal with the railway plans. It is clear that she did not regard the books of reference as giving any indication whether any way dealt with was public or private. In paragraph 39, she refers to a deposited plan dated 1856 which shows an occupational level crossing at the point of the claimed footpath after the building of the railway. She also referred to the Law Commission Consultation Paper 194 dated 2010 which stated that an occupation crossing occurred where the railway crossed a private road or way which served a farm, hamlet of village, and continued:

“We think that normally the private road or way would have a pre-existing right of way over it.”

38. In paragraph 40, the inspector said this:

“40. It is Network Rail's case that this occupation crossing was provided solely for fisherman, who required access to the foreshore. However, I have no agreements or other evidence to support this claim and given that a stile and unlocked gate were provided there was nothing to prevent it being used by anyone. Indeed, given the historical access to the foreshore at this location there would be no reason for the public to doubt that this was not to continue via the level crossing.”

39. That case was stated by Jeremy Greenwood, the claimant's head of liability negotiations. He said at the inquiry that the crossing was provided pursuant to section 68 of the Railway Clauses Consolidation Act 1845 to make good the interruption of private access confined to private users, probably fishermen and/or miners. Mr Lopez submits that the inspector misunderstood this evidence and that the provision of a stile and unlocked gate is not an indication of public rather than private use. However, the inspector's reference to these features was in the context of rejecting the claimant's case that the occupation crossing was provided for fishermen. Clearly no witness could give direct evidence of the particular use, and the inspector was entitled to draw proper inferences from the documents. She was entitled to take into account the absence of evidence to support the claimant's contention, and was also entitled to observe that given the historical access to the foreshore at this location there was no reason for the public to doubt that it was to continue after construction of the railway.
40. The inspector went on in paragraph 41 to observe that a deposited plan in 1861 did not appear to show a crossing or a slipway, but that a plan attached to a conveyance in 1863 did show a slipway which continues to provide some evidence of a point of access to the foreshore. In paragraph 42 she referred to a railway map dated 1882 which clearly showed a crossing over the railway to link with the slipway and also a double-pecked line linking the road to the foreshore which seemed to infer both a vehicular and a pedestrian crossing.
41. Mr Lopez submits that it was irrational for the inspector to have regard to what was on the ground after the construction of the railway, when it was the pre-existing use which she was concerned with. I do not accept that submission. The inspector was entitled to take this into account as some evidence of pre-existing use and the weight to be attached to that was a matter for her.
42. The same applies to a letter from an asset liability manager of the claimant's predecessor, Railtrack Plc, to the council dated 29 November 2001. In the letter the manager said that he had visited the crossing at Tywyn and consulted Railtrack's previous records. The letter continued:
- “This was once a vehicular level crossing probably constructed at the time of the advent of the railway here. Although the crossing is now disused, in as far as vehicles are concerned, separate pedestrian facilities were provided and are perpetuated. I cannot trace any signs have ever been displayed, at this site, which would lead any user to believe there was an intention by Railtrack or its predecessors not to dedicate the route to the public.”
43. The separate pedestrian facilities referred to ties in with what is shown on the 1882 plan. At paragraph 60 the inspector observed that that letter would seem to confirm that public use had been established. Mr Lopez submits that that was a misunderstanding on the part of the inspector of the letter, but in my judgment the inspector was entitled so to interpret it.
44. After dealing with the railway plans, the inspector then went on to deal with prints, postcards, and photographs. In paragraph 45 she said this:

“The first is an 1822 watercolour, by Samuel Austin, which shows a track leading down to the foreshore, said to represent the slipway (or access to the foreshore) and the track to Tyn-y-Coed.”

45. She also referred to prints dated 1850 and 1861 showing people and boats on the Tywyn side of the foreshore. She rightly reminded herself in paragraph 46 that the 1822 watercolour and other prints were creative works and their accuracy and reliability was unpersuasive, and remarked that taken on their own they do not demonstrate public use. In my judgment it is clear that the inspector accorded little weight to these works which she was entitled to do. She also noted that a later photograph when motor cars first appeared, showed a wooden style over onto the railway at this point.
46. The inspector then dealt with other matters which took the issue of a public right of way along the footpath no further, before concluding this section of the decision on documentary evidence by reference to an article (the article) published in the Llandudno Advertiser on 22 December 1899 entitled “A Short History of Old Llandudno.” The authorship of the article is not revealed, but it is archived in the National Library for Wales.
47. It is said in the article that between 50 and 60 years ago, so between 1839-1849, Llandudno was a very small village where fishing and mining were the staple industries. Conwy was a very important market town and the centre of commerce for the locality. Goods were brought from there to Llandudno by horse and cart several times a week. One access to Llandudno was said to be along the sand on the western or northern side and then on through Llanrhos. The article continued:

“The other access to the town was along Conway Shore, turning to the left at Tywyn, following along the Beach, passing Deganwy (which was then a gentleman’s residence), turning down to the sands, passing up to “Morfa Uchaf” (Higher Marsh), just opposite the present west entrance to Gloddaeth Street.”
48. The mining referred to was mining of copper ore from the Great Orme which towered then as now over Llandudno. The article went on to deal with post office business in the following colourful way:

“All letters, papers, parcels etc, were carried to and from Llandudno by a short, hardy, strong man – John Hughes by name, who always used to carry the bags to and from Conwy by the sands. He would arrive here each day about 8am, then walk up to Penygwaith, do a hard day’s work, and return to Conwy about 6pm; this he did for many years.”
49. The inspector cited these passages in paragraph 55 of the decision (and referred to the article in paragraph 61) and said this in paragraph 56:

“56. It would appear from this that people would have used the road/track (constructed c.1841) along the shoreline to Tywyn,

where this road ended. At this point it would be highly probable that people then used the rail crossing at Tywyn to access the foreshore, particularly as no other similar crossing point hereabout has been brought to my attention. It is clear that the foreshore was accessed by a variety of people and not solely fishermen. Tywyn was a thriving area at this time and had a population greater than Deganwy.”

50. In a footnote to that paragraph the inspector clarified her reference to using the rail crossing as follows:

“Given the construction of the railway in 1858, the slip way at Tywyn would have been used to get down to the foreshore and continue their walk to Llandudno.”

51. Mr Lopez submits that the inspector overlooked the reference in the article to two accesses from Conwy to Llandudno. However, far from overlooking that reference, the inspector cites the article as showing this access as “another” access. The article makes clear that the other was an inland route via Llanrhos. Mr Lopez further submits that it was irrational for the inspector to conclude that access was along the shoreline to Tywyn, when there are more prominent roads shown on the 1841 OS map which would have been used by pedestrians between Conwy and Llandudno, such as the one via Marle. However, he was not able to answer how those roads would sit with the reference to “...along Conwy shore turning left at Tywyn...”
52. In my judgement the inspector was entitled to conclude that that reference was to access along the track appearing in the 1841 OS map from the bridge to Tywyn and then turning left at Tywyn onto the beach. This ties in with her rejection of the claimant’s contention that this track severed any link between Pentwyn Road and the foreshore at that point. The inspector’s reference to people using the rail crossing at Tywyn in this context also shows the timescale which she drew from the article.
53. Mr Lopez submits that this access would have been less used if there was another access, that the fact that Llandudno was a very small village meant that any such use would not have a sufficient quality of public use, that the reference to one postman would not have that quality and that in any event that may have been a permissive service. In my judgment there is nothing in any of those points. Although Llandudno was a small village, the community of Tywyn as found by the inspector was thriving. The vivid account of the postman was just one example of use of access between the commercial centre of Conwy and the village of Llandudno, the others being of trading access.
54. After the inspector dealt with that article, under a subheading “Whether the footpath subsists on the balance of probabilities,” she concluded in paragraph 57 that taking the documentary evidence as a whole, a route very similar to the order route has existed for a long time and it is clear that that route had been used by the public for access to the foreshore as a destination or for onward travel. In the next three paragraphs she dealt with the issue that user after construction of the railway was “as of right” and concluded that it could not be presumed that a public footpath had been dedicated in accordance with the provisions of the 1980 Act.

55. That led to paragraphs 61-63 cited above, in which the inspector concluded that the evidence pointed to the order route being available on the ground, pre-railway, that was used by the public on foot.
56. Mr Lopez submits that the reference to the Tithe map and the early OS mapping “in particular” in paragraph 61 shows that the inspector placed impermissible weight on these documents as showing public as opposed to private use. In my judgment that is not a fair reading of the paragraph, which begins “...bringing all the threads together...” It is clear that the inspector placed particular weight on these maps to show a road leading to the foreshore. They were, she concluded, “suggestive” but not determinative of a public road. However, it is also clear from the following sentence as to why she was able to reach that conclusion. It was not the mere fact that the road was shown on the mapping. It was because it provided the only access in the local area to the foreshore, ferry links and onwards travel.
57. In my judgment these and all the points taken by Mr Lopez to show the decision was irrational amount to attempts to reargue the merits of the issues before the inspector or involve a misreading of the evidence or of her findings. The ground is not made out.

*Ground 2: material error of fact*

58. Mr Lopez accepts that there is what he terms overlay between the points which he says support ground 1 and those supporting ground 2.
59. It is not in dispute that for a material error of fact to be properly challengeable, four conditions must be fulfilled (per Carnwath LJ (as he then was) in *E v SSHD* [2004] EWCA Civ 49 at [44]-[67]). First, there must have been a mistake as to existing fact. Second, the fact or evidence must have been established in the sense that it was uncontentious and objectively verifiable. Third, the applicant must not have been responsible for the mistake. Finally, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.
60. Most of the alleged errors involve points already made under ground 1, namely public use, the spur/slipway and new slipway, the severance by the new track of any access to the foreshore at Store houses or the existence of such access, the inspector’s conclusion that the 1892 plan showed a separate pedestrian access, and her conclusions as to the ferry. In my judgment none of these involve uncontentious or objectively verifiable facts. They involve drawing inferences of fact from documentary evidence as to the likelihood of the existence of a public right of way over the footpath before the statutory railway process commenced in 1853.
61. One additional error of fact alleged is that the inspector at paragraph 11 indicated that the claimant had argued that the application to confirm the public right of way was motivated by the opening of the cycle path next to the railway in 2006, when that claim was not in fact made. No transcript is available of what was said at the hearing, but even if this had not been claimed, it is difficult to see how this played a material part in the inspector’s reasoning that a public right of way had been established. Ground 2 is not made out.

*Ground 3: Material/immaterial considerations*

62. Mr Lopez says in his skeleton argument that for the reasons given under grounds 1 and 2, the inspector has alternatively failed to take into account material considerations and/or has taken into account immaterial considerations. Two further aspects are now relied upon by Mr Lopez, having abandoned the third referred to in his skeleton argument, namely that the inspector failed to take into account; first, that none of the post railway OS maps show a way over the railway lines; second, the significance of the stile and gates installed on construction of the railway.
63. For reasons already given, in my judgment none of these points show a failure to take material points into account or taking immaterial points into account. The inspector was not required to comment on every piece of evidence presented at the hearing. The inspector dealt with the stile and gates in paragraph 40.

*Ground 4: Inadequate reasoning*

64. The lack of adequate reasoning challenge is particularly focussed upon evidential leaps and unfounded speculation from the OS and Tithe mapping to a conclusion of public status.
65. However, it will be apparent from my conclusions under ground 1 that in my judgment the reasoning of the inspector was adequate, and any doubts raised by Mr Lopez are merely forensic doubts. It is reasonably clear in particular from her conclusions at paragraphs 61-63 how and why she reached her conclusions on the main issues, and I cannot see how the claimant has been substantially prejudiced by any want of reasoning.

*Ground 5: Breach of natural justice; procedural/substantive unfairness*

66. Mr Lopez, who represented the claimant at the inquiry, submits that the inspector did not give the claimant an opportunity to comment upon the interpretations of the documents which she had in mind or upon the Law Commission Consultation Paper 194 which was not before the inquiry. Moreover, she drew from another inspector's decision in 2012 which in turn summarised the Planning Inspectorate's "Definitive Map Orders: Consistency Guidelines" and Training Manual without allowing the claimant an opportunity to comment on these matters. She did so in her approach to such issues as Tithe mapping, deposited railway plans and the book of reference, and user evidence. Finally, she did not address her mind to whether the weight to be afforded to those witnesses who were not cross-examined should be reduced.
67. The guidelines referred to are within the public domain, whereas access to the training manual is not so easily available.
68. As for the first of these points, Mr Lewis relies on the observation of Lord Diplock observed in *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369D-E as follows:

“Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the

parties may have a further opportunity of criticising his mental processes before he reaches a final decision.”

69. In my judgment that reasoning is equally applicable (if not more so) to the inspector’s thought processes on the documentary evidence and is sufficient to dispose of the first point. In relation to the Law Commission Consultation Paper 194, the relevant extract was cited in the applicants’ statement of case.
70. The training manual draws heavily in turn upon the guidelines, and as Mr Lewis submits is generic guidance which, so far as material, is not controversial as applied in this particular case. For example, the advice as to user evidence was not central to the reasoning of the inspector in her approach to documentary evidence in deciding whether on the balance of probabilities a pre-railway public right of way was in existence. For similar reasons, the fact that some witnesses were not cross examined takes the matter no further.
71. Mr Lopez pointed to what he termed nuances between the guidance and how it was paraphrased in the 2012 decision of the inspector’s colleague, including the approach to user, OS and Tithe mapping, and railway plans. However, I am not persuaded that such nuances impacted upon the inspector’s conclusions to the extent that failure to flag up reliance upon her colleague’s 2012 decision which in turn referred to the guidance and/or the training manual amounts to a breach of natural justice or procedural or substantive unfairness.

*Outcome*

72. Accordingly, none of the grounds of challenge to the decision are made out. The inspector rightly recognised that the issue of whether the evidence pointed towards the order route being available on the ground, pre-railway, that was used by the public on foot was finely balanced. She was entitled on that evidence to conclude that the balance tipped in favour of it being likely that there was such a route.
73. The claimant’s application is dismissed and the order stands. Counsel helpfully indicated that any outstanding consequential matters can be dealt with on the basis of written submissions, which should be filed and exchanged within 14 days of hand down.