IN THE MATTER OF THE HIGHWAYS ACT 1980 ("THE ACT")

AND IN THE MATTER OF APPLICATIONS BY THE KEEPERS AND GOVERNORS OF THE POSSESSIONS REVENUES AND GOODS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON ("THE SCHOOL") TO THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARROW ("THE COUNCIL") FOR TWO PUBLIC PATH DIVERSION ORDERS AND A PUBLIC PATH CREATION ORDER

JOINT OPINION

Introduction

1. We are instructed by Pemberton Greenish LLP, Solicitors, on behalf of the School. We are asked to advise on the merits of its applications (dated 19 March 2012) for two public path diversion orders and a public path creation agreement. We have had sight of a file of correspondence and documentation stretching back more than a decade, and we had the benefit of a site visit on 20 February 2012.

2. Underlying the applications is the ongoing conflict between the users of the School's facilities and the users of Footpaths 57 and 58. This conflict is widely acknowledged, and it has been for many years. It prompted the Ramblers Association to propose an

alternative, permissive, route for Footpath 58 back in 2000, a proposal that was adopted by Harrow LBC ("the Council"). The Ramblers Association also agreed back in 2002 to the School's proposal for an alternative, permissive, route in respect of Footpath 57. This discussion and agreement culminated in the Permissive Footpath Agreement executed on 23 May 2003. Unfortunately, this agreement has not resolved the acknowledged conflict. The School intends promptly to give notice of the closure of the permissive footpaths and the termination of the Permissive Footpath Agreement in parallel with its applications. The orders sought, if made and confirmed, should finally resolve the acknowledged conflict.

Legal tests

3. We have read the School's applications for the three orders.

4. The applications correctly identify and address the legal tests for the confirmation of (and hence the prior making of) orders under sections 26 and 119 of the Highways Act 1980. We agree with the conclusions that the statutory tests for making and confirming the orders sought are met. In fact, we would go further and add that they are easily met. On the evidence before us, we consider that it would be unreasonable not to make and confirm the orders sought.

5. The School has also quite properly addressed its mind to the width of the proposed footpaths, since width should be indicated in the orders as made. There is no statutory width, and the width proposed (maximum 1.2m, save as where indicated) is wholly appropriate.

Consultation

6. The School has, quite properly, consulted the Council and the current Footpath Checker for the Ramblers in the Borough (Graham Wright). The Council and the Ramblers' Association (now the Ramblers) have in the past adopted a sensible and pragmatic approach to resolving the acknowledged conflict. One would hope that they will adopt the same approach when it comes to assessing the School's applications.

Obstructions

7. We have seen references in the correspondence to alleged wilful obstruction of Footpath 57, together with references to sections 130 and 137 of the Highways Act 1980.

8. These references are unhelpful and inappropriate.

9. First, there is an issue as to whether or not Footpath 57 has in fact been obstructed. We note in this regard that the definitive statement describes it following an "undefined route". Members of the public are in fact able to walk unobstructed from the field stile to the termination point of Footpath 57 (where it meets Footpath 59) by taking a route between the tennis courts and the athletics track.

10. Second, and insofar as there has been any obstruction (which is not admitted or accepted by the School), there is an issue as to whether or not there has been any wilful obstruction. We would suggest that the correspondence and documentation over the years calls this seriously into question.

11. Third, a section 137 offence is made out only if free passage has been wilfully obstructed without lawful authority or excuse. We note the words of Glidewell LJ in this context: "Lawful authority includes permits and licences granted under statutory provision...".[1] The simple fact is that the gates and fences referred to by Mr Wright in his letter of 8 September 2011 were erected pursuant to the 2003 planning permission for the tennis courts and Astroturf pitches, part of the context for which was the almost simultaneous 2003 Permissive Footpath Agreement.

12. Fourth, the tennis courts and the Astroturf pitches (with their netting and gates) were laid out in 2003 and 2004 without complaint at the time and there has been no objection taken until recently. This itself demonstrates the acceptance (or at the very least the acquiescence) by the Council and the Ramblers' Association of the creation of any obstruction now alleged to be in existence.

13. In short, there are major doubts as to whether the evidential test is met in terms of section 137.

14. There is no public interest in a section 137 prosecution even if the conclusion is able to be reached that the evidential test has been met. The Council has expressly recognised that the whole issue requires further discussion and a "satisfactory permanent solution in the longer term."[2] The three applications and the orders sought are designed to achieve precisely that. The School would have a good case for obtaining a stay of any prosecution as an abuse of process, with a favourable award of costs, given in particular the agreement as to the permissive footpath and the terms of the Council's recent letter as just described.

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[1] Hirst and Agu v Chief Constable of West Yorkshire (1987) 85 Cr.App.R 143 at 151.

[2] Letter from David Eaglesham, Service Manager – Council Traffic & Highway Network Management, dated 14 October 2011.

15. The court is now very unlikely to grant any application for an injunction to remove any obstructions particularly as the School is submitting a package of proposals for the diversion of Footpaths 57 and 58 plus the creation of a new, permanent, statutory footpath linking the two proposed diverted routes.

Conclusion

16. We are able to advise on current evidence that the three applications have very good prospects of success, and that the Council (or Secretary of State) may well be considered to have acted unreasonably if such applications are refused.

JOHN STEEL Q.C.

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19 MARCH 2012