Appendix 26

R (Wardens and Fellows of Winchester College and anr) v Hampshire CC [2009] 1 WLR 138

Court of Appeal

*Regina (Warden and Fellows of Winchester College and another) *v* Hampshire County Council

[2008] EWCA Civ 431

2008 April 15, 16; 29 Ward, Dyson, Thomas LJJ

Highway — Right of way — Definitive map — Applications to modify map by upgrading road used as public path and bridleway to byways open to all traffic — Applicants failing to comply with statutory requirements to attach copies of documentary evidence and to serve notice on landowners — Applications approved by surveying authority — New statutory provision extinguishing rights of way for mechanically propelled vehicles unless modification application made in accordance with existing statutory requirements determined before commencement date — Whether authority's decision effective to save such rights of way from extinguishment — Whether authority entitled to waive non-compliance with statutory requirements — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, paras 1, 2, 3 — Natural Environment and Rural Communities Act 2006 (c 16), s 67(1)(3)(6)

The claimants' land was crossed by a right of way, shown on the county definitive map as a road used as a public path, which, together with another right of way there shown as a bridleway, formed a continuous route. Applications were submitted to the defendant surveying authority, purportedly pursuant to section 53(5) of the Wildlife and Countryside Act 1981[1], to modify the definitive map by upgrading the rights of way to byways open to all traffic. The requirements of paragraphs 1 and 2 of Schedule 14 to the Act were not complied with in that copies of documentary evidence were not attached to the applications and notices were not served on the relevant owners and occupiers, although they were made aware of the applications and given the opportunity to make representations. In March 2006 the authority resolved to make the orders sought. The claimants sought judicial review of a refusal by the authority to reconsider those determinations, contending that upon the coming into force of section 67 of the Natural Environment and Rural Communities Act 2006[2] on 2 May 2006 any existing rights for mechanically propelled vehicles had been extinguished, not having been saved by section 67(3) because neither application for modification had complied with the requirements of paragraphs 1 and 2 of Schedule 14 to the 1981 Act and so was not an application under section 53(5) of the 1981 Act within the meaning of section 67(6) of the 2006 Act. The judge dismissed the claim, holding, inter alia, that such rights for mechanically propelled vehicles as existed over the two rights of way on 2 May 2006 had been saved from extinguishment (i) by section 67(3)(b) of the 2006 Act because the authority's decisions of March 2006 had been valid determinations under paragraph 3 of Schedule 14 of the applications to modify the definitive map, and (ii), in the case of the bridleway, by section 67(3)(a) because a valid application had been made before the relevant date.

On the claimants' appeal—

Held, allowing the appeal, that, in order to determine whether section 67(3) of the Natural Environment and Rural Communities Act 2006 applied to prevent a specific right of way being extinguished under section 67(1), it was necessary to determine the date at which an application for modification to the definitive map and

[1] Wildlife and Countryside Act 1981, s 53: see post, para 14.
Sch 14: see post, para 15.
[2] Natural Environment and Rural Communities Act 2006, s 67: see post, para 19.

A statement had been made under section 53(5) of the Wildlife and Countryside Act 1981; that by section 67(6) such an application was not made for the purposes of section 67(3) unless it complied fully with paragraph 1 of Schedule 14 to the 1981 Act, which required it to be made in the prescribed form and to be accompanied by a map showing the ways to which the application related and by copies of any documentary evidence, including statements of witnesses, which the applicant wished to adduce in support of the application; that merely identifying and providing B copies of documents to which the surveying authority had no access did not satisfy the requirements of paragraph 1; that, therefore, irrespective of whether an authority had jurisdiction on an application for modification to waive compliance with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3, since neither application for modification had been accompanied by copies of any of the documents to which they referred neither constituted an application under section 53(5) of the 1981 Act within the meaning of section C 67(3)(6) of the 2006 Act; and that, accordingly, section 67(3) did not apply to save the rights of way in question from extinguishment under section 67(1) (post, paras 36–38, 42, 54–55, 56, 58, 59, 71, 72, 73).

Per curiam. In so far as it is shown that there has been a failure to comply with the procedural requirements of paragraph 2 of Schedule 14 to the 1981 Act and that a certificate under paragraph 2(3) therefore has been wrongly issued, it does not follow that the determination under paragraph 3 is invalid. If the consequences of the defect in the certificate are serious and the defective certificate has caused real prejudice D it may be that the determination should be declared to be invalid. On the facts, the authority was entitled to waive the failure to comply with the procedural requirements (post, paras 67, 70, 72, 73).

Decision of George Bartlett QC sitting as a deputy judge of the Queen's Bench Division [2007] EWHC 2786 (Admin); [2008] RTR 173 reversed.

The following cases are referred to in the judgment of Dyson LJ:

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London and Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182; [1979] 3 All ER 876, HL(Sc)

R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354; [1999] 3 All ER 231, CA

R v Soneji [2005] UKHL 49; [2006] 1 AC 340; [2005] 3 WLR 303; [2005] 4 All ER 321, HL(E)

F

No additional cases were cited in argument or referred to in the skeleton arguments.

APPEAL from George Bartlett QC sitting as a deputy judge of the Queen's Bench Division

By a claim form the claimants, the Warden and Fellows of Winchester College and Humphrey Feeds Ltd, applied for judicial review of the refusal G of the defendant, Hampshire County Council, to reconsider decisions of one of its committees made on 22 March 2006 whereby two rights of way were to be upgraded to the status of byways open to all traffic. The Secretary of State for the Environment, Food and Rural Affairs was joined as an interested party. By a decision dated 28 November 2007 the deputy judge dismissed the claim for judicial review, holding, inter alia, that such rights for mechanically propelled vehicles as existed over the two rights of H way on 2 May 2006 had not been extinguished by section 67(1) of the Natural Environment and Rural Communities Act 2006 when the section came into force.

By appellant's notice dated 9 January 2008, and with the permission of the Court of Appeal (Mummery LJ) dated 8 February 2008, the claimants

appealed on the grounds, inter alia, that the applications should have been found to be invalid in light of failures to comply with the formal requirements governing such applications, and the judge should have found that the relevant rights had not been saved from extinguishment.

By respondent's notice dated 12 March 2008 the Secretary of State, as interested party, sought to uphold the decision of the deputy judge on the grounds that the judge had (1) rightly rejected the submission that an application was only validly made if it complied with all the requirements of paragraph 1 of Schedule 14 to the 1981 Act; and (2) wrongly rejected the interested party's case that an application was validly made if it was in the prescribed form and accompanied by a map and list/summary of documents but not copy documents.

The facts are stated in the judgment of Dyson LJ.

George Laurence QC and *Ross Crail* (instructed by *Knights, Tunbridge Wells*) for the claimants.

Timothy Mould QC (instructed by *Head of Corporate and Legal Services, Hampshire County Council, Winchester*) for the defendant.

John Litton (instructed by *Solicitor, DEFRA Legal Group*) for the Secretary of State.

The court took time for consideration.

29 April 2008. The following judgments were handed down.

DYSON LJ

Introduction

1 The claimants are owners of land in Hampshire. They appeal against the decision of Mr George Bartlett QC, sitting as a deputy High Court judge, refusing their claim for judicial review of the refusal by the Hampshire County Council to reconsider decisions made by it on 22 March 2006, as surveying authority for Hampshire, to make an order modifying the definitive map and statement ("the DMS") by upgrading two rights of way to the status of byway open to all traffic ("BOAT"). The two rights of way were shown on the DMS as Chilcomb Bridleway 3 and Twyford Road Used as a Public Path 16 ("Twyford RUPP 16") respectively.

2 The main issue raised by the appeal is whether the judge was right to hold that such rights for mechanically propelled vehicles as existed over the two rights of way on 2 May 2006 were not extinguished by section 67(1) of the Natural Environment and Rural Communities Act 2006 when the 2006 Act came into force. The judge held that these rights were saved from extinguishment under section 67(3)(b) by virtue of the council's decisions on 22 March 2006 which he found to have been valid determinations of applications to modify the DMS under section 53(5) of and paragraph 3 of Schedule 14 to the Wildlife and Countryside Act 1981. In the case of Chilcomb Bridleway 3, the judge also held that those rights were saved from extinguishment under section 67(3)(a) of the 2006 Act by virtue of the application dated 11 June 2001, which the judge found to have been a valid application under section 53(5) of and paragraph 1 of Schedule 14 to the 1981 Act.

A **3** I shall come to the relevant statutory provisions in more detail later in this judgment. But at the heart of the appeal lie section 67 of the 2006 Act and paragraph 1 of Schedule 14 to the 1981 Act. Section 67(1) extinguishes an existing public right of way for mechanically propelled vehicles which before commencement (2 May 2006) was not shown in a DMS or was shown in a DMS only as a footpath, bridleway or restricted byway. But this is subject to subsections (2) to (8). Section 67(3) provides:

B

> "Subsection (1) does not apply to an existing public right of way over a way if— (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (ch 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic, (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or . . ."

C

4 The "relevant date" is 20 January 2005: subsection (4). Section 67(6) provides: "For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act."

D **5** Paragraph 1 of Schedule 14 to the 1981 Act provides:

> "An application shall be made in the prescribed form and shall be accompanied by— (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application."

E **6** The principal issue of law raised by this appeal is what is meant by an application "made in accordance with paragraph 1 of Schedule 14 to [the 1981] Act" within the meaning of section 67(6) of the 2006 Act. It is contended by Mr George Laurence QC and Miss Ross Crail on behalf of the claimants that the applications made by Mr Tilbury in respect of Chilcomb Bridleway 3 and Mr Fosberry in respect of Twyford RUPP 16

F were not made in accordance with that provision and that it was not open to the council to waive compliance with the requirements of the statute. The questions raised are believed to affect many cases throughout the country and are important for landowners and users alike. The Secretary of State has an interest in the proper construction of section 67(6) of the 2006 Act and paragraph 1 of Schedule 14 to the 1981 Act and has been

G added as an interested party. His interest arises because of the guidance given by the Department for Environment, Food and Rural Affairs ("DEFRA") in its publication "Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways" version 4 November 2006 and a letter circulated by DEFRA to all local highway authorities dated 26 March 2007.

H *The legislative and general factual background*

7 Under Part IV of the National Parks and Access to the Countryside Act 1949, county councils as surveying authorities were required to maintain a DMS showing three categories of highway, namely: footpaths, where the public right of way was on foot only; bridleways, where the public right of

way was on foot or horseback or leading a horse; and roads used as public paths ("RUPPs") which were defined as highways other than footpaths or bridleways used by the public mainly for the purposes for which footpaths and bridleways are so used. The 1949 Act was amended by the Countryside Act 1968 so as to require surveying authorities to reclassify each RUPP shown on their definitive maps either as a footpath or as a bridleway or as a BOAT in accordance with specified criteria. This reclassification was far from complete when the relevant provisions of the 1949 and 1968 Acts were replaced by Part III of the 1981 Act.

8 Section 54 of the 1981 Act required surveying authorities, as soon as reasonably practicable, to review all RUPPs remaining on their DMSs and make modification orders reclassifying each as: (a) a BOAT, if a public right of way for vehicular traffic had been shown to exist; or (b) a bridleway, if (a) did not apply and bridleway rights had not been shown not to exist; or (c) as a footpath, if neither (a) nor (b) applied. A BOAT was defined in section 66 of the 1981 Act as "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".

9 Section 53 of the 1981 Act contains provisions relating to orders modifying the DMS. It imposes a duty on the surveying authority to make modifications on the occurrence of certain events.

10 In 2000, with the reclassification of RUPPs still being far from complete, the Countryside and Rights of Way Act 2000 was enacted. Section 47(2) provided that every way which, immediately before commencement of the Act was shown in any DMS as a RUPP, should be treated instead as a "restricted byway". The 2000 Act in addition made provision for the extinguishment in 2026 of unrecorded rights of way for mechanically propelled vehicles over byways. It also inserted into the 1981 Act (as section 53B) a requirement that every surveying authority should keep a register of applications under section 53(5).

11 The reclassification provisions of the 2000 Act reflected the growing public concern that unmade minor vehicular ways in the countryside, green lanes, enjoyed by walkers and those on horseback, were being damaged by off-road vehicles and motorcycles. That concern was recognised in a consultation document published by DEFRA in 2003. In a foreword the Rural Affairs Minister, Alun Michael, said:

> "As Rural Affairs Minister, I have been approached by many individuals and organisations who are deeply concerned about problems caused by the use of mechanically propelled vehicles on rights of way and in the wider countryside. I share these concerns, having seen for myself examples of damage to fragile tracks and other aspects of our natural and cultural heritage in various areas of the country. There is considerable concern about behaviour that causes distress to others seeking quiet enjoyment of the countryside . . . I do not think that it makes sense that historic evidence of use by horse drawn vehicles or dedications for vehicular use at a time before the internal combustion engine existed can give rise to rights to use modern mechanically propelled vehicles. Those who suffer from vehicle misuse find this incomprehensible and in this paper we offer new proposals that are intended to address what many

A have come to view as the inappropriate and unsustainable way in which vehicular rights are acquired and claimed on rights of way."

12 In due course the 2006 Act was enacted, and it provided for the extinguishment of all existing public rights of way for mechanically propelled vehicles over ways which, immediately before commencement, either were not shown on the DMS at all or were so shown but only as a B footpath, bridleway or restricted byway.

13 Sections 47 to 50 of the 2000 Act (including in particular the provision reclassifying RUPPs as restricted byways) were brought into force on 2 May 2006, and section 67 of the 2006 Act (together with other provisions in Part 6 of that Act) was brought into force on the same day but immediately after the commencement of sections 47 to 50 of the 2000 Act.

C

The relevant statutory and regulatory provisions

14 I set out below all the relevant provisions, including those to which I have already referred. So far as material, section 53 of the 1981 Act provides:

D "(2) As regards every definitive map and statement, the surveying authority shall— (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the E occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

"(3) The events referred to in subsection (2) are as follows . . . (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows— (i) that a right of way F which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map G and statement require modification."

"(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

H

15 Schedule 14 provides:

"*Form of applications*

"1. An application shall be made in the prescribed form and shall be accompanied by— (a) a map drawn to the prescribed scale

and showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

"*Notice of applications*

"2(1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates.

"(2) If, after reasonable inquiry has been made, the authority are satisfied that it is not practicable to ascertain the name or address of an owner or occupier of any land to which the application relates, the authority may direct that the notice required to be served on him by sub-paragraph (1) may be served by addressing it to him by the description 'owner' or 'occupier' of the land (describing it) and by affixing it to some conspicuous object or objects on the land.

"(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

"(4) Every notice or certificate under this paragraph shall be in the prescribed form.

"*Determination by authority*

"3(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall— (a) investigate the matters stated in the application; and (b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates."

16 Regulation 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), which were made under Schedule 14 (and other provisions), provides:

"(1) An application for a modification order shall be in the form set out in Schedule 7 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case.

"(2) Regulation 2 above shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order.

"(3) A notice required by paragraph 2 of Schedule 14 to the Act (applications for certain orders under Part III) shall be in the form set out in Schedule 8 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case.

"(4) A certificate required by paragraph 2 of Schedule 14 to the Act shall be in the form set out in Schedule 9 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case."

17 Schedule 7 of the 1993 Regulations, which contains the form of application for a modification order, is in these terms:

A "Wildlife and Countryside Act 1981

"(Title of definitive map and statement)

"To: (name of authority)

"of: (address of authority)

"I/We, (name of applicant) of (address of applicant) hereby apply for an order under section 53(2) of the Wildlife and Countryside Act 1981 modifying the definitive map and statement for the area by (deleting the (footpath) (bridleway) [restricted byway] (byway open to all traffic) from . . . . . to . . . . .) (adding the (footpath) (bridleway) [restricted byway] (byway open to all traffic) from . . . . . to . . . . .) (upgrading) (downgrading) to a (footpath) (bridleway) [restricted byway] (byway open to all traffic) the (footpath) (bridleway) [restricted byway] (byway open to all traffic) from . . . . . to . . . . .) ((varying) (adding to) the particulars relating to the (footpath) (bridleway) [restricted byway] (byway open to all traffic) from . . . . . to . . . . . by providing that . . . . .) and shown on the map accompanying this application.

"I/We attach copies of the following documentary evidence (including statements of witnesses) in support of this application:

"List of documents

"Dated: . . . . . Signed . . . . . .

18 Regulation 2 of the 1993 Regulations provides that a definitive map shall be on a scale of not less than 1/25,000, but permits the surveying authority to include an inset map on a larger scale.

19 Section 67 of the 2006 Act provides so far as material:

"(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement— (a) was not shown in a definitive map and statement, or (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway. But this is subject to subsections (2) to (8)."

"(3) Subsection (1) does not apply to an existing public right of way over a way if— (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic, (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or (c) . . .

"(4) 'The relevant date' means— (a) in relation to England, 20 January 2005 . . ."

"(6) For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act."

The applications

20 The application relating to Chilcomb Bridleway 3 was made by David Leonard Tilbury and was dated 11 June 2001. It stated:

"I . . . hereby apply for an order under section 53(2) of the Wildlife and Countryside Act 1981 to modify the definitive map and statement for the area by . . . upgrading to a byway open to all traffic the bridleway from SU502275 to SU507279 and shown on the map annexed hereto. I append a list of documents on which I base this application. Parish Chilcomb Way number 3 Way name Cowards Lane."

21 A map was annexed to the application. The list of documents that was "appended" was in the body of the application and included some 25 maps and plans, in respect of each of which Mr Tilbury added a comment. For example, the fifth document was "1838 Tithe map" and the comment was:

"The lane is shown, coloured yellow, and marked 'Church Lane' & 'Cowards Lane'. It is numbered '3'. It is shown as a through-route from the village to the 'Bishop's Waltham' road."

22 Mr Tilbury also sent to the council a certificate of service, certifying that the requirements of paragraph 2 of Schedule 14 to the Act had been complied with, and giving as the name of the landowner "Mr J Seale" and his address. The certificate is dated 11 June 2001.

23 There were in fact three applications by Sean Fosberry in respect of Twyford RUPP 16. He made two separate applications on 14 March 2005 because he was under the impression that part of the route in question was RUPP15. He replaced these two applications with a single application dated 16 June 2005. The council treated the original applications as the effective application ("the Fosberry application").

24 The Fosberry application was made on a printed council pro forma. It gives as the name of the applicant "Sean Fosberry, on behalf of the Trail Riders Fellowship", and it states that the applicant applied for an order under section 53(2) modifying the DMS by "upgrading to a byway open to all traffic the Road Used as a Public Path RUPP 16 from SU 48325 25584 to SU 50210 27410 and shown on the map annexed hereto". In the body of the application are the words: "I/We attach copies of the following documentary evidence (including statements of witnesses) in support of this application." Under the heading "List of documents" appear the words "see attached report". The attached "detailed evidence report" identifies some 30 maps. Against each of them, under the heading "evidence entry" there is a commentary. Thus, for example, in relation to the map in the 1855 enclosure award for Twyford, the following is stated:

"The map of Twyford Down, Hants, 1851, No 3, Part 2A shows the RUPP from SU485263 north eastwards as Chilcombe Road, 24 feet wide. Annotated 'From Twyford' at its south western end and 'To Chilcombe' at its north eastern end. The award states: 'And I do hereby declare that I have set out and appointed and do hereby set out and appoint the following public carriage roads or highways that is to say one public carriage road or highway of the width of 24 feet to be called Chilcombe Road commencing at a point marked Aa on the said map and extending thence in a North Eastward direction along the side and thence across Twyford Down to and terminating at a point marked Ab on the same map opposite the continuation of the same road to the village of Chilcombe.' The map of Twyford Inclosure, Hants, 1851, Part 2B, which concerns

A inclosures in and around Twyford village, shows the south western end of the RUPP coloured brown as are all other public roads including the Turnpike and London Lane (now Hazeley Road). There is no barrier or anything where it leaves the turnpike on the bend."

25 Mr Fosberry also sent to the council a certificate certifying that the requirements of paragraph 2 of Schedule 14 had been complied with. Under B the heading "Name and address of landowner(s)" the certificate says: "Notice served on site. Please see photos sent by e-mail."

The council's determination

26 The applications were considered by the council at the meeting of its regulatory committee on 22 March 2006. The committee had before it a C report by the Director of Recreation and Heritage. The report referred to the relevant statutory provisions, and it described the applications and the claimed routes. It went on to state that the issue to be decided was whether or not there was evidence to show on the balance of probabilities that the claimed routes should be shown as BOATs on the DMS. It summarised and discussed the modern user evidence and the historic and documentary evidence. It quoted letters from Winchester College as landowners on D RUPP 16 and Hockley Golf Club as occupiers expressing their strong objection to the reclassification. It summarised the responses received from consultees. The conclusion in respect of both routes was that the claims to upgrade them should be accepted and it recommended that the appropriate orders should be made.

27 The minutes of the committee meeting record that it was resolved: E (a) that an order be made to upgrade Twyford RUPP 16 to BOAT, and it be recorded in the definitive statement with a maximum width of 6·0 metres (between point A and point B on Appendix 1 to the report) and 7·3 metres (between point B and point C on Appendix 1 to the report); and (b) that an order be made to upgrade Chilcomb Bridleway 3 to BOAT, and it be recorded with a maximum width of 3·0 metres.

F *The issues in summary*

28 Two issues arise on this appeal. They both concern the scope of the exceptions in section 67(3) of the 2006 Act and the circumstances in which they saved from extinguishment on 2 May 2006 public rights of way for mechanically propelled vehicles over ways which were not shown on a DMS at all, or were shown but only as a footpath, bridleway or restricted G byway.

29 The first issue is whether the Tilbury and Fosberry applications were made in accordance with paragraph 1 of Schedule 14 to the 1981 Act for the purposes of section 67(3) of the 2006 Act. I shall adopt the terminology of Mr Laurence and refer to an application so made as a "qualifying application". The claimants contend that neither of the two applications was a qualifying application. If that is right, it is common ground that both H appeals must succeed. If that is wrong, it is accepted by Mr Laurence that the appeal in respect of the Tilbury application must be dismissed.

30 The second issue arises only in the case of the Fosberry application and then only if it was a qualifying application. This issue is whether the defects in the certificate of service purportedly given by Mr Fosberry

pursuant to paragraph 2(3) of Schedule 14 to the 1981 Act rendered unlawful the council's decision on 22 March 2006 to make an order pursuant to paragraph 3(2) of the Schedule.

The first issue

Summary of the claimants' argument

31 The submissions of Mr Laurence and Miss Crail in essence are short and of disarming simplicity. They say that, for any of the three exceptions in section 67(3) to apply, a section 53(5) application must have been made in accordance with *all* the requirements of paragraph 1 of Schedule 14. That is to say, it must have been: (i) made in the prescribed form; and (ii) accompanied by a map drawn to the prescribed scale and showing the way(s) to which the application related; and (iii) accompanied by copies of any documentary evidence (including statements of witnesses) which the applicant wished to adduce in support of the application. At first sight, this seems unanswerable. The words are expressed in clear and ordinary language. Why not give them their plain and ordinary meaning? I need at this stage to summarise the reasons the judge gave for deciding the first issue against the claimants. Mr Timothy Mould QC (supported by Mr Litton) submits that the judge reached the right conclusion and for the right reasons.

The judge's treatment of the first issue

32 The judge held [2008] RTR 173, para 36, that the authority has no power to waive requirements as to the "contents of an application" or the requirements as to "what an application must consist of". I think that by this he meant at least that the authority has no power to waive the requirement that the application shall be made in the prescribed form. Mr Mould certainly accepted that this is the case. This view seems to be reflected, at para 43, where the judge said:

> "It is implicit in the function of subsection (5) in the context of section 53 as a whole that, to be valid, an application must identify the way to which it relates and the modification to the definitive map and statement that is sought. It is also implicit, it seems to me, that it must refer to the new evidence on which the application is based—new, that is to say, in being evidence that was not taken into account by the authority when they prepared the definitive map and statement or subsequently modified it. Provided that the application includes these things and the new evidence, with or without evidence available to the authority, is not irrelevant or manifestly incapable of supporting the modification that is sought, the authority is, in my judgment, entitled to treat it as a valid application."

33 He accepted, at para 37, the submission of Mr Mould that the requirements that the application should be in the prescribed form and should be accompanied by a map and copies of any documentary evidence are separate requirements: "an application, in my judgment, does not fail to constitute an application because it is not accompanied by a map and such copies." He said, at para 38, that the requirement that the application should be accompanied by a map and copies of documentary evidence is a "procedural" requirement which the authority may be able to waive in the

light of the principles stated in *London and Clydesdale Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 188–190, and *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354. Thus, if the authority has all the information it needs to determine the application in the absence of all or any of the documents that are required to accompany the application, it has the right to waive the requirement and determine the application. There would be no point in insisting on the provision of documents which are not needed to enable the application to be determined. On the other hand, if documents that are needed for this purpose are not supplied, the authority would no doubt take the view that, until they are supplied, it would not be "reasonably practicable" under paragraph 3(1) to investigate the matters stated in the application and to decide whether to make the order. The judge put it this way, at para 39:

> "To construe paragraph 1 in this way, it seems to me, not only reflects the actual language of the provision but it avoids the absurdities that would result if the requirement to supply the documents were treated as fundamental to an application."

34 The judge then proceeded to apply this approach to the two applications. He held [2008] RTR 173, para 44 that the council were entitled to treat each application as valid and that they were justified in not seeking compliance with the requirement that copies of the documentary evidence relied on should accompany the application. On the facts of the case, there was no need for them to be sent and the council were entitled to waive this procedural requirement.

35 In case this conclusion was wrong, at para 45, the judge reached the same decision on the first issue by a different route. He said that what had to be sent was "copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application". He said that "adduce" was used to mean "put forward" or "provide", and not "rely upon". Thus the applicant does not have to provide copies of all the documentary evidence on which he relies in support of the modification of the DMS for which he contends. He can rely on documentary evidence in the possession of the authority (or to which it has access) without sending copies of it. What the applicant must do, however, is to provide copies of any documentary evidence that, because it is not already available to the authority, he wishes to put forward. He may not wish to put forward any such evidence because he relies on evidence that is already before the authority.

Discussion on the first issue

36 It is important not to lose sight of the precise question raised by the first issue. It is whether, *for the purposes of section 67(3) of the 2006 Act*, the Tilbury and Fosberry applications were made in accordance with paragraph 1 of Schedule 14 to the 1981 Act. This question is not the wider question of whether it was open to the council to treat an application which was not made in accordance with that paragraph as if it had been so made because the failure could be characterised as a breach of a procedural requirement rather than a breach which was so fundamental that (to use the judge's language) the application failed to "constitute an application" at all. I readily accept that the wider question is relevant and important in the

context of applications made under section 53(5) generally and whether an authority has jurisdiction to make a determination pursuant to paragraph 3 of Schedule 14.

37 But the question that arises in relation to section 67(6) is not whether the council had jurisdiction to waive breaches of the requirements of paragraph 1. It is whether the applications were made in accordance with paragraph 1. For present purposes, the question of whether the applications were made in accordance with paragraph 1 is only relevant to whether extinguishment by subsection (1) is disapplied by subsection (3). It has nothing to do with the wider question of whether, absent the 2006 Act, the council would be entitled to treat a non-compliant application as if it complied by waiving what the judge referred to as breaches of "procedural" requirements.

38 In any event, I accept the submission of Mr Laurence that the purpose of section 67(6) is to define the moment at which a qualifying application is made because timing is critical for the purpose of determining whether subsection (1) is disapplied. The moment identified by Parliament as the relevant moment is when an application is made in accordance with paragraph 1. A purported subsequent waiver of the obligation to accompany the application with copies of documentary evidence cannot operate to alter the date when the non-qualifying application was made or to treat such an application which was made on a particular date as having been made in accordance with paragraph 1 when it was not. All a waiver can do, with effect from the date of the waiver, is to permit the decision-maker to treat itself as free to determine the application even though it was not made in accordance with paragraph 1.

39 The main emphasis of the judgment and Mr Mould's oral submissions was on the argument that the failures to accompany the applications with copies of the documentary evidence were breaches of procedural requirements which did not affect the council's jurisdiction to waive the breaches and determine the applications. For the reasons that I have given, this argument is irrelevant to the section 67(6) question.

40 But, at para 37, the judge also said that "an application does not fail to constitute an application" because it is not accompanied by a map and copies of the evidence that the applicant wishes to adduce. I take this to mean that an application which is invalid because it is not so accompanied is nevertheless made in accordance with paragraph 1. That is to say, it is so made if it is made in the form set out in Schedule 7 to the 1993 Regulations or "in a form to substantially like effect" (regulation 8(1)) and it refers to new evidence which is not irrelevant: see para 43 of the judgment.

41 In his skeleton argument, Mr Mould submits that an application under section 53(5) is *made* when it is made in the prescribed form and identifies the route to which the application relates. He says that it is immaterial to the question whether an application has been *made* that it is accompanied by copies of all, some, or none, of the documentary evidence relied on by the applicant as the evidential basis for the application.

42 I cannot accept that an application which is not accompanied by a map (sub-paragraph (a)) or by copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application (sub-paragraph (b)) is made in accordance with paragraph 1 of Schedule 14. An application is not so made unless it is made

A in accordance with all three requirements of the paragraph. There is no warrant for saying that an application which is in accordance with the first requirement of the paragraph, but not the second or third, is made in accordance with the paragraph.

43 Section 67(6) could have said that, for the purposes of section 67(3), an application under section 53(5) is made when it is made in the form prescribed by regulation 8 of the 1993 Regulations. Mr Mould's argument B proceeds as if it did. The judge's approach is the same, although he adds that it is implicit in the function of section 53(5) that, in order to be made in accordance with paragraph 1 of Schedule 14, an application must also refer to new evidence that is not irrelevant.

44 Mr Litton adopts a yet different approach. He submits that an application is made in accordance with paragraph 1 if it is made in the C prescribed form (or a form to substantially like effect) and the requirements of paragraph 1(a) are satisfied. He says, however, that it is not necessary for the making of an application that the requirements of paragraph 1(b) be met. He seeks to justify the different treatment of the two sub-paragraphs of paragraph 1 by saying that this is required by a purposive construction. He submits that the requirement that the application should be accompanied by a map showing the public right of way to which the application relates is D important: it is necessary to identify clearly the rights of way in respect of which the rights are being claimed. On the other hand, a strict insistence that an application should be accompanied by copy documents serves no real purpose and confers no obvious advantage over providing a list of the documents in support of the claim, particularly where the authority is already in possession of, or has access to, such documents.

E **45** I can see that the distinction Mr Litton seeks to draw may be relevant to the question whether a failure to comply with paragraph 1 should be waived in the particular circumstances of the case. But I do not see how the distinction can be relevant to determining whether an application has been made in accordance with paragraph 1. As a matter of construction, it seems to me that, in order to be made in accordance with the paragraph, an application must be accompanied by both a map and copies of documentary F evidence or neither. It is impossible to spell out of paragraph 1 that an application may be made in accordance with it if it is accompanied by one but not the other.

46 In my judgment, as a matter of ordinary language an application is not made in accordance with paragraph 1 unless it satisfies all three requirements of the paragraph. Moreover, there are two particular G indications that an application is only made in accordance with paragraph 1 of Schedule 14 if it is made in accordance with all the requirements of the paragraph. First, paragraph 1 is headed "Form of applications". The word "form" in the heading is clearly not a reference only to the prescribed form. It is a summary of the content of the whole paragraph. It is a reference to how an application should be made. It must be made in a certain form (or a form substantially to the like effect with such insertions or omissions as are H necessary in any particular case). It must also be accompanied by certain documents. The requirement to accompany is one of the rules as to how an application is to be made.

47 Secondly, Schedule 7 to the 1993 Regulations shows that the prescribed form itself requires the route to be shown on the map

"accompanying this application" and the applicant to "attach" copies of the following documentary evidence (including statements of witnesses) in support of the application. This language reflects the content of sub-paragraphs (a) and (b) of paragraph 1. It is artificial to say that, in order to be made in accordance with paragraph 1, an application must be made in the prescribed form or a form to substantially like effect; but that it need not be accompanied by a map or have attached to it the documentary evidence and witness statements to be adduced even though these are referred to in the body of the prescribed form itself. The language of the form shows that an application is only made in accordance with paragraph 1 if it is made in the prescribed form and is accompanied by a map and the documentary evidence and witness statements to be adduced.

48 It is submitted by Mr Mould and Mr Litton that a strict interpretation of paragraph 1 leads to absurdity and cannot have been intended by Parliament. For example, the application may list a number of documents, but by oversight may be accompanied by only some of them. The absurdity may be sharpened by the fact that the authority has the originals in its possession or has access to them.

49 I acknowledge that matters of this kind are relevant to the question whether the consequences of the failure to make the application in accordance with paragraph 1 are such that the failure can and should be waived in the particular circumstances of the case. But in relation to the specific section 67(6) question, I do not see how they are relevant to whether the application, when it was made, was made in accordance with paragraph 1. In relation to that question, Parliament stipulated that an application is made when it is made in accordance with all the requirements of the paragraph.

50 It is also necessary to consider the case where an application is not accompanied by the copy documents because the applicant is unable to obtain them. Mr Laurence concedes that it would be absurd to hold that an application is not made in accordance with paragraph 1 where copy documents do not accompany it because the applicant cannot obtain them. In order to avoid such absurdity, he submits that the obligation should be construed as being to accompany the application with copies of all the documents which the applicant wishes to adduce in support of his application, save for any which it is impossible for him to obtain. Such a construction is justified on the basis that "unless the contrary intention appears, an enactment by implication imports the principle of the maxim lex non cogit ad impossibilia (law does not compel the impossible)": see section 346 of *Bennion on Statutory Interpretation*, 4th ed (2002), p 969.

51 I accept this submission. Mr Mould submits that this exception is not expressed in the legislation and is uncertain as to its extent and application. He says that it is unclear how, as regards any given application, the question whether it is impossible for the applicant to supply a copy of a document is to be judged and by whom such judgment is to be made. The court should be slow to adopt so arbitrary and uncertain an approach.

52 But it is intrinsic to the maxim of construction that it arises by implication. Further, in my view the difficulties identified by Mr Mould are overstated. It should not be difficult for a surveying authority (or if necessary the court) to verify the explanation given by the applicant for his failure to copy a particular document. I do, however, acknowledge that to

this limited extent there is an element of uncertainty in the application of paragraph 1 if, for the purposes of section 67(3), it is strictly construed in the way that I have described.

53 Uncertainty cannot be avoided on the approach advocated by Mr Mould and Mr Litton either. This is because, on that approach, the question whether an application is a qualifying application where there is a failure to comply with paragraph 1(a) and/or (b) depends on whether the authority is entitled to waive the non-compliance. That in turn depends on an assessment of the consequences of the non-compliance for the authority in the particular circumstances of the case. The consequences for authority A which has copies of the missing documents are obviously different from the consequences for authority B which has no copies of the documents. Predicting the assessment is far from certain.

54 In his analysis of the first issue, the judge did not address the effect of section 67(6) at all. Nor do the submissions of Mr Mould and Mr Litton. In my judgment, section 67(6) requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things (de minimis non curat lex). Indeed this principle is explicitly recognised in regulation 8(1) of the 1993 Regulations. Thus minor departures from paragraph 1 will not invalidate an application. But neither the Tilbury application nor the Fosberry application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances, I consider that neither application was made in accordance with paragraph 1.

55 I wish to emphasise that I am not saying that, in a case which does not turn on the application of section 67(6), it is not open to authorities in any particular case to decide to waive a failure to comply with paragraph 1(b) of Schedule 14 and proceed to make a determination under paragraph 3; or to treat a non-compliant application as the "trigger" for a decision under section 53(2) to make such modifications to the DMS as appear requisite in consequence of any of the events specified in subsection (3).

The judge's alternative route

56 I have summarised this, at para 35 above. I would reject this approach substantially for the reasons given by Mr Laurence. There is no basis in the wording of paragraph 1 (or in the prescribed form) for distinguishing between two categories of documentary evidence: (i) those on which the applicant relies, but of which he is not providing copies because they are available to the surveying authority and (ii) those on which he relies and of which he is providing copies because they are not available to the authority. The language of the paragraph is clear and unambiguous. The application must be accompanied by copies of *any* documentary evidence which the applicant wishes to adduce. This must mean any documentary evidence, whether it is already available to the authority or not. The dichotomy adopted by the judge between "put forward" and "rely upon" does not stand up to scrutiny. The word "adduce" read in its context means "put forward *and* rely upon". The applicant is required to identify and provide copies of all the documentary evidence on which he relies in support

of his application. There is nothing in the language of the paragraph which supports the construction that the applicant's obligation is limited to identifying and providing copies of those documents on which he relies to which the authority does not have access.

57 In any event, an applicant cannot reasonably be expected to know, or take steps to discover, what documents or copy documents the surveying authority possesses or to which it has access. Further, it is not reasonable to expect an authority, before accepting an application as valid, to investigate which, if any, of the documents listed in the application is available to it. On the other hand, as Mr Laurence submits, it is straightforward for an applicant to provide copies of all the documents on which he wishes to rely in support of his application and lists as such in his application.

58 Both Mr Tilbury and Mr Fosberry wished to adduce the documentary evidence to which they referred in the body of their applications. No copy of any of these documents accompanied the applications. Even if the council already had copies of all the documentary evidence which they wished to adduce (or the original documents), that fact would not mean that the applications were made in accordance with paragraph 1.

Conclusion on the first issue

59 It follows that neither the Tilbury application nor the Fosberry application was a qualifying application. The Tilbury application was made before 20 January 2005 and was not a section 53(5) application for the purposes of section 67(3)(a). The result is that for that reason his application did not save the rights for mechanically propelled vehicles over Chilcomb Bridleway 3 from extinguishment by section 67(1). The Fosberry application was made after 20 January 2005 and before the commencement date of 2 May 2006. If the rights for mechanically propelled vehicles to which that application was relevant were to be saved from extinguishment, this could only be if a determination was made before 2 May 2006 under paragraph 3 of Schedule 14 "in respect of [an application made under section 53(5)]": see section 67(3)(b). The reference to "such an application" in section 67(3)(b) is to an application made under section 53(5) for the purposes of section 67(3)(a). For this reason, the relevant rights in that case (over Twyford RUPP 16) were not saved from extinguishment by section 67(1) either. I would, therefore, decide the first issue in favour of the claimants in respect of both applications.

The second issue

60 In the light of my conclusion on the first issue, it is not necessary to deal with the second issue. But because it was the subject of full argument, I shall express my conclusions on it, although less fully than if it had been necessary to decide the point.

61 The second issue has no relevance to the Tilbury application. That is because, having been made before 20 January 2005, it could only escape from the extinguishing effect of section 67(1) by virtue of section 67(3)(a). If it was not a qualifying application by virtue of section 67(3)(a), it was not a qualifying application at all.

62 But the second issue has relevance to the Fosberry application because it was made after 20 January 2005. Not only did it have to be made

A in accordance with paragraph 1 of Schedule 14, but it had to be an application in respect of which the council made a determination under paragraph 3 before 2 May 2006: section 67(3)(b).

63 The council was required by paragraph 3(1), as soon as reasonably practicable after receiving a certificate under paragraph 2(3), to decide whether or not to make the order to which the application related. Mr Laurence submits that, because, to the knowledge of the council, B Mr Fosberry had provided his certificate under paragraph 2(3) without complying with the requirements of paragraph 2(2), the council's decision in this case could not be a determination under paragraph 3. It follows that the requirements of section 67(3)(b) were not satisfied.

64 The judge rejected this argument. He found that, when Mr Fosberry provided his certificate, the council must have known that the requirements C of paragraph 2 were not being complied with. It was aware that notice had not been served on Mr and Mrs Wood or Humphrey Farms Ltd and these were the registered owners. Mr Fosberry's certificate stated that notices had been displayed on the site, but no direction had been given by the council pursuant to paragraph 2(2) that notice could be served by addressing it to the owner by the description "owner" of the land and affixing it to some conspicuous object or objects on the land.

D **65** The judge held, at para 58, that these failures to comply with the statutory procedural requirements of paragraph 2(2) did not render the council's decision on the applications invalid. The purpose of the requirements is to ensure that each landowner and occupier affected by an application is made aware of it. All landowners and occupiers affected by the Fosberry application received notice of it in good time to enable them to E consider the application and make representations to the council in respect of it. The council was entitled to waive the formal requirements and to determine the application as it did.

66 Mr Laurence submits that the council had no jurisdiction to make a decision pursuant to an application made under section 53(5) if any of the paragraph 2 requirements had to its knowledge not been complied with. That is because in any such case, the resulting paragraph 2(3) certificate F would be invalid.

67 In my view, the judge was right on this issue. As Mr Mould submits, the correct approach is to apply ordinary public law principles. In so far as there is shown to have been a failure to comply with the procedural requirements of paragraph 2, it is necessary to ask whether and, if so, to what extent any substantial prejudice has been suffered as a result. On the G facts of this case, the council was entitled to waive the failure to comply with the procedural requirements.

68 In my view, the difference between the failure to comply with paragraph 1 (the first issue) and the failure to comply with paragraph 2 (the second issue) is fundamental. As I have explained, in the first case the effect of section 67(6) was that section 67(3)(a) was not engaged and section 67(1) applied. It was irrelevant whether the failure was a breach of a procedural H requirement which could be waived. On the other hand, in the second case section 67(6) is not in play. The only question here is whether the determination was a determination under paragraph 3. On the face of it, the council unquestionably decided to make a determination. It purported to be a determination in respect of the Fosberry application: see paras 26–27

above. It must follow that it was purportedly a determination under paragraph 3 (rather than a freestanding decision pursuant to section 53(2)). Moreover, the determination was made following receipt of what purported to be a certificate under paragraph 2(3).

69 It is true that the certificate was not properly issued, but it does not follow that the consequent determination was invalid. In *R v Soneji* [2006] 1 AC 340, para 23, having reviewed the authorities on the distinction between mandatory and directory requirements, Lord Steyn said:

> "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

70 Adopting that approach, I conclude that Parliament cannot fairly be taken to have intended that, if a paragraph 2(3) certificate is wrongly issued, it must follow that a determination on which it is based is invalid. The facts of the present case show that the better approach is to examine the consequences of the defect in the certificate. If they are serious and the defective certificate has caused real prejudice, then it may be that the determination on which it is based should be declared to be invalid. But in my judgment, on the facts of this case the judge reached the correct conclusion on this issue and for the right reasons.

Overall conclusion

71 For the reasons that I have given, I would allow this appeal in relation to both applications.

THOMAS LJ

72 I agree.

WARD LJ

73 I also agree.

Appeal allowed.

M B