**APPENDICES TO THE OBJECTION TO INTERIM DECISION 15 JUNE 2023 on behalf of**

**TRAIL RIDERS FELLOWSHIP**

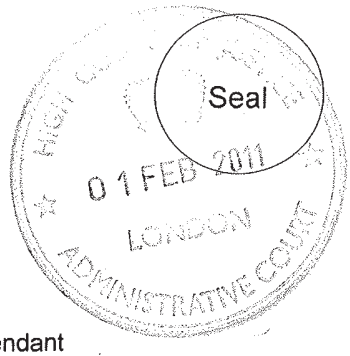
**TRFDOC1 – Claim Form N461 in R (Trail Riders Fellowship) v Dorset CC**

# Judicial Review
## Claim Form

In the High Court of Justice
Administrative Court

**Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.**

| For Court use only | |
|---|---|
| Administrative Court Reference No. | CO/899/2011 |
| Date filed | 01-02-11 |




### SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

**name**
(1) Trail Riders Fellowship; (2) David Leonard Tilbury

**address**
(1) Business Accountancy Consultants, 2 London Road, Headington, Oxford, OX3 7PA
(2) Oakbank Cottage, 1 Oakbank Road, Eastleigh, SO50 6PA

**Telephone no.**

**Fax no.**

**E-mail address**

Claimant's or claimant's solicitors' address to which documents should be sent.

**name**
Brain Chase Coles

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**E-mail address**
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Claimant's Counsel's details

**name**
Adrian Pay

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Lincolns Inn
WC2A 3SW

**Telephone no.**
020 7419 8000

**Fax no.**
020 7419 8050

**E-mail address**
adrian.pay@newsquarechambers.co.uk

1st Defendant

**name**
Dorset County Council

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

**name**
Dorset County Council

**address**
County Hall
Colliton Park
Dorchester
Dorset DT1 1XJ

**Telephone no.**
01305 251000

**Fax no.**

**E-mail address**

2nd Defendant

**name**
Secretary of State for Environment, Food & Rural Affairs

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

**name**
Secretary of State for Environment, Food & Rural Affairs

**address**
Nobel House
17 Smith Square
London SW1P 3JR

**Telephone no.**
08459 335577

**Fax no.**

**E-mail address**

## SECTION 2 Details of other interested parties

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

| | |
|---|---|
| **name** | **name** |
| **address** | **address** |
| **Telephone no.** / **Fax no.** | **Telephone no.** / **Fax no.** |
| **E-mail address** | **E-mail address** |

## SECTION 3 Details of the decision to be judicially reviewed

**Decision:**

Decision of Dorset CC to reject applications as not made within paragraph 1 Schedule 14 Wildlife and Countryside Act 1981; and/or decision of Secretary of State not to entertain appeal against that decision

**Date of decision:**

Decision of Dorset CC 2/11/10; decision of Secretary of State 8/12/10

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

| | |
|---|---|
| **name** | **address** |
| Dorset CC / Secretary of State | as above |

## SECTION 4 Permission to proceed with a claim for judicial review

I am seeking permission to proceed with my claim for Judicial Review.

| | | |
|---|---|---|
| Is this application being made under the terms of Section 18 Practice Direction 54 (Challenging removal)? | ☐ Yes | ☑ No |
| Are you making any other applications? If Yes, complete Section 7. | ☑ Yes | ☐ No |
| Is the claimant in receipt of a Community Legal Service Fund (CLSF) certificate? | ☐ Yes | ☑ No |
| Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application. | ☐ Yes | ☑ No |
| Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the box below. | ☐ Yes | ☑ No |

The claim has been made urgently. The Claimants have communicated their intention to bring proceedings to the Defendants and the basis of the claim is largely apparent from the earlier history.

| | | |
|---|---|---|
| Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below. | ☑ Yes | ☐ No |

Does the claim include any issues arising from the Human Rights Act 1998?
If Yes, state the articles which you contend have been breached in the box below. ☐ Yes ☑ No

**SECTION 5 Detailed statement of grounds**

☐ set out below ☑ attached

**SECTION 6 Details of remedy (including any interim remedy) being sought**

(1) A declaration that the five applications under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981;
(2) A mandatory order requiring Dorset CC to determine those five applications;
(3) An order quashing Dorset CC's decision to reject the applications as not made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981.

Alternatively,
(4) An order requiring the Secretary of State to determine the appeal against Dorset CC's decision to reject the applications.

Further and in any event,
(5) Further or other relief
(6) Costs

**SECTION 7 Other applications**

I wish to make an application for:-
Permission to adduce further evidence in the nature of expert evidence and/or specialist evidence of fact in relation to map scales and digital mapping.

**SECTION 8 Statement of facts relied on**

(1) Summary Statement of Facts
(2) Witness Statement Jonathan Stuart
(3) Witness Statement David Tilbury

## Statement of Truth

~~I believe~~ (The claimant believes) that the facts stated in this claim form are true.

Full name Margaret Sarah Stevenson

Name of claimant's solicitor's firm Brain Chase Coles

Signed M. S. Stevenson Position or office held

Claimant ('s solicitor) (if signing on behalf of firm or company)

## SECTION 9 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

| | | |
|---|---|---|
| ☑ Statement of grounds | ☐ included | ☑ attached |
| ☑ Statement of the facts relied on | ☐ included | ☑ attached |
| ☐ Application to extend the time limit for filing the claim form | ☐ included | ☐ attached |
| ☑ Application for directions | ☑ included | ☐ attached |

☐ Any written evidence in support of the claim or application to extend time

☐ Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision

☑ Copies of any documents on which the claimant proposes to rely

☐ A copy of the legal aid or CSLF certificate *(if legally represented)*

☑ Copies of any relevant statutory material

☑ A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

| | | |
|---|---|---|
| ☐ a copy of the removal directions and the decision to which the application relates | ☐ included | ☐ attached |
| ☐ a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case | ☐ included | ☐ attached |
| ☐ a detailed statement of the grounds | ☐ included | ☐ attached |



MS PAGE NUMBER 222

Reasons why you have not supplied a document and date when you expect it to be available:-

The Claimants have included the key documents on which they propose to rely within the witness statements of Jonathan Stuart and David Tilbury. There may, however, be further documents upon which they intend to rely which have been omitted due to time pressure.

Signed M. S. Stevenson Claimant ('s Solicitor) Brian Michael Cohen

**TRFDOC2 – R (Trail Riders Fellowship) v Dorset CC [2012] EWHC 2634 (Admin) [2013] PTSR 302**

Queen's Bench Division

# Regina (Trail Riders' Fellowship and another) *v* Dorset County Council

## [2012] EWHC 2634 (Admin)

2012 June 26, 27; Oct 2

Supperstone J

*Highway — Right of way — Definitive map — Applications to modify definitive map to upgrade rights of way to byways open to all traffic — Applications accompanied by computer generated enlargements of Ordnance Survey maps drawn to 1:50,000 scale — Local authority rejecting applications as maps not drawn to prescribed scale of no less than 1:25,000 — Whether applications defective — Whether non-compliance de minimis — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, para 1 — Natural Environment and Rural Communities Act 2006 (c 16), s 67(3)(6) — Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), regs 2, 8*

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking modification orders in respect of the definitive map and statement ("DMS") in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the DMS. Accompanying each application was a map of the route in question. Each map had been taken from computer software with digitally encoded mapping "sourced from the Ordnance Survey". Each had originally been drawn to a scale of 1:50,000 and then printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the basis that the maps had not been drawn to a scale of not less than 1:25,000 as required by the 1981 Act, as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006[2], and the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[3].

On the claimants' claim for judicial review—

*Held*, dismissing the claim, that an application to amend the definitive map and statement made pursuant to section 53(5) of and Schedule 14 to the 1981 Act as applied by section 67(6) of the 2006 Act had to be made strictly in accordance with the terms of paragraph 1 of Schedule 14 to the 1981 Act; that, therefore, the accompanying maps had to have been drawn to a scale of not less than 1:25,000, pursuant to the requirement prescribed by regulation 2 of the 1993 Regulations; that the map "showing the way to which the application relates", in the words of paragraph 1 of Schedule 14 of the 1981 Act, had to be originally and properly drawn to that scale, whether by a professional or lay person and whether drawn by computer or hand drawn, with an accuracy and precision relative to that scale to enable the surveying authority to ascertain, as a minimum, the route of the claimed way; that Parliament had prescribed a scale of not less than 1;25,000 in the knowledge that OS maps were used to prepare the DMS and in the reasonable expectation that applicants would accompany their applications with OS maps drawn to the required scale thereby including a sufficient level of physical detail; that the maps submitted by the claimants, drawn to a scale of 1:50,000 and then printed to a scale of not less than 1:25,000, had not been drawn to the prescribed scale so that the application had not

[1] Wildlife and Countryside Act 1981, S 53(5): see post, para 5.
[2] Natural Environment and Rural Communities Act 2006, s 67(6): see post, para 9.
[3] Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, regs 2, 8: see post, para 8.

A been made strictly in accordance with the requirements of the 1981 Act; and that, accordingly, that non-compliance being more than merely de minimis, the authority had been right to refuse the applications (post, paras 22, 27, 31, 33, 34–36, 44, 45).

The following cases are referred to in the judgment:

*Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 280, CA

B *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA

No additional case was cited in argument of referred to in the skeleton arguments.

**CLAIM** for judicial review

By a claim form the claimants, Trail Riders' Fellowship and David C Tilbury, sought judicial review of the decision of the defendant surveying authority, Dorset County Council, to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement for the area. The grounds of claim were: (1) that (a) the authority had been wrong to find that the requirements of paragraph 1 of Schedule 14 to the 1981 Act were D not exactly complied with and (b) the authority's rejection of the applications proceeded on a mistaken understanding of the process by which the maps were produced; and (2) that any non-compliance with paragraph 1 of Schedule 14 to the 1981 Act was de minimis.

The Secretary of State for Environment, Food and Rural Affairs was originally joined as second defendant to the proceedings but, by agreement, later served as the first interested party. Philip Graham Plumbe, representing E the interests of the Green Lanes Protection Group and affected landowners, was served as the second interested party.

The facts are stated in the judgment.

*Adrian Pay* (instructed by *Brain Chase Coles, Basingstoke*) for the claimants.

F *George Laurence QC* (instructed by *Head of Legal and Democratic Services, Dorset County Council, Dorchester*) for the surveying authority.

*Claire Staddon* (instructed by *Thomas Eggar, Solicitors*) for the second interested party.

The Secretary of State did not appear and was not represented.

The court took time for consideration.

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2 October 2012. **SUPPERSTONE J** handed down the following judgment.

*Introduction*

1 The claimants challenge the decision of the local authority, Dorset County Council, to reject five applications made under section 53(5) of and H Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement ("the DMS"). The claim concerns five routes over which the claimants maintain the public enjoy vehicular public rights of way (including with mechanically-propelled vehicles) which were not recorded on the DMS.

**2** The claimants contend that the effect of the decisions made by the local authority is that public rights of way for mechanically-propelled vehicles have been extinguished.

**3** The principal issue in this case is whether for the purposes of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006 a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to the prescribed scale only if it is derived from a map originally so drawn without being enlarged or reduced in any way.

**4** Mr Stuart, a member of the Friends of Dorset's Rights of Way ("FoDRoW") submitted the applications. The first claimant is an organisation that took over the conduct of the applications from FoDRoW in October 2010. Mr Tilbury, the second claimant, is a member of FoDRoW. The local authority is the surveying authority, as defined in section 66(1) of the 1981 Act, for the area in which the proposed "byway[s] open to all traffic" are located. The Secretary of State for Environment, Food and Rural Affairs, the first interested party, was originally joined to the proceedings as a defendant; subsequently by agreement the Secretary of State was removed as a defendant and joined as an interested party. Mr Plumbe, the second interested party, represents the interests of the Green Lanes Protection Group and affected landowners.

*The legal framework*

**5** Section 53 of the 1981 Act imposes a duty on a surveying authority to keep a DMS of the public rights of way in its area under continuous review. So far as material, it provides:

> "(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 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 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 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."

6 There are three categories of public highway: footpath, bridleway, and "byway open to all traffic" ("BOAT"). Section 66 of the 1981 Act defines a BOAT 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".

7 Schedule 14 to the 1981 Act provides:

"1 *Form of applications*

"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.

"2 *Notice of applications*

"(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."

"(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.

"3 *Determination by authority*

"(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."

"5 *Interpretation*

"(1) In this Schedule . . . 'prescribed' means prescribed by regulations made by the Secretary of State."

8 The material regulations made by the Secretary of State are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. The 1993 Regulations provide:

"2 *Scale of definitive maps*

"A definitive map shall be on a scale of not less than 1/25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

"6 *Provisions supplementary to regulations 4 and 5*

"Regulations 2 and 3 above shall apply to the map contained in a modification or reclassification order as they apply to a definitive map."

"8 *Application for a modification order*

"(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."

9 Section 67 of the Natural Environment and Rural Communities Act 2006 provides:

"*Ending of certain existing unrecorded public rights of way*

"(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 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) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically-propelled vehicles— (i) was reasonably necessary to enable that person to obtain access to the land, or (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

"(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."

10 Section 130(1) of the Highways Act 1980 provides:

"It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it."

*The factual background*

11 Between 14 July 2004 and 21 December 2004 Mr Stuart submitted five applications under section 53(5) of the 1981 Act to modify the definitive map to upgrade existing rights of way to BOAT status and/or to cause lengths of path to be shown as BOATs. The applications relate to routes (1) at Bailey Drove (T338); (2) from Doles Hill Plantation East to Chebbard Gate in Cheselbourne/Dewlish (T339); (3) in Tarrant Gunville/Chettle (T350); (4) in Meerhay Lane from Meerhay to Beaminster Down,

A Beaminster (T353); and (5) in Crabbs Barn Lane (T354). Accompanying each application was a map showing the route in question. Mr Stuart describes at para 6 of his witness statement the method by which the maps were produced. In summary the method was: (1) the maps were generated using software installed on his personal computer. The software is called "Anquet" and the relevant version number was V1. (2) The software was
B designed for the viewing and printing of digitally encoded maps. The digitally encoded maps from which the applications maps were generated were purchased by him and were supplied on a CD-ROM. The packaging on the CD-ROM describes the map as "Anquet Maps: the South Coast". The packaging refers to 1:50,000 and states: "mapping sourced from Ordnance Survey". (3) The printing function on the software allows maps to be printed to a range of scales. In relation to the maps in
C question, the software allowed maps to be printed to scales ranging from 1:10,000 to 1:1,000,000. He selected a scale that best fitted the claimed route on A4 paper but it was always 1:25,000 or larger. He then printed the maps on a laser printer. (4) The maps, he says, which were produced are "to a scale of at least 1:25,000: that is to say, e g, a measurement of one centimetre on the printed map corresponds to a measurement of 250 metres
D or less on the ground".

12 Each of the applications was acknowledged by the local authority by early 2005. There was no intimation that the applications were defective before 2009.

13 The minutes of the meeting of the local authority's Roads and Rights of Way Committee ("the committee") held on 7 October 2010 at which the five applications were considered record, at minute 125.6:

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> "The Head of Legal and Democratic Services referred members to the requirement for an application to be accompanied by a map drawn to a scale of not less than 1:25,000 . . . The Head of Service[s] advised that he did not believe the maps which accompanied the applications to have been drawn to a scale of not less than 1:25,000. Members were referred to letters [dated 19 March 2009 and 10 December 2009] provided by the
> F Ordnance Survey setting out their comments and in particular to their description of an application map as a facsimile copy of an enlarged image taken from the Ordnance Survey digital raster mapping originally produced at a 1:50,000 scale."

The committee resolved to refuse all five applications. Under the heading "Reasons for Recommendation", the following was recorded:

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> "1. For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that public rights of way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question
> H were accompanied by computer generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1:25,000. In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused."

That decision was notified in writing to the claimants on 2 November 2010.

*The parties' submissions*

**14** Mr Pay, for the claimants, submits that the local authority was wrong to find that the requirements of paragraph 1 of Schedule 14 to the 1981 Act were not exactly complied with. The maps were drawn to a scale of no less than 1:25,000 and plainly showed the routes in question. The legislative requirements do not address themselves to the way in which such a map is derived, only to the end result. "Drawn to the prescribed scale" must, he submits, refer to the scale of what is produced to the authority: ground 1(a). It is common ground that the applications were accompanied by a map; and that the map was to a scale of no less than 1:25,000 in the sense that measurements on the map corresponded to measurements on the ground by a fixed ratio whereby a measurement of one centimetre on the map corresponds to a measurement of no more than 250 metres on the ground.

**15** Further Mr Pay submits that the local authority's rejection of the applications proceeded on a mistaken understanding of the process by which the maps were produced: ground 1(b). He so submits by reference to the second claimant's evidence, at para 18.3 of his witness statement dated 30 January 2011:

> "Although a digital map might be said to have a level of accuracy in that the location of particular features will be stored to a particular resolution, it is misleading to talk of it having a scale until it is printed (or viewed). Such a map may be printed or viewed at any particular scale . . ."

In their detailed statement of grounds in support of their application for judicial review the claimants indicated that they wished to call expert evidence on this issue.

**16** If paragraph 1 of Schedule 14 to the 1981 Act was not exactly complied with, Mr Pay submits that any departure was "de minimis": ground 2. The maps which accompanied the applications enabled the local authority to identify the routes in relation to which the applications were made; and were of a greater practical use than many examples of maps which, on the local authority's analysis, would have complied exactly with the legislative requirements, such as, for example, a hand drawn map or a poorly photocopied 1:25,000 map.

**17** Mr George Laurence QC, for the local authority, submits that on the proper construction of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the 2006 Act, a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to not less than the prescribed scale only if it is originally so drawn (i e created or produced) and is thereafter reproduced for use by the applicant when making his application without being enlarged or reduced in any way: ground 1(a).

**18** Further Mr Laurence submits the local authority was entitled to rely on the views expressed by the Ordnance Survey ("OS") (on whose maps the applications maps were based). The OS stated in letters dated 19 March 2009 and 10 December 2009 that the application maps were an enlargement of the 1:50,000 map: ground 1(b).

**19** Mr Laurence submits that if a map accompanying an application must be a replica, neither enlarged nor reduced, of a map drawn to a scale of

A not less than 1:25,000, it is wrong to treat a map that has been enlarged to 1:25,000 or less from a 1:50,000 map as compliant with the legislation on the basis of de minimis merely because, on the facts of a particular case, it could be said that it was possible to identify the routes in relation to which the application was made: ground 2.

**20** Miss Staddon, for the second interested party, supports the local B authority's position. She submits that the claimants' failure to comply with paragraph 1 of Schedule 14 is not a mere "technical" point, as the claimants suggest. The objection is not that 1:25,000 scale maps happen to have been produced in an incorrect way; the objection is that the applications were not accompanied by 1:25,000 scale maps at all: ground 1.

**21** Further Miss Staddon submits paragraph 1 of Schedule 14 requires that the application maps satisfy both of two elements: first, "drawn to the C prescribed scale", and second, "showing the way". The fact that a map to the wrong scale shows the way at that wrong scale is not a good reason, she submits, for saying that the use of the wrong scale is de minimis: ground 2.

*Discussion*

*The first issue: whether there was compliance with paragraph 1 of* D *Schedule 14*

**22** In *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138 the Court of Appeal considered 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. Dyson LJ said, at para 54:

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> "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 F paragraph 1 will not invalidate an application."

**23** Mr Pay submits that there was strict compliance with paragraph 1 of Schedule 14. He observes that the sole basis on which the applications were rejected was that the map which accompanied each application was derived by enlarging a 1:50,000 map. As to the legislative requirement for a map to a scale of no less than 1:25,000 he makes five points. First, it does not G specify that an OS map must be used (or indeed any other specific type of map). Second, it does not require that any particular physical details be given on the map other than the way itself; third, it places no relevance on the fact that, for example, OS 1:25,000 maps as compared to OS 1:50,000 maps by convention show differing land details. Fourth, it contemplates that a hand drawn map would suffice. Fifth, it does not specify particular accuracy with which a map must be drawn.

H **24** Further, Mr Pay emphasises the purpose of an application map. It is provided at the first stage in an application for a modification order. As such it triggers an obligation on the surveying authority to investigate. The surveying authority may then propose a modification order, as a result of which the surveying authority may themselves produce a map. A change

to the definitive map is not effective until confirmed, which may involve a public inquiry at which any person may give evidence as to the route to be adopted. The Secretary of State may then decide not to confirm the order proposed, but rather propose a different order.

**25** In a letter dated 5 June 2009 the Department for Environment, Food and Rural Affairs ("DEFRA") expressed the view that an application that was accompanied by a map that has been photographically enlarged could be a "qualifying" application under the de minimis principle. Mr Pay prays in aid two of the reasons given for that conclusion in support of his primary submission that there was strict compliance with paragraph 1 of Schedule 14. First, as DEFRA noted, the legislation does not specify that maps accompanying an application are to be either professionally prepared or based on OS maps, so there is nothing to say that an applicant cannot "draw" his own map. Provided it was to a scale of 1:25,000 or greater, such a map would meet the terms of the legislation, but could be considerably less clear, accurate and detailed than a map photographically enlarged from a 1:50,000 OS map. Second, one can take this argument one stage further and envisage a scenario where an applicant takes a 1:50,000 OS map, photographically enlarges it to 1:25,000, then traces that map onto blank paper and submits that tracing as the map accompanying the application, now "drawn" as prescribed to 1:25,000. Such a map would meet the terms of the legislation, even if (almost inevitably) the traced version would have lost something of the detail contained in the original OS map from which it was taken and therefore be less fit for purpose than a map photographically enlarged from a 1:50,000 OS map.

**26** Mr Pay suggests this illustrates the absurdity of the local authority's argument that the focus of the legislative requirements is on the map as it is originally drawn and not, as the claimants contend, on the map as it is produced to the authority. Similarly Mr Pay submits, if the map was hand drawn to the prescribed scale, it being mechanically produced from another map, it would, he suggests, be impossible to tell the scale from which it had been drawn, yet on the local authority's construction if the hand drawn map was an enlargement or reduction of the source map it would not be compliant. However as Mr Laurence points out, if a map is drawn by an applicant from, say, two sources, so long as what is produced can properly be described as a map to the prescribed scale, it would comply with the statutory requirements. That being so, Mr Laurence suggests that Mr Pay's example does not advance his submission. The onus is on the applicant to show that the map is produced to the prescribed scale.

**27** In my judgment, none of these matters alter the fact that the applications were accompanied by a map that was not a 1:25,000 scale map. A document headed "Ordnance Survey response to questions posed by the parties to the case" dated 18 May 2012, provides what has been treated by the parties as expert evidence from the OS. In Part I of the document, under the heading "The implications for computer based technologies on the presentation of mapping", the OS state, inter alia:

> "26. For the purposes of this response, Ordnance Survey will focus solely on raster data since the digital versions of the mapping from Ordnance Survey at issue are both held by Ordnance Survey and published in raster data format. (i) Since the raster image is in lay terms a

A 'digital picture' of the map, it follows that once the raster has been created only the content of the source graphic map is contained within the data . . .

"27. It also follows that, disregarding the capabilities of a computer screen or printer/plotter to reproduce a specific map image, the process of outputting from raster data, a map published at one scale, at a larger or smaller output scale simply magnifies or reduces the image of the map, but cannot change the content or appearance of the source map/source data . . ."

**28** Questions asked by the local authority and answers provided by OS include the following:

"(1) Question 1 (first part) where: 1.1 digital raster mapping is originally produced by the OS at 1:50,000 scale ('the original product'); 1.2 an image is taken from the original product and enlarged to a 1:25,000 scale; and 1.3 a facsimile copy of that enlarged image is produced in printed form ('the map') is the map properly to be regarded as being at a scale of 1:50,000 or 1:25,000?"

"Answer: As described in the question the map would be properly to be regarded as a 1:50,000 scale Ordnance Survey map enlarged to a 1:25,000 scale."

"(2) Question 1 (second part): If not properly regarded as being at a scale of 1:25,000 is the map regarded as equivalent to a map produced at 1:25,000 by the Ordnance Survey?"

"Answer: It is not regarded by Ordnance Survey as equivalent to a map published by Ordnance Survey at 1:25,000 scale, since it does not conform to the standard cartographic style and content used by Ordnance Survey for national series maps and data products published at the 1:25,000 scale."

"Question 6: What are the differences between an OS 1:25,000 map and an enlarged (by the method described by the claimants) 1:50,000 product?"

"Answer: The differences are those already expressed as the differences between the specifications of the two data sets published by Ordnance Survey. They are most apparent visually in the different levels of content simplification, generalisation, symbology and conventions of depiction of the two map series.

"These include, for example, the inclusion of land enclosure boundaries, separate depiction of a greater number of individual buildings, and depiction of various roads widths for certain categories of road within the 1:25,000 scale OS Explorer Map and 1:25,000 scale colour raster, compared with the more heavily simplified and generalised content of the 1:50,000 scale OS Landranger Map and 1:50,000 scale colour raster which has standardised road width depictions, far fewer individual buildings identified and minimal land enclosure boundary information."

**29** Mr Laurence and Miss Staddon submit that the construction of paragraph 1 of Schedule 14 that they put forward is consistent with the approach taken in the decisions of two inspectors; first, that of Mr Beckett of 10 June 2009 in a case involving Buckinghamshire County Council.

The application map used in that case was a photocopy extract from an OS 1:50,000 scale map which had been enlarged photographically to a scale of 1:25,000. The inspector decided that the map remained a map which had been drawn at a scale of 1:50,000, so the exemption in section 67(3) of the 2006 Act did not apply.

30 Second, there was the decision of Mr Millman made on 15 July 2011 in a case involving Dorset County Council which included applications made by the claimants as part of a series of applications, which include the five applications in issue in the present proceedings, all of which use the same kind of application maps. Exactly the same questions arose in that case as in the instant case. Mr Millman had regard to DEFRA's advice letter of 3 July 2009 and concluded that as there was no distinction between the appearance of a map produced by photographic enlargement and one printed from digital data, there can be no sensible justification for not applying DEFRA's advice on photographic enlargement to a computer generated image of an identical product. He found that the applications in question did not comply with the requirements of Schedule 14 to the 1981 Act for the purposes of section 67(6) of the 2006 Act.

31 In my judgment it does not follow from the fact that Parliament has not specified that an OS map must be used that by selecting as the minimum prescribed scale 1:25,000 Parliament did not have in mind that at that scale it is possible to provide detail which at lesser scales it becomes increasingly difficult to provide. I accept Mr Laurence's submission that Parliament required a map at a prescribed scale of 1:25,000 to accompany applications under section 53(5) of the 1981 Act in the knowledge that OS maps were used to prepare the DMS itself and in the reasonable expectation many persons who apply to modify the DMS would choose to accompany their applications with OS maps. Accordingly it made sense to prescribe that the accompanying map should be at a scale enabling applicants who choose to use an OS map to include a level of detail sufficient to ensure that in most cases physical features, bounding tracks on the ground or separating one parcel of land from another would appear on an OS map drawn to that scale.

32 Such a construction of paragraph 1 of Schedule 14 is supported by reference to paragraph 3 of Schedule 14. A compliant application engages the provisions of paragraph 3 of Schedule 14 by requiring the authority to investigate the matters stated in it. The requirement for the accompanying map to be at the prescribed scale avoids or diminishes the burden on the authority of inspecting the land and then trying to construe the application in order to ascertain, for example, whether the way claimed passes between hedges, not shown on the map, or on which side of a boundary feature, also not shown on the map, the way claimed runs. Where, for example, a question arises as to which side of a field boundary the route applied for runs, the 1:25,000 map will inform the surveying authority that there is, physically, such a boundary whereas that information may often not appear on a 1:50,000 map at all: see the witness statement of Ms Meggs on behalf of the local authority, at paras 8–14.

33 Mr Laurence submits that the words in paragraph 1 of Schedule 14 "showing the way to which the application relates" appear to have been carefully chosen. Whilst, even on a map at a scale of 1:25,000 it would not be reasonable to expect the applicant to depict exactly the area of land said

A to qualify say as a BOAT, a document needs to contain a certain amount of appropriate detail before it can qualify as a map at all. The requirement for it to be drawn to scale of not less that 1:25,000 suggests, Mr Laurence contends, that a good deal of accurate detail must be included in order that the document put forward may qualify as a "map" as required by paragraph 1 (as opposed to being a mere, even if accurate, sketch map). Moreover, where, as in the present case, an OS map is used the position of B the way claimed can be shown with greater accuracy if a 1:25,000 map as opposed to a 1:50,000 map is used owing to the inclusion on the former of important physical features which are not shown on the latter. For example, OS 1:50,000 mapping convention is to show roads of generalised standard widths rather than at their true scale width, unlike OS 1:25,000 mapping for certain categories of roads. So an OS 1:50,000 would not be able to show C the route of the claimed way by reference to the alignment of such a road to the same degree of accuracy and precision as the OS 1:25,000 version.

**34** I accept Miss Staddon's submission that in order to "show the way" a qualifying map needs to show sufficient physical features to enable the surveying authority to ascertain, at least, the route of the claimed way, within the constraints of the prescribed scale. Separately from the need to D show the claimed way though, Miss Staddon submits, the overarching requirement that the application map be a map to a scale of not less than 1:25,000 imports the requirement that the map be properly drawn to that scale, whether by a professional or lay person and whether drawn by computer or hand drawn, with an accuracy and precision relative to that scale.

**35** The claim at ground 1(b) is refuted by the OS evidence. It was the E claimants' understanding that the scale of the OS raster data used by the claimants was in effect flexible in their hands within the scope of the Anquet product and that the "nominal" scale on the product (1:50,000) in fact meant nothing in terms of "true" scale. The claimants understood that the raster data had no inherent scale but allowed a selection of scales and that they had duly selected, printed and supplied to the local authority F application maps at the scale of 1:25,000. However it is clear from the OS evidence that is not correct: see paras 27 and 28 above.

*Conclusion on first issue*

**36** In my judgment there was no strict compliance with the requirements of paragraph 1 of Schedule 14 to the 1981 Act. The maps G which accompanied the applications were not drawn to a scale of no less than 1:25,000: ground 1(a). I reject the claimants' submission that the local authority's analysis of the facts was premised upon a fundamental misunderstanding of the process of reproducing a map by digital means. It is clear from the evidence from OS that the misunderstanding was that of the claimants, not the local authority: ground 1(b).

H *The second issue: the application of the de minimis principle*

**37** In the *Winchester College* case [2009] 1 WLR 138 the Court of Appeal accepted, at para 54, that "minor departures from paragraph 1 will not invalidate an application". Indeed, as Dyson LJ observed, this principle is explicitly recognised in regulation 8(1) of the 1993 Regulations. Examples

of departures from the requirements of paragraph 1 of Schedule 14 which may fall within the de minimis rule appear from the later decision of the Court of Appeal in *Maroudas v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA Civ 280. In that case Dyson LJ accepted that the lack of a date and signature in an application form can in principle be cured by a dated and signed letter sent shortly after the submission of the form, where the omissions are pointed out and the council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter: paras 27 and 36. Similarly, if the application form contains a minor error in the description of the route or its width or length, and the applicant discovers the error shortly after he has submitted the application and writes to the authority correcting it, the application would be contained in the original application form as corrected. Such an amended application would be in accordance with paragraph 1 of Schedule 14: para 28.

**38** In *Maroudas's* case Dyson LJ did not find it necessary to define the limits of permissible departures from the strict requirements of paragraph 1 of Schedule 14: para 30. In particular he did not find it necessary to decide whether paragraph 1 of Schedule 14 requires that the map, which should accompany the prescribed form, must be sent at the same time as the form: para 30. In that case the application form was not signed or dated and it was not accompanied by a map showing the route to which it related. The court held that the departures from the requirements of paragraph 1 of Schedule 14 were substantial and were not such as could be saved by the de minimis principle, even when the application was considered together with the subsequent exchange of correspondence.

**39** Mr Pay submits that there can be no suggestion but that the maps which accompanied the applications enabled the local authority to identify the routes in relation to which the applications were made; and even if there were any uncertainty about the application routes, any such uncertainty could be very easily rectified. Further, he submits, the maps which accompanied the applications were of, at least, as great a practical use as maps which exactly complied with the legislative requirement, on the local authority's analysis; indeed, he submits, they were of greater practical use than many examples of maps which would on the local authority's analysis exactly comply with the legislative requirements, such as a hand drawn map or a poorly photocopied 1:25,000 map.

**40** In the circumstances Mr Pay submits that the only departure from the requirements of paragraph 1 of Schedule 14 was de minimis.

**41** I do not accept that the maps which accompanied the applications were of equal practical use as the maps which should have been submitted. Mr Laurence and Miss Staddon in their oral submissions showed by reference to the maps in evidence before the court why this is not so: see for example Mr Plumbe's first witness statement dated 25 February 2011, at paras 6 and 7, in relation to a similar application by the claimants (T323); Mr Plumbe's third witness statement dated 24 April 2012, at paras 13–17, in relation to application T338; and maps (exhibited to Mr Plumbe's fourth witness statement dated 19 June 2012) using OS 1:25,000 scale mapping, to show OS 1:25,000 scale versions of the application maps, for comparison with the application maps in applications T339, T350, T353 and T354. It is plain that there are material differences between the presentation of the

A claimed ways on the application maps and their presentation on a 1:25,000 scale map.

**42** Further I reject Mr Pay's submission that any departure from the strict requirements of paragraph 1 of Schedule 14 was of less consequence than a number of illustrations of the scope of the de minimis rule as illustrated in the *Winchester College* case [2009] 1 WLR 138 and *Maroudas's* case [2010] EWCA Civ 280. The de minimis principle, as B Miss Staddon submits, is not such as to excuse a failure to use application maps to the prescribed scale. It is clear from the evidence that a map to a scale of 1:50,000 is very different from a map to a scale of 1:25,000, in particular, in terms of the detail relevant to the routes of the claimed ways and their impact relative to surrounding features. It cannot follow from the fact that the maps which accompanied the applications enabled the local C authority to identify the routes in relation to which the applications were made that the departure from the requirements of paragraph 1 of Schedule 14 was de minimis. I accept Mr Laurence's submission that for the doctrine of de minimis to apply in these circumstances would mean that each application accompanied by a non-compliant enlarged map would have to be scrutinised on a case-by-case basis, leading to expense and uncertainty.

**43** It is not suggested by the claimants that it was impossible for them to D submit applications with maps drawn to the prescribed scale: see the *Winchester College* case [2009] 1 WLR 138, para 50. This is not a case like *Maroudas's* case [2010] EWCA Civ 280 where the issue was whether the applicant had remedied the defects in question soon enough for them to be treated as de minimis. The claimants do not recognise that there was no qualifying map. Mr Laurence accepts that, if a compliant map is E photocopied, without being enlarged or reduced in size, and it became distorted in the copy, the de minimis principle should apply; however that is not this case.

*Conclusion on second issue*

**44** In my judgment the de minimis principle has no application in the F present case.

*Conclusion*

**45** For the reasons I have given this claim fails.

*Claim dismissed.*

G BENJAMIN WEAVER ESQ, Barrister

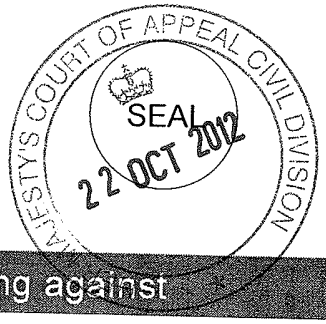
H

**TRFDOC3 – Appeal Notice of the TRF in R (Trail Riders Fellowship) v Dorset CC**

# Appellant's notice
(All appeals except small claims track appeals)

| For Court use only | |
|---|---|
| Appeal Court Ref. No. | 2012/2689 |
| Date filed | 22 OCT 12 |

Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.




## Section 1 Details of the claim or case you are appealing against

Claim or Case no. CO/889/2011

Name(s) of the ☑ Claimant(s) ☐ Applicant(s) ☐ Petitioner(s)

(1) TRAIL RIDERS FELLOWSHIP (a company limited by guarantee)
(2) DAVID LEONARD TILBURY

Name(s) of the ☑ Defendant(s) ☐ Respondent(s)

DORSET COUNTY COUNCIL

(for details of Interested Parties, see the attached list)

Details of the party appealing ('The Appellant')

Name

TRAIL RIDERS FELLOWSHIP

Address (including postcode)

TRAIL RIDERS FELLOWSHIP
c/o BUSINESS ACCOUNTANCY CONSULTANTS
2 LONDON ROAD
HEADINGTON
OXFORD
OX3 7PA

| | |
|---|---|
| Tel No. | |
| Fax | |
| E-mail | |

Details of the Respondent to the appeal

Name

DORSET COUNTY COUNCIL

Address (including postcode)

COUNTY HALL
COLLITON PARK
DORCHESTER
DT1 1XJ

| | |
|---|---|
| Tel No. | |
| Fax | |
| E-mail | |

Details of additional parties (if any) are attached ☑ Yes ☐ No

## Section 2 Details of the appeal

From which court is the appeal being brought?

☐ The County Court at

☑ High Court

- ☑ Queen's Bench Division
- ☐ Chancery Division
- ☐ Family Division

☐ Other (please specify)

What is the name of the Judge whose decision you want to appeal?

MR JUSTICE SUPPERSTONE

What is the status of the Judge whose decision you want to appeal?

☐ District Judge or Deputy ☐ Circuit Judge or Recorder ☐ Tribunal Judge

☐ Master or Deputy ☑ High Court Judge or Deputy

What is the date of the decision you wish to appeal against?

2 October 2012

To which track, if any, was the claim or case allocated?

☐ Fast track

☐ Multi track

☑ Not allocated to a track

Nature of the decision you wish to appeal

☐ Case management decision ☐ Grant or refusal of interim relief

☑ Final decision ☐ A previous appeal decision

## Section 3 Legal representation

Are you legally represented? ☑ Yes ☐ No

If 'Yes', please give details of your solicitor below

Name of the firm of solicitors representing you

BRAIN CHASE COLES

The address (including postcode) of the firm of solicitors representing you

Haymarket House,
20/24 Wote Street,
Basingstoke,
Hampshire,
RG21 7NL

| | |
|---|---|
| Tel No. | +44 (0)1256 354481 |
| Fax | +44 (0)1256 841432 |
| E-mail | mstevenson@brainchasecoles.co.uk |
| DX | DX 3005 - BASINGSTOKE |
| Ref. | MSS |

Are you, the Appellant, in receipt of a Legal Aid Certificate or a Community Legal Service Fund (CLSF) certificate? ☐ Yes ☑ No

Is the respondent legally represented? ☑ Yes ☐ No

If 'Yes', please give details of the respondent's solicitor below

Name and address (including postcode) of the firm of solicitors representing the respondent

Dorset County Council
Head of Legal and Democratic Services
County Hall
Colliton Park
Dorchester
Dorset
DT1 1XJ

| | |
|---|---|
| Tel No. | 01305 225 104 |
| Fax | 01305 224 399 |
| E-mail | s.l.meggs@dorsetcc.gov.uk |
| DX | DX 8716 Dorchester |
| Ref. | SLM |

## Section 4 Permission to appeal

Do you need permission to appeal? ☑ Yes ☐ No

Has permission to appeal been granted?

☐ **Yes** (Complete Box A) ☑ **No** (Complete Box B)

**Box A**

Date of order granting permission

Name of Judge granting permission

**Box B**

I BRAIN CHASE COLES

the Appellant('s solicitor) seek permission to appeal.

If permission to appeal has been granted **in part** by the lower court, do you seek permission to appeal in respect of the grounds refused by the lower court? ☐ Yes ☐ No

## Section 5 Other information required for the appeal

Please set out the order (or part of the order) you wish to appeal against

The whole of the order dated 2 October 2012.

Have you lodged this notice with the court in time?
(There are different types of appeal -
see Guidance Notes N161A)

☑ Yes ☐ No

If **'No'** you must complete
**Part B of Section 9**

## Section 6 Grounds of appeal

Please state, in numbered paragraphs, **on a separate sheet** attached to this notice and entitled 'Grounds of Appeal' (also in the top right hand corner add your claim or case number and full name), why you are saying that the Judge who made the order you are appealing was wrong.

☑ I confirm that the grounds of appeal are attached to this notice.

## Section 7 Arguments in support of grounds for appeal

☑ I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' are set out **on a separate sheet** and attached to this notice.

OR

☐ I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal will follow within 14 days of filing this Appellant's Notice

## Section 8 What are you asking the Appeal Court to do?

I am asking the appeal court to:-
(please tick the appropriate box)

☐ set aside the order which I am appealing

☑ vary the order which I am appealing and substitute the following order. Set out in the following space the order you are asking for:-

(1) The claim is allowed;
(2) It is declared that the five applications dated 14/7/04 (ref. T338), 25/9/04 (ref. T339), 21/12/04 (ref. T350), 21/12/04 (ref. 353) and 21/12/04 (ref. T354) under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981;
(3) Dorset CC be ordered to determine the five such applications;
(4) The decision of Dorset CC by letter dated 2 November 2010 rejecting the five such applications be quashed;
(5) Costs.

☐ order a new trial

## Section 9 Other applications

Complete this section **only** if you are making any additional applications.

**Part A**

☐ I apply for a stay of execution. (You must set out in Section 10 your reasons for seeking a stay of execution and evidence in support of your application.)

**Part B**

☐ I apply for an extension of time for filing my appeal notice. (You must set out in Section 10 the reasons for the delay and what steps you have taken since the decision you are appealing.)

**Part C**

☐ I apply for an order that:

(You must set out in Section 10 your reasons and your evidence in support of your application.)

## Section 10 Evidence in support

In support of my application(s) in Section 9, I wish to rely upon the following reasons and evidence:

**Statement of Truth** – This must be completed in support of the evidence in Section 10

~~I believe~~ (The appellant believes) that the facts stated in this section are true.

Full name MARGARET SARAH STEVENSON

Name of appellant's solicitor's firm BRAIN CHASE COLES

signed M.S. Stevenson

Appellant ('s solicitor)

position or office held

(if signing on behalf of firm or company)

## Section 11 Supporting documents

To support your appeal you should file with this notice all relevant documents listed below. To show which documents you are filing, please tick the appropriate boxes.

If you do not have a document that you intend to use to support your appeal complete the box over the page.

- [x] two additional copies of your appellant's notice for the appeal court;
- [x] one copy of your appellant's notice for each of the respondents;
- [x] one copy of your grounds for appeal for each of the respondents;
- [x] one copy of your skeleton argument for each copy of the appellant's notice that is filed;
- [x] a sealed *(stamped by the court)* copy of the order being appealed;
- [x] a copy of any order giving or refusing permission to appeal, together with a copy of the judge's reasons for allowing or refusing permission to appeal;
- [ ] any witness statements or affidavits in support of any application included in the appellant's notice;
- [ ] a copy of the order allocating the case to a track *(if any)*; and
- [ ] a copy of the legal aid or CLSF certificate *(if legally represented)*.

A bundle of documents for the appeal hearing containing copies of all the papers listed below:-

- [ ] a sealed copy *(stamped by the court)* of your appellant's notice;
- [ ] a sealed copy *(stamped by the court)* of the order being appealed;
- [ ] a copy of any order giving or refusing permission to appeal, together with a copy of the judge's reasons for allowing or refusing permission to appeal;
- [ ] any affidavit or witness statement filed in support of any application included in the appellant's notice;
- [ ] a copy of the grounds for appeal;
- [ ] a copy of the skeleton argument;
- [ ] a transcript or note of judgment, and in cases where permission to appeal was given by the lower court or is not required those parts of any transcript of evidence which are directly relevant to any question at issue on the appeal;
- [ ] the claim form and statements of case (where relevant to the subject of the appeal);
- [ ] any application notice (or case management documentation) relevant to the subject of the appeal;
- [ ] in cases where the decision appealed was itself made on appeal (eg from district judge to circuit judge), the first order, the reasons given and the appellant's notice used to appeal from that order;
- [ ] in the case of judicial review or a statutory appeal, the original decision which was the subject of the application to the lower court;
- [ ] in cases where the appeal is from a Tribunal, a copy of the Tribunal's reasons for the decision, a copy of the decision reviewed by the Tribunal and the reasons for the original decision and any document filed with the Tribunal setting out the grounds of appeal from that decision;
- [ ] any other documents which are necessary to enable the appeal court to reach a decision; and
- [ ] such other documents as the court may direct.

Reasons why you have not supplied a document and date when you expect it to be available:-

| Title of document and reason not supplied | Date when it will be supplied |
|---|---|
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## Section 12 The notice of appeal must be signed here

Signed Brian Chase Colyer. Appellant('s Solicitor)

IN THE COURT OF APPEAL

Appeal Court Ref. No.

ON APPEAL FROM

THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE SUPPERSTONE)

Claim No. CO/899/2011

THE QUEEN ON THE APPLICATION OF

(1) TRAIL RIDERS FELLOWSHIP
(2) DAVID LEONARD TILBURY — Claimants

and

DORSET COUNTY COUNCIL — Defendant

and

(1) SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) MR GRAHAM PLUMBE — Interested Parties

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## GROUNDS OF APPEAL

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1. The learned Judge erred in holding that the five applications did not comply in terms with the requirements of paragraph 1 Schedule 14 Wildlife and Countryside Act 1981.

2. The learned Judge erred in holding that any departure from the requirements of paragraph 1 Schedule 14 Wildlife and Countryside 1981 was not within the scope of the principle *de minimis non curat lex*.

IN THE COURT OF APPEAL

Appeal Court Ref. No.

ON APPEAL FROM

THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE SUPPERSTONE)

Claim No. CO/899/2011

THE QUEEN ON THE APPLICATION OF

(1) TRAIL RIDERS FELLOWSHIP
(2) DAVID LEONARD TILBURY — Claimants

and

DORSET COUNTY COUNCIL — Defendant

and

(1) SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS
(2) MR GRAHAM PLUMBE — Interested Parties

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## DETAILS OF ADDITIONAL PARTIES

---

## DETAILS OF THE FIRST INTERESTED PARTY

Name

SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Address (including postcode)

| |
|---|
| Nobel House<br>17 Smith Square<br>London<br>SW1P 3JR |

| | |
|---|---|
| Tel No. | 020 7238 6000 |
| Fax | 020 7238 2294 |
| Email | Jennifer.ferns@defra.gsi.gov.uk |

Name and address of the solicitors representing the First Interested Party

| |
|---|
| General Public Law and Planning Team<br>Treasury Solicitor's Department<br>10th Floor<br>One Kemble Street<br>London WC2B 4TS |

| | |
|---|---|
| Tel No. | 0207 210 2919 |
| Fax | 0207 210 3352 |
| Email | Juliette.Devani@tsol.gsi.gov.uk |
| DX | |
| Ref. | Juliette Devani |

## DETAILS OF THE SECOND INTERESTED PARTY

Name

MR PHILIP GRAHAM PLUMBE

Address (including postcode)

| |
|---|
| Crondall House, Crondall Road<br>Crookham Village, Fleet<br>Hants GU51 5SY |

| | |
|---|---|
| Tel No. | 01252 850282 |
| Fax | |
| Email | Graham.plumbe@googlemail.com |

Name and address of the solicitors representing the Second Interested Party

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**TRFDOC4 – R (Trail Riders Fellowship) v Dorset CC [2013] EWCA 553 [2013] PTSR 987**

A Court of Appeal

# Regina (Trail Riders' Fellowship and another) *v* Dorset County Council

## [2013] EWCA Civ 553

B 2013 April 23; May 20

Maurice Kay, Black, Rafferty LJJ

*Highway — Right of way — Definitive map — Applications to modify definitive map and statement — Applications accompanied by computer generated enlargements of Ordnance Survey maps drawn to 1:50,000 scale — Local authority rejecting applications on ground maps not drawn to prescribed scale of* C *not less than 1:25,000 — Whether maps required to be originally drawn to scale of not less than 1:25,000 — Whether applications defective — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, para 1 — Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), regs 2, 8*

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking D modification orders in respect of the authority's definitive map and statement in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the map and statement. Accompanying each application was a map of the route in question. Each map had been taken from computer software with digitally encoded mapping "sourced from the Ordnance Survey". Each had originally been drawn to a scale of 1:50,000 and then printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the E basis that the maps did not comply with the requirement in paragraph 1(a) of Schedule 14 to the 1981 Act that they be drawn to the prescribed scale, which, by regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[2], was a scale of not less than 1:25,000. The judge dismissed the claim, holding that in order to comply with the requirements of the 1981 Act and the 1993 Regulations a map had to have been originally drawn to a scale of not less than 1:25,000.

F On appeal by the claimants—

*Held*, allowing the appeal, that paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981, read together with regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, required that an application to which Schedule 14 applied be accompanied by something that (i) was identifiable as a map, (ii) was drawn to a scale of not less than 1:25,000 and (iii) showed the way or ways to which the application related; that the statutory G scheme did not specify that the map had to be one produced by the Ordnance Survey or any other commercial or public authority, nor was the scheme prescriptive as to the features which had to be shown on the map beyond the way or ways to which the application related; that "drawn" in paragraph 1(a) of Schedule 14 to the 1981 Act was not to be construed as being confined to "originally drawn" but should be given a

[1] Wildlife and Countryside Act 1981, s 53(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 H 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."

Sch 14, para 1: see post, para 3.

[2] Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, reg 2: see post, para 4.

Reg 8(2): see post, para 5.

meaning which embraced later techniques for the production of maps, synonomous with "produced" or "reproduced"; that, therefore, the requirement that a map be "drawn" to a scale of not less than 1:25,000 did not mean that the map had to have been originally drawn to that scale and what was important was the scale on the document which accompanied the application; that it followed that a map produced to a scale of 1:25,000, even if it was digitally derived from an original map with a scale of 1:50,000, satisfied the requirements of paragraph 1(a) of Schedule 14 to the 1981 Act provided that it was indeed a map and it showed the way or ways to which the application related; and that, accordingly, the maps submitted by the claimants had been drawn to the correct scale and the application had been made in accordance with the requirements of the 1981 Act (post, paras 10–12, 14, 16, 17, 18).

*Grant v Southwestern and County Properties Ltd* [1975] Ch 185 and *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] 2 AC 687, HL(E) considered.

Decision of Supperstone J [2012] EWHC 2634 (Admin); [2013] PTSR 302 reversed.

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

*Grant v Southwestern and County Properties Ltd* [1975] Ch 185; [1974] 3 WLR 221; [1974] 2 All ER 465

*R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] UKHL 13; [2003] 2 AC 687; [2002] 2 WLR 692; [2003] 2 All ER 113, HL(E)

*Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800; [1981] 2 WLR 279; [1981] 1 All ER 545, CA and HL(E)

The following additional cases were cited in argument:

*Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 280; [2010] NPC 37, CA

*Perkins v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin); [2009] NPC 54

*R (Wardens and Fellows of Winchester College) v Hampshire County Council* [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA

*R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490; 89 LGR 398, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

*Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] 1 AC 425; [1991] 3 WLR 1126; [1992] 1 All ER 230; 90 LGR 15, HL(E)

*Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs* [2012] EWHC 1976 (Admin); [2012] ACD 311

*Morgan v Hertfordshire County Council* (1965) 63 LGR 456, CA

*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385; [1999] LGR 651, HL(E)

*R v Secretary of State for the Environment, Ex p Hood* [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243; 73 LGR 426, CA

**APPEAL** from Supperstone J

By a claim form the claimants, Trail Riders' Fellowship and David Tilbury, sought judicial review of the decision of the defendant surveying authority, Dorset County Council, to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement for the area.

A The grounds of claim were: (1) that (a) the authority had been wrong to find that the requirements of paragraph 1 of Schedule 14 to the 1981 Act were not exactly complied with and (b) the authority's rejection of the applications proceeded on a mistaken understanding of the process by which the maps were produced; and (2) that any non-compliance with paragraph 1 of Schedule 14 to the 1981 Act was de minimis. The Secretary of State for
B Environment, Food and Rural Affairs was originally joined as second defendant to the proceedings but, by agreement, later served as the first interested party. Philip Graham Plumbe, representing the interests of the Green Lanes Protection Group and affected landowners, was served as the second interested party.

By order dated 2 October 2012 [2012] EWHC 2634 (Admin); [2013] PTSR 302 Supperstone J sitting in the Administrative Court of the Queen's
C Bench Division dismissed the claim, holding that the maps submitted had not been drawn to the prescribed scale so that the applications had not been made strictly in accordance with the requirements of the 1981 Act; and that since the non-compliance was more than merely de minimis the authority had been right to refuse the applications.

By an appellant's notice dated 22 October 2012 and pursuant to the
D permission of the Court of Appeal (Sullivan LJ) granted on 28 November 2012 the claimants appealed. The sole ground of appeal was that the judge had erred in holding that the five applications did not comply in terms with the requirements of paragraph 1 of Schedule 14 to the 1981 Act: in particular his conclusion that a map produced to a scale of 1:25,000 which was digitally derived from an original map with a scale of 1:50,000 did not satisfy the relevant requirements of paragraph 1(a) of Schedule 14 to
E the 1981 Act. The judge should have found that a map of 1:25,000 scale so produced to accompany each of the five applications was a "map" drawn to the prescribed scale which showed the ways to which the applications related for the purposes of the 1981 Act. The Court of Appeal at the substantive hearing refused permission to appeal on a second ground, rejected by Sullivan LJ, relying on the de minimis principle.

F The facts are stated in the judgment of Maurice Kay LJ.

*Adrian Pay* (instructed by *Brain Chase Coles, Basingstoke*) for the claimants.

*George Laurence QC* (instructed by *Head of Legal and Democratic Services, Dorset County Council, Dorchester*) for the surveying authority.

Philip Graham Plumbe, as the second interested party, in person.

G The Secretary of State did not appear and was not represented.

The court took time for consideration.

20 May 2013. The following judgments were handed down.

H **MAURICE KAY LJ**

1 Access to the countryside often gives rise to controversy. The existence and extent of public rights of way is now regulated by Part III of the Wildlife and Countryside Act 1981. It requires surveying authorities to maintain definitive maps and statements. They are given "conclusive evidence" status by section 56, which distinguishes between footpaths,

bridleways and byways open to all traffic ("BOATs"). Definitive maps and statements have to be kept under continuous review: see section 53(2)(b). Any person can apply to the relevant authority for an order which makes such modifications as appear to the authority to be requisite in consequence of certain events: see section 53(5). The prescribed events include the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map or statement subsists or that a highway shown in the map or statement as a highway of a particular description ought to be there shown as a highway of a different description: see section 53(3). An application pursuant to section 53(5) must comply with requirements set out in Schedule 14. This case is concerned with those requirements.

**2** In 2004, Mr Jonathan Stuart, a member of Friends of Dorset's Rights of Way, submitted five applications to Dorset County Council ("the local authority"), the appropriate surveying authority, seeking modification orders in relation to the definitive map and statement. His aim was to achieve the upgrading of existing rights of way from footpath or bridleway to BOAT status and/or to achieve BOAT status for other lengths of path. In due course, Mr Stuart and his organisation were replaced as claimants by Mr David Tilbury and the Trail Riders' Fellowship (of which Mr Tilbury is a member). The objects of the Trail Riders' Fellowship are "to preserve the full status of vehicular green lanes and the rights of motorcyclists and others to use them as a legitimate part of the access network of the countryside". Essentially, the Trail Riders' Fellowship seeks to establish that rights of way presently depicted in definitive maps and statements as footpaths or bridleways should be reclassified as BOATs, thereby enabling members of the fellowship and others to ride their motorcycles on them. As Mr Tilbury says in his witness statement, this is an emotive issue. However, at this stage we are not concerned with the merits of the applications or the quality of the general evidence said to support them. Our sole concern is with whether, as a matter of form, the applications complied with the statutory requirements.

*The statutory requirements*

**3** 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 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."

The present dispute is concerned with the maps submitted with the applications.

**4** "Prescribed" in paragraph 1(a) means prescribed by regulations made by the Secretary of State: see paragraph 5(1). The relevant regulations are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. Regulation 2 provides:

> "A definitive map shall be on a scale of not less than 1:25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

A 5 By regulation 8(2), regulation 2 "shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order".

6 Thus, in simple terms, when a person applies for a modification order, he must show the right of way for which he contends on a map drawn to a scale of not less than 1:25,000.

B *The issue*

7 In his witness statement, Mr Stuart describes how he produced the maps which he submitted with the applications:

> "The maps were generated using software installed on my personal computer. The software is called 'Anquet' and the relevant version
C number was V1 . . . The software was designed for the viewing and printing of digitally encoded maps. The digitally encoded maps from which the application maps were generated were purchased by me and were supplied on a CD-ROM. The packaging on the CD-ROM describes the map as 'Anquet Maps: the South Coast'. The packaging refers to 1:50,000 scale and states: 'mapping sourced from Ordnance Survey' . . .
D The printing function on the software allows maps to be printed to a range of scales. In relation to the maps in question, the software allowed maps to be printed to scales ranging from 1:10,000 to 1:1,000,000. I selected a scale that best fitted the claimed route on A4 paper but it was always 1:25,000 or larger. I then printed the maps on a laser printer . . . The maps which were produced are, indeed, to a scale of at least 1:25,000, that is to say . . . a measurement of one centimetre on the
E printed map corresponds to a measurement of 250 metres or less on the ground."

8 For more than four years after the applications were filed with the local authority, no point was taken as to compliance with the statutory requirements relating to the maps—or, indeed, as to anything else. However, in October 2010 all five applications were rejected by the local
F authority. Its reasoning was: "The applications in question were accompanied by computer generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1:25,000 . . ." In other words, it did not accept that a map which had originally been drawn to a scale of 1:50,000 but then enlarged by a computer program to a scale of 1:25,000 was a map which was, at the time of its submission, drawn to a
G scale of not less than 1:25,000.

9 The Trail Riders' Fellowship and Mr Tilbury challenged this decision by way of an application for judicial review but on 2 October 2012 the application was dismissed by Supperstone J [2013] PTSR 302. In essence, he agreed with the local authority's interpretation, found non-compliance by the claimants and rejected an alternative ground of challenge based on the de minimis principle.

H *Discussion*

10 It is important to keep in mind what paragraph 1(a) of Schedule 14 to the 1981 Act does and does not require. It is beyond dispute that it requires (1) something that is identifiable as "a map", which (2) is drawn to a

scale of not less than 1:25,000, and which (3) shows the way or ways to which the application relates. Although the first of these requirements necessitates a map, it does not necessitate an Ordnance Survey map. It could have done. Such a statutory requirement is not unknown. For example, section 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an ordnance survey map shall, if possible, be used". More recently, regulation 5 of the Petroleum (Production) (Landward Areas) Regulations 1995 (SI 1995/1436), which is concerned with licence applications, requires an application to be accompanied by two "copies of an Ordnance Survey map on a scale of 1:25,000, or such other map or chart as the Secretary of State may allow". The scheme with which we are concerned is not so specific. Nor is it prescriptive as to features which must be shown on the map, apart from the requirement that it "shows the way or ways to which the application relates". It is well known that an original Ordnance Survey map with a scale of 1:25,000 depicts more physical features than an original Ordnance Survey map of the same site with a scale of 1:50,000. However, as paragraph 1(a) of Schedule 14 to the 1981 Act permits the use of a map which is not produced by Ordnance Survey (or any other commercial or public authority), it cannot be said to embrace a requirement that a map accompanying an application must include the same features as are depicted on an original 1:25,000 Ordnance Survey map. It may include more or fewer such features.

**11** In my judgment, this tends to militate against the submissions made on behalf of the local authority. To the extent that it is contended that "drawn to a scale of not less than 1:25,000" means "*originally* drawn to that scale, with the range of features normally depicted on an original Ordnance Survey map drawn to that scale", the submission seeks to read more into the text than its language permits. I can find nothing to support such a prescriptive requirement as to content as opposed to scale. The only prescriptive requirement as to content is that the map "shows the way or ways to which the application relates". This is a flexible requirement. Sometimes more detail will be necessary, sometimes less, depending on the way in question and its location.

**12** The next question is whether the words "drawn to" a scale of not less than 1:25,000 mean that the map in question must have been originally drawn to that scale rather than enlarged or reproduced to it. I can see no good reason for giving the requirement such a narrow construction. What is important is the scale on the document which accompanies the application. "Drawn" need not imply a reference to the original creation. It is more sensibly construed as being synonymous with "produced" or "reproduced". The local authority does not suggest that only an original document will suffice. It accepts that a photocopy or a tracing of a 1:25,000 Ordnance Survey map would meet the requirement. However, no doubt mindful of the logic of his position, Mr George Laurence QC submits that an original 1:25,000 map which had been digitally enlarged to produce a 1:12,500 map would not meet the requirement. Mr Graham Plumbe, whilst also seeking to uphold the construction of Supperstone J, dissociates himself from this aspect of Mr Laurence's analysis. I consider that he is right to do so. It points to the pedantry of the local authority's position.

**13** I reach this conclusion on the basis of conventional interpretation. However, it is fortified by an approach which takes account of technological

A change. At the time when the 1981 Act was enacted, Parliament would not have had in mind the kind of readily available technology which was used in this case. In *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] 2 AC 687, para 9 Lord Bingham of Cornhill said:

> "There is, I think, no inconsistency between the rule that statutory
B language retains the meaning it had when Parliament used it and the rule that a statute is always speaking . . . The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language . . . [a] revealing example is found in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, where Walton J had to decide whether a tape recording falls within the
C expression 'document' in the Rules of the Supreme Court. Pointing out, at p 190, that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that a tape recording was a document."

Lord Bingham also referred to the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822 where he said:

D

> "when a new state of affairs, or a fresh set of facts bearing on policy comes into existence, the courts have to consider whether they fall within . . . the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the
E extension is made."

Although the present case may be said to be more concerned with procedure than with policy, the same approach is appropriate, as it was in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185.

**14** All this leads me to the view that, whilst I am confident that "drawn" was never intended to be construed as being confined to "originally drawn", it should also now be given a meaning which embraces later techniques for
F the production of maps. For practical purposes, when a computer is used to translate stored data into a printed map, it can properly be said that the computer and the printer are, on human command, "drawing" the map which emerges to the scale which has been selected. I find no difficulty in this approach in circumstances in which the requirements do not prescribe that the submitted map depicts the features which are depicted on an original
G 1:25,000 Ordnance Survey map.

**15** It is submitted on behalf of the local authority that its task as the surveying authority is made more difficult by the use of a map which, although it is to the scale of 1:25,000, does not depict all the features of an original 1:25,000 Ordnance Survey map. For example, the absence of such features may make it difficult to determine which of two adjacent landowners is the "owner or occupier of the land to which the application
H relates" for the purpose of service of a notice pursuant to paragraph 2(1) of Schedule 14 to the 1981 Act. However, service of such a notice is an obligation of the applicant, not of the surveying authority and, in any event, there is a statutory alternative where it is not practicable, after reasonable inquiry, to ascertain the owner: see paragraph 2(2) of Schedule 14.

Ultimately, it is for the surveying authority "to investigate the matters stated in the application": see paragraph 3(1)(a) of Schedule 14. In some cases such an investigation may be easier with the benefit of a map such as an original 1:25,000 Ordnance Survey map but that does not mean that the map accompanying the application must take that form in the absence of clear prescription. Parliament has laid down minimum requirements for the map which accompanies an application. The application triggers an investigation. If the investigation results in a modification of the definitive map, the surveying authority may conclude that the definitive map can only convey the requisite clarity if, say, an original Ordnance Survey 1:25,000 map is used in order to include features not shown on an original 1:50,000 map. It does not follow that such a map was required at the application stage. Moreover, at the modification stage, if further clarity is considered necessary, it may be secured by the statement which may be part of "the definitive map and statement": see section 53(1) of the 1981 Act. I am unconvinced by the protestations of inconvenience advanced on behalf of the local authority. They do not assist with the task of interpretation.

*Conclusion*

**16** For all these reasons, I conclude that a map which is produced to a scale of 1:25,000, even if it is digitally derived from an original map with a scale of 1:50,000, satisfies the requirements of paragraph 1(a) of Schedule 14 to the 1981 Act provided that it is indeed "a map" and that it shows the way or ways to which the application relates. I would therefore allow this appeal. There was originally a second ground of appeal which sought to rely on the de minimis principle. Sullivan LJ refused permission to appeal on that ground, observing that if the appeal were to succeed on the first ground, the second ground is unnecessary; and that, if the appeal were to fail on the first ground, the non-compliance with paragraph 1(a) "could not sensibly be described as de minimis". I respectfully agree. Although we have received submissions in support of a renewed application for permission in relation to the second ground, I would refuse permission.

**BLACK LJ**

**17** I agree.

**RAFFERTY LJ**

**18** I also agree.

*Appeal allowed.*

ALISON SYLVESTER, Barrister

**TRFDOC5 – Order of Court of Appeal 20 May 2013**


COURT 72
Appeal No.

C1/2012/2689

MONDAY 20TH MAY 2013

# IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO8992011

**BEFORE** LORD JUSTICE MAURICE KAY Vice President of the Court of Appeal, Civil Division
LADY JUSTICE BLACK
**AND** LADY JUSTICE RAFFERTY

IN THE MATTER OF a claim for judicial review

**B E T W E E N**

THE QUEEN (ON THE APPLICATION OF)

(1)TRIAL RIDERS FELLOWSHIP

FIRST CLAIMANT/ APPELLANT

- and -

(2)DAVID LEONARD TILBURY

SECOND CLAIMANT

- and -

DORSET COUNTY COUNCIL

DEFENDANT/ FIRST RESPONDENT

- and -

(1)SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

FIRST INTERESTED PARTY/ SECOND RESPONDENT

- and -

(2)MR GRAHAM PLUMBE

SECOND INTERESTED PARTY/ THIRD RESPONDENT

UPON HEARING Counsel for the Appellant, Leading Counsel for the First Respondent and the Third Respondent in person

1. The appeal is allowed on Ground 1.

2. Permission to appeal is refused on Ground 2.

3. The order of Mr Justice Supperstone dated 2 October 2012 is set aside.

4. The claim for judicial review of the decision of the First Defendant dated 2 November 2010 is allowed.

5. It is declared that the five applications dated 14/7/04 (ref. T338), 25/9/04 (ref. T339), 21/12/04 (ref. T350), 21/12/04 (ref. 353) and 21/12/04 (ref. T354) under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981.

6. The First Defendant will proceed to determine such applications in accordance with the provisions of Schedule 14 Wildlife and Countryside Act 1981.

7. The First Defendant will by 4.00pm 3 June 2013:

   7.1. Repay to the Appellant the sum of £5,000 paid to the First Respondent pursuant to the order of Mr Justice Supperstone dated 2 October 2012;

   7.2. Pay the Appellant's costs of the proceedings in the Court below in the agreed sum of £15,000 (inclusive of VAT).

   7.3. Pay the Appellant's costs of the appeal in the agreed sum of £10,000 (inclusive of VAT).

8. Permission to appeal to the Supreme Court is refused.

*By the Court*

**MONDAY 20TH MAY 2013**

# IN THE COURT OF APPEAL

ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF a claim for judicial review

ORDER

Copies to:

Queen's Bench Division - Administrative Court
Room C317
Royal Courts of Justice
The Strand
London WC2A 2LL

Brain Chase Coles
Dx 3005
Basinstoke
Ref: MSS/TRF/DORSET

Dorset County Council
Legal And Democratic Services
Dx 8716
Dorchester
Ref: SLM/E105678

Thomas Eggar Llp
Dx 85715
Crawley
Ref: PPG/JRP/2312/45106495

Treasury Solicitors
Dx 123242
Kingsway 6
Ref: JULIETTE DEVANI

* This order was drawn by Mr J Hebden (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to Mr J Hebden, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 020 7947 7896

**TRFDOC6 – Email correspondence agreeing the Order of Court of Appeal**

**From:** Adrian Pay
**Sent:** 17 May 2013 08:34:14
**To:** George Laurence
**Cc:** S.L.Meggs@dorsetcc.gov.uk;james.pavey@thomaseggar.com;Stevenson Margaret;Adrian Pay
**Subject:** RE: Trailriders v Dorset County Council
**Attachments:** Submissions re permission to appeal to the CA.doc, Draft order.doc, Corrections.doc

Dear all,

Please find attached

i. Suggested draft order
ii. The TRF's suggested corrections to the draft judgment
iii. The TRF's submissions on Dorset's application for permission to appeal.

I would be grateful for comments on the draft order with a view to lodging an agreed order, if possible, by midday today.

If Mr Plumbe has any additional corrections to the draft judgment, please feel free to add those to the TRF's suggested corrections and I will lodge these as one combined document (Dorset has already indicated that they have no suggested corrections).

Many thanks,
Adrian.

Adrian Pay

adrian.pay@newsquarechambers.co.uk

020 7419 8000
New Square Chambers
12 New Square
Lincolns Inn



---

**From:** Elvine Simms **On Behalf Of** George Laurence
**Sent:** 16 May 2013 16:54
**To:** carole.dobbie@hmcts.gsi.gov.uk

**Cc:** Adrian Pay; S.L.Meggs@dorsetcc.gov.uk; james.pavey@thomaseggar.com
**Subject:** Trailriders v Dorset County Council

Dear Ms Dobbie

I have no corrections to suggest in relation to the draft judgment in this matter. Mr Pay is submitting an order which he and I will have agreed. I enclose an application for permission to appeal on behalf of Dorset County Council.

Would you kindly acknowledge receipt and confirm that your Lord Justice is content to deal with the question of permission to appeal in this way?

Kind regards

George Laurence QC

<< File: R v Dorset and others.docx >>

12 New Square, Lincoln's Inn, London WC2A 3SW
Tel +44 (0)20 7419 8000
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**From:** Adrian Pay
**Sent:** 17 May 2013 09:36:56
**To:** Meggs, Sarah L.;George Laurence
**Cc:** james.pavey@thomaseggar.com;Stevenson Margaret;adrian.pay@newsquarechambers.co.uk
**Subject:** RE: Trailriders v Dorset County Council
**Attachments:** Draft order.doc

Dear Sarah,

Many thanks for pointing that out! Please find attached a further revised draft correcting 7.2. I have also made it clear that these sums are inclusive of VAT.

Subject to that, can I take it that the draft order is agreed now as between us (subject to any points that Graham Plumbe may have)?

Thanks again,

Adrian.

Adrian Pay

adrian.pay@newsquarechambers.co.uk

020 7419 8000
New Square Chambers
12 New Square
Lincolns Inn



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**From:** Meggs, Sarah L. [mailto:s.l.meggs@dorsetcc.gov.uk]
**Sent:** 17 May 2013 09:25
**To:** Adrian Pay; George Laurence
**Cc:** james.pavey@thomaseggar.com; Stevenson Margaret
**Subject:** RE: Trailriders v Dorset County Council

Dear all,

One comment on the draft judgment, paragraph 7.2 should be £15 000.

Regards

Sarah Meggs
Senior Solicitor
for Head of Legal and Democratic Services
Dorset County Council

Direct Line telephone: 01305 225104

Service of Court Documents is not accepted by e-mail

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**From:** Adrian Pay [mailto:Adrian.Pay@NewSquareChambers.co.uk]
**Sent:** 17 May 2013 08:34
**To:** George Laurence
**Cc:** Meggs, Sarah L.; james.pavey@thomaseggar.com; Stevenson Margaret; Adrian Pay
**Subject:** RE: Trailriders v Dorset County Council

Dear all,

Please find attached

i. Suggested draft order
ii. The TRF's suggested corrections to the draft judgment
iii. The TRF's submissions on Dorset's application for permission to appeal.

I would be grateful for comments on the draft order with a view to lodging an agreed order, if possible, by midday today.

If Mr Plumbe has any additional corrections to the draft judgment, please feel free to add those to the TRF's suggested corrections and I will lodge these as one combined document (Dorset has already indicated that they have no suggested corrections).

Many thanks,
Adrian.

Adrian Pay

adrian.pay@newsquarechambers.co.uk

020 7419 8000
New Square Chambers
12 New Square
Lincolns Inn

**From:** Elvine Simms **On Behalf Of** George Laurence
**Sent:** 16 May 2013 16:54
**To:** carole.dobbie@hmcts.gsi.gov.uk
**Cc:** Adrian Pay; S.L.Meggs@dorsetcc.gov.uk; james.pavey@thomaseggar.com
**Subject:** Trailriders v Dorset County Council

Dear Ms Dobbie

I have no corrections to suggest in relation to the draft judgment in this matter. Mr Pay is submitting an order which he and I will have agreed. I enclose an application for permission to appeal on behalf of Dorset County Council.

Would you kindly acknowledge receipt and confirm that your Lord Justice is content to deal with the question of permission to appeal in this way?

Kind regards

George Laurence QC

<< File: R v Dorset and others.docx >>

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Fax +44 (0)20 7419 8050
www.newsquarechambers.co.uk

**From:** Meggs, Sarah L.
**Sent:** 17 May 2013 11:03:19
**To:** Adrian Pay;George Laurence
**Cc:** james.pavey@thomaseggar.com;Margaret Stevenson (mstevenson@brainchasecoles.co.uk)
**Subject:** RE: Trailriders v Dorset County Council

Dear Adrian,

Yes I confirm that the draft Order is agreed on behalf of DCC.

Regards

Sarah Meggs
Senior Solicitor
for Head of Legal and Democratic Services
Dorset County Council

Direct Line telephone: 01305 225104

Service of Court Documents is not accepted by e-mail

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**From:** Adrian Pay [mailto:Adrian.Pay@NewSquareChambers.co.uk]
**Sent:** 17 May 2013 09:37
**To:** Meggs, Sarah L.; George Laurence
**Cc:** james.pavey@thomaseggar.com; Stevenson Margaret; Adrian Pay
**Subject:** RE: Trailriders v Dorset County Council

Dear Sarah,

Many thanks for pointing that out! Please find attached a further revised draft correcting 7.2. I have also made it clear that these sums are inclusive of VAT.

Subject to that, can I take it that the draft order is agreed now as between us (subject to any points that Graham Plumbe may have)?

Thanks again,

Adrian.

Adrian Pay

adrian.pay@newsquarechambers.co.uk

020 7419 8000
New Square Chambers

12 New Square
Lincolns Inn



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**From:** Meggs, Sarah L. [mailto:s.l.meggs@dorsetcc.gov.uk]
**Sent:** 17 May 2013 09:25
**To:** Adrian Pay; George Laurence
**Cc:** james.pavey@thomaseggar.com; Stevenson Margaret
**Subject:** RE: Trailriders v Dorset County Council

Dear all,

One comment on the draft judgment, paragraph 7.2 should be £15 000.

Regards

Sarah Meggs
Senior Solicitor
for Head of Legal and Democratic Services
Dorset County Council

Direct Line telephone: 01305 225104

Service of Court Documents is not accepted by e-mail

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**From:** Adrian Pay [mailto:Adrian.Pay@NewSquareChambers.co.uk]
**Sent:** 17 May 2013 08:34
**To:** George Laurence
**Cc:** Meggs, Sarah L.; james.pavey@thomaseggar.com; Stevenson Margaret; Adrian Pay
**Subject:** RE: Trailriders v Dorset County Council

Dear all,

Please find attached

i. Suggested draft order
ii. The TRF's suggested corrections to the draft judgment
iii. The TRF's submissions on Dorset's application for permission to appeal.

I would be grateful for comments on the draft order with a view to lodging an agreed order, if possible, by midday today.

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Many thanks,
Adrian.

Adrian Pay

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**From:** Adrian Pay
**Sent:** 17 May 2013 11:36:51
**To:** carole.dobbie@hmcts.gsi.gov.uk
**Cc:** S.L.Meggs@dorsetcc.gov.uk;james.pavey@thomaseggar.com;George Laurence;Margaret Stevenson (mstevenson@brainchasecoles.co.uk);Adrian Pay
**Subject:** RE: Trailriders v Dorset County Council
**Attachments:** Draft order.doc, Submissions re permission to appeal to the CA.doc, Corrections.doc

Dear Ms Dobbie

Please find attached

i. Draft order. This has been agreed between the Appellant and the First Respondent. The Second Respondent takes no active part in the appeal. The draft order was sent to the Third Respondent's solicitors for agreement earlier this morning, but has not yet been commented / agreed upon by them. The Third Respondent is largely unaffected by the substantive parts of the order (no costs order is sought against the Third Respondent): the Apppellant considers it unlikely that the Third Respondent will have any substantive points on the order.
ii. Suggested corrections on behalf of the Appellant.
iii. The Appellant's submissions in relation to the First Respondent's application for permission to appeal.

The Appellant would also appreciate it if the Court could deal with the question of permission to appeal (as requested by Leading Counsel for the Appellant) on these written submissions and dispense with any requirement for attendance by Counsel at the handing down of judgment. I too should be grateful if you could acknowledge receipt and confirm that Counsel need not attend on Monday.

The solicitors for the First Respondent and Third Respondent have been copied into this email.

Kind regards,

Adrian Pay (Counsel for the Appellant)

Adrian Pay

adrian.pay@newsquarechambers.co.uk

020 7419 8000
New Square Chambers
12 New Square
Lincolns Inn

---

**From:** Elvine Simms **On Behalf Of** George Laurence
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Fax +44 (0)20 7419 8050
www.newsquarechambers.co.uk

**From:** James Pavey
**Sent:** 17 May 2013 11:54:28
**To:** Adrian Pay;George Laurence
**Cc:** S.L.Meggs@dorsetcc.gov.uk;Stevenson Margaret;Clive Petchey
**Subject:** RE: Trailriders v Dorset County Council
**Attachments:** 2894_001.pdf
**Importance:** High

Dear Adrian

Please find attached short submissions on my client's behalf in relation to the Council's application for permission to appeal.

I am happy with everything else being sent as has previously been circulated.

As we are having difficulties with e-mail, I will also send this via my Hotmail account.

Regards

**James Pavey**
Partner
for and on behalf of Thomas Eggar LLP

Direct Dial: +44 (0)1293 742746
Reception: +44 (0)1293 742700
Direct Fax: +44 (0)1293 742998
Mobile: +44 (0)7774 737295

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Station Way
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DX Number: 85715 Crawley
www.thomaseggar.com

@ThomasEggarLLP



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**Sent:** 17 May 2013 08:34
**To:** George Laurence
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Adrian.

Adrian Pay

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**TRFDOC7 – R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406**

Supreme Court

# *Regina (Trail Riders Fellowship and another) *v* Dorset County Council (Plumbe intervening)

## [2015] UKSC 18

2015 Jan 15; March 18

Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath, Lord Toulson JJSC

*Highway — Right of way — Definitive map — Applications to modify definitive map and statement — Applications accompanied by computer generated enlargements of Ordnance Survey maps drawn to 1:50,000 scale — Local authority rejecting applications on ground maps not drawn to prescribed scale of not less than 1:25,000 — Whether maps required to be originally drawn to scale of not less than 1:25,000 — Whether applications defective — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, para 1 — Natural Environment and Rural Communities Act 2006 (c 16), s 67 — Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), regs 2, 8*

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking modification orders in respect of the authority's definitive map and statement in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the map and statement. Accompanying each application was a map of the route in question. Each map had been produced using a computer software program and digitally encoded maps which derived originally from Ordnance Survey maps drawn to a scale of 1:50,000 but were printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the basis that the maps did not comply with the requirement in paragraph 1(a) of Schedule 14 to the 1981 Act that they be drawn to the prescribed scale, which, by regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[2], was a scale of not less than 1:25,000, with the result that any rights of way which were the subject of the applications were extinguished by section 67 of the Natural Environment and Rural Communities Act 2006[3]. The claimants sought judicial review of the authority's decision. The judge dismissed the claim, holding that in order to comply with the requirements of the 1981 Act and the 1993 Regulations a map had to have been originally drawn to a scale of not less than 1:25,000. The Court of Appeal allowed the claimants' appeal.

On the authority's appeal—

*Held*, dismissing the appeal (Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC dissenting), that paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981, read together with regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, required that an application for a modification order had to be accompanied by a map (i) which was drawn to the prescribed scale, (ii) which was not less than 1:25,000 and (iii) which showed the way or ways to which the application related; that the statutory scheme did not specify that the map should had to be produced by the Ordnance Survey or

[1] Wildlife and Countryside Act 1981, s 53: see post, para 5.
Sch 14, para 1(a): see post, para 7.
[2] Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, regs 2, 8: see post, para 8.
[3] Natural Environment and Rural Communities Act 2006, s 67: see post, para 9.

A any other commercial or public authority, nor was it prescriptive as to the features which had to be shown on the map, apart from the requirement that it had to show the way or ways to which the application related; that "drawn" in paragraph 1(a) of Schedule 14 to the 1981 Act was not to be construed as being confined to "originally drawn" but should be given a meaning which embraced later techniques for the production of maps, synonomous with "produced" or "reproduced"; that, therefore, a map which accompanied an application for a modification order which was B presented at a scale of no less than 1:25,000 satisfied the requirement of being "drawn to the prescribed scale" in circumstances where it had been digitally derived from an original map with a scale of 1:50,000, provided that it identified the way or ways to which the application related; and that, accordingly, the applications submitted to the authority were not defective (post, paras 18–33, 35–40, 51, 80–81).

*Per* Lord Clarke of Stone-cum-Ebony JSC. The surveying authority is under a public law obligation to prepare and maintain the definitive map and statement in C proper form, which duty must itself imply that it should be at least professionally prepared to a quality and detail equivalent to the Ordnance Survey map. Given the availability of the Ordnance Survey map, it would be irrational for the authority not to use it (post, para 28).

*Per* Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Toulson JJSC. The purpose of section 67 of the Natural Environment and Rural Communities Act 2006 is to extinguish certain rights of way if they are not registered, subject to certain D exemptions including those ways subject to applications under section 53(5) of the 1981 Act which are made in accordance with paragraph 1 of Schedule 14. It is consistent with the purpose of section 67 of the 2006 Act to exclude from that class of exemption cases where the application is defective (post, paras 41, 49, 98–102, 108–109).

Decision of the Court of Appeal [2013] EWCA Civ 553; [2013] PTSR 987; [2014] 3 All ER 429 affirmed.

E The following cases are referred to in the judgments:

*Grant v Southwestern and County Properties Ltd* [1975] Ch 185; [1974] 3 WLR 221; [1974] 2 All ER 465

*Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375, HL(Sc)

*Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 628 (Admin); [2010] EWCA Civ 280; [2010] NPC 37, CA

F *Oxfordshire County Council v Oxford City Council* [2005] EWCA Civ 175; [2006] Ch 43; [2005] 3 WLR 1043; [2005] 3 All ER 961; [2005] LGR 664, CA; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817; [2006] LGR 713, HL(E)

*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 G 321, HL(E)

*R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687; [2003] 2 WLR 692; [2003] 2 All ER 113, HL(E)

*R (Warden and Fellows of Winchester College) v Hampshire County Council* [2007] EWHC 2786 (Admin); [2008] RTR 173; [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA

H The following additional cases were cited in argument:

*Perkins v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 658 (Admin); [2009] NPC 54

*R (Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin); [2006] 1 WLR 1103; [2005] 4 All ER 994

**APPEAL** from the Court of Appeal

The claimants, Trail Riders Fellowship and David Tilbury, sought judicial review of the decision of the defendant surveying authority, Dorset County Council, on 7 October 2010 to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement. On 2 October 2012 Supperstone J sitting in the Administrative Court of the Queen's Bench Division dismissed the claim, holding that the maps submitted had not been drawn to the prescribed scale so that the applications had not been made strictly in accordance with the requirements of the 1981 Act; and that since the non-compliance was more than merely de minimis the authority had been right to refuse the applications: [2013] PTSR 302. On 20 May 2013, the Court of Appeal (Maurice Kay, Black and Rafferty LJJ) allowed the authority's appeal: [2013] PTSR 987. On 24 March 2014 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Carnwath and Lord Toulson JJSC) allowed an application by the claimants for permission to appeal. The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were: (1) did a map which accompanied an application and was presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where it had been digitally derived from an original map with a scale of 1:50,000; and (2), if it did not, did the exception in section 67(3)(a) of the Natural Environment and Rural Communities Act 2006 ipso facto not apply or should an application nevertheless be treated as having been made in accordance with paragraph 1 of Schedule 14 for the purposes of saving rights for mechanically propelled vehicles?

On 24 November 2014 the Supreme Court granted permission for Graham Plumbe, who represented the interests of the Green Lanes Protection Group and affected landowners, to intervene on the appeal.

The facts are stated in the judgment of Lord Clarke of Stone-cum-Ebony JSC.

*George Laurence QC* and *Kira King* (instructed by *Head of Legal and Democratic Services, Dorset County Council, Dorchester*) for the surveying authority.

*Adrian Pay* and *Thomas Fletcher* (instructed by *Brain Chase Coles, Basingstoke*) for the claimants.

Mr Plumbe (assisted by his solicitors, *Thomas Eggar LLP, Crawley*) in person.

The court took time for consideration.

18 March 2015. The following judgments were handed down.

## LORD CLARKE OF STONE-CUM-EBONY JSC

*Introduction*

1 This is an appeal by Dorset County Council ("the council") from an order of the Court of Appeal (Maurice Kay LJ, who is Vice President of the Court of Appeal, Black LJ and Rafferty LJ) [2013] PTSR 987, allowing an appeal by the claimants from an order of Supperstone J ("the judge") dated

A 2 October 2012, [2013] PTSR 302, in which he dismissed an application for judicial review of the decision of the council to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act") for modification orders to a definitive map and statement ("the DMS"). The claim concerns five routes over which the claimants say that the public enjoy vehicular public rights of way (including with mechanically propelled vehicles) which were not recorded on the DMS.

B **2** The first issue in this appeal and the principal issue which was considered in the courts below is whether, for the purposes of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to the prescribed scale only if it is derived from a map originally so C drawn without being enlarged or reduced in any way. The judge answered that question in the affirmative but the Court of Appeal disagreed. In this appeal the council seeks the restoration of the order made by the judge. If the appeal succeeds, any public rights of way which were the subject of the five applications will have been extinguished.

**3** In this judgment I will focus on the first issue. There is a second issue, which only arises if the council's appeal on the first issue fails.

D **4** The applications were submitted by Mr Jonathan Stuart, who is a member of the Friends of Dorset's Rights of Way ("FDRW"). The first claimant, the Trail Riders Fellowship ("TRF"), took over the conduct of the applications from FDRW in October 2010. The second claimant, Mr David Tilbury, is a member of FDRW. The council is the surveying authority, as defined in section 66(1) of the 1981 Act, for the area in which the proposed byways open to all traffic ("BOATs") are located. The intervener, E Mr Graham Plumbe, represents the interests of the Green Lanes Protection Group and affected landowners. He supports the council's appeal.

*The legal framework*

**5** Section 53 of the 1981 Act imposes a duty on a surveying authority to keep a DMS of the public rights of way in its area under continuous review. F So far as material, it provides:

> "(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 G subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the 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 H other relevant evidence available to them) shows— (i) that a right of way 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 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."

**6** As the judge put it [2013] PTSR 302, para 6, there are three categories of public highway: footpaths, bridleways, and "byways open to all traffic", known as "BOATs". Section 66 of the 1981 Act defines a BOAT 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 . . ."

**7** Schedule 14 to the 1981 Act provides:

"1 *Form of applications*

"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.

"2 *Notice of applications*

"(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."

"(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.

"3 *Determination by authority*

"(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."

"5 *Interpretation*

"(1) In this Schedule . . . 'prescribed' means prescribed by regulations made by the Secretary of State."

**8** The material regulations made by the Secretary of State are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 ("the 1993 Regulations"), which provide:

"2 *Scale of definitive maps*

"A definitive map shall be on a scale of not less than 1:25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

A "*6 Provisions supplementary to regulations 4 and 5*

"Regulations 2 and 3 above shall apply to the map contained in a modification or reclassification order as they apply to a definitive map."

"8 *Applications for a modification order*

"(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
B 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."

The form of application set out in Schedule 7 provides for an applicant who
C wishes, for example, to add a BOAT to the DMS (whether by upgrading an existing path shown on the map or by adding the path for the first time) to identify the points from and to which the proposed BOAT runs and its route as "shown on the map accompanying this application."

9 Section 67 of the 2006 Act provides:

"*Ending of certain existing unrecorded public rights of way*

D "(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)."

E "(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 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
F Schedule 14 to the 1981 Act in respect of such an application, or (c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles— (i) was reasonably necessary to enable that person to obtain access to the land, or (ii) would have been reasonably necessary to enable that person to obtain access to a part of
G that land if he had had an interest in that part only.

"(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."

H 10 Section 130(1) of the Highways Act 1980 provides:

"It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it."

*The factual background and procedural history*

**11** I take this from the agreed statement of facts and issues. The following five applications were made for modification orders under section 53(5). (1) On 14 July 2004 application T338 was made in relation to a route at Bailey Drove so as to add a BOAT to part of the route and to upgrade to a BOAT on two other parts of the route, which were at the time shown as a footpath (to the west) and a bridleway (to the east). (2) On 25 September 2004 application T339 was made in relation to a route consisting of two bridleways in the parishes of Cheselbourne and Dewlish so as to upgrade them to a BOAT. (3) On 21 December 2004 application T350 was made in relation to a route in the parish of Tarrant Gunville so as to add a BOAT to part of the route and to upgrade to a BOAT the remainder of the route, which at the time was shown as a bridleway. (4) On 21 December 2004 application T353 was made in relation to a route in the parish of Beaminster so as to upgrade the same to a BOAT from its existing status of bridleway. (5) On 21 December 2004 application T354 was made in relation to a route in the parish of Beaminster so as to add a BOAT to two parts of the route not shown on the DMS and to upgrade to a BOAT two further parts of the route which were at the time shown as bridleways.

**12** Accompanying each application was a map showing the route in question. Each map was produced using a computer software program entitled "Anquet" and digitally encoded maps which derived originally from Ordnance Survey ("OS") maps drawn to a scale of 1:50,000. The computer software program allowed the user to view or print out maps (or parts of maps) at a range of scales. In my opinion importantly, it was expressly agreed in the statement of facts and issues that the enlarged maps that were reproduced as a result of this process were all to a presented scale of 1:25,000 or larger, in that measurements on the maps corresponded to measurements on the ground by a fixed ratio whereby a measurement of 1 cm on the map corresponds to a measurement of no more than 250 metres on the ground.

**13** It does not appear that the council had any difficulty in considering the applications. Each of the applications was acknowledged by the council by early 2005 and there was no indication that the applications were defective until 2009. The council made no complaint about them until 7 October 2010, when, perhaps because of objections to the applications on their merits, a meeting took place of the council's roads and rights of way committee, at which it rejected all five applications on the ground that they "were accompanied by computer generated enlargements of OS maps and not by maps drawn to a scale of not less than 1:25,000".

**14** As the judge noted at [2013] PTSR 302, para 13, under the heading "Reasons for recommendation", the following was recorded:

> "For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that public rights of way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question were accompanied by computer generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1:25,000.

A In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused."

On 2 November 2010 the council communicated its decision to Mr Tilbury, who appealed to the Secretary of State on behalf of TRF but the Secretary of State declined to determine the appeals on the basis of lack of jurisdiction.

15 Subsequently permission to apply for judicial review seeking an B order that the decision of 2 November 2010 be quashed and that a mandatory order be granted requiring the council to determine the applications was refused on paper. It was however subsequently granted after an oral hearing before Edwards-Stuart J and the matter was fully argued before the judge, who on 2 October 2012 upheld the decision of the council on the ground that the application map did not comply with the legal C requirements. He further held that the extent of the non-compliance was not within the scope of the principle de minimis non curat lex.

16 The judge refused permission to appeal to the Court of Appeal. Permission to appeal was granted on the first point by Sullivan LJ. It was however refused on the de minimis point. As stated above, on 20 May 2013, the Court of Appeal reversed the decision of the judge on the first point: [2013] PTSR 987. However, it refused an application for permission D on the de minimis point on the basis that, if the appeal had failed on the first point, the non-compliance "could not sensibly be described as de minimis": para 16.

17 The parties agreed that the first question can be stated as follows. Does a map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where E it has been "digitally derived from an original map with a scale of 1:50,000"?

*Discussion*

18 This is a short point. It involves the construction of two particular provisions which I have already set out. By paragraph 1 of Schedule 14 to F the 1981 Act, an application for a modification order must be made in the prescribed form and must be accompanied by a map (a) which was drawn to the prescribed scale, (b) which was not less than 1:25,000 and (c) which showed the way or ways to which the application related. No distinction has been drawn between the five applications. They either all complied or they all failed to comply. It is accepted that they were each accompanied by G a map. It is I think also accepted that each of the maps showed the way or ways to which the application related.

19 The question is therefore whether each of the maps was drawn to a scale of not less than 1:25,000. On the face of it that question must be answered in the affirmative. Paragraph 1 of Schedule 14 provides that the map must be drawn "to the prescribed scale" and by paragraph 5 "prescribed" means prescribed by the 1993 Regulations. By regulation 2 of H those Regulations, "A definitive map shall be on a scale of not less than 1:25,000" and, by regulation 8(2), regulation 2 applies to a map accompanying an application. As I read these provisions, no distinction is drawn between a map "drawn to the prescribed scale" and a map "on a scale of not less than 1:25,000".

**20** On the ordinary and natural meaning of these provisions it appears to me that the map referred to in paragraph 1(a) of Schedule 14 is the map which must be drawn to the prescribed scale. Only one map accompanied each application. In each case it was the map produced as described above to a presented scale of 1:25,000 or larger, in that measurements on the map corresponded to measurements on the ground by a fixed ratio whereby a measurement of 1 cm on the map corresponds to a measurement of no more than 250 metres on the ground. Thus each such map was on a scale of not less than 1:25,000 and, in my opinion, satisfied regulations 2 and 8(2) of the 1993 Regulations. In my opinion each such map also satisfied paragraph 1(a) of Schedule 14 on the basis that it was drawn to the same scale.

**21** To my mind only one map had to comply with the prescribed criteria in each case, namely the map which accompanied the application, which I will call "the application map". So far as I am aware no one has suggested that the application map was not a map, whether it was a photocopy of an existing map or an enlargement of a map. In any event I would hold that it was plainly a map. It was submitted on behalf of the council (and held by the judge) that, where the application map was based on or drawn from a previous map, the relevant map was any map from which the application map was derived but not the application map itself. I agree with the Court of Appeal that there is nothing in the language of the relevant statutes or regulations to warrant that conclusion.

**22** It was also suggested that it must have been intended that the application map should be on a scale of 1:25,000 and exhibit all the detail which would appear on an OS map on that scale. Of course, it could have been so provided by statute or regulation. As Maurice Kay LJ said at [2013] PTSR 987, para 10, such a statutory requirement is not unknown. For example, section 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an Ordnance Survey map shall, if possible, be used". More recently, regulation 5 of the Petroleum (Production) (Landward Areas) Regulations 1995 (SI 1995/1436), which is concerned with licence applications, requires an application to be accompanied by two "copies of an Ordnance Survey map on a scale of 1:25,000, or such other map or chart as the Secretary of State may allow". I agree with Maurice Kay LJ that the scheme with which we are concerned is not so specific. Nor is it prescriptive as to features which must be shown on the map, apart from the requirement that it must show the way or ways to which the application relates.

**23** It is of course well known (and not in dispute) that an original OS map with a scale of 1:25,000 depicts more physical features than an original OS map of the same site with a scale of 1:50,000. However, again I agree with Maurice Kay LJ that, since paragraph 1(a) permits the use of a map which is not produced by OS (or any other commercial or public authority), it cannot be said to embrace a requirement that the application map must include the same features as are depicted on an original 1:25,000 OS map.

**24** I appreciate that, as was submitted on behalf of the council, an original OS map on a scale of 1:25,000 might well have been of more use to the council than an enlarged OS map originally produced on a scale of 1:50,000 but, for good or ill, no such requirement was included in the statutory provisions. In any event this point seems to me to have been afforded more emphasis that it merits. The council of course already has OS maps on a scale of 1:25,000 which it can readily consult. If it has any

A questions which are relevant to the application it can raise them with the applicant.

**25** Further, it is in my opinion important to note that the council expressly concedes in its case that in theory an applicant might himself be able to create an accurate map at 1:25,000 which nevertheless contained only such detail as an OS 1:50,000 map. Moreover, he could do so in manuscript without reference to an OS map. It seems to me to follow from
B that concession that, if used as the application map, such a map would comply with the statutory provisions. Moreover, that is so even if one would ordinarily expect the application map to be based on the OS 1:25,000 map. Some reliance was placed on the fact that an OS map would ordinarily be used but I do not see how that helps to construe a provision which defines what must be done but makes no reference to such a requirement.

C **26** There is in evidence an extract of an online road map (not an OS map) on a scale of 1:25,000 which shows the claimed route in red but on which a number of public roads and village names are missing. It satisfies the relevant provisions notwithstanding the fact that it contains very little information. It satisfies the provisions because it is a map, because it is on a scale of not less than 1:25,000 and, critically, because it shows the way to which the application related. So far as I am aware, the council accepts that
D an application map so drawn is not objectionable but, even if it did not, I would so hold. If that is correct, it follows that it is not necessary that the application map should be an OS map. As Maurice Kay LJ said in his para 10, the application map may include more or fewer features than those marked on an OS map of the same scale. And, as he said at para 11, the provision that the map must show "the way or ways to which the application
E relates" is a flexible requirement; sometimes more details will be required and sometimes fewer, depending on the way in question and its location. This is I think a critical point because it shows that the application map may have very few of the details on the ordinary OS map on a scale of 1:25,000.

**27** I recognise that, without any requirement of scale, an applicant (who is quite likely to be a lay person) might produce a map of any scale. It is therefore understandable that the application map should have to be on a
F reasonable scale for the purposes of clarity. Any scale chosen would have an element of arbitrariness but, since the DMS has to be on a scale of not less than 1:25,000, it was no doubt thought to make practical sense for the application map to be on the same scale. It does not follow that it should have all the same features as the OS map.

**28** Some reliance is placed on the fact that the prescribed scale applies in the same terms to the application map as it does to the DMS (regulations 2
G and 6) and that, whatever might be reasonable for an applicant, it would be odd if the DMS itself could be prepared on something other than an OS base. In my opinion, that argument ignores the different contexts in which the rule applies. The authority is under a public law obligation to prepare and maintain the DMS in proper form, which duty must itself imply that it should be at least professionally prepared to a quality and detail equivalent
H to the OS map. Given the availability of the OS map, it would be irrational for the authority not to use it. The same does not apply to a lay applicant, who has no public law duty, and whose sole function is to put the relevant material before the authority for investigation by them. Indeed the draftsman may deliberately have adopted a form of definition which is sufficiently flexible for both contexts.

29 It is not, so far as I am aware, part of the council's case that the application map was not "drawn" within the meaning of paragraph 1(a) of Schedule 14. However, there have been some suggestions to this effect, notably by Mr Plumbe, which Maurice Kay LJ considered at [2013] PTSR 987, paras 12–14. He considered in para 12 whether the words "drawn to" a scale of not less than 1:25,000 mean that the application map in question must have been originally drawn to that scale rather than enlarged or reproduced to it. He said that he could see no good reason for giving the requirement such a narrow construction. What was important was the scale of the application map. The word "drawn" did not need to imply a reference to the original creation but was more sensibly construed as being synonymous with produced or reproduced. He said at para 13 that he reached that conclusion on the basis of conventional interpretation but that he was fortified by an approach which takes account of technological change. He referred to *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 9, where Lord Bingham of Cornhill said that courts had frequently had to grapple with the question whether a modern invention or activity falls within old statutory language, and approved the decision of Walton J in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, where he held that a tape recording fell within the expression "document" in the Rules of the Supreme Court.

30 Maurice Kay LJ concluded, at para 14:

> "All this leads me to the view that, whilst I am confident that 'drawn' was never intended to be construed as being confined to 'originally drawn', it should also now be given a meaning which embraces later techniques for the production of maps. For practical purposes, when a computer is used to translate stored data into a printed map, it can properly be said that the computer and the printer are, on human command, 'drawing' the map which emerges to the scale which has been selected. I find no difficulty in this approach in circumstances in which the requirements do not prescribe that the submitted map depicts the features which are depicted on an original 1:25,000 OS map."

I agree.

31 Finally, some reliance was placed on evidence provided by OS at the request of the council. They were asked this question:

> "Where:
> "1.1 digital raster mapping is originally produced by the OS at 1:50,000 scale ('the original product');
> "1.2 an image is taken from the original product and enlarged to a 1:25,000 scale; and
> "1.3 a facsimile copy of that enlarged image is produced in printed form ('the map');
> "is the map properly to be regarded as being at a scale of 1:50,000 or 1:25,000?"

The answer was as follows: "As described in the question the map would be properly to be regarded as a 1:50,000 scale OS map enlarged to 1:25,000." It was submitted on behalf of the council that the scale of the maps as presented by the claimants was indeed (larger than) 1:25,000, but this was only because they had all been enlarged from their original scale. It was submitted that the answer to the issue posed in para 2 above, namely

whether an application map is drawn to the prescribed scale only if it is derived from a map originally so drawn without being enlarged or reduced in any way, is "no".

**32** In my opinion the true answer to that question was "yes". The map is a reference to the application map. It was conceded that the scale of the map as presented was larger than 1:25,000. Since, as I see it, the question is what was the scale of the map as presented, i e the application map, it follows that the map complied with the statutory requirements. For the reasons given above, the fact that it was taken from a map on a smaller scale is irrelevant.

**33** For all these reasons I would dismiss the appeal on the first issue. The question posed in para 17 above was this. Does a map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where it has been "digitally derived from an original map with a scale of 1:50,000"? I would answer the question yes, provided that the application map identifies the way or ways to which the application relates.

*The second issue*

**34** Since Lord Carnwath and Lord Toulson JJSC answer the first question in the same way, it follows that the appeal will be dismissed and the second question will not arise. I am sympathetic to Lord Carnwath JSC's general approach to the construction of provisions like section 67(3) of the 2006 Act and I am doubtful whether Parliament can have intended such a narrow approach as was approved by the Court of Appeal in *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37 to which he refers at para 65. However, I am conscious that we heard no submissions on the correctness of the *Maroudas* case and I see the force of the conclusions expressed by the other members of the court. In these circumstances, since it is not necessary to do so, I prefer to express no view on the second question unless and until it arises on the facts of a particular case.

**LORD TOULSON JSC**

**35** On the question whether the applications submitted by Mr Stuart to the council satisfied the statutory requirements, I agree with Lord Clarke of Stone-cum-Ebony JSC and the Court of Appeal.

**36** Paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 required applications for the modification of a definitive map and statement to be in the "prescribed form" and accompanied by (a) "a map *drawn to* the prescribed scale and showing the way or ways to which the application relates" (emphasis added), and (b) any documentary evidence on which the applicant wished to rely. "Prescribed" means prescribed by the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 ("the Regulations").

**37** Regulation 8(1) required each application to be in the form set out in Schedule 7 to the Regulations or in a form substantially to the like effect; and regulation 8(2) provided that regulation 2 should apply to the map which accompanied the application in the same way as it applied to the map

contained in a modification order. Regulation 2 provided that a definitive map "shall *be on* a scale of not less than 1:25,000" (emphasis added).

**38** I do not construe the words "*drawn to* the prescribed scale" as meaning more than "*be on* a scale of not less than 1:25,000". More particularly, I do not see the word "drawn" as mandating a particular method of production. I agree with Maurice Kay LJ that linguistically "drawn" may sensibly be regarded as synonymous with "produced". But the construction of a statute is not simply a matter of grammar, and the question arises whether in the particular context the expression "drawn to the prescribed scale" should be given a narrower interpretation in order to serve its statutory purpose. While I respect the arguments of Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC, I am not persuaded by them. I regard the OS as a red herring. It does not feature in the Regulations. I do not see a proper basis for the admission of the evidence given by the OS, and I do not consider it legitimate to use the OS as a tool in construing the Regulations.

**39** As Maurice Kay LJ pointed out, the application for a modification order triggers an investigation. It is the start of a process. The natural purpose of the requirement placed on the applicant is to enable the council properly to understand and investigate the claim. For that purpose one would expect a plan on a 1:25,000 scale as presented to be sufficient, and this case provides an illustration. (On receipt of the applications in 2005, an officer prepared maps in the usual way for the roads and rights of way committee, but the applications had not been considered by the committee when *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138 was decided.) The reason for requiring a plan showing the way or ways to which the application related is self-evident. As to the purpose underlying the prescription of a scale of 1:25,000, rather than simply requiring "a map", I respectfully consider that para 27 of Lord Clarke JSC's judgment offers a sufficient and credible explanation.

**40** For those reasons, which I am conscious are no more than a summary of the reasons given by Lord Clarke JSC and Maurice Kay LJ, I agree with their conclusion.

**41** The issue regarding the effect of section 67(6) of the Natural Environment and Rural Communities Act 2006 therefore does not arise for decision, but it has been fully argued and I have come ultimately to agree with Lord Neuberger PSC and Lord Sumption JSC.

**42** The context of the 2006 Act was that off road use of motorised vehicles had become a subject of considerable controversy in rural areas. The 2006 Act was the culmination of a lengthy process involving considerable public consultation and pre-legislative parliamentary scrutiny, in the course of which a large number of applications were made for modifying definitive maps to re-classify former RUPPs (roads used as public paths) as BOATs (byways open to all traffic). The publication in January 2005 of the Bill which became the 2006 Act coincided with the publication of a lengthy joint report by the Department for the Environment, Food and Rural Affairs and the Countryside Agency of a research project on the use of motor vehicles on BOATs.

**43** The purpose of the relevant part of the 2006 Act was to extinguish any unrecorded public rights of way for motor vehicles (by section 67) and to place restrictions on the creation of any fresh rights (by section 66).

A **44** Section 67 is subject to certain exceptions, the relevant one being under subsection (3)(a). This exception applies to an existing right of way if

> "before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 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 **45** The relevant date was 20 January 2005: subsection (4)(a). The obvious purpose of setting this date was to exclude applications made during the legislative process in an attempt to avoid the guillotine.

**46** Section 53(5) of the 1981 Act included the words that "the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

C **47** I have referred in para 36 to the requirement under paragraph 1 of Schedule 14 for the application to be made in the prescribed form and to be accompanied by (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and (b) any documentary evidence on which the applicant wished to rely.

**48** Those provisions, i e section 67(3) of the 2006 Act read with section 53(5) and Schedule 14 paragraph 1 of the 1981 Act, might have been D considered sufficient as an ordinary matter of construction to limit the exception created by section 67(3) to cases where an application conforming with the requirements of the 1981 Act had been made before 20 January 2005. But the drafter provided reinforcement by section 67(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 E Schedule 14 to that Act."

**49** That subsection, as it appears to me, made it clear for the removal of doubt that section 67(3) of the 2006 Act applied only to an application made in time and in compliance with the formal requirements of paragraph 1 of Schedule 14. Put in negative terms, the saving provided by section 67(3) does not include applications purportedly made before the cut-off date which were substantially defective, whether or not the defects might F otherwise have been cured in one way or another. It is well understandable in the circumstances in which the 2006 Act was passed that Parliament should not have wished councils to be burdened potentially with a mass of non-conforming applications made in an attempt to beat the deadline.

**50** I was initially attracted by Lord Carnwath JSC's argument for a more flexible approach, based on the precedents of *Oxfordshire County* G *Council v Oxford City Council* [2006] Ch 43 and *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375 which he cites, but it is a truism that every statute must be construed in its own context. On full consideration I am persuaded that Lord Neuberger PSC and Lord Sumption JSC are right, having regard to the language of the statute and the legislative context to which I have referred.

H **LORD CARNWATH JSC**

*Ground 1—prescribed scale*

**51** My initial reaction on reading the papers in this case was that the appeal should succeed on the first ground, substantially for the reasons given

by Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC. It is an easy assumption that the draftsman must have had in mind an OS 1:25,000 map, or something of equivalent detail and quality. However, I am persuaded that this approach is too simplistic. The draftsman could have so specified but did not. Once it is accepted (as it is) that the word "drawn" does not connote any particular form of physical production, and that the plan need not be as detailed as an OS map (even one of 1:50,000 scale), nor professionally prepared, I see no convincing answer to the Court of Appeal's analysis. The fact that in practice applicants do normally use OS maps, or that there would be no hardship in requiring them to do so, does not seem to me to assist on the question of construction. I would therefore dismiss the appeal on the first ground for the reasons given by Lord Clarke of Stone-cum-Ebony JSC.

**52** This conclusion makes it strictly unnecessary to decide the second ground. This challenges the principle that only "strict compliance" will suffice to save an application under section 67(6) of the 2006 Act (as decided in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138). However, since the point has been fully argued and may be material in other cases, it may be helpful to consider it. Furthermore, as will be seen, I regard it as somewhat artificial to separate the two issues, as the courts below have had to do (being bound by the decision of the Court of Appeal in that case). At this level we are able to take a broader view.

*Ground 2—strict compliance*

**53** The second issue turns on the construction of section 67(6) of the 2006 Act. It needs to be read in its full statutory context, as already set out by Lord Clarke JSC. The starting point is section 53 of the 1981 Act in Part III, which imposes a duty on authorities to keep the definitive map "under continuous review", and to make modifications so far as required by the occurrence of any of the events specified in subsection (3). Those events are (in summary): (a) the coming into operation of "any enactment or instrument, or any other event" whereby a highway is stopped up, altered or extinguished or a new way created; (b) the expiration of a period sufficient to give rise to a presumption of dedication; or—

> "(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 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 . . ."

**54** Subsection (5) allows any person to apply to the authority for an order under subsection (2) making such modifications "as appear to the authority to be requisite" in consequence of an event within paragraph (b) or (c) of subsection (3); and provides: "the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection." Schedule 14, paragraph 1 provides that the application is to be made "in the prescribed form", and 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".

**55** Section 67 of the 2006 Act provides for the extinguishment, subject to defined exceptions, of hitherto unrecorded rights of way for mechanically propelled vehicles. It applied generally from the date of "commencement", which for England was 2 May 2006 (defined under section 107(4)). This date applied also to the exceptions under subsection (3)(b) and (c). By contrast subsection (3)(a), which applies in this case, was related to an earlier "relevant date", defined for England as 20 January 2005 (section 67(4)). As explained to Parliament, this was the date on which ministers, following consultation, announced their intention to legislate, in the form of a document "The Government's framework for action". That paper did not contain any proposal for a cut-off date for applications prior to the commencement of the Act. That was introduced in the course of the parliamentary proceedings, in response to concerns that the authorities would be flooded by protective applications in the period before the 2006 Act took effect.

**56** The critical subsection is section 67(6), by which for these purposes 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." In the *Winchester* case [2009] 1 WLR 138 an application for modification had been made before the relevant date, but had not been accompanied by the supporting "documentary evidence" as required by Schedule 14, paragraph 1(b). In those circumstances the court held that it had not been "made in accordance" with that paragraph before the relevant date and therefore did not come within the exception. Dyson LJ, with whom the other members of the court agreed, said, at para 54:

> "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."

That approach was followed in *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37, in which the only substantive judgment was again given by Dyson LJ.

*The present proceedings*

**57** In the present case, before Supperstone J, it was argued that the defect which he had found in relation to the scale of the plan was no more than a "minor departure" permissible under the *Winchester* principle. He rejected that submission, holding that there were "material differences

between the presentation of the claimed ways on the application maps and their presentation on a 1:25,000 scale map", and that there was no difficulty in compliance: [2013] PTSR 302, paras 41–43. Permission to appeal that aspect of the judgment was refused.

**58** In this court, Mr Adrian Pay asks us to hold that the reasoning in the *Winchester* case [2009] 1 WLR 138 was erroneous, with the consequence that failure to comply strictly with the Regulations was not necessarily fatal to the application. In short, he submits that Dyson LJ was wrong to adopt a different approach under section 67(6) than would have been applied to an application under section 53(5) apart from the 2006 Act. Under general principles, he submits, failure to comply with procedural requirements, even those of more than "minor" significance, does not necessarily make an application void, and so incapable of having legal effect. Under the modern law, the question depends not on whether the procedural provision is mandatory or directory, or indeed whether the defect can be described as minor or de minimis, but (as Lord Steyn explained, *R v Soneji* [2006] 1 AC 340, para 23) the emphasis is "on the consequences of non-compliance . . . posing the question whether Parliament can fairly be taken to have intended total invalidity."

**59** Applying those principles, he submits, the alleged defects in this case were not such as to render the application void. Their consequences were of no serious significance, since the authority were given all the information they needed to identify the proposal, to prepare their own more detailed plans (as indeed they did shortly after receipt of the application), and to carry out their own investigations. It was therefore properly treated from the outset as a legally effective application for the purposes of paragraph 1 of Schedule 14 to the 1981 Act, even if the authority would have been entitled to require the substitution of a compliant plan. It was thus, as at the date of its submission, "made in accordance with" that paragraph under section 67(6) of the 2006 Act.

**60** For the authority, Mr George Laurence QC supports the *Winchester* decision [2009] 1 WLR 138 substantially for the reasons given by the Court of Appeal (in substance accepting his own submissions on behalf of the landowners in that case). Before discussing those submissions it is necessary to look in more detail at the reasoning of Dyson LJ in the earlier cases.

*Dyson LJ's reasoning*

**61** The *Winchester* case involved two separate applicants. It is sufficient to refer to the facts relating to the first, Mr Tilbury. His application, made in June 2001 to the Hampshire County Council, was to modify the definitive map to upgrade a bridleway to a BOAT. The application referred to an appended list of documents, which identified some 25 maps and plans (the earliest dating back to 1739) with his comments. He did not include copies of these maps. It was treated as a valid application by the authority, which on 22 March 2006 resolved to make modifications accordingly. This decision was challenged by landowners affected by the route, on the grounds that there had been no valid application or determination within the time limits set by section 67 (inter alia) because the application had not been accompanied by copies of all the documentary evidence relied on.

**62** The application was heard in the High Court by George Bartlett QC (President of the Lands Tribunal, and a judge with great practical experience

in this field), who rejected the challenge: [2008] RTR 173. In short he held that the requirement to submit documents was a procedural requirement which could be waived by the authority without affecting the validity of the application: paras 38–40. Alternatively, he interpreted the requirement to "adduce" the evidence to be relied on as not extending to evidence already before the council: para 45.

**63** In the Court of Appeal, Dyson LJ did not disagree with the judge's approach in relation to the treatment of an application under section 53(5) of the 1981 Act itself. He distinguished this from the question before the court under section 67, at [2009] 1 WLR 138, paras 36–37:

> "36. . . . 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."

The purpose of section 67(6), he thought, was "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": para 38. That moment was when an application was "made in accordance with paragraph 1." A subsequent waiver of the obligation to accompany the application with copies of documentary evidence could not operate "to treat such an application . . . as having been made in accordance with paragraph 1 when it was not."

**64** In his view section 67(6) required strict compliance with each of the elements of paragraph 1, regardless apparently of considerations of practical utility. He rejected, for example, an argument that "strict insistence" that an application be accompanied by copy documents "serves no real purpose and confers no obvious advantage" over providing a list of the documents "particularly where the authority is already in possession of, or has access to, such documents." Such considerations might be relevant to the question whether a failure to comply with paragraph 1 should be waived, but not to whether an application has been made "in accordance with" paragraph 1: paras 44–45. Similarly he was unmoved by arguments that strict interpretation could lead to absurdity, for example if the application listed a number of documents but by oversight omitted some of them, the absurdity possibly being "sharpened by the fact that the authority has the originals in its possession . . ." Even a defect of that kind was relevant only to the question of waiver, not to validity for the purpose of section 67(6): paras 48–49. The only exception he allowed was if copies were impossible to obtain, on the basis of the principle that "law does not compel the impossible": para 50.

**65** The consequences of that narrow approach are strikingly illustrated by the following case, *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37. The court reversed the judgment of the Administrative Court ([2009] EWHC 628 (Admin), Judge Mackie QC), to which reference can be made for a fuller account of the history. The proceedings had taken the form of an application to quash the decision of the Secretary of State, made by an inspector in May 2008 following a hearing, to confirm a modification order made in response to an application originally made under section 53(5).

**66** The application had been made as long ago as February 1997, several years before the cut-off date later adopted in the 2006 Act. It had not itself been signed or dated, nor accompanied by a plan showing the way in question. However the council had helpfully responded a month later enclosing a summary and plan, and asking for confirmation that the proposed reclassification extended to the whole of the identified route. The applicant replied by signed letter asking for the whole route to be included. The authority apparently proceeded to deal with it on that basis as a valid application. As far as one can judge from the reports, no objection was taken to the form of the application until the hearing before the inspector some 11 years later. By an unfortunate coincidence (from the applicant's point of view) the hearing took place on 30 April 2008, the day after the promulgation of the *Winchester* judgment, on which the objector was thus able to rely.

**67** On these facts the judge upheld the inspector's decision to treat the application as validly made by the relevant date. As he observed, there had been nothing "opportunistic" about the application, made long before any hint of the proposals which led in due course to the 2006 legislation. Although he was bound by the *Winchester* decision, and he accepted that the defects in the original application could not be treated as "minor", he was entitled to look "at the substance of the matter", which was, at para 25, that

> "by the time the letter of 22 April 1997 was written it was perfectly clear what the application related to. There was a map, as one sees from 'enclosed is a summary plan of the application' in the letter of 25 March 1997, and a signature and a date. No one would, or could, have been misled about what happened after that. Mr Maroudas rightly had to accept that he would have no grounds at all for his application if, instead of the exchange of letters, the council had gone through the bureaucratic, or some would say necessary, step of returning the form to [the applicant] to sign and amend, rather than resolving the matter on an exchange of correspondence. That seems to me to move proper strictness into unnecessary bureaucracy."

**68** The Court of Appeal disagreed. In particular, the applicant's failure to sign and date the application, and his failure to submit a plan, were not cured by the subsequent exchanges, at [2010] NPC 37, paras 33 and 35:

> "33. . . . the lack of a date and signature in the application form can in principle be cured by a dated and signed letter sent *shortly* after the submission of the form, where the omissions are pointed out and the council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter. But the lack of a date and, in particular, the lack of a signature are important omissions. The signature

A is necessary to prove that the application is indeed that of the person by whom it is purportedly made. If the application form remains unsigned for a substantial period of time, I would not regard that as a minor departure from the statutory requirement that it should be signed. The fact that the application was unsigned for some ten weeks in this case is of itself a strong reason for holding that there was a substantial departure from the strict requirements of paragraph 1 of Schedule 14."

B "35. The final point is that the plan enclosed with the council's letter of 25 March was not sent back by Mr Drinkwater with his letter of 22 April. Mr Drinkwater never sent an accompanying map. The absence of an accompanying map is an important omission just as is the absence of documentary evidence on which an applicant wishes to rely (as *Winchester* demonstrates). Mr Coppel's case is that the plan which was
C enclosed with the council's letter of 25 March was the accompanying map and that by his letter Mr Drinkwater was agreeing with the council that it should so treat it. But Mr Drinkwater's letter says nothing about the enclosed plan. There is nothing to indicate that he even looked at it. In view of his indifference to what the council was asking, it seems unlikely that he would have had any interest in the plan at all."

D *Discussion*

**69** I start from the general principle that procedural requirements such as those in the 1981 Act should be interpreted flexibly and in a non-technical way. There are close parallels with the provisions relating to applications to register village greens, considered by the Court of Appeal in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 (approved on this point
E by Lord Hoffmann in the House of Lords: [2006] 2 AC 674, para 61). The question there was the power to amend an application for registration, in the absence of any specific provision in the Regulations permitting amendment. In giving the judgment of the Court of Appeal (paras 101–112), I cited the guidance of Lord Keith of Kinkel, dealing with similar arguments in a case concerning the amendment of details submitted under an outline planning
F permission: *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375. He said, at p 397:

"This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good
G reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon."

**70** The *Inverclyde* case has added relevance in the present context since it also involved a time limit. Conditions on the permission imposed a three-year time limit for submission of details. Further, the Act in question there
H provided that an application for approval made after that date should be treated as not made in accordance with the terms of the permission. The general development order governing submission of details contained no specific provision for amendment. The authority accepted that amendments could be made within the three-year time limit, but not after it had expired. Of that Lord Keith said simply, at p 397: "an amendment which would have

the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent". A

71 Such a flexible approach is particularly appropriate in the context of an application to modify the definitive map. A developer submitting details under an outline planning permission is doing so generally for his own benefit, and it is his responsibility to make sure that the details comply with the planning permission and other requirements. In a case of any complexity, the details will generally be professionally prepared. By contrast, under section 53 of the 1981 Act the primary duty to keep the definitive map up to date and in proper form rests with the authority, as does the duty (under section 53(3)(c)) to investigate new information which comes to their attention about rights omitted from the map. An application under section 53(5), which may be made by a lay person with no professional help, does no more than provide a trigger for the authority to investigate the new information (along with other information already before them) and to make such modification "as appears to [them] to be requisite." B C

72 The deputy judge in the *Winchester* case [2009] 1 WLR 138 cited the guidance given by Lord Woolf MR in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354 (a judgment noted with approval by Lord Steyn in *R v Soneji* [2006] 1 AC 340, para 19). In a passage headed "What should be the approach to procedural irregularities?", Lord Woolf MR referred to recent authority qualifying the traditional mandatory/directory test, and said, at [2000] 1 WLR 354, 362: D

> "the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows. E
>
> "1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) F
>
> "2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
>
> "3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequence question.) G
>
> "Which questions arise will depend on the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver." H

73 I find this passage particularly helpful since it distinguishes clearly between two logically distinct issues: first, whether as a matter of construction a particular procedural rule is capable of being satisfied

("fulfilled") by "substantial compliance"; secondly, whether even if the rule is not so satisfied a failure to comply can as a matter of discretion be waived by the relevant authority. For most practical purposes the distinction is immaterial. However, it can be significant in a case such as the present where timing is important. In my view, if the statutory rule properly construed can be satisfied by substantial compliance, it is no misuse of language to say that an application made before the relevant time, in a form which meets that standard, is made "in accordance with" the rule.

**74** As I understand his two judgments, Dyson LJ proceeded on the basis that any flexibility in the exercise of the section 53(5) procedure could only be explained as a matter of waiver by the authority. It therefore had no relevance to whether the application itself had been made "in accordance with" the statutory requirements for the purpose of section 67 at the relevant time. Indeed, in the *Maroudas* case [2010] NPC 37 he appears to have gone even further. The only latitude allowed was the possibility of curing the defects by a submission made "shortly" after the initial application. Later waiver by the authority of any procedural deficiencies, even if made long before the cut-off date, would not be enough.

**75** In my view, with respect, this approach was too narrow. For the reasons I have given, this is not a context in which either statute needs to be read as requiring more than substantial compliance to achieve validity.

**76** The words "in accordance with" in section 67(6) do not necessarily imply anything more than compliance which would in any event be required by the terms of section 53(5) and Schedule 14. Dyson LJ appears to have attached importance to the statutory purpose of "defining the moment" by reference to which section 67(1) is disapplied. But the same could have been said of the planning condition in the *Inverclyde* case 43 P & CR 375. It is not clear why that consideration should require a different approach under section 67 than under the governing section.

**77** There remains a legitimate question as to the purpose of section 67(6). If it merely reproduces the effect of section 53(5) taken with Schedule 14, why was it necessary to include it at all? Mr Pay's answer is that it was probably intended to make clear that the date was to be fixed by reference only to paragraph 1 of Schedule 14, without regard to the provision (in paragraph 2) for service on landowners. I see some force in that suggestion. It can be said against it that paragraph 2 as it stands leaves no room for ambiguity on that point, since it requires in terms a notice that "the application *has* been made". On that view section 67(6) adds nothing. However, the same point could be made of section 67(7). Even without it, there would have been no reason to read subsection (3)(c)(i) as requiring the applicant to be using, or able to use, the right of way in question. Alternatively, it may be that the purpose of section 67(6) was simply to make clear that what was required was a substantially complete application; in other words a bare application would not be sufficient, if it was not accompanied by the relevant information required by the rule (whether or not precisely in the prescribed form).

**78** It has to be remembered that section 67(3) was retrospective in effect. In the *Inverclyde* case there would have been no obvious hardship in tying the applicant to the three-year limit set by the condition, of which he had notice at the time of the permission. By contrast, the cut-off date under section 67(3) was deliberately fixed by reference to the date of the announcement of the legislation, and so as to allow no further opportunity

for an applicant to improve his position. The legislative purpose no doubt was to identify for preservation genuine applications made before that date. This was understandable as a means of limiting pre-emptive applications in the period before the Act came into effect. But that purpose did not justify or require subjecting them retrospectively to standards of procedural strictness which had no application at the time they were made.

**79** It is unnecessary for present purposes to determine whether the *Winchester* case [2009] 1 WLR 138 was correctly decided on its own facts. Nor should this judgment be seen as encouragement to resurrect applications rejected in reliance on it. I would however question its extension to a case, such as the *Maroudas* case [2010] NPC 37 where the defects in the original application had been resolved to the satisfaction of the authority, and waived by them, long before the cut-off date. I would respectfully echo the comment of the deputy judge in the *Maroudas* case that this was "to move proper strictness into unnecessary bureaucracy". As was conceded, it would have been simple for the applicant, if required to do so, to have resubmitted the application in strictly correct form, but neither the authority nor anyone else thought that necessary. Without a crystal ball he would have had no reason to do so. Yet that wholly excusable failure resulted more than a decade later in the application and all that followed being declared invalid. I would have expected the draftsman to have used much clearer wording in section 67(6) if he had intended to achieve such a surprising and potentially harsh result.

*Conclusion*

**80** As I suggested at the beginning of this judgment, there is some overlap in the two grounds of appeal. Under ground 1, for the reasons given by Lord Clarke JSC, the wording of the definition does not on an ordinary reading bear the interpretation urged on us by the council. By the same token, under ground 2, the fact that the draftsman has not thought it necessary to define more precisely the form and contents of the application map can itself be taken as an indication against implying a requirement for unusually strict compliance, under either section 53 or section 67.

**81** For these reasons I would dismiss the appeal on both grounds.

## LORD NEUBERGER OF ABBOTSBURY PSC

*Introductory*

**82** The relevant facts and statutory provisions have been set out by Lord Clarke of Stone-cum-Ebony JSC, and they need not be repeated. Two questions arise. The first is whether the applications submitted to the Dorset County Council by Jonathan Stuart on behalf of the Friends of Dorset's Rights of Way ("the applications"), purportedly made under section 53(5) of the 1981 Act ("section 53(5)"), complied with the requirements of paragraph 1(a) of Schedule 14 to that Act ("Schedule 14"), in the light of the requirement in regulation 8(2) of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (the "1993 Regulations"). The second question, which only arises if the answer to the first question is "no", concerns the consequences of such non-compliance in the light of the provisions of section 67 of the 2006 Act.

A 83 In disagreement with Lord Clarke JSC and the Court of Appeal, and in agreement with Supperstone J, I consider that the answer to the first question is that the applications did not comply with the requirements of paragraph 1(a) of Schedule 14 as the accompanying map was not to the required scale, and that the answer to the second question is that the applications were ineffective as a result of section 67, and in particular subsection (6) thereof. My reasons for these conclusions are as follows.
B

*The validity of the applications: the 1:25,000 scale requirement*

84 The applications were accompanied by documents which were enlarged photocopies of plans which had been prepared on a scale of 1:50,000, and which, as a result of the enlargement exercise, were on a scale of around 1:20,000. In those circumstances, the first question is whether
C such enlarged photocopies constituted maps "drawn to the prescribed scale" within paragraph 1(a) of Schedule 14, which as a result of regulation 8(2) and regulation 2 of the 1993 Regulations had to be "on a scale of not less than 1:25,000".

85 A map of a particular area is a document which shows in reduced, two-dimensional form, normally with markings, symbols or annotations,
D what is on the ground in that area. It is almost inevitable that the "map" accompanying an application under section 53(5) will be a copy (either in printed form or a photocopy of a printed form) of an original map drawn by an individual, a group of individuals or a machine. The court was told that, in the experience of those involved in these proceedings, a photocopy of the appropriate section of a published copy of the relevant OS map is invariably used by applicants under section 53(5). That is entirely unsurprising,
E although there is no reason why the map accompanying a section 53(5) application should not be a copy of another published map, or an original plan, drawn for the purpose of the application, provided, of course, that it is "drawn to the prescribed scale".

86 Where an applicant uses a copy of an original map, the appellant council contends that the document only complies with the requirements of
F paragraph 1(a) of Schedule 14 if it is a copy of a map which was prepared on a scale of at least 1:25,000, whereas the respondent claimants argue that it complies with these requirements if the copy is on a scale of at least 1:25,000, even if the map from which the copy was made was on a scale of less than 1:25,000.

87 The words used in paragraph 1 of Schedule 14 and in regulations 8(2) and 2 of the 1993 Regulations could justify either
G contention as a matter of pure language, although, as explained in para 90 below, I consider that the more natural meaning is that contended for by the council. For that reason, but also for two other reasons, I prefer the council's case.

88 First, the purpose of imposing a minimum scale for the accompanying map was, in my view, because it could be expected to show a level of detail which would not normally be shown on a map prepared on a smaller scale.
H That would enable the council to appreciate the nature of the land and the various features close to the way in question. The only justification for the imposition of a minimum scale on the claimants' case could be that a smaller scale plan would not show the way clearly, but that is a fanciful suggestion in my opinion, not least because paragraph 1(a) of Schedule 14 already contains

a requirement that the way be "[shown]" on the plan, and that must mean "clearly [shown]".

**89** It is true that applicants could draw their own map showing no detail, but that unlikely possibility is not an answer to the point that those responsible for the 1993 Regulations must have envisaged (rightly as events have turned out) that an OS map would normally be the document from which the copy map was made. Given that OS maps to a scale of 1:25,000 are easily obtainable in respect of all parts of England and Wales, it would be very eccentric for an applicant to incur the cost and time of preparing, or paying someone else to prepare, a new plan or map to that scale for the purpose of a section 53(5) application. That point is underlined by the fact, already mentioned, that applicants appear invariably to use photocopies of OS maps, and the fact that definitive maps are always based on OS maps.

**90** Secondly, it is not an entirely natural use of language to describe an enlarged photocopy of a map originally prepared on a scale of 1:50,000, as "drawn" on a higher scale. To my mind at any rate, a map is "drawn" to a certain scale if it is originally prepared to that scale. One might fairly describe a doubly magnified photocopy of a 1:50,000 map as "being on" a scale of 1:25,000, but I do not think that it would be naturally described as having been "drawn to" a scale of 1:25,000. The word "drawn" in paragraph 1 of Schedule 14 must, of course, be given a meaning which is appropriate in the light of modern technology and practice, but I do not see how that impinges on the natural meaning of the expression in the present case.

**91** Thirdly, the operative regulation in the present case, regulation 8(2) of the 1993 Regulations, states that regulation 2 is to apply to an application. Regulation 2 contains the express requirement "A definitive map shall be on a scale of not less than 1:25,000". It appears to me therefore incontrovertible that if a map satisfies regulation 8(2), it must also satisfy regulation 2. With due respect to those who think otherwise, I do not see how regulation 2 can have one meaning in relation to a definitive map and another meaning in relation to a map accompanying an application. Bearing in mind the public importance of a definitive map, it strikes me as very unlikely that the drafter of the 1993 Regulations could have envisaged that such a map could be an enlarged photocopy of a map which had been prepared on a scale of significantly less than 1:25,000. I also note that regulation 2 is foreshadowed by section 57(2) of the 1981 Act, which refers to "Regulations" which can "prescribe the scale on which maps are to be prepared": again, it does not seem to me to be a natural use of language to describe a doubly magnified photocopy of a 1:50,000 scale map as "prepared" on a scale of 1:25,000.

*The effect of section 67 of the 2006 Act on the applications*

**92** The status of the applications if the maps which accompanied them failed to comply with the requirements of paragraph 1 of Schedule 14 requires a little analysis. Confining myself for the moment to the 1981 Act and the 1993 Regulations, it appears to me that the following three propositions are correct. First, the council could have treated the applications as valid, and effectively waived the failure to comply with the map scale requirements. Secondly, if the council had taken the point that the enlarged photocopies did not comply with the requirements of

A paragraph 1 of Schedule 14, then the defect could not simply have been treated as if it had not existed. Thirdly, in such an event, subject to any special reason to the contrary (eg the claimants not having availed themselves of ample opportunity to do so after warnings), the claimants would have been entitled to remedy the defect on the applications by submitting maps which were properly compliant with paragraph 1 of Schedule 14.

B **93** In relation to each of these three propositions, it seems to me that Lord Steyn's observations in *R v Soneji* [2006] 1 AC 340, paras 14 and 23, are in point. He said that where "Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply", "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be C taken to have intended total invalidity", which is "ultimately a question of statutory construction."

**94** As to the first proposition, it seems to me that the purpose of the requirement in paragraph 1(a) of Schedule 14 is to enable the council to whom a section 53(5) application is made to be assisted as to the identity, location, extent and surroundings of the way, when dealing with the application. Accordingly, if the council is content to accept a less helpful or D informative map than it was entitled to insist on, that is a matter for the council, and there is no basis for holding the application invalid.

**95** As to the second proposition in para 92 above, the notion that the defect could simply have been overlooked seems to me to fly directly in the face of the conclusion that paragraph 1 of Schedule 14, when read together with the 1993 Regulations, requires a section 53(5) application to be E accompanied by a map drawn to a certain minimum scale. If an application does not comply with that requirement, and the failure is not waived by the council, the application is invalid as it stands. Unless it can be said that the failure is de minimis (a suggestion which was rightly rejected by Supperstone J in this case), the court would not be giving effect to the statute if it simply overlooked the defect.

F **96** That brings one to the third proposition in para 92 above. I do not consider that it would be consistent with the purpose of the 1981 Act, and in particular section 53 and Schedule 14, if an application which was defective because it was accompanied by a map on too small a scale, could not be validated by the subsequent provision of a map on the appropriate scale. On the contrary. The point was well put in *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375 (cited and followed by Carnwath LJ in G *Oxfordshire County Council v Oxford City Council* [2006] Ch 43, paras 106–109), by Lord Keith of Kinkel, who held that it was open to an applicant to amend an application after the final date by which the application had had to be made. He said, at p 397:

> "The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the H circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage . . ."

**97** Accordingly, in the absence of any other statutory provisions, I would have held that, although the applications were invalid for the purposes of section 53(5) because they did not comply with the requirements

of Schedule 14, they could effectively be saved by the applicant submitting maps drawn to the stipulated scale.

**98** Having said that, such a conclusion is not available in my opinion in this case, because the provisions of section 67 of the 2006 Act, on which Mr Plumbe (a chartered surveyor who intervened on this appeal) rightly placed great emphasis in his brief submission, apply in this case. Section 67(1) extinguishes a certain type of public right of way (namely one "for mechanically propelled vehicles") if it is not "shown in a definitive map". Paragraphs (a) to (c) of section 67(3) exclude certain ways from the ambit of section 67(1); only paragraph (a) is directly in point, and it refers to ways in respect of which "an application was made under section 53(5) of the [1981 Act]". However, and here lies the problem for the claimants, section 67(6) states: "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".

**99** As Mr Gorge Laurence QC says on behalf of the council, the observations of Lord Steyn in *R v Soneji* [2006] 1 AC 340 cannot apply to the position under section 67, because this is a case where "Parliament . . . [has] expressly [spelled] out the consequences of a failure to comply" with its "command", in that section 67(1) expressly provides that a right of way is extinguished unless (for present purposes) section 67(3)(a) applies. To adopt the words of Lord Woolf MR in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, 362, quoted by Lord Carnwath JSC in para 72, Parliament in section 67(1) and (6) has spelled out "the consequence of the non-compliance", and as "the result of non-compliance goes to jurisdiction . . . jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

**100** Unless section 67(6) is mere surplusage, it seems to me that it can only sensibly be interpreted as meaning that, if a section 53(5) application has been made, but that application does not comply with the requirements of paragraph 1 of Schedule 14, then it is not to be treated as an application for the purposes of section 67(3)(a). As that is what happened in the present case, it must follow that the ways the subject of the applications have been extinguished pursuant to section 67(1).

**101** It seems to me impossible to give section 67(6) any meaning if it does not have the effect for which Mr Laurence contends. The ingenious notion that it was intended to make it clear that only paragraph 1, and not paragraph 2, of Schedule 14 had to be complied with is wholly unconvincing, because, as Lord Carnwath JSC says in para 77, it is clear from the wording of paragraph 2 itself that it only applies after an application has been made.

**102** I find the notion that section 67(6) is surplusage very difficult to accept. It is not as if the choice was between a strained meaning and no meaning, as the natural effect of the words of the subsection is as I have described. And that meaning appears to me to be entirely consistent with the purpose of section 67, which is to extinguish certain rights of way if they are not registered, subject to certain exemptions including those ways subject to section 53(5) applications. While it may seem harsh, it seems to me quite consistent with the purpose of the section to exclude from that class of exemption cases where the application is defective (even though it may otherwise be saveable). I do not consider that the court would be performing its duty of reflecting the intention of Parliament as expressed in legislation if

A it effectively ignored or discarded a subsection simply because it did not like the consequences, or it considered that they were rather harsh.

103 It is said on behalf of the claimants by Mr Pay, who presented his arguments very well, that section 67 was retrospective in its effect and it is therefore appropriate to interpret a provision such as section 67(6) generously to a party who has made a defective section 53(5) application. I am unpersuaded by that. First, the effect of section 67 was only backdated
B to the moment when the Government announced its intention to enact it. Secondly, the claimants' case does not involve interpreting section 67(6) so much as discarding it. Thirdly, there is no correlation between the retrospectivity and the timing of the failure to comply or opportunity to remedy the failure to comply.

104 It is also said that there is some surplusage in section 67 anyway.
C Although that was not gone into in any detail, I am unconvinced that it is true. However, even if it is, I do not see how it would assist the claimants' case.

105 The notion that my conclusion as to the effect of section 67(6) leads to absurdity, because an application could thereby be invalidated by virtue of a small oversight, does not impress me. It is an argument which can be raised in relation to any provision, whether contractual or statutory, which
D requires a step, which has potentially beneficial consequences for the person who is to take it, to be taken by a certain date which cannot be moved. An obvious example is the service of a statutory or contractual notice: if a defective notice is served and is not corrected before the stipulated date, then the right to serve the notice, and the consequential benefits, are irretrievably lost, even if the defect was due to an oversight.

E

*Conclusion*

106 For these reasons (which on the second question are very similar to those contained in the judgment of Dyson LJ in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138), and for the reasons given in the brief judgment of Lord Sumption JSC, I would
F have allowed this appeal.

**LORD SUMPTION JSC**

107 There are two reasons why regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 might have prescribed the use of a map on a scale of not less 1:25,000. One is because a map on that scale showing the relevant byway could be expected to show
G more of the surrounding detail than a map on a smaller scale. The other is that it was desired to ensure that the map should be visible without unduly straining the eyesight of those using it. In my opinion it is manifest that the requirement was imposed for the first of those reasons and not for the second. It is true that the Regulations do not specify what maps of the prescribed scale must be used and that different maps may vary in the amount of surrounding detail shown. It is also true that an applicant
H supplying a map under regulation 8 might in theory satisfy the requirement by producing a 1:25,000 scale map with less surrounding detail than some 1:50,000 scale maps. It is also true that he might satisfy it by producing a home-made map on which the byway was shown with little or no surrounding detail (although this course would clearly not be open to a local

authority producing a definitive map under regulation 2). But I do not regard this as relevant to the construction of the Regulations, because I decline to construe them on the assumption that applicants could be expected to complete their applications in the most obtuse and unhelpful manner consistent with the language. In my opinion the Regulations have been drafted on the assumption that a map would be used in which a 1:25,000 scale map would have sufficient surrounding detail, and in any event more than a 1:50,000 map. A magnified copy of a 1:50,000 map is therefore not the same thing as a 1:25,000 map, and does not comply with regulation 8.

**108** Section 67(6) of the Natural Environment and Rural Communities Act 2006 provides that for the purposes of subsection (3) an application seeking modifications to the definitive map means one which complies with Schedule 14, paragraph 1 of the Wildlife and Countryside Act 1981. That means one which includes a map drawn on the prescribed scale. The application in this case was therefore not an application of the kind referred to in section 67(3) of the 2006 Act. It follows that on the relevant date any right of way for mechanically propelled vehicles was extinguished. Since the defect might in theory have been made good after the relevant date, this may be described as a technical point. But sometimes technicality is unavoidable. Where the subsistence of rights over land depend on some state of affairs being in existence at a specified date, it is essential that that state of affairs and no other should be in existence by that date and not later.

**109** For these reasons, which are the same as those of Lord Neuberger of Abbotsbury PSC, I would have allowed the appeal.

*Appeal dismissed.*

JILL SUTHERLAND, Barrister

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Supreme Court

## *Regina (Lee-Hirons) *v* Secretary of State for Justice

2015 Feb 24

Baroness Hale of Richmond DPSC, Lord Clarke of Stone-cum-Ebony, Lord Hodge JJSC

**APPLICATION** by the claimant for permission to appeal from the decision of the Court of Appeal [2014] EWCA Civ 553; [2015] 2 WLR 256

Permission to appeal was given.

---

**TRFDOC8 – Order of Supreme Court 13 April 2015**

IN THE SUPREME COURT OF THE UNITED KINGDOM

13 April 2015

*Before:*

Lord Neuberger
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson

**R (on the application of Trail Riders Fellowship and another) (Respondents) *v* Dorset County Council (Appellant)**

AFTER HEARING Counsel for the Appellant, Counsel for the First Respondent and the Intervener on 15 January 2015 and

THE COURT ORDERED THAT

1) The appeal be dismissed

2) The claim for judicial review of the Appellant's decision of 2 November 2010 succeeds

3) By 4.00pm on 15 April 2015 the Appellant will pay the First Respondent's costs of the appeal in the agreed sum of £10,000 (inclusive of VAT) and

IT IS DECLARED that

4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref. T339), 21 December 2004 (ref. 350), 21 December 2004 (ref. 353) and 21 December 2004 (ref. T 354) made to the Appellant under section 53(5) of the Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981.

Louise di Mambro.

Registrar
13 April 2015

**TRFDOC9 – Email correspondence agreeing the Order of the Supreme Court**

**From:** Kira King
**Sent:** 16 March 2015 18:26:58
**To:** Adrian Pay;Thomas Fletcher
**Cc:** George Laurence
**Subject:** TRF v Dorset - First draft of order
**Attachments:** TRF v Dorset CC - Draft Order.docx

Dear Adrian and Tom,
Well done!
Please find attached my first draft of the Order. George has not yet had an opportunity to review/comment on my draft so please review it in that light. George will provide his input tomorrow morning.
Thanks
Kind regards
Kira

**From:** Thomas Fletcher
**Sent:** 17 March 2015 09:23:33
**To:** Kira King;Adrian Pay
**Cc:** George Laurence
**Subject:** Re: TRF v Dorset - First draft of order

Dear Kira,
Many thanks for this. We will revert after George has had an opportunity to contribute. We will also need to forward any order agreed as between us to James Pavey at TE to get any input from him and/or Mr Plumbe.
Thanks,
Tom

---

**From:** Kira King <Kira.King@NewSquareChambers.co.uk>
**Date:** Monday, 16 March 2015 18:26
**To:** Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>, Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>
**Cc:** George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** TRF v Dorset - First draft of order
Dear Adrian and Tom,
Well done!
Please find attached my first draft of the Order. George has not yet had an opportunity to review/comment on my draft so please review it in that light. George will provide his input tomorrow morning.
Thanks
Kind regards
Kira

**From:** Kira King
**Sent:** 18 March 2015 15:17:41
**To:** Thomas Fletcher;Adrian Pay
**Cc:** George Laurence
**Subject:** FW: TRF v Dorset (amended order)
**Attachments:** TRF v Dorset CC - Amended Draft Order.docx

Adrian and Tom,
Please find attached a second draft of the order incorporating George's initial comments. It is slightly different to my original draft.
George may still have further comments but I wanted to get something to you further to your email this morning.
Thanks
Kind regards
Kira

**From:** Thomas Fletcher
**Sent:** 18 March 2015 09:40:05
**To:** Kira King;Adrian Pay
**Cc:** George Laurence
**Subject:** Re: TRF v Dorset - First draft of order

Dear Kira,
Following on from my previous email, we consider that para 1 should be amended to simply state that the appeal is dismissed. The remainder seems fine, subject to George's comments. Many thanks again.
Thanks,
Tom

---

**From:** Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>
**Date:** Tuesday, 17 March 2015 09:23
**To:** Kira King <Kira.King@NewSquareChambers.co.uk>, Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>
**Cc:** George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** Re: TRF v Dorset - First draft of order
Dear Kira,
Many thanks for this. We will revert after George has had an opportunity to contribute. We will also need to forward any order agreed as between us to James Pavey at TE to get any input from him and/or Mr Plumbe.
Thanks,
Tom

---

**From:** Kira King <Kira.King@NewSquareChambers.co.uk>
**Date:** Monday, 16 March 2015 18:26
**To:** Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>, Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>
**Cc:** George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** TRF v Dorset - First draft of order
Dear Adrian and Tom,
Well done!
Please find attached my first draft of the Order. George has not yet had an opportunity to review/comment on my draft so please review it in that light. George will provide his input tomorrow morning.
Thanks
Kind regards
Kira

**From:** Thomas Fletcher
**Sent:** 26 March 2015 18:58:50
**To:** Kira King;George Laurence
**Cc:** Adrian Pay
**Subject:** Re: TRF v Dorset (amended order)
**Attachments:** TRF v Dorset CC - Draft Order.docx

Dear George and Kira,
I re-attach the draft order with the wording of para 1 amended and with the bumph added before the orders. I understand your instructing solicitor is away on holiday until 30th, so the draft is subject to confirmation at your end. However, unless you have any objections, perhaps the draft could be sent to Mr Pavey at Thomas Eggar for confirmation of Mr Plumbe's position. That does carry the advantage of ensuring we can get this to the Registrar fairly swiftly on or after 30th.
Thanks,
Tom
Thomas Fletcher

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clerks@newsquarechambers.co.uk ▪ http://www.newsquarechambers.co.uk ▪


**From:** Kira King <Kira.King@NewSquareChambers.co.uk>
**Date:** Wednesday, 18 March 2015 15:17
**To:** Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>, Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>
**Cc:** George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** FW: TRF v Dorset (amended order)
Adrian and Tom,
Please find attached a second draft of the order incorporating George's initial comments. It is slightly different to my original draft.
George may still have further comments but I wanted to get something to you further to your email this morning.
Thanks
Kind regards
Kira

**From:** James Pavey
**Sent:** 31 March 2015 20:16:45
**To:** Kira King
**Cc:** Thomas Fletcher;Adrian Pay;George Laurence
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Dear Kira

Thanks for your e-mail and the attachment.

My client is happy with the proposed draft Order, save that, for the sake of clarity and completeness, he suggests that it is made clear in term 3 of the Order that the five applications were "made to the Appellant":

> "It is declared that the five applications dated 14/7/2004 (ref. T338), 25/9/2004 (ref. T339), 21/12/2004 (ref. 350), 21/12/04 (ref. 353), 21/12/04 (ref. T 354) and made to the Appellant under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981."

Kind regards

James

**James Pavey**
Partner
for and on behalf of Thomas Eggar LLP

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DX Number: 85715 Crawley
www.thomaseggar.com



---

**From:** Kira King [mailto:Kira.King@NewSquareChambers.co.uk]
**Sent:** 31 March 2015 18:03
**To:** James Pavey
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** TRF v Dorset (amended order)

Dear James,

Please find attached a draft order in respect of the above case that has been agreed by the Claimant and Respondents.

Please can you confirm Mr Plumbe's position and whether he is willing to agree the order as drafted.

Thanks very much
Kind regards
Kira

**From:** Kira King
**Sent:** 31 March 2015 17:58:25
**To:** Thomas Fletcher;George Laurence
**Cc:** Adrian Pay
**Subject:** RE: TRF v Dorset (amended order)

Dear Tom,
Sorry for my delay in responding on this. I have been swamped.
I have now had a response from Sarah and she is happy with the current draft of the order and I am happy for the draft to be sent to James Pavey.
Thanks
Kind regards
Kira

---

**From:** Thomas Fletcher
**Sent:** 26 March 2015 18:58
**To:** Kira King; George Laurence
**Cc:** Adrian Pay
**Subject:** Re: TRF v Dorset (amended order)

Dear George and Kira,
I re-attach the draft order with the wording of para 1 amended and with the bumph added before the orders. I understand your instructing solicitor is away on holiday until 30th, so the draft is subject to confirmation at your end. However, unless you have any objections, perhaps the draft could be sent to Mr Pavey at Thomas Eggar for confirmation of Mr Plumbe's position. That does carry the advantage of ensuring we can get this to the Registrar fairly swiftly on or after 30th.
Thanks,
Tom

Thomas Fletcher
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clerks@newsquarechambers.co.uk ▪ http://www.newsquarechambers.co.uk ▪


**From:** Kira King <Kira.King@NewSquareChambers.co.uk>
**Date:** Wednesday, 18 March 2015 15:17
**To:** Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>, Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>
**Cc:** George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** FW: TRF v Dorset (amended order)
Adrian and Tom,

Please find attached a second draft of the order incorporating George's initial comments. It is slightly different to my original draft.
George may still have further comments but I wanted to get something to you further to your email this morning.
Thanks
Kind regards
Kira

**From:** Kira King
**Sent:** 31 March 2015 18:03:06
**To:** james pavey
**Cc:** Thomas Fletcher;Adrian Pay;George Laurence
**Subject:** TRF v Dorset (amended order)
**Attachments:** TRF v Dorset CC - Draft Order.docx

Dear James,
Please find attached a draft order in respect of the above case that has been agreed by the Claimant and Respondents.
Please can you confirm Mr Plumbe's position and whether he is willing to agree the order as drafted.
Thanks very much
Kind regards
Kira

**From:** Kira King
**Sent:** 02 April 2015 18:40:59
**To:** James Pavey
**Cc:** Thomas Fletcher;Adrian Pay;George Laurence
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

James,
I have no objection to this addition.
Tom, please could you confirm whether your clients are happy with the order as amended and we can get the order agreed and filed.
Thanks very much
Have a lovely Easter all.
Kind regards
Kira

---

**From:** James Pavey [James.Pavey@thomaseggar.com]
**Sent:** 31 March 2015 20:16
**To:** Kira King
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Dear Kira

Thanks for your e-mail and the attachment.

My client is happy with the proposed draft Order, save that, for the sake of clarity and completeness, he suggests that it is made clear in term 3 of the Order that the five applications were "made to the Appellant":

> "It is declared that the five applications dated 14/7/2004 (ref. T338), 25/9/2004 (ref. T339), 21/12/2004 (ref. 350), 21/12/04 (ref. 353), 21/12/04 (ref. T 354) and made to the Appellant under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981."

Kind regards

James

**James Pavey**
Partner
for and on behalf of Thomas Eggar LLP
Thomas Eggar
Direct Dial: +44 (0)1293 742746

Reception: +44 (0)1293 742700
Direct Fax: +44 (0)1293 742998
Mobile: +44 (0)7774 737295

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DX Number: 85715 Crawley
www.thomaseggar.com



**From:** Kira King [mailto:Kira.King@NewSquareChambers.co.uk]
**Sent:** 31 March 2015 18:03
**To:** James Pavey
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** TRF v Dorset (amended order)

Dear James,

Please find attached a draft order in respect of the above case that has been agreed by the Claimant and Respondents.

Please can you confirm Mr Plumbe's position and whether he is willing to agree the order as drafted.

Thanks very much
Kind regards
Kira

**From:** Thomas Fletcher
**Sent:** 02 April 2015 18:45:02
**To:** Kira King;James Pavey
**Cc:** Adrian Pay;George Laurence
**Subject:** Re: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Dear all,
I confirm that my clients are happy to agree the draft order with the proposed amendment referred to below. Have a good Easter all
Kind regards,
Tom

Thomas Fletcher
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clerks@newsquarechambers.co.uk ▪ http://www.newsquarechambers.co.uk ▪


**From:** Kira King <Kira.King@NewSquareChambers.co.uk>
**Date:** Thursday, 2 April 2015 18:40
**To:** James Pavey <James.Pavey@thomaseggar.com>
**Cc:** Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>, Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>, George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

James,
I have no objection to this addition.
Tom, please could you confirm whether your clients are happy with the order as amended and we can get the order agreed and filed.
Thanks very much
Have a lovely Easter all.
Kind regards
Kira

---

**From:** James Pavey [James.Pavey@thomaseggar.com]
**Sent:** 31 March 2015 20:16
**To:** Kira King
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Dear Kira

Thanks for your e-mail and the attachment.

My client is happy with the proposed draft Order, save that, for the sake of clarity and completeness, he suggests that it is made clear in term 3 of the Order that the five applications were "made to the Appellant":

> "It is declared that the five applications dated 14/7/2004 (ref. T338), 25/9/2004 (ref. T339), 21/12/2004 (ref. 350), 21/12/04 (ref. 353), 21/12/04 (ref. T 354) and made to the Appellant under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981."

Kind regards

James

**James Pavey**
Partner
for and on behalf of Thomas Eggar LLP

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**From:** Kira King [mailto:Kira.King@NewSquareChambers.co.uk]
**Sent:** 31 March 2015 18:03
**To:** James Pavey
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** TRF v Dorset (amended order)

Dear James,

Please find attached a draft order in respect of the above case that has been agreed by the Claimant and Respondents.

Please can you confirm Mr Plumbe's position and whether he is willing to agree the order as drafted.

Thanks very much
Kind regards
Kira

**From:** Kira King
**Sent:** 02 April 2015 19:25:10
**To:** Thomas Fletcher;James Pavey
**Cc:** Adrian Pay;George Laurence
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Thanks Tom, I will get this filed.
Thanks
Kind regards
Kira

---

**From:** Thomas Fletcher
**Sent:** 02 April 2015 18:45
**To:** Kira King; James Pavey
**Cc:** Adrian Pay; George Laurence
**Subject:** Re: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Dear all,
I confirm that my clients are happy to agree the draft order with the proposed amendment referred to below. Have a good Easter all
Kind regards,
Tom

Thomas Fletcher
NEW SQUARE CHAMBERS
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clerks@newsquarechambers.co.uk ▪ http://www.newsquarechambers.co.uk ▪


**From:** Kira King <Kira.King@NewSquareChambers.co.uk>
**Date:** Thursday, 2 April 2015 18:40
**To:** James Pavey <James.Pavey@thomaseggar.com>
**Cc:** Thomas Fletcher <thomas.fletcher@newsquarechambers.co.uk>, Adrian Pay <Adrian.Pay@NewSquareChambers.co.uk>, George Laurence <George.Laurence@NewSquareChambers.co.uk>
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]
James,
I have no objection to this addition.
Tom, please could you confirm whether your clients are happy with the order as amended and we can get the order agreed and filed.
Thanks very much
Have a lovely Easter all.

Kind regards
Kira

---

**From:** James Pavey [James.Pavey@thomaseggar.com]
**Sent:** 31 March 2015 20:16
**To:** Kira King
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** RE: TRF v Dorset (amended order) [IWOV-GATWICK.FID201077]

Dear Kira

Thanks for your e-mail and the attachment.

My client is happy with the proposed draft Order, save that, for the sake of clarity and completeness, he suggests that it is made clear in term 3 of the Order that the five applications were "made to the Appellant":

> "It is declared that the five applications dated 14/7/2004 (ref. T338), 25/9/2004 (ref. T339), 21/12/2004 (ref. 350), 21/12/04 (ref. 353), 21/12/04 (ref. T 354) and made to the Appellant under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981."

Kind regards

James

**James Pavey**
Partner
for and on behalf of Thomas Eggar LLP

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Reception: +44 (0)1293 742700
Direct Fax: +44 (0)1293 742998
Mobile: +44 (0)7774 737295

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Station Way
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DX Number: 85715 Crawley
www.thomaseggar.com

**From:** Kira King [mailto:Kira.King@NewSquareChambers.co.uk]
**Sent:** 31 March 2015 18:03
**To:** James Pavey
**Cc:** Thomas Fletcher; Adrian Pay; George Laurence
**Subject:** TRF v Dorset (amended order)

Dear James,

Please find attached a draft order in respect of the above case that has been agreed by the Claimant and Respondents.

Please can you confirm Mr Plumbe's position and whether he is willing to agree the order as drafted.

Thanks very much
Kind regards
Kira

**From:** Kira King
**Sent:** 02 April 2015 19:25:21
**To:** Neil Garrett
**Cc:** Michelle Greene;George Laurence;Thomas Fletcher;Adrian Pay
**Subject:** TRF v Dorset CC - Agreed Order
**Attachments:** TRF v Dorset CC- UKSC 2013 0153 - Agreed Order.docx

Dear Neil,
The order in the above case has finally been agreed by all the parties, please can this be filed with the Supreme Court.
Thanks very much
Kind regards
Kira

**TRFDOC10 – Email from Registrar of the Supreme Court 5 November 2019**

**From:** Ian Sewell <ian.sewell@supremecourt.uk>
**Sent:** 05 November 2019 10:42
**To:** Philip Crowther <p.crowther@dorsetcc.gov.uk>; mstevenson@brainchasecoles.co.uk; Graham Plumbe <graham.plumbe@gmail.com>
**Cc:** UKSC Registry <registry@supremecourt.uk>
**Subject:** r (app trail riders v dorset cc

Lord Carnwath has directed me to write to the parties as follows:

"The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage."

Kind regards, and thanks for your patience!

Ian

**Ian Sewell**
Deputy Registrar of the Supreme Court of the United Kingdom and Costs Clerk in the Judicial Committee of the Privy Council
The Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council
Parliament Square, London, SW1P 3BD
DX 157230 PARLIAMENT SQUARE 4
+44(0)20 7960 1990 | ian.sewell@supremecourt.uk

www.supremecourt.uk | www.jcpc.uk

**TRFDOC11 – Brain Chase Coles (for the TRF) letter to Planning Inspectorate 16 December 2019**

brain
chase
coles
Solicitors

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**Hampshire RG21 7NL**

**Tel 01256 354481**
**Fax 01256 470637**
**DX 3005 Basingstoke**
**www.brainchasecoles.co.uk**

FAO Helen Sparks
Rights of Way Section
The Planning Inspectorate
3A Eagle
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

By email only – helen.sparks@planninginspectorate.gov.uk

Your Ref: FPS/C1245/14A/10
Our Ref: MSS/SS/TRF74

16th December 2019

Dear Sirs

**Re: Our Client – Trail Riders Fellowship**
**FPS/C1245/14A/10 – Dorset Council Refusal to upgrade Bridleway 14, Beaminster, to a Byway Open to All Traffic**

We refer to your letter 20 November 2019 and Mr Plumbe's submission 16 November 2019.

The Court of Appeal in the case Trail Riders Fellowship v Dorset CC [2013] EWCA Civ 553, by order dated 20 May 2013 declared that five applications, including that relating to Bridleway 14 Beaminster (Dorset T353), were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981. A copy of the order dated 20 May 2013 is enclosed herewith as Annex 1.

The Supreme Court ([2015] UKSC 18, [2015] 1 WLR 1406) dismissed an appeal against the Court of Appeal's decision.

Whether or not the application, Dorset T353, complied with paragraph 1 Schedule 14 has been disposed of by the declaration of the Court of Appeal, as upheld by the Supreme Court.

Mr Plumbe and Dorset CC sought to reopen that issue by applying to the Supreme Court. That attempt was misconceived, given the terms of the declaration and the disposal of the appeal in the Supreme Court. That application has been rejected by the Supreme Court, for the reasons set out by Lord Carnwath: '*The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the relief sought in the*

brain
chase
coles
Solicitors

*original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage.*' A copy of Lord Carnwath's decision is enclosed herewith as Annex II.

Accordingly, not only had any question as to the compliance with paragraph 1 Schedule 14 of this application already been finally disposed of in the Court of Appeal and the Supreme Court, but the misconceived attempt to reopen this question has also been squarely rejected by the Supreme Court.

There is no further right of appeal either from the original decision of the Supreme Court, nor from the Supreme Court's rejection of Dorset CC and Mr Plumbe's application. Mr Plumbe's purported criticisms of Lord Carnwath's reasoning are ill-judged and also misconceived (and given the absence of any further right of appeal or possibility of reopening the decision are neither here nor there).

The TRF has incurred costs in responding to Mr Plumbe's misconceived collateral attack on a decision of the Supreme Court. The TRF regards Mr Plumbe's submissions as unreasonable conduct and reserves the right to seek its costs from Mr Plumbe.

Yours faithfully

**Brain Chase Coles**
(mstevenson@brainchasecoles.co.uk)

**TRFDOC12 – Planning Inspectorate Decision 31 July 2020**

The Planning Inspectorate

# Appeal Decision

**by Mark Yates BA(Hons) MIPROW**

**an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 31 July 2020**

## Appeal Ref: FPS/C1245/14A/10

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of the Dorset Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application was dated 21 December 2004 and this appeal relates to the Council's decision of 26 March 2019 to not make an order.
- The appellant claims that Beaminster Bridleway No. 14 should be upgraded to a byway open to all traffic ("BOAT").

**Summary of Decision: The appeal is dismissed.**

## Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.

2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

3. Submissions have been received from the appellant, the Council, affected landowners and other interested parties regarding this appeal. References below to 'the landowners' relate to the representations made on behalf of Mr and Mrs Clunes.

4. The alleged BOAT ("the claimed route") is shown on the map attached to this decision between points A, B, C, D and E. It links at point A with the C102 county road and at point E with BOAT 89. The definitive map was modified in 2001, following a public inquiry held to determine the status of the route that became BOAT 89.

## Main Issues

5. Section 53(3)(c)(ii) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows 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*". The evidential test to be applied is the balance of probabilities.

6. The case in support relies on various historical documents and maps. I shall consider whether the evidence provided is sufficient to infer the dedication of higher public rights over the claimed route at some point in the past. Section

32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.

7. The Natural Environment and Rural Communities Act 2006 ("the 2006 Act") has the effect of extinguishing unrecorded public rights of way for mechanically propelled vehicles unless one or more of the exemptions in Section 67(2) or (3) of the Act is applicable. In this case, reliance is placed on the exemption in Section 67(3)(a) of the 2006 Act, namely that prior to the relevant date[1] an application was made for an order to modify the definitive map and statement to show the route as a BOAT.

## Reasons

### *Consideration of the documentary evidence*

8. The comments of the Council's Senior Archaeologist point to the claimed route being potentially of medieval origin. In respect of the representation from Mr Legg, I share the landowners concern in terms of the lack of evidence provided by him in support of his assertions regarding the historical use of the claimed route.

9. Two commercial maps produced by Taylor in 1765 and 1796 show a feature that could correspond to the claimed route. This is shown linking with a route at possibility point C or point E. No through route is visible to the south, beyond the land shown as a common. It can only be said that these maps could potentially provide support for the claimed route being a highway.

10. A circa 1800 sketch plan of roads in the neighbourhood of Beaminster is not particularly clear. It appears to depict other routes running north to south in this locality but not the claimed route. The provenance of this plan is unclear which lessens the weight that can be attached to it. However, I do not find that this plan provides support for the claimed route being viewed as one of the roads in Beaminster.

11. The map in connection with the Beaminster Inclosure Award of 1809 shows a route leading north eastwards to the edge of the land to be enclosed. This route is shown open-ended at its north-eastern end and annotated "*Meerhay*". It is described in the award as a public carriage road and highway with a width of 20 feet going to a place called Meerhay. The annotation on the map lies at the edge of the land to be enclosed and would have been located at a point to the south of the southern end of BOAT 89.

12. The landowners say that unless specific provision was made in the 1804 local Act, the general clauses contained in the Inclosure Consolidation Act 1801 ("the 1801 Act") would prevail. No provision is stated to have been made to vary Section 8 of the 1801 Act whereby public carriageways were to have a width of at least 30 feet. It is submitted that the provision in the award of a 20 feet wide carriage road was ultra vires. However, this does not prevent a finding that the way involved was dedicated at some other point in time. Moreover, this way lies to the south of the claimed route and the connecting BOAT 89.

[1] 20 January 2005

13. The Inclosure Commissioner was clearly of the view that a road continued beyond the land to be enclosed. No definitive view can be reached regarding the point where the road was considered to terminate in Meerhay. However, I find the submission of the landowners that the road would have terminated in the locality of the former manor house to be more persuasive than the appellant's view that it continued further northwards and encompassed the claimed route. The map evidence suggests that the settlement of Meerhay was concentrated in the locality of the manor house. Accordingly, there is real doubt regarding whether the road to Meerhay included any part of the claimed route.

14. The claimed route is shown by means of solid lines on the Ordnance Survey ("OS") map of 1811. OS maps assist in identifying the physical features present when the land was surveyed, but they provide no confirmation regarding the status of the roads or tracks shown. Nonetheless, the claimed route is shown as a through route between recognised highways.

15. The claimed route is shown as a cross road on the 1826 Greenwood map. This would generally be reflective of the existence of a highway running between two roads. However, the landowners draw attention to some private roads shown on the Greenwood map in the same way. This suggests the surveyor was concerned with the representation of all roads irrespective of their status. The fact that the claimed route is shown as a through route is suggestive of it being a highway rather than a private road but there is the potential for this to be indicative of bridleway status.

16. An 1843 tithe map shows the majority of the claimed route excluded from the taxable parcels of land. However, a section of the route around point C is shown within plot 844. The whole of the claimed route is shown coloured sienna and the Council says this colouring was used on the map in connection with other public routes. In contrast, the landowners draw attention to there being private routes marked in this way.

17. Highways were incidental to the tithe process and this will usually serve to limit the evidential weight of tithe maps. The exclusion of a route from the tithed parcels of land could be indicative of a public or private road as both would have impacted upon the productivity of the land being assessed. In this case, a section of the route falls within one of the tithed parcels of land. The depiction of the claimed route as a through route and the colouring used on the tithe map could again provide some support for it being a highway. However, there is the potential for this to be indicative of a bridleway.

18. OS mapping from the late nineteenth century and early part of the twentieth century shows the claimed route by a mixture of solid and pecked lines, which indicates that there were sections where it was unenclosed and others where it was enclosed on one or both sides. There are additional cycling and touring maps that appear to record the physical existence of the claimed route during the early part of the twentieth century.

19. The initials "*B.R.*" appear on the OS maps in relation to the claimed route to denote a bridle road. I accept that this does not necessarily mean the route was a bridleway. It is likely to have reflected how it appeared to the surveyor and represented the physical nature of the claimed route or sections of it. In terms of the footbridge identified on the 1903 OS map near to the southern end of BOAT 89, it cannot be determined what features previously existed at

this point. Nor does the absence of any reference to the claimed route in the OS name book mean that it was not a public road.

20. Attention has been drawn to locations where solid lines shown across the route are indicative of the presence of gates. The number of potential gates in this case could have served to hinder or slow the passage of vehicular traffic. However, the presence of gates does not mean that a route was not a historical vehicular highway.

21. The exclusion of a route from the surrounding hereditaments on the maps produced in connection with the 1910 Finance Act can provide a good indication of highway status, most likely of a vehicular nature as footpaths and bridleways were usually dealt with by way of deductions in the accompanying field books. In this case, the majority of the claimed route is shown running through the hereditaments numbered 136 and 430. A deduction was claimed for "*public rights of way or user*" through the latter, but it is not possible to determine the way in question. The exclusion of only limited parts of the claimed route from the surrounding hereditaments means that this document provides little, if any, support for the route being a vehicular highway.

22. The fact that the claimed route was considered to be a bridleway when the original definitive map was compiled does not impact on any unrecorded higher public rights that may exist over it. A subsequent letter of 22 May 1973 from the clerk of Beaminster Parish Council outlines that they were having difficulty in obtaining the required evidence in support of the upgrade of the claimed route. The reference to use appears to relate to access in connection with properties that adjoin the route. It was requested that the county council adopt the claimed route. This letter provides no actual evidence of use by the public and seems to be concerned with the maintenance of the route.

23. The reservation of rights of access, private maintenance undertaken on the route during the twentieth century and an obligation on tenants to not allow additional paths to be dedicated also do not assist in determining whether the claimed route was a pre-existing vehicular highway.

***Conclusions on the evidence***

24. There is some historical map evidence that shows the claimed route as a thorough route between recognised highways. The connecting BOAT 89 also connects with the D11228 road, which means that it is not a vehicular cul de sac at its northern end. The depiction of the claimed route as a through route provides some support for it historically being part of the public road network but only limited weight can be given to this map evidence. It could also potentially be reflective of the route's current status.

25. The reference to the road continuing to Meerhay in the inclosure documents does not necessarily indicate that it continued over the claimed route. I have found there to be merit in the view that the road terminated in the locality of the former manor house. The Finance Act evidence does not provide support for the majority of the claimed route being a vehicular highway.

26. Overall, I do not find that the different pieces of documentary evidence, when considered together, show on the balance of probabilities that this bridleway ought to be recorded as a BOAT.

### *The 2006 Act*

27. In light of my conclusion above, I do not need to decide whether the relevant exemption in the 2006 Act is applicable. However, due to the extensive submissions made on this matter, I briefly address it below.

28. The former Dorset County Council previously turned down five applications, including this one, on the ground that the map with the applications did not comply with paragraph 1(a) of Schedule 14. This matter is relevant for the purpose of determining whether the exemption contained in Section 67(3)(a) of the 2006 Act was engaged.

29. The appellant successfully challenged the decisions in the Court of Appeal and this appeal was upheld by the Supreme Court. The Supreme Court declared that the applications were compliant with paragraph 1 of Schedule 14 of the 1981 Act. Attempts to have this declaration varied have been unsuccessful. On this issue, it is asserted that it should have related solely to paragraph 1(a) of Schedule 14. A decision would then need to be made regarding whether the application was compliant in respect of the provision of evidence in accordance with paragraph 1(b) of Schedule 14.

30. The declaration clearly states that the application is compliant with paragraph 1 of Schedule 14, which is the matter to be decided in terms of the relevant exemption in the 2006 Act. Nonetheless, the information provided by the Council indicates that the application was received before the cut-off date and that all of the documents listed in the application form were supplied by the applicant. There may well be additional evidence that is later found to be relevant, but the Council does not consider that the applicant deliberately withheld any evidence.

31. From the written information provided it appears to me that the relevant exemption in the 2006 Act would have been applicable in this case.

### Other Matters

32. A number of concerns have been raised regarding the impact of the claimed route being recorded as a BOAT in relation to issues such as safety, the environment, maintenance, congestion and the suitability of the route for vehicular traffic. However, none of these matters are relevant to the test that I need to apply, as set out in paragraph 5 above.

### Overall Conclusion

33. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

### Formal Decision

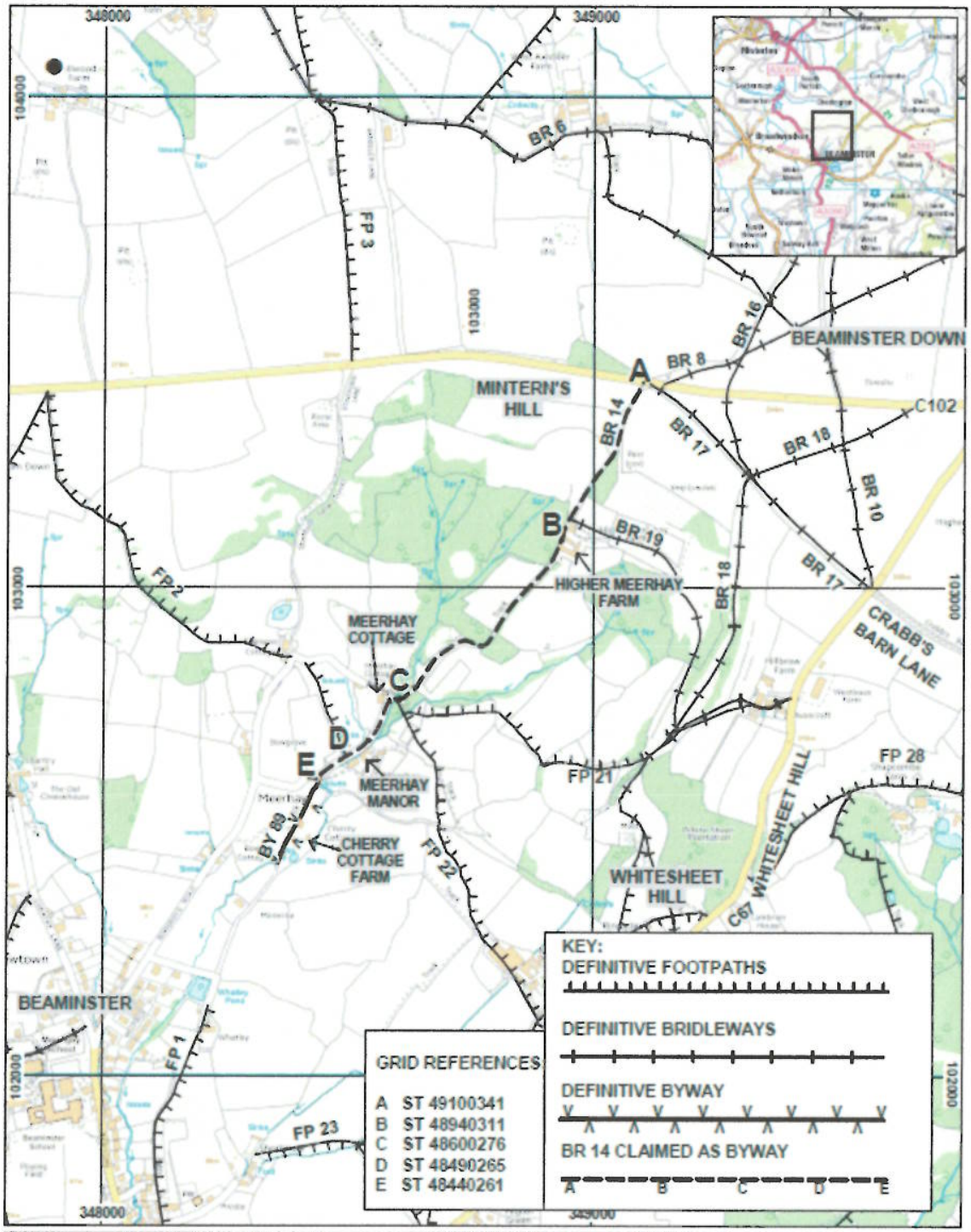
34. I dismiss the appeal.

*Mark Yates*

**Inspector**

**APPENDIX 1**

**PLAN 18/12**




**WILDLIFE AND COUNTRYSIDE ACT 1981**

APPLICATION TO UPGRADE BR 14, BEAMINSTER TO BYWAY OPEN TO ALL TRAFFIC

THIS MAP IS NOT DEFINITIVE AND HAS NO LEGAL STATUS

**Ref: 18/12**
Date: 23/07/2018
Scale 1:10000
Drawn By: AH
Cent X: 348780
Cent Y: 102939

GEOGRAPHICAL INFORMATION SYSTEMS
Dorset County Council

**TRFDOC13 – R (Winchester College) v Hampshire CC [2008] EWCA Civ 431 [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:

E

*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 D a map showing the public right of way to which the application relates is 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 F application must be accompanied by both a map and copies of documentary 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

**TRFDOC14 – Maroudas v Secretary of State for Environment, Food and Rural Affairs [2010] EWCA Civ 280**

# Frederick Ian Maroudas v Secretary of State for Environment Food & Rural Affairs


Positive/Neutral Judicial Consideration

**Court**
Court of Appeal (Civil Division)

**Judgment Date**
18 March 2010

Case No: C1/2009/0836

High Court of Justice Court of Appeal (Civil Division)

**[2010] EWCA Civ 280, 2010 WL 889414**

Before : Lord Justice Dyson Lord Justice Richards and Lord Justice Jackson

Date: 18th March 2010

On Appeal from the Administrative Court

HHJ Mackie Q.C.

CO/6286/2008

Hearing date: 4 March

**Representation**

The Appellant appeared in person.
Philip Coppel Q.C. (instructed by Secretary of State for Environment ) for the Respondent.

**Judgment**

Lord Justice Dyson:

1. This is an appeal against the decision of HH Judge Mackie QC whereby he dismissed the appellant's application under para 12 of Schedule 15 to the Wildlife and Countryside Act 1981 (“the 1981 Act”) for an order quashing the decision of the Secretary of State for Environment, Food and Rural Affairs, acting by his Planning Inspector, Heidi Cruickshank, dated 21 May 2008 confirming as modified The Oxfordshire County Council Shiplake Restricted Byway 1 Modification Order 2007 (“the Modification Order”) made under section 53(2)(b) of the 1981 Act by the Oxfordshire County Council (“the Council”).

2. The effect of the Modification Order , as confirmed and modified by the Inspector, was to modify the definitive map and statement for the area to upgrade Shiplake Restricted Byway 1 (“the Byway”), which had previously been shown as a Road Used as a Public Path (“RUPP”), to a Byway Open to All Traffic (“BOAT”) in the part of the Byway described in Part 1 of the Schedule to the Modification Order . The relevant part of the Byway runs east from Shiplake lock (point A on the map incorporated in the Modification Order ) to a railway bridge (point B) and then across Shiplake Meadow to the stone steps at the River Thames (point C).

**The legal framework**

3. Section 53 of the 1981 Act imposes a duty on a surveying authority to keep a definitive map and statement of the public rights of way in its area under continuous review. So far as material, it provides:

> "(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 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 to them) shows…(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.
>
> …
>
> (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 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."

Schedule 14 to the 1981 Act provides:

> "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."
>
> 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.
>
> …
>
> (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.
>
> 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.

(2) If the authority have not determined the application within twelve months of their receiving a certificate under paragraph 2(3), then, on the applicant making representations to the Secretary of State, the Secretary of State may, after consulting with the authority, direct the authority to determine the application before the expiration of such period as may be specified in the direction.

(3) As soon as practicable after determining the application, the authority shall give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1).

5.

(1) In this Schedule—

"prescribed" means prescribed by regulations made by the Secretary of State."

4. The regulations made by the Secretary of State are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (S1 1993/12) ("the 1993 Regulations"). Regulation 8(1) of the 1993 Regulations 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."

5. The form of application prescribed by Schedule 7 to the 1993 Regulations is in these terms:

"(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) (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
>
> Date:…19…Signed…"

6. Section 67(1) of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") provides:

> "(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…
>
> (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."

**R (on the application of Warden and Fellows of Winchester College v Hampshire County Council [2008] EWCA Civ 431, [2009] 1 WLR 138**

7. In the judgment which I delivered in Winchester , with which Ward and Thomas LJJ agreed, I said at [38] that the purpose of section 67(6) of the 1981 Act is to define the moment at which a qualifying application is made. Later, I said:

> "46. In my judgment, as a matter of ordinary language an application is not made in accordance with para 1 unless it satisfies all three requirements of the paragraph. Moreover, there are two particular indications that an application is only made in accordance with para 1 of Schedule 14 if it is made in accordance with all the requirements of the paragraph. First, para 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 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 appellant to 'attach' copies of the following documentary evidence (including statements of witnesses) in support of the application. This language reflects the content of sub-paras (a) and (b) of para 1. It is artificial to say that, in order to be made in accordance with para 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 para 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."

8. At [54], I said:

> "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 para 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 para 1 will not invalidate an application. But neither the Tilbury application not the Fosberry application was accompanied by any copy documentation 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 para 1."

9. Accordingly, the reason why the court held that the applications relied on by the applicant were not in accordance with para 1 of Schedule 14 was that they were not accompanied by any copy documentation, although it was clear from the face of the applications that the applicants wished to adduce a substantial quantity of documentary evidence.

**The facts**

10. In about February 1997, Mr Robin Drinkwater, who at the time was the owner of the land between points A and B on the map which became incorporated in the Modification Order , submitted an application to the Council under section 53(5) of the 1981 Act. He used an application form which was substantially in the form prescribed by Schedule 7 to the 1993 Regulations. It stated that the modification sought of the definitive map was to upgrade the RUPP to a BOAT from the railway viaduct (point B) to the stone steps (point C). The application form (which I shall refer to as "the February application") was not signed or dated and it was not accompanied by a map showing the route to which it related. The precise date on which the February application was made by Mr Drinkwater is unclear. The received date stamp shows that it was received by the Council on or before 7 February.

11. On 14 January 1997, Mr Drinkwater had sent a certificate to the Council certifying that the requirements of para 2 of Schedule 14 to the 1981 Act had been complied with in that "all owners and occupiers of land affected by the Modification Order application" had been notified of the application. It would seem that, notwithstanding the terms of para 2(1) of Schedule 14 to the 1981 Act, Mr Drinkwater notified the owners and occupiers of his application before it was made. But nothing turns on this, not least because, as will be seen, Mr Drinkwater submitted another certificate pursuant to para 2(1) on 12 November 1997.

12. The senior Rights of Way Officer of the Council responded to the February application by a letter dated 25 March 1997 which stated:

> "I refer to your application to reclassify C.R.B. No 1 Shiplake as a Public Byway Open to All Traffic on the Definitive Map of Public Rights of Way.
>
> Enclosed is a summary and plan of the application. This is intended to be used in consultation with interested parties. In order to proceed with this next stage, I would be grateful if you could confirm in writing that the enclosed details are an accurate representation of your application. In particular you will see from these details that I have shown the entire length of C.R.B. 1 as being part of your application. To commence the reclassification from the railway bridge would leave an anomaly of a section of the route as remaining C.R.B. I trust therefore that it was your intention to include the entire route within your application, although I would appreciate your clarification on this point.
>
> I look forward to hearing from you."

13. We have not seen a copy of the summary or the plan that were enclosed with the Council's letter, but it is clear that they showed that the subject of Mr Drinkwater's application was the entire length of the route from point A to point C. Mr Drinkwater replied by a signed letter dated 22 April 1997 saying:

> "I cannot foresee a problem through co-operating with the plan to incorporate the whole road into the application, so please do that if you will.
>
> Many thanks."

14. On 12 November 1997, Mr Drinkwater sent a further certificate to the Council which was in the same terms as the earlier certificate of 14 January.

**The judgment of HH Judge Mackie QC**

15. The central part of the judge's reasoning is contained in para 25 of his judgment:

> "I also accept, of course the guidance given by the Court of Appeal, that the approach to these applications is one requiring strict compliance. I am also of the view that, to the extent to which the Inspector was saying that the application form itself, without a signature or a date, or [with] other particular defects, was a minor departure, excusable under the considerations set out in Winchester , she was mistaken. I accept the submission from Mr Maroudas that the absence of a signature in an official document is a matter of substance and not a minor departure. But, just as compliance has to be strict, one is entitled, it seems to me to look at the substance of the matter, which is that by the time the letter of 22nd April 1997 was written it was perfectly clear what the application related to. There was a map, as one sees from "enclosed is a summary plan of the application" in the letter of 25th March 1997, and a signature and a date. No one would, or could, have been misled about what happened after that. Mr Maroudas rightly had to accept that he would have no grounds at all for his application if, instead of the exchange of letters, the Council had gone through the bureaucratic, or some would say necessary, step of returning the form to Mr Drinkwater to sign and amend, rather than resolving the matter on an exchange of correspondence. That seems to me to move proper strictness into unnecessary bureaucracy. In my judgement, the matter has to be looked at as a whole. When one does look at it as a whole, all the requirements of what should have been on the original form were met. For those reasons, while I have considerable sympathy for the position of Mr Maroudas and other people who are disappointed that mechanically propelled vehicles should be able to go down this stretch of territory, it seems to me that the Inspector was right, overall, in treating the documents and maps as a whole as being the application."

**The submissions of Mr Maroudas**

16. Mr Maroudas submits that the judge conflated two distinct arguments put forward on behalf of the Secretary of State, both of which are wrong. The first is that the subject of the February application (when read with the correspondence in March and April 1997) was quite clear. Nobody could have been misled by the defects in the February application. To require Mr Drinkwater to amend and sign the form would have constituted unnecessary bureaucracy. The second is that the Inspector was right to treat the application as comprising the application form, the Council's letter of 25 March and Mr Drinkwater's reply of 22 April, when read together.

17. He says that the first of these arguments is inconsistent with the reasoning in Winchester . If the application was not in accordance with para 1 of Schedule 14 , then it is irrelevant that nobody could have been misled by the defects.

18. The second is wrong because the signature and dating of a document are key elements which evidence the maker's intentions, his commitment to its accuracy and his willingness to be bound by all of its contents. If a cheque or tax return or an application to the court is unsigned or undated, it will be returned to the maker or applicant to be signed and dated (as the case may be). Where an official document is required to be signed and dated, the absence of the signature and date from the document is a matter of substance which goes to its validity. It cannot be cured by some other document which supplies the missing signature and date. Where the law requires a document to be strictly in a particular form, the failure to comply with the strict requirement renders the document invalid.

19. In this case, the February application failed to comply with the strict requirements of para 1 of Schedule 14 in that it was not signed or dated and was not accompanied by "a map drawn to the prescribed scale and showing the way or ways to which the application relates" ( para 1(a) of Schedule 14 ). In fact, it was not accompanied by any map at all. The primary submission of Mr Maroudas is that these defects could only be cured by a fresh application made strictly in accordance with para 1 of the

Schedule 14 . That, he says, was decided in Winchester . He draws attention to section 67(6) of the 2006 Act ("is made when it is made in accordance with paragraph 1 of Schedule 14 "); para 1 of Schedule 14 to the 1981 Act ("an application *shall* be made in the prescribed form and *shall* be accompanied by…" (emphasis added); and regulation 8(1) of the 1993 Regulations ("an application for a modification order *shall* be in the form set out in Schedule 7 …" (emphasis added).

20. Alternatively, Mr Maroudas submits that, if it is possible to cure defects in an application by amending or adding to a defective application, this can only be done to the extent that the principle *de minimis non curat lex* allows. By this he means that it may be possible to cure a defect if that is done within a very short time of the making of the defective application. He would probably also concede that a defect may be cured some time after the making of the defective application if the defect is trivial.

21. Mr Maroudas submits, however, that if either of his submissions is correct, this appeal must be allowed. He says that Mr Drinkwater's letter of 22 April 1997 did not cure the defects in the application. It was sent some 10 weeks after the February application had been made. The letter made no reference to the accuracy or completeness of the original application form. Nor did it purport to correct the defects in that form. On the contrary, the letter made clear that Mr Drinkwater was unable to confirm that the summary and plan prepared by the Council, which added the line of the route between points A and B, reflected the intention of his original application. That is for the very good reason that Mr Drinkwater had not intended to include that part of the route in his application because, as a landowner with access as of right, he had no need to do so. Mr Maroudas submits that all that can be derived from the letter of 22 April is that Mr Drinkwater was prepared to co-operate with the Council's plan to add the western section of the route, which had never been his own intention. Finally, there was nothing in the exchange of correspondence between Mr Drinkwater and the Council which identified the accompanying map as required by para 1 of Schedule 14 .

**The submissions of Mr Coppel QC**

22. Mr Coppel submits that the decision in Winchester does not support the case advanced by Mr Maroudas. He relies on what I said at [46] and submits that what matters is that the information prescribed in the form set out in Schedule 7 to the 1993 Regulations is forthcoming from the applicant. The reason why the applicants failed in Winchester was that they failed to supply copies of the documentation on which they wished to rely. An applicant is not required to use the form that appears in Schedule 7 as a template. Provided that all the information sought to be elicited by the Schedule 7 form is contained within the application (together with any accompanying material) and nothing inconsistent is added, then the application is valid.

23. Nor is there anything in the 1993 Regulations which requires an applicant to produce all the material in his application at the same time. The accompanying material may be extensive, since it must include copies of any documentary evidence which the applicant wishes to adduce. It is unrealistic and unnecessary to read para 1 of Schedule 14 as requiring that all this material must be lodged simultaneously by the applicant. Mr Coppel draws our attention to the New Shorter Oxford English Dictionary definition of "accompany". Among its meanings are "join or unite a thing with, supplement with" He submits that, as a matter of ordinary language, simultaneity is not necessarily required. He relies on the decision of the New South Wales Court of Appeal in Botany Bay Council v Remath Investment No 6 Pty Ltd (2000) 50 NSWLR 312 in support of his submission that there is no requirement that "accompanying" documents should be lodged at the same time as the application form itself. In that case, the relevant statutory provision was that "A development application shall …(b) be made in the prescribed form and manner;…and (d) …be accompanied by an environmental impact statement in the prescribed form…". The application and the environmental impact statement were both submitted, but not at the same time. It was said by the court that "substantial compliance" with the statutory provisions would be satisfied even where the statement is lodged later than the application itself: see per Stein JA at [14] and Fitzgerald JA at [50].

24. Mr Coppel submits that what section 53(5) and para 1 of Schedule 14 require is that the application should have within it all the material (including the map to the prescribed scale) that is specified in those provisions. The application is only

made from the date when the applicant completes it. It is open to a surveying authority to treat an application as having been completed in the prescribed form when the applicant submits all the information specified in Schedule 7 to the 1993 Regulations.

25. As regards the facts in the present case, Mr Coppel accepts that the February application was defective at the time when it was sent, since it was neither signed nor dated nor accompanied by a map. He submits, however, that the February application, the Council's letter of 25 March and Mr Drinkwater's letter of 22 April must all be read together. By saying "please do that" in his letter, Mr Drinkwater was confirming that the summary and plan of the application which the Council had enclosed with their letter to him was an accurate representation of his application. The three documents, if read together, contained all the information specified in Schedule 7 to the 1993 Regulations and the "accompanying" map was the plan enclosed with the Council's letter.

**Discussion**

26. I cannot accept the primary submission advanced by Mr Maroudas. It is true that, for the purposes of section 67(3) of the 2006 Act and subject to the *de minimis* principle, an application must strictly comply with para 1 of Schedule 14 : see Winchester . But that does not mean that a valid application must be contained in a single document, namely the prescribed form (I leave aside the map and documentary evidence referred to in para 1 of Schedule 14 for the moment). Minor departures from the requirements of para 1 do not invalidate an application. In my judgment, there are circumstances in which a valid application may be contained in the application form when read with another document.

27. Let us suppose that an application form, like the February application, is submitted but it is not signed or dated. Shortly after lodging the application, the applicant realises that he has not signed or dated the form and he writes a letter to the surveying authority (which he dates and signs), referring to the application and asking the authority to treat it as bearing the date of the letter and as now bearing his signature. I would regard the supply of the date and signature shortly after the submission of the application form as a minor departure from para 1 . In the example I have given, therefore, the application is comprised in the original application form supplemented by the date and signature provided by the letter and is a valid application.

28. To take another example, let us suppose that the application form contains a minor error in the description of the route or its width or length. If the applicant discovers the error shortly after he has submitted the application and writes to the authority correcting it, it seems to me that the application is contained in the original application form as corrected. In my judgment, such an amended application would be in accordance with para 1 of Schedule 14 .

29. At least on the basis of his alternative submission, Mr Maroudas accepted that, for the purposes of section 67(3) , a valid application may be made where supplementary information is provided to make good an error or omission in the application, at any rate if the information is provided within a very short time of the submission of the application form.

30. I do not find it necessary to define the limits of permissible departures from the strict requirements of para 1 of Schedule 14 . In particular, I do not find it necessary to decide whether para 1 of Schedule 14 requires that the map, which should accompany the prescribed form, must be sent at the same time as the form. It seems to me that the map and copies of the documentary evidence referred to in the form are required to be treated in the same way. That is what para 1 of Schedule 14 says: the application shall be "accompanied" by both a map and copies of any documentary evidence which the applicant wishes to adduce. It is true that the prescribed form itself provides that copies of the documentary evidence referred to in the form are required to be "attached" to the form. That would appear to mean that the copies of any documentary evidence are required to be sent at the same time as the form. It would be surprising if the map were to be treated differently in this respect from the documentary evidence. But it is not necessary to decide whether submitting the map and documentary evidence, say,

later the same day on which the application form itself was lodged or even a few days later, is to be regarded as a departure from the strict requirements of para 1 sufficient to invalidate the entire application even for the purposes of section 67(3) . I take note of the decision in Botany Bay . But that is a decision on a different statute in a different jurisdiction and both Steyn JA and Fitzgerald JA made it clear that they were concerned with whether there had been "substantial compliance" with the statutory requirement.

31. I can now return to the facts of the present case. Mr Coppel rightly concedes that the February application was invalid at the time when it was sent, because it was neither dated nor signed nor accompanied by a map showing the way to which it related. The central question that arises on this appeal is whether these shortcomings in the application were made good by the exchange of correspondence between the Council and Mr Drinkwater. The Council's letter of 25 March enclosed a summary and "plan". We have not seen either document. The argument before us proceeded on the basis that the "plan" was the map which was eventually incorporated in the Modification Order .

32. A number of points need to be made about the exchange of correspondence. First, the Council's letter was a clear reference to the February application. So too was Mr Drinkwater's reply: "incorporate the whole road into the application". Secondly, Mr Drinkwater's letter of 22 April 1997 was written approximately 10 weeks after he had lodged his application form. Thirdly, Mr Drinkwater's letter was dated and signed by him. Fourthly, the Council's letter asked for confirmation in writing that it was Mr Drinkwater's intention to include the entire length of the route (as shown on the enclosed plan) in his application. Fifthly, Mr Drinkwater replied saying: "I cannot foresee a problem through cooperating with the plan to incorporate the whole road into the application, so please do that if you will." Sixthly, Mr Drinkwater did not send the plan back to the Council under cover of his letter of 22 April or at all.

33. In my view, the departures from the requirements of para 1 of Schedule 14 were substantial and were not such as could be saved by the *de minimis non curat lex* principle. As I have said, the lack of a date and signature in the application form can in principle be cured by a dated and signed letter sent *shortly* after the submission of the form, where the omissions are pointed out and the Council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter. But the lack of a date and, in particular, the lack of a signature are important omissions. The signature is necessary to prove that the application is indeed that of the person by whom it is purportedly made. If the application form remains unsigned for a substantial period of time, I would not regard that as a minor departure from the statutory requirement that it should be signed. The fact that the application was unsigned for some 10 weeks in this case is of itself a strong reason for holding that there was a substantial departure from the strict requirements of para 1 of Schedule 14 .

34. The next question is whether Mr Drinkwater's letter made it clear that he was now applying for the entire route from point A to point C to be upgraded to a BOAT. As Mr Maroudas points out, Mr Drinkwater had no interest in the length between A and B because he owned that land. His omission of that length of the route from the February application was not an oversight on his part. It was quite deliberate. In my view, what Mr Drinkwater was saying in his letter of 22 April was that he was content for the Council to treat his application as extending to the length between A and B, but he was indifferent as to whether it should be so extended. That is why he said that he could not "foresee a problem" in his "co-operating" with what he saw as the Council's plan to incorporate the whole road in the application. It is also why he said that the Council should do that "if you will". In other words, left to himself, Mr Drinkwater would not have wished to extend the scope of the application, but he was willing to allow the Council to do so if that is what it wished to do. I accept that it remained Mr Drinkwater's application. But this is far from the case of an applicant who realises that he has made a slip in the description of the route which he is applying to upgrade and notifies the surveying authority that he wishes to correct the error.

35. The final point is that the plan enclosed with the Council's letter of 25 March was not sent back by Mr Drinkwater with his letter of 22 April. Mr Drinkwater never sent an accompanying map. The absence of an accompanying map is an important omission just as is the absence of documentary evidence on which an applicant wishes to rely (as Winchester demonstrates). Mr Coppel's case is that the plan which was enclosed with the Council's letter of 25 March was the accompanying map and

that by his letter Mr Drinkwater was agreeing with the Council that it should so treat it. But Mr Drinkwater's letter says nothing about the enclosed plan. There is nothing to indicate that he even looked at it. In view of his indifference to what the Council was asking, it seems unlikely that he would have had any interest in the plan at all.

36. For these reasons, I would hold that the February application, even when it is considered together with the exchange of correspondence, did not comply with the strict requirements of para 1 of Schedule 14 of the 1981 Act.

**Conclusion**

37. I would, therefore, allow this appeal.

Lord Justice Richards:

I agree

Lord Justice Jackson:

I also agree

**TRFDOC15 – Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs [2016] EWHC 2083 (Admin)**

# Trail Riders Fellowship v Secretary of State for Environment, Food and Rural Affairs v Dorset County Council


**Court**
Queen's Bench Division (Administrative Court)

**Judgment Date**
12 August 2016

Case No: CO/1437/2016

High Court of Justice Queen's Bench Division Administrative Court

**[2016] EWHC 2083 (Admin), 2016 WL 04191478**

Before : Mr Justice Gilbart

Date: 12/08/2016

Hearing dates: 20th July 2016

**Representation**

Adrian Pay (instructed by Brain Chase Coles , Solicitors of Basingstoke) for the Claimant
Jonathan Moffett (instructed by Government Legal Department ) for the Defendant.
The Interested Party did not appear and was not represented.

**Approved Judgment**

Gilbart J :

**(a) Introduction**

1. This matter relates to the modification of the definitive map of highways in part of Dorset. This is an area of law where acronyms abound. I shall do the best I can to avoid inserting impenetrable clusters of them, but the following short list of acronyms and abbreviations will, I hope, assist the reader.

**Types of Highway and Traffic**

| | |
|---|---|
| BOAT | Byway Open To All Traffic |
| RB | Restricted Byway |
| BR | Bridleway |
| MPV | Mechanically Propelled Vehicles |

**Legislation etc**

| | |
|---|---|
| *NPACA 1949* | National Parks and Access to Countryside Act 1949 |
| *CA 1968* | Countryside Act 1968 |
| *WCA 1981* | Wildlife and Countryside Act 1981 |
| *CROWA 2000* | Countryside and Rights of Way Act 2000 |
| *NERCA 2006* | Natural Environment and Rural Communities Act 2006 |
| *WC(DMS)Regs 1993* | Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 |

**Routes in issue**

| | |
|---|---|
| BR3 | Bridleway 3 |
| BR4 A-K | Bridleway 4 including northern part, running from points A to K |
| BR 4 A-E | Bridleway 4 excluding northern part, running from points A to E |
| BR3 application | Application of 4th March 2004 to upgrade BR3 to a BOAT |
| BR4 application | Application of 25th September 2004 to upgrade BR4 A-K to a BOAT |

**Other acronyms**

| | |
|---|---|
| DMS | Definitive Map and Statement |
| IR | Inspector's Report |
| DL | Decision Letter |
| DCC | Dorset County Council |
| TRF | Trail Riders Fellowship |
| SSE | Secretary of State for Environment, Food and Rural Affairs |

2. This case relates to the status of parts of bridleways running in or close to the delightfully named parishes of Puddletown, Piddlehinton, Piddletrenthide and Cheselbourne, which lie generally northwards of Dorchester. The route in question runs eastwards from Point A in Piddlehinton, and then after crossing BR 3 and meeting BR 5 at Point C, runs northwards to Point E, where it meets BR 1 which has arrived from the west. From Points A to E, it is accepted that there is a highway. Its status is in issue because of the history of relevant applications and Orders. From E northwards the route and status is contested. The TRF contend that there is a route running northwards to Drakes Lane (point K) which lies west of Cheselbourne. (Points A to K are references to points marked on an ordnance survey map which appeared at page 38 of the hearing bundle)

3. The NPACA 1949 , the CA 1968 and the WCA 1981 all made provision for the recording of minor highways. Three kinds existed: footpaths, bridleways and minor vehicular highways, which were to be shown on the relevant Definitive Map. The third kind came to be known as a BOAT, over which there were rights of passage given to those travelling on foot, horseback, or by vehicles, including mechanically propelled vehicles (MPVs). CROWA 2000 also introduced the RB, over which vehicles other than MPVs could pass.

4. Until the passage of the NERCA 2006 the DMS was definitive in the sense that if it showed a right of way, that was conclusive evidence that it existed. But it was not definitive in the sense that it excluded higher rights than those rights of way (e.g. for MPVs over what was shown as a footpath) nor in the sense that it was evidence that other highways did not exist. Under s 53 WCA 1981 it is the duty of the surveying authority to keep the DMS under review. It may amend it of its own initiative in the event of evidence coming to light. Further, any member of the public could apply to have the DMS changed, to which applications Schedules 14 and 15 of WCA 1981 apply, to whose terms I shall turn shortly. However by s 67 of NERCA 2006 , any existing public right of way for MPVs was extinguished unless it was shown on a DMS.. However that did not apply to an existing right of way where, before the relevant date (in England, 20th January 2005), an application had been made under s 53(5) of the WCA 1981 for an order modifying the DMS to show it as a BOAT ( s 67(3) ). An application under s 53(5) WCA 1981 means one made in accordance with paragraph 1 of Schedule 14 of the WCA 1981 . A fuller and very helpful description is given by Dyson LJ in *R (Winchester College) v Hampshire CC [2008] EWCA Civ 431 [2009] 1 WLR 138* at [7]- [19].

5. It is the contention of the Claimant TRF that the whole route from A to K is a highway usable by vehicles. There is a dispute about the existence of such a highway north of Point E. TRF's contention is that there is evidence which shows that the route from A to K was a highway open to all traffic, drawn from historical materials, of which I say more below. An application that the whole route should be shown as a BOAT was made on 25th September 2004 by an organisation called Friends of Dorset's Rights of Way (FoDRoW). The principal issue in this litigation relates to that application, and whether it was made in accordance with paragraph 1 of Schedule 14 of WCA 1981 .

**(b) the making of the application, and subsequent procedures**

6. I shall describe some aspects of the procedure in greater detail in due course. It suffices for the present to note that there is one procedure for the surveying authority to follow when considering whether to modify the DMS (in this case pursuant to an application), which appears in Schedule 14 of WCA 1981 (as amended), and a further procedure to deal with the confirmation of any consequent Orders (Schedule 15). In essence if there are unresolved objections to a proposed Order, the Order must be submitted to the SSE for confirmation. The SSE may, and usually does, cause a public inquiry to be held (Schedule 15 para 7). There are provisions relating to the powers of the SSE to confirm an Order (paragraph 8).

7. In this case the application was submitted on 25th September 2004 by FoDRoW. Having identified the grid references of the start and finish of the claimed BOAT, and a map, it went on:

> We attach copies of the following documentary evidence ……. in support of this application
>
> Cheselbourne Inclosure, DRO Ref Inclosure 79; D/COO:H/T/20
>
> Piddlehinton Inclosure,DRO Ref Inclosure 21A;
>
> Piddletrenthide Inclosure,DRO Ref Inclosure 67

It identified the landowners it thought were affected. It included copies of the three Inclosure awards 79, 21A and 67, but it did not include copies of the document D/COO:H/T/20. (NB "DRO" is a reference to the Dorset Records Office)

8. It also included a statement of its reasons for asserting the existence of the BOAT. Evidence from south of Point E did not depend on those documents. But north of Point E, they were relevant. Point K, as already noted, lies on Drakes Lane. The case for the applicant (and now for TRF) was that the route from E to K was part of a public carriage road which continued around the western side of Cheselbourne, heading towards Melcombe Bingham, a settlement north of Cheselbourne. It did so on the basis that the Piddlehinton Inclosure map of 1835 stated with regard to the route running northwards at Point E that it led "to Hareput Lane." The application statement went on to refer to the document D/COO:H/T/20 as referring to "land at Melcombe Bingham including cottages in Harput Lane" which it took as indicating that Harput Lane is at Melcombe Bingham. It then contended that

> "Hartfoot, Harfoot and Harput are all different spellings of an old name for Melcombe Bingham. It is so close to a variety of names used for Melcombe Bingham, which is also in the location we would expect to find Hareput Lane, that it is highly likely that Hareput Lane is in fact Melcombe Bingham. The inclosure map and award thus describes public carriage road B as continuing to what is today Melcombe Bingham. The most likely route to follow to Melcombe Bingham would have been along the claimed route and no other possible routes have been identified."

9. One can tell at once that this was a brave submission being made. Such evidence as there was showing that the Hareput Lane referred to on the Inclosure Award to the south lies in the vicinity of Melcombe Bingham depended on what was shown in the document D/COO:H/T/20.

10. After the application had been made, the TRF made further submissions, referring to further documents and maps.

11. On 20th November 2006 DCC refused the application. FoDRoW made an appeal to the SSE under paragraph 4(1) of Schedule 14 of WCA 1981 . The then Inspector considered that there was clear evidence of vehicular rights over the section A to E but not over E to K [112]. That Inspector also considered that the application to upgrade BR4 between A and K to a BOAT must fail because the application was defective, in that the documents D/COO:H/T/20 had not been provided. Although the evidence showed vehicular rights over points A to E, the effect of s 67(6) NERCA 2006 was to extinguish them because of the omission [122].

12. DCC was required to make the appropriate Order upgrading the stretch from A to E as an RB. (There were also proceedings relating to another bridleway BR3). FoDRoW then ceased to exist and TRF took over conduct of the relevant applications. Once DCC published the modification Order on 9th April 2010, TRF objected, on the basis that the route from point A to point K should be shown as a BOAT. (It also objected to another part of the same Order) In its objection letter, it referred to the documents D/COO:H/T/20, claiming (wrongly) that they were nowhere referred to in the previous IR or Decision Letter. It described it as follows:

"…. (it)….was merely meant to show the location of a destination point, namely Hareput Lane (now Ansty) and was not relied upon to prove the status of the claimed route, therefore it is not caught by the *Winchester* judgement. However, another map (Richmond-dated late 1800's) was submitted and showed the same information; therefore this omission ……should be ruled as "de minimis" and not fatal to the application."

13. The inquiry was held on 5th November 2014. DCC did not take part. TRF submitted a great deal of evidence to the inquiry in its witness evidence. It sought to rely on the Inclosure Awards listed in the original application, and on other material which had not been included. So far as the material identified as D/COO:H/T/20, it said in the following through its witness Mr David Oickle, its Rights of Way officer, in paragraph [65] of his statement

**"65. Missing Document - Appendix 64**

65.1 When FoDRoW originally submitted the evidence for this route, the document D/COO:H/T/20 was missing from the documentation but was listed as part of the application.

65.2 I have inspected this document at the Dorset History Centre and it is a set of lease indentures for properties in the Melcombe Bingham area and some of them show that Hareput Lane is in the Parish of Melcombe Bingham.

65.3 There are no maps and each indenture is written in the legal text of the day and sets out the obligations for both parties.

65.4 As these documents did not affect the claimed route in any way but were meant to indicate a distant point, I would respectfully request that the Inspector rules this omission as *de minimus* " (sic). "Other maps submitted during the consultation period did however show the location of Hareput Lane.

65.5 It would appear that the applicant made a human error in not supplying the document and/or not removing it from his list of submitted documentation as not required. "

14. The decision of the SSE was made by the Inspector as the appointed person pursuant to paragraph 10 of Regulation 15. She issued an interim decision on 2nd December 2014. It was an interim order because she proposed a further modification to BR 3 in Piddlehinton whereby, if confirmed, it would be a BOAT. She confirmed the status of BR4 between Points A and E as an RB.

15. In that DL she dealt with the issue of the application made in respect of BR4 as a BOAT. She ruled as follows at paragraphs 42 to 49:

**"Bridleway 4**

42 With respect to the later application made on 25 September 2004 for BW4, similar arguments were advanced by both parties, but slightly different circumstances prevail, The application form listed, as attachments, three Inclosure Acts (Cheselbourne, Piddlehinton and Piddletrenthide) for which the Dorset Record Office reference numbers are given, and another document, reference D/COO:H/T/20. A CD containing copies of various documents was submitted at the same time. Mr Oickle accepted that the latter document did not appear to have been included on the CD or attached to the application, but stated that it was subsequently discovered to refer to some property documents not directly associated to the application but merely included to identify the name of a place mentioned in the Inclosure Awards. Its omission appeared to be accidental, and I was urged by both Mr Oickle and Mr Kind to consider that the applicant was not relying on this document as evidence of status; the document was merely background information identifying the location of the onward destination of the route In question. Its absence should not therefore invalidate the application in terms of compliance with paragraph 1 of Schedule 4 to the 1981 Act.

43 Mr Plumbe however expressed the view that accidental omission of a document could not detract from the fact that the applicant had not, as a matter of fact, attached all the evidence on which he relied and therefore had not strictly complied with the requirements of paragraph 1 of Schedule 14 of the 1981 Act.

44 Taking the wording of the schedule into account, the applicant must attach copies of documentary evidence which they wish to adduce. The judgement in *Winchester* addressed the interpretation of this and concluded that the word 'adduce' in this context means 'to put forward and rely upon'. Dyson LJ who gave the leading judgement was quite clear that it was always open to an authority to waive a failure to comply with the relevant paragraph and to determine an application which was deficient in some way. However, in terms of satisfying the requirements of the NERC Act, a strict interpretation was necessary.

45 It seems to me that it was the intention of FoDRoW that the document reference D/COO:H/T/20 was to be 'adduced'. It was listed both as an attachment to the application and in the list of documents which had been researched by the applicant. The document itself referred to the location of Hareput Lane, which was identified in the Inclosure Award documents as the onward route of the claimed route north of Point E on the Order Plan. Although the missing document was produced at the Inquiry, having been identified by the TRF whilst preparing their inquiry statement, it was not, as a matter of fact, attached to the application. The question for me is whether or not this omission can be treated as de minimis.

46 In the judgement in *Winchester* , I note that Dyson LJ states, at paragraph 54, that minor departures from paragraph 1 will not invalidate an application, but gives no real guidance as to what would constitute *de minimis* in this context. It is necessary to turn to another judgement ( *Maroudas* ) for help in this matter. As it happens the leading judgement in this case was also given by Dyson LJ which provides consistency in interpretation. Despite declining to define the limits of permissible departures from the strict requirements of paragraph 1 of Schedule 14 , at paragraphs 27 and 28 Dyson LJ postulates on two scenarios which, if they arose, he considered would not prevent an application from being compliant with paragraph 1. Both of these examples relate to minor errors or omissions. He considered that if they were discovered shortly after the submission of the application and put right promptly the application would still be valid in this context. It seems to me that Dyson LJ envisages that a small error which is subsequently corrected within a short time of the original application is what he means by *de minimis* .

47 In the case I am considering, the omission of the document was not commented on or even noticed, apparently, until Mr Oickle was preparing the case for the inquiry. The defect was

> consequently not put right until the inquiry, some 4 years or so after the original application. However I accept that the document which was missing was far less important than either of the two factors being considered by Dyson LJ in *Maroudas* , where the application had been unsigned and there had been no map attached to it. Nevertheless, the missing document in respect of the FoDRoW application was intended to identify a location not readily identifiable from modern mapping or the Inclosure Awards, and thus it assisted in the interpretation of the Inclosure Award evidence.
>
> 48 Taking the judgements into consideration and the circumstances of this particular case, I am forced to conclude that, in strict terms, the application was not accompanied by all the documentary evidence which the applicant wished to adduce, and which was necessary to evaluate the evidence as a whole, and thus it was not made in accordance with Paragraph 1 of Schedule 14 of the 1981 Act. Consequently the application cannot benefit from the exemption in Section 67(3)(a) of the NERC Act and rights for mechanically propelled vehicles have been extinguished.
>
> 49 Notwithstanding my conclusion on this matter, if the Order in respect of SW 4 is to be confirmed as a Restricted Byway it is still necessary for me to examine the evidence to ascertain whether or not other vehicular rights subsist over the route."

16. It is also necessary to refer to her paragraphs 15-20. She there addressed the request of TRF to include within the order the length from E to K, whether as BOAT (its main case) or if not as an RB. She declined to consider making the extension, on these grounds:

> "19 To include the onward route as originally claimed by FoDRoW would require the addition to the Order of a map and a revised schedule, a draft of which was supplied by Mr Oickle at the inquiry. I have considered the situation carefully, and taken account of the arguments for and against such a modification. Whilst I understand the implications as expressed by Mr Kind, I consider that to make such a fundamental alteration to the Order would be an abuse of the process. It may be acceptable to add a map to an Order for clarification purposes (for example to clarify the location or some other aspect of a route) but to add a map for an additional length route which would extend significantly beyond the scope of the map attached to the Order as made would be a very substantial alteration
>
> 20 My powers of modification are quite wide, but I must exercise those powers fairly and with discretion. In this case I have concluded that to modify the Order in the way requested would be too significant a change, and make the Order substantially different from the one I am considering. I have therefore declined to make any modification in respect of the additional claimed section of the route."

17. She too considered the evidence supporting the existence of vehicular rights. She thought the case for them on the route from point A to E was established (subject to the validity of the application) but not onwards from Point E to K [72] The proposed modification was published. TRF objected, inter alia, to the absence of BOAT status on the route in question. It again argued that the application was not invalid, citing further obiter judicial dicta, namely the judgement of Lord Carnwath in *Trail Riders Fellowship v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406* , and repeating its submissions that the omitted document was of nugatory significance, and whose absence had been remedied as soon as it was noticed. It also argued that DCC had never noticed its omission.

18. The Inspector issued her final decision on 14th December 2015 after a second inquiry on 4th November 2015. DCC again did not appear. She reiterated her view on the issue of the application

> **"Bridleway 4: Whether there is new evidence which affects my interim decision**
>
> *Whether the exemption in Section 67(3) of the NERC Act applies*
>
> 13 In my interim decision I concluded that the application in respect of the Order route ……..had not been completed strictly in accordance with the requirements of Paragraph 1 of Schedule 14 to the 1981 Act because one of the documents referred to on the application form had not been submitted with the application. It was not, in fact, submitted until preparations were underway for my first inquiry, some 10 years after the application was made.
>
> 14 Mr Kind made a lengthy legal submission as to why the absence of the missing document should be ignored in this context, and Mr Stuart, the original applicant, gave oral evidence to support this contention. He stated that the document was not relevant to the alleged status of the route, but only assisted with locating the onward route described in the Inclosure Award. In that sense he was not and never had been relying on the property indenture in the context of Paragraph 1 of Schedule 14 .
>
> 15 Mr Kind took issue with my reasoning in the interim decision and attempted to draw a distinction between the evidence that an applicant wishes to 'adduce' and evidence on which an applicant wishes to 'rely'.
>
> 16 I consider that I made myself perfectly clear in my interim decision; that evidence which is 'adduced' is that evidence on which a person wishes to put forward and to rely upon. This is the definition set out in the judgement in *Winchester* , which I have already explained is the relevant case in this context. Mr Pavey considered that my decision in this regard was correct, and commented that Mr Stuart had accepted that the document had not been submitted. He also expressed the opinion that Mr Stuart was clearly awkward about the rather contrived argument being put forward by his advocate.
>
> 17 I am satisfied that I set out my reasoning in sufficient detail in my interim decision and correctly addressed the question of whether or not the application in respect of (what was then) Bridleway 4 was a qualifying application in terms of the NERC Act 2006 . I concluded then that it was not, and I have not heard any new evidence or legal argument to cause me to depart from that view. Any rights for Mechanically Propelled Vehicles ('MPVs') were extinguished by the NERC Act 2006 because the application was not strictly in compliance with the requirements of Paragraph 1 of Schedule 14 to the 1981 Act.
>
> 18 This may appear 'unfair' to some people but interpreting the requirements in this way is in accordance with legal judgements and with government policy in respect of MPV rights, and does not strain the meaning in any way."

19. She also addressed the issue of the modification set out in her interim IR at paragraphs 15-20, setting out her conclusions at paragraphs 22-29. In short terms she repeated her previous conclusions. She also considered *Trevelyan v SSETR [2001] EWCA Civ 266* , and accepted that she had the power to make a modification. But she said as follows at [25]- [28]

"25 In coming to my conclusion that it was not appropriate to make such an extensive modification to the Order, my purpose was not to fetter any future attempt to modify the definitive map and statement, but to be fair, open and impartial. The draft schedule prepared most carefully by Mr Oickle amply demonstrates my difficulty. To modify the Order would require the addition of several pages to the Order schedule and three additional maps to cover the extended route. It would also affect at least one other landowner who has not been party to the legal process to date, and may include others (as yet unidentified).

26 I acknowledge the judgement in Trevelyan v SSETR [20011 EWCA Civ 266 regarding the view of Lord Phillips that if facts come to light during the course of an inquiry which persuade the inspector that the definitive map should depart from the proposed order (he) should modify it. However, in this case the existing Order map cannot accommodate the proposed modification, and therefore the facts in this case do not persuade me, for the reasons I set out in my interim decision.

27 Furthermore, the procedures set out in Schedules 14 and 15 of the 1981 Act were designed to ensure a fair and inclusive notification and consultation process prior to the making of a definitive map modification order. I acknowledge that that this includes advertising the Order, but this comes late in the process, after the Order has been made. In this case, the landowner or landowners who own the land north of Point E would be directly affected by this proposed addition and have, to date, not been given any chance to engage in the full legal notification and consultation process set out in the relevant schedules.

28 I maintain my view that making such a major and significant alteration to this Order so as to include a substantial additional length of route would be an abuse of the detailed processes set out in the 1981 Act, and would involve practical and administrative alterations and additions that take it outside the scope of a mere modification."

**(c) The legislative context and the relevant case law on Schedule 14 paragraph 1**

20. S 53 of the WCA 1981 (as amended) reads

"53 Duty to keep definitive map and statement under continuous review.

(1) ……..

(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 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—

(a) the coming into operation of any enactment or instrument, or any other event, whereby—

(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or

(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

(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 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 such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;

(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) …….

(4) ……..

(4B) …….

(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.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2)."

21. It follows that in a case where subsection (3)(c) applies (as here) the surveying authority must consider and determine the application pursuant to Schedule 14 , but the making of the relevant Orders must then follow Schedule 15 , as also happened here.

22. The relevant application must be made under Schedule 14 paragraph 1 , whereby

> **"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.

23. The effect of Paragraph 1 of Schedule 14 has been considered twice by the Court of Appeal (in *R (Wardens and Fellows of Winchester College and another) v Hampshire CC [2008] EWCA Civ 431 [2009] 1 WLR 138* (" *Winchester* "), *Maroudas v SSEFRA [2010] EWCA Civ 280* ) and by the Supreme Court in *R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 8 [2015] 1 WLR 1406* in *obiter dicta* by Lord Neuberger, Lord Sumption and Lord Toulson JJSC, with dissenting *obiter dicta* by Lord Carnwath JSC.

24. In *Winchester* the relevant applications were not accompanied by the maps on which reliance was placed. The judge at first instance held that the application did not fail to be an application because it was not accompanied by a map and copies of any documentary evidence. Dyson LJ, as he then was, gave the main judgment allowing the appeal of the landowners. In it he addressed the question of whether strict compliance was required with the requirements of the regulations. I cite it at length because it deals with the issue thoroughly and persuasively. He said this at paragraphs [36] – [55]:

> **"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 [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 [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 (subparagraph (a)) or by copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application (subparagraph (b)) is made in accordance with Paragraph 1 of Schedule 14 . An application is not so made unless it is made 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 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 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 subparagraphs 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 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.

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 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 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 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. (My italics)

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 subparagraphs (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).

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)."

25. In *Maroudas* , the original application of early February 1997 was not signed or dated, and was not accompanied by a map. The matter was raised by the relevant County Council by a letter of 25th March 1997, who sought to identify the extent of the route proposed on a map. The applicant accepted their map by letter of 22nd April 1997. The proposal was eventually upheld by the SSE after a public inquiry. Mr Maroudas than challenged that decision, and appealed to the Court of Appeal when his claim was dismissed by the first instance judge. Dyson LJ again gave the leading judgement. He said at paragraphs [26]- [39]

**"Discussion**

26 I cannot accept the primary submission advanced by Mr Maroudas. It is true that, for the purposes of section 67(3) of the 2006 Act and subject to the *de minimis* principle, an application must strictly comply with para 1 of Schedule 14 : see Winchester. But that does not mean that a valid application

must be contained in a single document, namely the prescribed form (I leave aside the map and documentary evidence referred to in para 1 of Schedule 14 for the moment). Minor departures from the requirements of para 1 do not invalidate an application. In my judgment, there are circumstances in which a valid application may be contained in the application form when read with another document.

27 Let us suppose that an application form, like the February application, is submitted but it is not signed or dated. Shortly after lodging the application, the applicant realises that he has not signed or dated the form and he writes a letter to the surveying authority (which he dates and signs), referring to the application and asking the authority to treat it as bearing the date of the letter and as now bearing his signature. I would regard the supply of the date and signature shortly after the submission of the application form as a minor departure from para 1. In the example I have given, therefore, the application is comprised in the original application form supplemented by the date and signature provided by the letter and is a valid application.

28 To take another example, let us suppose that the application form contains a minor error in the description of the route or its width or length. If the applicant discovers the error shortly after he has submitted the application and writes to the authority correcting it, it seems to me that the application is contained in the original application form as corrected. In my judgment, such an amended application would be in accordance with para 1 of Schedule 14 .

29 At least on the basis of his alternative submission, Mr Maroudas accepted that, for the purposes of section 67(3) , a valid application may be made where supplementary information is provided to make good an error or omission in the application, at any rate if the information is provided within a very short time of the submission of the application form.

30 I do not find it necessary to define the limits of permissible departures from the strict requirements of para 1 of Schedule 14 . In particular, I do not find it necessary to decide whether para 1 of Schedule 14 requires that the map, which should accompany the prescribed form, must be sent at the same time as the form. It seems to me that the map and copies of the documentary evidence referred to in the form are required to be treated in the same way. That is what para 1 of Schedule 14 says: the application shall be "accompanied" by both a map and copies of any documentary evidence which the applicant wishes to adduce. It is true that the prescribed form itself provides that copies of the documentary evidence referred to in the form are required to be "attached" to the form. That would appear to mean that the copies of any documentary evidence are required to be sent at the same time as the form. It would be surprising if the map were to be treated differently in this respect from the documentary evidence. But it is not necessary to decide whether submitting the map and documentary evidence, say, later the same day on which the application form itself was lodged or even a few days later, is to be regarded as a departure from the strict requirements of para 1 sufficient to invalidate the entire application even for the purposes of section 67(3) . I take note of the decision in Botany Bay. But that is a decision on a different statute in a different jurisdiction and both Steyn JA and Fitzgerald JA made it clear that they were concerned with whether there had been "substantial compliance" with the statutory requirement.

31 I can now return to the facts of the present case. Mr Coppel rightly concedes that the February application was invalid at the time when it was sent, because it was neither dated nor signed nor accompanied by a map showing the way to which it related. The central question that arises on this appeal is whether these shortcomings in the application were made good by the exchange of correspondence between the Council and Mr Drinkwater. The Council's letter of 25 March enclosed a summary and "plan". We have not seen either document. The argument before us proceeded on the basis that the "plan" was the map which was eventually incorporated in the Modification Order.

32 A number of points need to be made about the exchange of correspondence. First, the Council's letter was a clear reference to the February application. So too was Mr Drinkwater's reply: "incorporate the whole road into the application". Secondly, Mr Drinkwater's letter of 22 April 1997 was written approximately 10 weeks after he had lodged his application form. Thirdly, Mr Drinkwater's letter was dated and signed by him. Fourthly, the Council's letter asked for confirmation

in writing that it was Mr Drinkwater's intention to include the entire length of the route (as shown on the enclosed plan) in his application. Fifthly, Mr Drinkwater replied saying: "I cannot foresee a problem through cooperating with the plan to incorporate the whole road into the application, so please do that if you will." Sixthly, Mr Drinkwater did not send the plan back to the Council under cover of his letter of 22 April or at all.

33 In my view, the departures from the requirements of para 1 of Schedule 14 were substantial and were not such as could be saved by the *de minimis non curat lex* principle. As I have said, the lack of a date and signature in the application form can in principle be cured by a dated and signed letter sent shortly after the submission of the form, where the omissions are pointed out and the Council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter. But the lack of a date and, in particular, the lack of a signature are important omissions. The signature is necessary to prove that the application is indeed that of the person by whom it is purportedly made. If the application form remains unsigned for a substantial period of time, I would not regard that as a minor departure from the statutory requirement that it should be signed. The fact that the application was unsigned for some 10 weeks in this case is of itself a strong reason for holding that there was a substantial departure from the strict requirements of para 1 of Schedule 14 .

34 The next question is whether Mr Drinkwater's letter made it clear that he was now applying for the entire route from point A to point C to be upgraded to a BOAT. As Mr Maroudas points out, Mr Drinkwater had no interest in the length between A and B because he owned that land. His omission of that length of the route from the February application was not an oversight on his part. It was quite deliberate. In my view, what Mr Drinkwater was saying in his letter of 22 April was that he was content for the Council to treat his application as extending to the length between A and B, but he was indifferent as to whether it should be so extended. That is why he said that he could not "foresee a problem" in his "co-operating" with what he saw as the Council's plan to incorporate the whole road in the application. It is also why he said that the Council should do that "if you will". In other words, left to himself, Mr Drinkwater would not have wished to extend the scope of the application, but he was willing to allow the Council to do so if that is what it wished to do. I accept that it remained Mr Drinkwater's application. But this is far from the case of an applicant who realises that he has made a slip in the description of the route which he is applying to upgrade and notifies the surveying authority that he wishes to correct the error.

35 The final point is that the plan enclosed with the Council's letter of 25 March was not sent back by Mr Drinkwater with his letter of 22 April. Mr Drinkwater never sent an accompanying map. The absence of an accompanying map is an important omission just as is the absence of documentary evidence on which an applicant wishes to rely (as Winchester demonstrates). Mr Coppel's case is that the plan which was enclosed with the Council's letter of 25 March was the accompanying map and that by his letter Mr Drinkwater was agreeing with the Council that it should so treat it. But Mr Drinkwater's letter says nothing about the enclosed plan. There is nothing to indicate that he even looked at it. In view of his indifference to what the Council was asking, it seems unlikely that he would have had any interest in the plan at all.

36 For these reasons, I would hold that the February application, even when it is considered together with the exchange of correspondence, did not comply with the strict requirements of para 1 of Schedule 14 of the 1981 Act."

26. My attention was also drawn to *R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 8 [2015] 1 WLR 1406* . There, the issue before the Court related to the requirement of the relevant regulations relating to the scale of the map. Lord Neuberger PSC and Lord Sumption JSC dissented on the main issue, but both of them, together with Lord Toulson JSC expressed obiter views on the issue of strict compliance, holding that s 67 of NERCA 2006 extinguished rights where applications had been made but which were defective in terms of Paragraph 1 of Schedule 14 . Lord Carnwath, who was in the majority, disagreed

with their approach, and questioned the extension of *Winchester* to the facts of the *Maroudas* case, setting out his view that the doctrine was unnecessarily strict.

27. So far as *R (Trail Riders Fellowship) v Dorset CC* is concerned, it was common ground before me that all the passages referred to were *obiter dicta* and that both *Winchester* and *Maroudas* were binding on this Court. Lord Carnwath JSC criticised the approach in *Winchester* at [69]- [79], preferring the approach instead of determining whether there had been substantial compliance with the statutory regime (see [75]). He criticised the retrospective application of standards of procedural strictness which had no application when the applications in questions were made [78]. He then said this at [79]

> "It is unnecessary for present purposes to determine whether the *Winchester* case was correctly decided on its own facts. Nor should this judgment be seen as encouragement to resurrect applications rejected in reliance on it. I would however question its extension to a case, such as *Maroudas* where the defects in the original application had been resolved to the satisfaction of the authority, and waived by them, long before the cut-off date. I would respectfully echo the comment of the deputy judge in *Maroudas* that this was "to move proper strictness into unnecessary bureaucracy". As was conceded, it would have been simple for the applicant, if required to do so, to have resubmitted the application in strictly correct form, but neither the authority nor anyone else thought that necessary. Without a crystal ball he would have had no reason to do so. Yet that wholly excusable failure resulted more than a decade later in the application and all that followed being declared invalid. I would have expected the draftsman to have used much clearer wording in section 67(6) if he had intended to achieve such a surprising and potentially harsh result."

28. Lord Clarke JSC also doubted whether Parliament had intended "such a narrow approach as was approved by the Court of Appeal in *Maroudas ……"* but declined to express a view having not heard any argument upon it, and being conscious also of the force of the conclusions expressed by others. Lord Neuberger PSC by contrast strongly supported the strict approach- see [102]. Lord Sumption JSC agreed with him. Lord Toulson agreed with Lord Neuberger PSC and Lord Sumption JSC on this issue, saying this at [47] to [50]:

> "47 I have referred in para 36 to the requirement under Paragraph 1 of Schedule 14 for the application to be made in the prescribed form and to be accompanied by (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and (b) any documentary evidence on which the applicant wished to rely.
>
> 48 Those provisions, i.e. section 67(3) of the 2006 Act read with section 53(5) and Schedule 14 paragraph 1 of the 1981 Act, might have been considered sufficient as an ordinary matter of construction to limit the exception created by section 67(3) to cases where an application conforming with the requirements of the 1981 Act had been made before 20 January 2005. But the drafter provided reinforcement by section 67(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."

> 49 That subsection, as it appears to me, made it clear for the removal of doubt that section 67(3) of the 2006 Act applied only to an application made in time and in compliance with the formal requirements of Paragraph 1 of Schedule 14 . Put in negative terms, the saving provided by section 67(3) does not include applications purportedly made before the cut-off date which were substantially defective, whether or not the defects might otherwise have been cured in one way or another. It is well understandable in the circumstances in which the 2006 Act was passed that Parliament should not have wished councils to be burdened potentially with a mass of non-conforming applications made in an attempt to beat the deadline.
>
> 50 I was initially attracted by Lord Carnwath's argument for a more flexible approach, based on the precedents of the Oxfordshire City Council case and the Inverclyde District Council case which he cites, but it is a truism that every statute must be construed in its own context. On full consideration I am persuaded that Lord Neuberger and Lord Sumption are right, having regard to the language of the statute and the legislative context to which I have referred."

**(d) the submissions of Mr Pay for the Claimant Trf**

29. Mr Pay's first ground is that the defect in the application, by its failure to attach the documents referred to as D/COO:H/T/20, did not render it invalid. He contended that the error was *de minimis* which did not render it defective. *Maroudas* shows that omissions can be remedied later, and Dyson LJ accepted at [30] that the subsequent sending of maps or documents could still be permissible. He also submitted, in line with Lord Carnwath in the *TRF v Dorset CC* case, that a deficiency could be remedied by amendment.

30. Mr Pay maintains that this argument is not excluded by *Winchester* but that in any event TRF reserves the right to argue before the Court of Appeal that *Winchester* was decided *per incuriam* .

31. On the *de minimis* point he argued that

i) the application was actually determined in accordance with the documents submitted;
ii) the value of the documents was nugatory as to the existence of rights;
iii) DCC never remarked on the absence of the documents;
iv) The references given enabled anyone to check them;
v) DCC never suggested that there was any difficulty in dealing with the application in their absence. Indeed an RB was proved;
vi) This was a tangential document whose omission constituted the sort of minor departure referred to in *Winchester* at [54]. In *Maroudas* the defects were not substantial.

32. On his second ground, The northern extension should not have been excluded, given the guidance of Lord Phillips MR in Trevelyan v SSETR [2001] EWCA 266 [2001] 1 WLR 1264 at [22]-[23]:

> "22 For the Secretary of State, Mr Hobson QC supported the conclusion of the inspector. He argued that to depict a footpath in place of bridleway 8, when the order directed that the bridleway should be deleted, could not be described as *confirming* the order subject to modification. It was making a fundamentally different order.

> 23 If Mr Hobson's submission is correct, the consequence, as he accepted, was that, if the inspector had been satisfied that there was a right of way on foot along the course of bridleway 8, but that this was the limit of the right of way, he would have been bound to decide that the original order should not be confirmed, leaving on the definitive map a bridleway that should not be there. This would be a manifestly unsatisfactory state of affairs. In my judgment, the scheme of the procedure under Schedule 15 is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be *confirming* the original order would be undesirable in principle and difficult in practice. Accordingly I consider that Mr Laurence was correct to challenge the decision of the inspector as to the ambit of his powers."

33. Thus, the Inspector should have considered the evidence relating to the stretch from E to K, whether as a BOAT, or as an RB. No landowner would be prejudiced, but would be protected by the Schedule 15 procedure. All were on notice anyway. It was her duty to propose a modification if the evidence justified it. Alternatively her decision was irrational.

**(e) The submissions of Mr Moffett for the Defendant SSE**

34. On the first ground , he submitted that statute requires that any documentation upon which the applicant wishes to rely (i.e. wishing at the time of making the application) must accompany the application ( *Winchester* [50]). A strict approach was intended by Parliament (see Lords Neuberger and Sumption in *Trf v Dorset Cc* at [102], [108]), even if there has been an oversight ( *Winchester* [48]- [49], *Trf v Dorset Cc* [105], [108]).

35. A *de minimis* departure does not invalidate an application, and a timely correction might allow a departure to be seen as *de minimis* ( *Winchester* [54] *Maroudas* [27] [36].

36. The issue is a matter of law for the Court to determine, not a matter for the decision maker only capable of review on public law grounds.

37. The omitted material was not included in the application as an insignificant matter. The documents were used to make the submission identifying that Hareput Lane (or similar nomenclature) was the destination of the route from Point E to K. The fact that TRF later put the case differently cannot detract from that. This is not a case where the material was provided shortly afterwards. It appeared 10 years later.

38. On the second ground this was a matter for the discretion of the Inspector, only reviewable on public law grounds. As to the effect of Trevelyan , the Inspector properly considered that she did have power to make the Order, but declined to do so. Her decision is only challengeable on rationality grounds. None exist here.

**(f) Discussion and conclusions**

39. In my judgement, the two passages cited above from *Winchester* and *Maroudas* , and in particular the passages which I have italicised in paragraphs [45]- [46] of *Winchester* , can leave one in no doubt that it is the policy of this legislative code, as interpreted and applied by the Court of Appeal, that applications must be made in full accordance with paragraph 1 of Schedule 14 . The argument in the Supreme Court in *R (TRF) v Dorset CC* between the different Justices was not about the interpretation and application of *Winchester* and *Maroudas* but about whether they were rightly decided. The Supreme Court's *obiter dicta* (from both sides of the argument) make it entirely plain that the approach in *Winchester* and *Maroudas* is a strict one, from which any departure in the making of the application from the statutory requirements will render it defective unless it is *de minimis* . On any view of the ratio of either case, the application with which we are here concerned was defective, and the application was accordingly invalid and did not suffice for the purposes of s 67 (3) of the NERCA 2006 if a more relaxed test is adopted.

40. I do not regard the requirement that the documents accompany the application as unimportant. Its purpose is to enable those affected by an application to know the strength of the case they have to meet.

41. This application sought to rely on documents which did not accompany it. No reader of the application and its enclosures would have been able to test the supportive material for himself or herself. As formulated by the then applicant, those documents were seen as important, even if in hindsight they lost their forensic allure in the succeeding decade.

42. Wherever, for the purposes of *Winchester* and *Maroudas* the line is drawn between matters which are *de minimis* and those that are not, this lies well beyond it. I say "for the purposes of *Winchester* and *Maroudas* " because I recognise that if the approach adumbrated by Lord Carnwath JSC in *TRF v Dorset CC* applies, then the test would be a quite different one of whether there has been substantial compliance. But where the limits of that test would fall in its application to paragraph 1 is entirely unclear, and I am in any event bound to follow clear Court of Appeal authority in *Winchester* and *Maroudas* . The Claimant must also recognise that the approach of Lord Carnwath, while it attracted sympathy from Lord Clarke, but no commitment, was rejected by Lord Neuberger PSC, and Lords Toulson and Sumption JJSC.

43. I am therefore in not the slightest doubt that, on the current state of the law Ground 1 must fail. I am by no means convinced that it should succeed even if a more relaxed test is adopted.

44. That leaves Ground 2. I was at first very attracted by the idea that the Inspector had not had an open mind about her ability to propose a modification, but I am persuaded by Mr Moffett's arguments that her decision is only open to challenge on standard public law grounds. None of her reasons could be said to be unreasonable, and she has considered all relevant issues.

45. In any event, she was the second Inspector to conclude that the evidence justifying the route from E to K was insufficient to support the existence of vehicular rights.

46. This ground is also dismissed.

**TRFDOC16 – Craig v HM Advocate [2022] UKSC 6 [2022] 1 WLR 1270**

Supreme Court

# *Craig *v* Her Majesty's Advocate and another

## [2022] UKSC 6

2021 Nov 25; 2022 Feb 23

Lord Reed PSC, Lord Kitchin, Lord Burrows, Lord Stephens JJSC, Lord Lloyd-Jones

*Extradition — Compatibility with Convention rights — Right to respect for private and family life — Forum bar protection for requested persons inserted by amendment into United Kingdom extradition statute but not commenced in Scotland — Court of Session ruling that continuing failure to commence unlawful — Lord Advocate nevertheless proceeding with extradition request on behalf of United States and Scottish Ministers ordering extradition — Whether requested person's extradition when unable to invoke forum bar provisions "in accordance with the law" — Whether incompatible with Convention right to respect for private and family life — Whether conducting extradition proceedings and making extradition order ultra vires — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 8 — Scotland Act 1998 (c 46), s 57(2) — Extradition Act 2003 (c 41), ss 79(1)(e), 83A — Crime and Courts Act 2013 (c 22), s 61(2)*

Acting under section 61(2) of the Crime and Courts Act 2013[1] the Secretary of State made a commencement order bringing section 50 of and Schedule 20 to that Act into force in England and Wales and in Northern Ireland. Those provisions inserted sections 79(1)(e) and 83A into the Extradition Act 2003[2], which provided that extradition of a person to a category 2 territory could be barred by reason of forum in certain circumstances ("the forum bar provisions"). The commencement order did not extend to Scotland. Subsequently the requested person, a British citizen living in Scotland, was the subject of an extradition request under Part 2 of the 2003 Act made by the Lord Advocate on behalf of the United States of America, where he was accused of securities fraud. Wishing to rely on the forum bar provisions, he sought judicial review of the Government's failure to bring them into force in Scotland. The Court of Session made a declarator that the continuing failure of the Secretary of State to bring the forum bar provisions into effect in Scotland was unlawful, holding that section 61 of the 2013 Act had intended that those provisions should be brought into force throughout the United Kingdom on the same date. Notwithstanding that declarator, the Secretary of State failed to bring the provisions into force in Scotland and the Lord Advocate continued to pursue the requested person's extradition under the unamended legislation. At the resumed extradition hearing the requested person claimed that to extradite him without his having been able to invoke the forum bar provisions would amount to an interference with his right to respect for his private and family life which was not "in accordance with the law", contrary to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[3], and as such beyond the powers of the Scottish Ministers, including the Lord Advocate, by reason of section 57(2) of the Scotland Act 1998[4]. The Sheriff held that since he would have held in any event that the requested person could not have successfully relied upon the forum bar provisions, the question of legality did not arise and, having determined that there were no other bars to extradition, sent the case to the Scottish Ministers, who approved the extradition. The High Court of

[1] Crime and Courts Act 2013, s 61(2): see post, para 12.

[2] Extradition Act 2003, s 79(1): "If the judge is required to proceed under this section he must decide whether the person's extradition to the category 2 territory is barred by reason of— . . . (e) forum."

S 83A(1)–(3): see post, para 8.

[3] Human Rights Act 1998, Sch 1, Pt I, art 8: see post, para 48.

[4] Scotland Act 1998, s 57(2): see post, para 25.

A Justiciary dismissed the requested person's appeal, holding that the unlawful failure to commence the forum bar provisions was appropriately to be addressed as a factor in the balancing exercise between the public and private interests involved when considering the proportionality of the interference, and which, given the Sheriff's findings, did not amount to an unlawful interference with the requested person's article 8 rights. The requested person appealed. Prior to the hearing of the appeal, the Secretary of State made an order bringing section 50 of and Schedule 20 to the
B 2013 Act into force in Scotland.

On the appeal—

*Held*, allowing the appeal, that where, as in the case of an order for a person's extradition to another country, an act would constitute an interference with the right to respect for private and family life, guaranteed by article 8(1) of the Human Rights Convention, it was necessary to consider in the first place whether that interference was "in accordance with the law" within the meaning of article 8(2) before there was any consideration, should that test of legality be satisfied, of whether the measures in
C question were necessary for some legitimate purpose and represented a proportionate means of achieving that purpose; that the need for the act to be "in accordance with the law" was an absolute requirement which necessitated not only that the interference had to be in conformity with domestic law, but also that such domestic law met the requirements of the rule of law so as to afford adequate legal protection against arbitrariness; that since the Court of Session's declaratory order, expressed in the present tense, had made clear that the failure to bring the forum bar provisions
D into force in Scotland was a continuing unlawful breach of section 61 of the Crime and Courts Act 2013, the acts of the Lord Advocate in conducting the extradition proceedings, and of the Scottish Ministers in making the extradition order, under a process vitiated by that breach, had not been in compliance with domestic law and so not "in accordance with the law" within the meaning of article 8, and thus, by virtue of section 57(2) of the Scotland Act 1998, ultra vires; and that, accordingly, a new extradition hearing was required, with the requested person then able to rely on the
E forum bar provisions as since brought into force (post, paras 37, 41–42, 48–50, 52–54).

*In re Gallgaher; R (P) v Secretary of State for Justice* [2020] AC 185, SC(E) considered.

*Per curiam*. There is a clear expectation that the executive will comply with a declaratory order, and it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory
F orders instead. The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to
G be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which ministers have failed to comply with court orders, they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard. However, where a legally enforceable duty to act, or to refrain from acting, can be established, the court is capable of making a coercive order. Furthermore, a declaratory order itself has important legal consequences. First, the legal issue which forms the subject matter of
H the declaration is determined and is res judicata as a result of the order being granted. In addition, a minister who acts in disregard of the law as declared by the courts will normally be acting outside his authority as a minister, and may consequently expose himself to a personal liability for wrongdoing (post, paras 44, 46).

Dicta of Lord Woolf in *M v Home Office* [1994] 1 AC 377, 397, 422–423, HL(E) applied.

Decision of the High Court of Justiciary Appeal Court [2020] HCJAC 22; 2020 JC 258 reversed.

The following cases are referred to in the judgment of Lord Reed PSC:

*Craig v Advocate General for Scotland* [2018] CSOH 117; 2019 SC 230, Ct of Sess
*Davidson v Scottish Ministers* [2005] UKHL 74; 2006 SC (HL) 41, HL(SC)
*Gallagher, In re; R (P) v Secretary of State for Justice* [2019] UKSC 3; [2020] AC 185; [2019] 2 WLR 509; [2019] 3 All ER 823, SC(E & NI)
*H v Lord Advocate* [2012] UKSC 24; [2013] 1 AC 413; [2012] 3 WLR 151; [2012] 4 All ER 600, SC(Sc)
*Halford v United Kingdom* (Application No 20605/92) (1997) 24 EHRR 523, ECtHR
*Love v Government of the United States of America* [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
*M v Home Office* [1994] 1 AC 377; [1993] 3 WLR 433; [1993] 3 All ER 537, HL(E)
*R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513; [1995] 2 WLR 464; [1995] 2 All ER 244, HL(E)
*R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46; [2021] 3 WLR 1075, SC(E)
*St George's Healthcare NHS Trust v S* [1999] Fam 26; [1998] 3 WLR 936; [1998] 3 All ER 673, CA
*Vince v Advocate General for Scotland* [2019] CSOH 77; 2020 SC 78; [2019] CSIH 51; 2020 SC 90, Ct of Sess

The following additional cases were cited in argument:

*AB v HM Advocate* [2017] UKSC 25; 2017 SC(UKSC) 101; 2017 SLT 401, SC(Sc)
*Kapri v Lord Advocate* [2013] UKSC 48; [2013] 1 WLR 2324; [2013] 4 All ER 599, SC(Sc)
*Millar v Dickson* [2001] UKPC D4; [2002] 1 WLR 1615; [2002] 3 All ER 1041, PC
*R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157, DC
*R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49; [2014] 3 WLR 96; [2014] 4 All ER 159,, SC(E)

**APPEAL** from the High Court of Justiciary Appeal Court

On 5 November 2015 an indictment was filed in the United States District Court for the Northern District of California charging James Craig, a British citizen resident in Scotland ("the requested person"), with a violation of Title 18, United States Code, section 1348 by knowingly executing and attempting to execute a material scheme and artifice to defraud others in connection with securities and obtain, by other means of false or fraudulent pretences, representations, and promises, money and property in connection with the purchase and sale of securities. On 15 May 2017 the Government of the United States of America made an extradition request seeking to extradite him to the United States in respect of that alleged offence. On 28 June 2017 the requested person first appeared at Edinburgh Sheriff Court following the grant of a warrant issued under section 71(2) of the Extradition Act 2003 and was admitted to bail. On 7 March 2018 the requested person commenced proceedings seeking judicial review, as against the Advocate General for Scotland and the Scottish Ministers, of (i) the policy decision of the United Kingdom Government not to bring into force in Scotland section 50 of, and Schedule 20 to, the Crime and Courts Act 2013 (inserting "forum bar provisions" into the 2003 Act) and (ii) the continuing "decision" by the Lord Advocate and the Scottish Ministers that section 50

A and Schedule 20 should not be commenced in Scotland. On 12 December 2018 the Lord Ordinary (Lord Malcolm) made a declarator that in its continuing failure to bring section 50 and Schedule 20 into force in Scotland, the UK Government was acting unlawfully and contrary to its duties under section 61 of the 2013 Act: *Craig v Advocate General for Scotland* [2018] CSOH 117; 2019 SC 230.

B On 4 July 2019 at Edinburgh Sheriff Court, at the resumed extradition hearing, Sheriff Norman McFadyen determined that there were no bars to extradition in terms of section 79 of the 2003 Act, that the extradition of the requested person would be compatible with his Convention rights within the meaning of the Human Rights Act 1998 and sent the case to the Scottish Ministers for their decision whether he was to be extradited. On 6 September 2019 Scottish Ministers decided to extradite the requested C person.

On 3 June 2020 the High Court of Justiciary Appeal Court (Lord Justice Clerk (Lady Dorrian), Lord Brodie, Lord Turnbull) [2020] HCJAC 22; 2020 JC 258 dismissed an appeal by the requested person under section 103 of the Extradition Act 2003 against the decision of the Scottish Ministers to extradite him.

D Pursuant to leave granted by the High Court of Justiciary (Lord Justice Clerk (Lady Dorrian), Lord Brodie and Lord Turnbull) on 28 August 2020 the requested person appealed to the Supreme Court under paragraph 13 of Schedule 6 to the Scotland Act 1998 which provided for a right of appeal to the Supreme Court for the purposes of determining a devolution issue, defined in so far as relevant in paragraph 1(d) of Schedule 6 to the 1998 Act to mean "a question whether a purported or proposed exercise of a function E by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights". The Lord Advocate (representing the United States of America) and the Advocate General for Scotland were, respectively, the first and second respondents to the appeal. The issue for the court, as stated in the parties' agreed statement of facts and issues, was whether the extradition of the requested person to the United States of America would be F compatible with his Convention rights within the meaning of the Human Rights Act 1998 as a consequence of (i) the unlawful failure of the UK Government to bring into force in Scotland the forum bar provisions in section 50 of, and Schedule 20 to, the Crime and Courts Act 2013, and (ii) the involvement of the Scottish Ministers (if any) in the United Kingdom Government's failure to bring into force the forum bar provisions in Scotland whilst the Lord Advocate is required under section 191(1) of the G 2003 Act to conduct any extradition proceedings in Scotland on behalf of the requesting state.

The facts are stated in the judgment of Lord Reed PSC, post, paras 15–17.

*Aidan O'Neill QC* and *Fred Mackintosh QC* (instructed by *Dunne Defence, Edinburgh*) for the requested person.

H *Kenny McBrearty QC* and *Lesley Irvine* (instructed by *Crown Office, Edinburgh*) for the Lord Advocate.

*Andrew Webster QC* (instructed by *Office of the Advocate General, Edinburgh*) for the Advocate General for Scotland.

The court took time for consideration.

23 February 2022. **LORD REED PSC** (with whom **LORD KITCHIN, LORD BURROWS, LORD STEPHENS JJSC** and **LORD LLOYD-JONES** agreed) handed down the following judgment.

**1** This appeal concerns the powers of the Scottish Ministers. They exercise functions in relation to extradition proceedings in Scotland, but their powers are limited under the Scotland Act 1998 by a requirement not to act incompatibly with the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The appeal also raises issues under the constitutional law of the United Kingdom concerning the obligations of the Government in relation to the commencement of legislation which Parliament has enacted, and their obligations in relation to a declaration by a court that their conduct is unlawful.

**2** The appeal arises from the unlawful failure of the Government (more specifically, the Home Secretary) to make a commencement order bringing into force provisions of an Act of Parliament which are designed for the protection of individuals whose extradition has been requested. That failure was successfully challenged by an individual whose extradition was sought, in proceedings in which the court issued a final order declaring that the Government were acting unlawfully and contrary to their duties under the Act of Parliament. Notwithstanding the court's order, the Government's failure to make the commencement order subsequently continued over a period of years, during which the extradition proceedings were pursued against the individual who had obtained the court order. The question which now arises is whether the conduct of the proceedings under those circumstances, and the extradition order made in those proceedings, are legally valid.

*1. The legislative background*

**3** In October 2010 the Home Secretary appointed a panel chaired by the Rt Hon Sir Scott Baker to conduct a review of the UK's extradition arrangements, including the question whether a forum bar to extradition—that is to say, a bar to extradition on the ground that the UK was a more appropriate forum for prosecution—should be introduced. In the course of the review, the panel received representations on behalf of the Lord Advocate which opposed the introduction of a forum bar on the ground that it could involve the review by the courts of a prosecutorial decision. The review concluded that a forum bar should not be introduced.

**4** In March 2012 the House of Commons Home Affairs Committee published its report, *The US-UK Extradition Treaty* (HC 644). It noted that the question of forum had been a significant issue in US-UK extradition cases, including cases concerned with the use of computers in the UK to commit alleged offences under US law. It concluded that the current arrangements for determining the forum in which a person should be tried were unsatisfactory. It appeared to be very easy to engage the jurisdiction of the US courts without ever entering the country, since activity on the internet could involve the use of communications systems based in the US. Decisions as to forum were made by prosecutors behind closed doors, without the accused having any opportunity to make representations. Fundamental principles of human rights, democracy and the rule of law required that justice was seen to be done in public. The Committee accordingly believed that it would be in the interests of justice for

decisions about forum, in cases where there was concurrent jurisdiction, to be taken by a judge in open court, where the person whose extradition was requested would have the opportunity to put his case, rather than in private by prosecutors. The Committee therefore recommended that the Government introduce a forum bar as soon as possible.

5 Some months later the Government published *The Government Response to Sir Scott Baker's Review of the United Kingdom's Extradition Arrangements* (Cm 8458), October 2012, in which they rejected the review's recommendation in relation to forum bar, and announced that they would seek to legislate for a forum bar, for the reasons given by the Committee. They duly did so in February 2013, when they introduced a suitable amendment to the Crime and Courts Bill then before Parliament.

6 In 2013 Parliament enacted the Crime and Courts Act 2013 ("the 2013 Act"). Paragraphs 1 to 3 of Schedule 20, to which effect is given by section 50, amend Part 1 of the Extradition Act 2003 ("the 2003 Act"), concerned with extradition to category 1 territories, so as to introduce a forum bar defence. Paragraphs 4 to 6 make similar amendments to Part 2 of the 2003 Act, concerned with extradition to category 2 territories, including the US. I shall refer to these provisions as the forum bar provisions.

7 In particular, paragraph 5 of Schedule 20 to the 2013 Act inserts into section 79(1) of the 2003 Act, which requires the judge to decide whether a person's extradition to a category 2 territory is barred by reason of one or more of a number of considerations, an additional consideration, namely "(e) forum". In that regard, section 79(2) is also amended so as to provide that sections 83A to 83E (in addition to sections 80 to 83, in the unamended version) apply for the interpretation of section 79(1). Paragraph 6 of Schedule 20 to the 2013 Act also inserts into the 2003 Act the new sections 83A to 83E.

8 Section 83A provides in subsection (1) that the extradition of a person ("D") to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice. For that purpose, subsection (2) provides that the extradition would not be in the interests of justice if the judge (a) decides that a substantial measure of D's relevant activity was performed in the UK and (b) decides, having regard to the matters specified in subsection (3) (and only those matters), that the extradition should not take place. The matters specified in subsection (3) are:

> "(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
>
> "(b) the interests of any victims of the extradition offence;
>
> "(c) any belief of a prosecutor [defined by section 83E(2) as meaning a person who has responsibility for prosecuting offences in any part of the United Kingdom] that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;
>
> "(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;
>
> "(e) any delay that might result from proceeding in one jurisdiction rather than another;

"(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to— (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

"(g) D's connections with the United Kingdom."

9 The Divisional Court has described section 83A as "clearly intended to provide a safeguard for requested persons, not distinctly to be found in any of the other bars to extradition or grounds for discharge, including section 87 and the wide scope of article 8 of the Convention", and has identified its underlying aim as being "to prevent extradition where the offences can be fairly and effectively tried here, and it is not in the interests of justice that the requested person should be extradited": *Love v Government of the United States of America* [2018] 1 WLR 2889, para 22. The court also observed (ibid) that the matters listed in section 83A(3) "do not leave to the court the task of some vague or broader evaluation of what is just. Nor is the bar a general provision requiring the court to form a view directly on which is the more suitable forum, let alone having regard to sentencing policy or the potential for prisoner transfer, save to the extent that one of the listed factors might in any particular case require consideration of it".

10 The forum bar provisions enable the domestic prosecution authorities to have an input into the question whether a requested person should be extradited in one of two ways. First, under section 83A(3)(c), a prosecutor can express a belief that the UK, or a particular part of it, is not the most appropriate jurisdiction for a prosecution. Such a belief is a matter to which the court must have regard, but it is not conclusive. Secondly, sections 83B to 83D make provision for a "prosecutor's certificate" to be given by a designated prosecutor (an expression which includes a prosecutor who is designated by subordinate legislation, or is within a description of prosecutors so designated) where (a) a formal decision has been made that the requested person should not be prosecuted, on the ground that there would be insufficient admissible evidence or that the prosecution would not be in the public interest, or (b) the prosecutor believes that the person should not be prosecuted because of concerns about the disclosure of sensitive material. If produced, such a certificate requires the appropriate judge to decide that extradition is not barred by reason of forum. The designated prosecutor's decision relating to the certificate can, however, be questioned on appeal. In Scotland, such an appeal lies to the High Court of Justiciary. In determining such a question, the court is directed to "apply the procedures and principles that would be applied by it on an application for judicial review": section 83D(3). In a case where the High Court of Justiciary quashes the prosecutor's certificate, it must decide the issue of forum bar for itself.

11 Transitional provisions are set out in paragraph 7 of Schedule 20 to the 2013 Act. They provide that in a case where the Part 1 warrant or (in a Part 2 case, such as the present) the request for the person's extradition has been issued before the amendments come into force, those amendments apply to the extradition concerned only if, at that time, the judge has not yet decided all of the existing extradition bar questions, i e the questions in section 11(1) of the 2003 Act (in the case of a Part 1 warrant) or section 79(1) of that Act (in a Part 2 case), as those questions stand before their amendment.

A **12** Commencement provisions are set out in section 61 of the 2013 Act. Subject to exceptions which are not relevant to the present case, section 61(2) provides:

> ". . . this Act comes into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes and, in the case of Part 4 of Schedule 16 and section 44 so far as
B relating to that Part of that Schedule, for different areas."

**13** Section 50 and Schedule 20 were brought into force in England, Wales and Northern Ireland on 14 October 2013. They were not brought into force in Scotland. It was found in the courts below that that was because of the Government's sensitivity to the views of the Scottish Ministers, i e the members of the devolved Scottish Government: Scotland Act 1998,
C section 44(2). In particular, the Lord Advocate, who is one of the Scottish Ministers (Scotland Act, section 44(1)), regarded the provisions relating to the questioning of the prosecutor's certificate as an inappropriate interference with his independence.

**14** That finding was based on a body of material before Parliament. In particular, on the day when the provisions were introduced into Parliament as amendments to the Bill then before it, the Parliamentary Under-Secretary
D of State at the Home Office informed the House of Commons Public Bill Committee that "because Scottish Ministers and courts have a role in the process, we have decided that the provisions should be commenced only with their consent". That decision was not, however, reflected in the terms of the legislation which Parliament enacted. Nevertheless, in evidence given to Parliament in 2014, the Lord Advocate stated that the provisions would
E only be brought into force in Scotland if the Scottish Ministers requested it, and that they had no intention to do so for the foreseeable future. That was confirmed by the Minister of State at the Home Office in answer to a Parliamentary question on 21 December 2017:

> "The Scottish Government has decided that it does not wish section 50 of the Crime and Courts Act 2013 to be commenced in full in Scotland
F and there is no timetable for its commencement. This is a decision for the Scottish Government and there have been no recent discussions on the issue." (House of Commons Daily Report, 21 December 2017, p 132.)

Contrary to that statement, this was not a decision for the Scottish Government. Under section 61, the decision was for the Secretary of State alone.

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*2. The present proceedings*

**15** On 15 May 2017 the US Government made a request for the extradition of the appellant, Mr James Craig, under Part 2 of the 2003 Act. The appellant is a British citizen living in Scotland. Extradition proceedings in Scotland are conducted by the Lord Advocate, in accordance with section 191 of the 2003 Act. The decision whether to make an extradition
H order, under section 93 of that Act read together with section 141, is the responsibility of the Scottish Ministers.

**16** The appellant is accused of an offence relating to a fraudulent scheme. The US indictment alleges that he posted false information on Twitter in order to reduce the value of shares in US-based companies, so that

he could purchase the shares and resell them on advantageous terms. This is said to have resulted in losses to shareholders exceeding $1.6m. In a supporting affidavit it is said that one of the accounts used to buy the shares was held in the name of the appellant's girlfriend and registered to the appellant's home address in Scotland, and that incriminating evidence was found on electronic devices seized during a search of that address.

17 Following receipt of the request, a warrant for the appellant's arrest was issued under section 71 of the 2003 Act. On 28 June 2017 he appeared in court and was admitted to bail in accordance with section 72. A date was fixed for the extradition hearing, but the hearing was subsequently adjourned in order to allow the appellant to bring the proceedings described in the next paragraph.

18 In March 2018 the appellant began proceedings for judicial review of the Government's failure to commence the forum bar provisions in relation to Scotland, so as to be able to mount a defence under those provisions. The respondents to the proceedings were the Advocate General for Scotland, representing the Government in accordance with the Crown Suits (Scotland) Act 1857 (20 & 21 Vict c 44), and the Scottish Ministers.

19 Counsel appearing on behalf of the Advocate General, who also appeared on behalf of the Advocate General at the hearing of the present appeal, was either unable or unwilling to provide any explanation for the Government's failure to bring the forum bar provisions into force in Scotland, and was equally unable or unwilling to provide any explanation for the failure to provide an explanation. In any event, it was argued, the ministerial statements referred to in para 14 above did not indicate that the provisions would never be brought into force in Scotland, or that there had been a delegation of responsibility to the Scottish Ministers. Section 61 of the 2013 Act, it was argued, permitted the provisions to be brought into force at different times in different parts of the UK.

20 In his judgment, given on 12 December 2018, the Lord Ordinary, Lord Malcolm, rejected these contentions and held that the Government's continuing failure to bring the forum bar provisions into force in Scotland was unlawful: *Craig v Advocate General for Scotland* 2019 SC 230. He noted that the relevant words in section 61 ("this Act comes into force on such day as the Secretary of State may by order appoint") were virtually identical to those of the commencement provisions which were in issue in the leading case of *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513 ("the *Fire Brigades Union* case"). The power given in the subsequent words in section 61 (quoted at para 12 above) to appoint different days for different areas was clearly limited to section 44 and Part 4 of Schedule 16, which did not concern the forum bar provisions. It did not extend to section 50 and Schedule 20. It was also relevant that section 61(10) prohibited the making of a commencement order in respect of section 49 or Schedule 19 unless the Secretary of State had consulted the Scottish Ministers. No such provision was made in respect of section 50 and Schedule 20. Accordingly, Parliament intended that the forum bar provisions would be brought into law throughout the UK, and section 61 conferred no power to do so at different times in different parts of the UK.

21 Lord Malcolm dealt with the other aspects of the case on the basis of the principles established in the *Fire Brigades Union* case. The lesson of that case was that, absent a good reason to delay commencement, a failure to do so amounted to an abuse of power. It was equally an abuse of power if the

relevant Minister renounced the commencement power, failed to keep the matter under review, or delegated decision-making to a third party. In the circumstances before the court, it was clear from the answer given by the Minister of State (para 14 above) that the UK Government had decided not to bring the provisions into force, and that that would not change unless and until the Scottish Government altered their view on the matter. But a change in the view of the Scottish Government would merely return matters to the position as decided by Parliament at the outset.

**22** On the same date, Lord Malcolm made an order in which he "found and declared that in its continuing failure to bring into force in Scotland the extradition forum bar provisions in section 50 of, and Schedule 20 to, the Crime and Courts Act 2013, the UK Government is acting unlawfully and contrary to its duties under section 61 of the Act". Counsel for the appellant did not seek an order requiring the Government to bring the forum bar provisions into force in Scotland, as it was assumed that they would do so in compliance with the declaratory order.

**23** No appeal was taken against that decision, which became final. Nevertheless, the Government's failure to make a commencement order continued.

**24** The appellant's extradition hearing took place six months later, on 13 June 2019, before Sheriff Norman McFadyen. Prior to the hearing, the appellant gave notice of his intention to raise a devolution issue within the meaning of Schedule 6 to the Scotland Act. Paragraph 1(d) of that Schedule includes within the definition of "devolution issue" a question "whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights". The term "functions" is defined by section 126 of the Scotland Act as including powers and duties.

**25** On behalf of the appellant, it was argued at the hearing that his extradition would be incompatible with article 8 of the Convention, and was therefore beyond the powers of the Scottish Ministers, including the Lord Advocate, by reason of section 57(2) of the Scotland Act. That section provides: "A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights." Article 8 of the Convention requires that any interference with the appellant's right to respect for his private and family life, such as would result from his extradition, must be "in accordance with the law". It was argued that that requirement was not met, by reason of the Government's continuing unlawful failure to commence the forum bar provisions. In the course of the argument, it was accepted that the appellant had to show that he would have had a real prospect of meeting the test in section 83A, were it in force.

**26** In response, it was submitted on behalf of the Lord Advocate that the failure to commence the forum bar provisions was merely a procedural irregularity, and made no difference, as questions relating to forum could be addressed under the unamended provisions of the 2003 Act. In that regard, reference was made to section 87, which requires the judge to "decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act", and, if not, to order the person's discharge. The principle of legality under article 8 was said not to have been violated, as the unamended provisions of the 2003 Act complied with that principle. Notwithstanding the appellant's reliance upon

section 57(2) of the Scotland Act, which renders acts ultra vires if they are incompatible with Convention rights, the arguments of both parties before the Sheriff (and also, subsequently, before the High Court of Justiciary) proceeded on the basis that, if the appellant's submissions were well-founded, he would be entitled to be discharged in accordance with section 87 of the 2003 Act.

**27** On 4 July 2019 the Sheriff held that there was no bar to extradition under section 79 of the 2003 Act, and that the appellant's extradition would be compatible with his Convention rights. He accordingly sent the case to the Scottish Ministers for their decision as to whether the appellant should be extradited: *HM Advocate v Craig* (unreported) 4 July 2019. He rejected the Lord Advocate's contentions that the failure to commence the forum bar provisions was merely a procedural irregularity, and that it made no difference. As he observed, if the provisions made no difference, it would be hard to see why they were enacted or why the Lord Advocate opposed their commencement. He did not accept that the application of Convention rights under section 87 of the 2003 Act would necessarily bring about the same result as the application of the statutory bar arising under sections 83A to 83E, although it might do in some cases. He considered that the court had to respond to the unlawful character of the non-commencement of the forum bar provisions by attempting to apply section 87 in a way which was, so far as possible, compatible with those provisions. He commented that it was unsatisfactory that the court had in effect to apply section 83A by the back door.

**28** Approaching matters on that basis, the Sheriff considered whether the appellant was likely to have succeeded in a forum bar defence if the provisions had been in force. He felt able to decide that a substantial measure of the appellant's relevant activity was performed within the UK, as required by section 83A(2). In relation to the matters specified in section 83A(3), little information was available, and no consideration had been given to those matters by the Crown. Nevertheless, carrying out this "hypothetical exercise" (para 50) as best he could under the circumstances, the Sheriff concluded that a forum bar defence under section 83A, if it had been in force, would have been unlikely to succeed. In the light of that conclusion, he considered that the argument on legality, under article 8, did not arise (para 52), and that the appellant's extradition would be compatible with the Convention rights.

**29** On 6 September 2019 the Scottish Ministers decided under section 93 of the 2003 Act that the appellant should be extradited.

**30** The appellant then appealed to the High Court of Justiciary (the Lord Justice Clerk (Lady Dorrian), Lord Brodie and Lord Turnbull) under section 103 of the 2003 Act. The appeal was heard on 23 January 2020 and refused on 3 June 2020: *Craig v HM Advocate* 2020 JC 258.

**31** Before the High Court, it was argued on behalf of the appellant that the Sheriff had erred in attempting to apply the forum bar provisions, since they were not in force. Their effect could not in any event be replicated by section 87 of the 2003 Act, since the focus of the forum bar provisions, and the considerations which had to be taken into account, were different from those applicable under the Convention. The Sheriff should instead have focused on the legal consequences of the Government's unlawful failure to bring the provisions into force, thereby unlawfully depriving the appellant of the forum bar defence which would have been available if a commencement order had been made. In those circumstances, the extradition proceedings failed to comply with the article 8 requirement of legality.

A 32 Those arguments were rejected. The Lord Justice Clerk, with whose reasoning the other members of the court agreed, considered that the legal consequences of the unlawful failure to commence the forum bar provisions depended on the extent to which the appellant had been prevented from relying on arguments which could otherwise have been made. That could be considered as part of the court's assessment under section 87. In applying that section, the Sheriff "would of course be expected to include as part of B the balancing exercise the fact that the non-commencement of the forum bar provisions in Scotland has been found to be unlawful" (para 30). That would require the Sheriff "to take into account . . . the potential prejudice to an applicant of the failure to introduce provisions" (ibid). That was what the Sheriff had done.

33 On 28 August 2020 the High Court granted leave to appeal to this C court on the article 8 issue. In doing so, it must have recognised that it had determined a devolution issue, as no appeal would otherwise have lain from its decision: section 114(13) of the 2003 Act.

34 On 6 September 2021 the Secretary of State made the Crime and Courts Act 2013 (Commencement No 19) Order 2021 (SI 2021/1018), which brought section 50 of and Schedule 20 to the 2013 Act—that is to say, the forum bar provisions—into force in Scotland. The provisions do not D apply to the appellant, if the Sheriff's decision of 4 July 2019 is valid. That is because, as explained in para 11 above, paragraph 7 of Schedule 20 to the 2013 Act provides that where, in a Part 2 case such as the present, the request for the person's extradition has been issued before the amendments come into force, those amendments apply to the extradition concerned only if, at that time, the judge has not yet decided all of the existing extradition E bar questions, i e the questions in section 79(1) of the 2003 Act, as those questions stand before their amendment. Those questions were purportedly decided by the Sheriff on 4 July 2019, more than two years before the amendments were brought into force.

*3. The legal issues arising on the present appeal*

F *(i) Two preliminary issues*

35 Two preliminary issues need to be addressed before considering the principal questions in the appeal.

36 First, it is a matter of agreement between the parties that the High Court of Justiciary's order of 3 June 2020 determined the devolution issue which had been raised on behalf of the appellant, and that this is accordingly an appeal under paragraph 13 of Schedule 6 to the Scotland Act. Such an G appeal is not excluded by the 2003 Act: see the decision of this court in *H v Lord Advocate* [2013] 1 AC 413, given statutory effect in section 116 of the 2003 Act, as amended by paragraph 26 of Schedule 20 to the 2013 Act. The Advocate General for Scotland represents the Government in this appeal, as he is entitled to do by virtue of paragraphs 5 and 6 of Schedule 6 to the Scotland Act.

H 37 Secondly, it follows that the question which ultimately requires to be answered is not whether the appellant is entitled to be discharged under section 87 of the 2003 Act. The question is whether the Lord Advocate and the Scottish Ministers were acting ultra vires in performing their functions in relation to the appellant's extradition. It is a matter of agreement that they had no power to do so, by reason of section 57(2) of the Scotland Act

(para 25 above), if in doing so they were acting incompatibly with the appellant's Convention rights. Accordingly, if the appeal is allowed, the court has available to it all the powers set out in rule 29(1) of the Supreme Court Rules 2009 (SI 2009/1603), in terms of which "the Supreme Court has all the powers of the court below and may— (a) affirm, set aside or vary any order or judgment made or given by that court; (b) remit any issue for determination by that court; (c) order a new trial or hearing".

*(ii) Issues relating to the effect of the declaratory order*

**38** It is necessary next to consider the effect of the declaratory order granted by Lord Malcolm. That necessity arises in the light of the submissions made to this court by counsel appearing on behalf of the Advocate General.

**39** Counsel stated, on behalf of the Home Secretary, that she accepted that successive Secretaries of State had acted unlawfully. It had been believed that the commencement provisions permitted the commencement of the forum bar provisions in only part of the UK. The court had told the Secretary of State that that belief was wrong. However, by making a declaratory order and refraining from granting an order for specific performance (a remedy available in Scotland for the enforcement of statutory duties, by virtue of section 45 of the Court of Session Act 1988)—which, counsel said, it could have done—the court had told the Secretary of State that the failure to commence the provisions was unlawful, but not that the provisions had to be commenced. Notwithstanding the court's order, the Lord Advocate's concerns about the forum bar provisions remained. The Secretary of State therefore had to decide whether to impose the forum bar provisions despite the constitutional problem arising from those concerns, or to repeal the provisions for the whole of the UK (by which counsel presumably meant that the Secretary of State had to decide whether to propose to Parliament a legislative measure which, if enacted, would have that effect). The time taken to consider that question was said to explain the delay between December 2018, when the Secretary of State was declared to be acting unlawfully, and September 2021, when the commencement order was made.

**40** In written submissions, counsel also contended that, following the declaratory order, it was for any party who sought to rely on the provisions not commenced to apply for an order for specific performance requiring the Home Secretary to bring them into effect. The effect of the declaratory order was not that the forum bar provisions were unlawfully excluded from the extradition scheme, but that they were "lawfully recognised as not part of the scheme, but on a basis that could be relied upon to bring them within the scheme if desired". It seems, therefore, that the order was not regarded as having any practical implications for the Home Secretary unless and until a further, coercive, order was sought and obtained.

**41** The submissions which I have summarised reveal a number of misunderstandings. First, Lord Malcolm did not merely reject the contention that section 61 of the 2013 Act permitted the commencement of the forum bar provisions in only part of the UK. As was explained at para 21 above, he also made it clear that the Scottish Ministers' opposition to the provisions was not a lawful justification for the failure to bring them into force in Scotland: Parliament had decided, in enacting section 61, that they were to be brought into force throughout the UK. In those circumstances, the explanation put forward for the delay in commencement following Lord

A Malcolm's judgment simply reflects a perpetuation of the same error of law as underlay the delay in commencement before that judgment.

**42** Secondly, the order made by Lord Malcolm did not merely imply that the Home Secretary had acted unlawfully in the past. It was expressed in the present tense: it declared that "in its *continuing* failure to bring into force in Scotland the extradition forum bar provisions . . . the UK government *is acting* unlawfully and contrary to its duties under section 61" (emphasis B added). That order was not challenged, and became final. In the absence, at least, of any material change of circumstances—in which event I am inclined to think that the Secretary of State might have applied to the court for a further order declaring that the failure to commence the provisions was no longer unlawful—it was the duty of the Secretary of State to act in conformity with the court's order (and, as I have explained in para 41, the Secretary of State's C decision not to exercise the power to make a commencement order, after the court's order, was in any event unlawful, as it was vitiated by an error of law).

**43** Thirdly, the argument that, where a statutory duty exists which is capable of being enforced by a coercive order, a party should apply for such an order against a Government minister, instead of relying upon compliance with a declaratory order, has implications for the constitutional relationship D between the Government and the courts.

**44** In that regard, some general observations about the use of declaratory orders in public law may be helpful. It has been firmly established since the case of *M v Home Office* [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order, and that it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory orders instead. In that case, the E House of Lords held that a mandatory interim injunction had been properly granted against the Home Secretary, and that, following his department's breach of the injunction, he could properly be found in contempt of court (although no punishment was considered necessary beyond the payment of costs). Lord Woolf, with whom the other members of their Lordships' House agreed, observed at p 397 that the fact that these issues had only arisen for the F first time in that case was confirmation that in ordinary circumstances ministers of the Crown and government departments scrupulously observed decisions of the courts. He continued:

> "*Because of this*, it is normally unnecessary for the courts to make an executory order against a minister or a government department since they will comply with any declaratory judgment made by the courts and G pending the decision of the courts will not take any precipitous action." (Emphasis added.)

He added at pp 422–423:

> "The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against officers of the Crown does not mean that that jurisdiction should be exercised except in H the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations."

**45** The Government, for their part, have always accepted that they can be relied upon to comply with declarations: see, for example, the recent case of *Vince v Advocate General for Scotland* 2020 SC 90, where the court accepted the Government's submission that it was unnecessary to make a coercive order against the Prime Minister, since members of the Government could be expected to respect a declaratory order. It is to be hoped that the submissions made on behalf of the Government in the present case do not represent a fully considered departure from that longstanding approach.

**46** The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts' willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which Ministers have failed to comply with court orders (such as *M v Home Office* and the recent case of *R (Majera) v Secretary of State for the Home Department* [2021] 3 WLR 1075), they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard. However, where a legally enforceable duty to act, or to refrain from acting, can be established, the court is capable of making a coercive order, as *M v Home Office* and *Davidson v Scottish Ministers* 2006 SC (HL) 41 demonstrate. Furthermore, a declaratory order itself has important legal consequences. First, the legal issue which forms the subject matter of the declaration is determined and is res judicata as a result of the order being granted: *St George's Healthcare NHS Trust v S* [1999] Fam 26, 59–60. In addition, a minister who acts in disregard of the law as declared by the courts will normally be acting outside his authority as a Minister, and may consequently expose himself to a personal liability for wrongdoing: Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959), pp 193–194.

*(iii) Article 8 and the powers of the Scottish Ministers*

**47** It is necessary to consider next whether the acts of the Lord Advocate in conducting the extradition proceedings against the appellant, and the decision of the Scottish Ministers to order his extradition, were ultra vires by reason of their being incompatible with his rights under article 8 of the Convention.

**48** Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A Where an act would constitute an interference with the right guaranteed by article 8(1), it is therefore necessary to consider three questions: first, whether the interference is "in accordance with the law"; secondly, whether the interference pursues one of the legitimate aims listed in article 8(2); and thirdly, whether the interference is "necessary in a democratic society", that is to say, is a proportionate means of achieving the legitimate aim pursued, balancing the competing public and private interests in question.

B **49** In the present case, there is no dispute that the appellant's extradition would interfere with his right to respect for his private and family life under article 8(1). It therefore requires to be justified under article 8(2). The first question which arises under that provision is whether the interference is "in accordance with the law". As the European Court of Human Rights stated in *Halford v United Kingdom* (1997) 24 EHRR 523, C 544, para 49, and has repeated many times since, "this expression does not only necessitate compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law". Accordingly, the interference must, in the first place, be in conformity with domestic law. In addition, the domestic law must meet the requirements of the rule of law, so as to afford adequate legal protection against arbitrariness.

**50** These matters were not addressed by the courts below. Although D they accepted that the Home Secretary had acted unlawfully in failing to commence the forum bar provisions in Scotland, they did not treat that continuing breach of the law as meaning that the interference with the appellant's article 8 rights would not be "in accordance with the law". Instead, they treated the unlawfulness, and any consequent prejudice suffered by the appellant through his inability to invoke the forum bar provisions, as a matter which could be fully taken into account as a factor in the balancing E exercise between the public and private interests involved: see paras 27–28 and 32 above. In other words, they did not address the first question identified in para 48 above, and instead proceeded directly to the third question, treating the Home Secretary's failure to comply with section 61 of the 2013 Act as having a potential bearing on that issue. That was a mistaken approach. As was said in *In re Gallagher; R (P) v Secretary of State for Justice* [2020] AC F 185, para 12, the requirement that an interference must be in accordance with the law is an absolute requirement. In meeting it, Convention states have no margin of appreciation under the Convention, and the executive and the legislature have no margin of discretion or judgment under domestic public law. Only if the test of legality is satisfied does the question arise whether the measures in question are necessary for some legitimate purpose and represent a proportionate means of achieving that purpose.

G **51** In relation to the question whether the acts of the Lord Advocate and the Scottish Ministers were "in accordance with the law", it was submitted on their behalf, and on behalf of the Advocate General, that the extradition proceedings had been conducted, and the extradition order made, in accordance with the provisions of the 2003 Act which were in force. Those provisions were evidently in compliance with domestic law, since they formed part of that law. They met the Convention requirements of accessibility and H predictability. The fact that a forum bar defence had not been available was irrelevant, since the forum bar provisions were not in force, and therefore did not form part of domestic law with which it was necessary to comply.

**52** The flaw in this argument is that the commencement provision, section 61 of the 2013 Act, was undoubtedly in force and formed part of

domestic law. The procedure followed was not in compliance with section 61, as Lord Malcolm had declared. That remained the position following his decision, as explained at paras 41–42 above, and as the courts below accepted. The procedure was therefore not in compliance with domestic law. It follows that it was not "in accordance with the law" within the meaning of article 8 of the Convention. In the light of that conclusion, the question which would have arisen on the Lord Advocate's and Advocate General's submissions, as to whether the treatment of the appellant (including the delay in complying with Lord Malcolm's order) in any event complied with the rule of law, does not require to be determined.

**53** The consequence is that the acts of the Lord Advocate in conducting the extradition proceedings, and the act of the Scottish Ministers in making the extradition order, were incompatible with the appellant's Convention rights, and were therefore ultra vires by virtue of section 57(2) of the Scotland Act. In the language of paragraph 1(d) of Schedule 6 to the Scotland Act (para 24 above), they were merely "purported" acts, and were therefore invalid.

*(iv) The appropriate remedy*

**54** For these reasons, I would allow the appeal. I would leave it to the High Court of Justiciary to make such orders as fall to be made in consequence of this judgment in order to enable a new extradition hearing to be held before a different Sheriff. At that hearing, it will be open to the appellant to rely on the forum bar provisions (in addition to any other arguments properly available to him), since the effect of this judgment is that the Sheriff has not yet decided the existing extradition bar questions, i e the questions in section 79(1) of the 2003 Act, as those questions stood before their amendment by the commencement order made in September 2021.

*Appeal allowed.*
*High Court of Justiciary to make order enabling new extradition hearing.*

COLIN BERESFORD, Barrister

**TRFDOC17 – Email from Dorset CC to TRF 19 July 2023**

**From:** Vanessa Penny
**Sent:** 19 July 2023 14:05:53
**To:** John Vannuffel
**Cc:** Carol Mckay
**Subject:** RE: (Bridleway 8 (part), Cheselbourne and Bridleway 18, Dewlish to be upgraded to Byways Open to All Traffic) DMMO 2020

Hello John
Thanks for your email.
We do have a copy of the CD referred to. It is called "FoDRoW Evidence 25 September 2004". My colleague is working out the best way to send you the information and we will contact you again as soon as possible.
With regard to the user evidence forms, Dorset County Council (as it was then) undertook a consultation process inviting the public and various interested parties (including the TRF) to submit evidence in January 2006 and also in September 2009. The user evidence forms were submitted to us in Feb/Mar 2010 in response to these consultations and as part of our investigation. They cannot be considered to have been submitted as part of the application by the applicant, as the applicant at that time was still FoDRoW/ Jonathan Stuart. As you know, the TRF did not take over the application until 4 October 2010.
We'll be in touch regarding the CD. Please let me know if you need anything else.
Kind regards

**Vanessa Penny**
**Definitive Map Team Manager**
**Definitive Map Team**
**Economic Growth and Infrastructure**
**Dorset Council**

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dorsetcouncil.gov.uk



**From:** John Vannuffel <john.v@trf.org.uk>
**Sent:** Wednesday, July 19, 2023 11:48 AM
**To:** Vanessa Penny <vanessa.penny@dorsetcouncil.gov.uk>
**Cc:** Carol Mckay <carol.mckay@dorsetcouncil.gov.uk>
**Subject:** (Bridleway 8 (part), Cheselbourne and Bridleway 18, Dewlish to be upgraded to Byways Open to All Traffic) DMMO 2020
Dear Vannessa,
**Re: (Bridleway 8 (part), Cheselbourne and Bridleway 18, Dewlish to be upgraded to Byways Open to All Traffic) DMMO 2020**

I am working through the matter of the interim decision for the above-named order and discovering that TRF does not have all the case documents. I would be grateful if Dorset County Council would assist in filling in the gaps.
Please would you clarify if Dorset County Council has the CD referred to in paragraph 10 of the interim order decision? If so, please would Dorset County Council send me a copy – preferably by fileshare?
Paragraph 57 of the decision also refers to User Evidence Forms submitted to the Council in 2010. Please would you clarify if those forms were submitted in response to the Council inviting the public/TRF to submit evidence (perhaps as part of the investigation of the application)?
Kind regards
John

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