

NEW FOREST NOTES JANUARY 2004

The Verderers in the High Court

Two weeks before Christmas the Verderers were in the High Court for the first time in one hundred and nine years. This time they were effectively arguing for the right to continue enforcing their byelaws - which cover animal welfare, payments for the agisters' services and breeding control measures. Byelaw enforcement is one of the two crucial areas of the Verderers' work, the other being development control. On their previous visit to the Court in 1894, the subject under discussion was the Crown's use of steam sawing engines which were then causing serious damage to the Forest lawns. That case, involving issues which one of the judges described as "delicious" ended in an untidy and unsatisfactory compromise. This time the outcome was very different.

The 2003 case arose out of the decision to prosecute various people alleged to have broken the byelaws. The Verderers decided that, in the light of European human rights legislation, it would be preferable (perhaps essential) to use the magistrates' court rather than the Court of Swainmote established under the New Forest Acts. Proceedings were taken accordingly and two of the nine defendants pleaded guilty and were fined. The remainder pleaded not guilty. When the case was brought before a district judge in the Southampton magistrates' court, she decided that she had no jurisdiction and that if the cases were to be dealt with at all, it must be in the Swainmote, even if that would eventually lead to the failure of the prosecutions on human rights grounds. The jurisdiction of the magistrates could not be enlarged. The judge therefore set aside the convictions and fines already imposed and declined to deal with the remainder of the cases.

For the Verderers this presented a problem in that if the judge's decision was correct, it effectively meant that the byelaws were now unenforceable and that new legislation would be the only way out of the dilemma. There seemed little prospect of Parliamentary time for legislation and it was accordingly decided that there must be an appeal to the High Court. It was that appeal which was heard on 17th December.

My knowledge of London is extremely sketchy. After two Select Committees on the 1963 New Forest Bill and about a month living in the capital on and off during the opposition to the Lyndhurst Bypass Bill in 1988, I became quite familiar with parts of the Palace of Westminster, but this was my first ever visit to the Royal Courts. The building is remarkable - vaulted ceilings, stone columns, winding staircases and tiled floors, all of which can hardly have changed since the place was built. In a world increasingly dirty, noisy and disrespectful it seems an island of tradition and authority. The courtroom itself was even more extraordinary. With the exception of electric light, a few pendant microphones (apparently defunct) and a computer screen in front of the stenographer, I have no doubt that Charles Dickens would have felt himself perfectly at home there. The walls were lined with leather bound law books which, evidently, no-one ever opens: several shelves were collapsing under their loads. Heavy oak panelling and carving, uncomfortable seats which creaked horribly at the slightest movement of their occupiers and red curtains behind the judges all added to this antique atmosphere. To this, the only sharp contrast was the precision and rapidity with which the judges grasped and analysed complex questions, including New Forest matters.

I suppose it took the barristers about an hour to put their cases and at the end Lord Justice Rose said that judgement would be given in half an hour's time. Both judges had evidently been through the papers in great detail in advance of the hearing.

When we returned to our creaking seats after the prescribed half hour there was a good deal of tension. The short-term future of the Verderers' Court depended upon the judges' decision. The detail of the judgement is beyond my limited understanding of the law to explain. It is sufficient to say that much hinged upon the upon the correct interpretation of "summary" jurisdiction in relation to both the magistrates' and Verderers' courts. However, the progress of events was easier to follow. First of all Lord Justice Rose outlined the arguments we had already heard and then, after twenty minutes, he turned to the decision of the district judge. Point by point he dismissed her conclusions, each new subject being preceded by a "furthermore" By now everyone was, I suppose, fearing the "however . . ." which would have signalled the downfall of our case, but it never appeared. Eventually there came a "furthermore and finally", at which point everyone could breathe again.

The Verderers' appeal had been allowed in all respects. The two suspended convictions and fines were reinstated and the remaining (outstanding) cases were sent back to the magistrates under a different judge for determination. Finally, as perhaps the icing on the Christmas cake, the Verderers' substantial costs were awarded, to be paid out of public funds. Everyone emerged into the winter sunshine with the feeling that it had been a morning well spent.

The Verderers' decision to use the magistrates' courts for the prosecution of byelaw offences was, incidentally, confirmed by the judges. It was clear from their comments that they regarded the Swainmote court as inconsistent with European human rights legislation. That court, which had served the Forest well from 1877 to about 1970, will now disappear quietly into history, allowing the Verderers in future to concentrate their efforts on the preparation of any necessary prosecutions.

Flood reservoirs in the Forest ?

I suppose that the suggestion by the Environment Agency that huge temporary flood reservoirs should be constructed in the Forest is one of the most bizarre development proposals the Verderers have had to consider in post-war years. However, it has to be said at the outset that the plans are not nearly so devastating as a bare statement of their nature might suggest and for this reason they require very careful consideration.

The Agency has a problem with house flooding in Lymington and an alleged potential problem or a similar nature in Brockenhurst. The Lymington difficulties can be sorted out, at a price, by hard engineering in and around the town, particularly in the vicinity of the toll bridge, but there is an alternative. This comprises measures which would temporarily impound flood water within the New Forest and then release it slowly over several days. In cash terms it is a very much cheaper solution, but it carries environmental, amenity and farming costs which more than offset any financial savings. The idea is to construct low dams (the Agency calls them "bunds") across the flat-bottomed valleys of the principal rivers and streams in the catchment area north of Brockenhurst. The number, location and length of these bunds has yet to be decided and would depend upon the downstream advantages to be aimed at, but it

is clear that some would be of great length. Because the valleys are very flat in cross section and have only a slight fall, the bunds would not exceed one metre in height. They would be of natural materials except where greater strength is required adjacent to the river channels. Here the restricted outlets would regulate the flow of flood water, spreading the discharge over a period of days. The theory is that flooding in Lymington would be thereby eliminated. The Agency believes that the dams would quickly become covered in vegetation and would melt into the Forest background. They might even be used as causeways, incorporating new bridges for the convenience of commoners and their animals. For anyone familiar with the present bad crossings of the Lymington River (Highland Water), that is a not unattractive suggestion. The Agency further says that the odd additional day's flooding of Forest land every few years would not be a material problem. Once the extreme conditions had passed, everything would revert to normal.

At face value, therefore, the proposals seem fairly innocuous, but there are some serious underlying problems. Firstly, some of the bunds would be very long, stretching the entire width of the valleys. Their construction would be immensely disruptive and the initial appearance unsightly. The strengthening around the river channels would be permanently ugly. The bunds would almost certainly threaten conservation interests, woodland and archaeology. The extra flooding, while short-lived, might have damaging and largely unforeseen consequences for the exercise of common rights, public access and amenity generally. Finally, and perhaps most important of all, a very dangerous precedent would be established. Once the Environment Agency's foot was in the Forest's door, further concessions might be demanded. Moreover, if one public agency is permitted to carry out development on the Forest, others will seek to follow. In short, the Verderers are very unhappy with the proposals and are telling the Environment Agency so. Where there is a perfectly reasonable alternative, even the risk of damage to the Forest is unacceptable.

There is one other and perhaps conclusive obstacle to the Environment Agency's plans. So far, no authority under the New Forest Acts for the proposed work has been demonstrated and the Agency has been unable to show how either the Forestry Commission or the Verderers could legally grant consent, even if they wanted to. I think it quite likely that the flood reservoirs will join other peculiar schemes such as the Lyndhurst Light Railway, the Black Down rifle range and the Beaulieu Heath civil airport in the dustbin of Forest history.

Lost statistics from the past

The great tragedy of New Forest local history is that during the first half of the 20th Century, most of the pre-1877 court books and other records were stolen from or lost by the Verderers. The fact that no trace of them has come to light after thirty years of searching suggests that they could well have ended up as war salvage. Now, however, Richard Reeves of the New Forest Museum has discovered that some very extensive extracts from the lost books were prepared in the closing years of the 19th Century. These have provided the first really detailed turn-out figures for the years following the Deer Removal Act. They were prepared for a drift held in June 1864 to eight traditional New Forest pounds. The figures show a total of 1434 ponies and cattle caught, of which 1022 were cattle and 412 ponies. Ninety two owners are recorded – possibly including some duplication.

Of course figures like this have to be treated with extreme caution. Not all animals will have been caught and there would undoubtedly have been complications with stock from the Adjacent Commons, but the broad picture is interesting. Not only is the total of owners approximately one third of the reputed number today, but the number of cattle is also about a third of the pre-foot and mouth total. Ponies, on the other hand, appear to be at 6.6 times the level of 1864 on the basis of last year's figure of 2727 on the Forest.

Richard Reeves believes that the effects of enforcing obsolete Forest Law restrictions on depasturing after the Deer Removal Act, may have been more marked than is generally supposed and this also could be a factor in the 1864 figures.

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