Neutral Citation Number: [2013] EWCA Civ 553

Case No: C1/2012/2689 + 2689(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT (SUPPERSTONE J)
REF: CO899/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2013

Before :

Lord Justice Maurice Kay Vice President of the Court of Appeal, Civil Division
Lady Justice Black
and
Lady Justice Rafferty

- - - - - - - - - - - - - - - - - - -

Between :

THE QUEEN (on the application of)

(1)	**TRAIL RIDERS FELLOWSHIP**	**First Claimant / Appellant**
(2)	**DAVID LEONARD TILBURY**	**Second Claimant**
	and	
	DORSET COUNTY COUNCIL	**Defendant / First Respondent**
	and	
(1)	**SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS**	**First Interested party / Second Respondent**
(2)	**MR GRAHAM PLUMBE**	**Second Interested party / Third Respondent**

- - - - - - - - - - - - - - - - - - -

Mr Adrian Pay (instructed by **Brain Chase Coles**) for the **Appellant**
Mr George Laurence QC (instructed by **Dorset County Council** for the **(1st Respondent)**
Treasury Solicitors (2nd Respondent did not appear)
Mr Graham Plumbe (3rd Respondent in person)

Hearing date : 23 April 2013

- - - - - - - - - - - - - - - - - - -

Approved Judgment

Lord Justice Maurice Kay :

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 (the 1981 Act). 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 (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 (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 (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 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 applicants 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 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 (paragraph 5 (1)). The relevant regulations are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (the 1993 Regulations), regulation 2 of which 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."

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.

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 number was VI …
>
> The software is 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' …
>
> 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 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 1 centimetre on the 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 Dorset County Council, 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 Council. 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 programme to a scale of 1:25,000 was a map which was, at the time of its submission, drawn to a 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 : [2012] EWHC 2634 (Admin). In essence, he agreed with the Council's interpretation, found non-compliance by the applicants and rejected an alternative ground of challenge based on the *de minimis* principle.

Discussion

10. It is important to keep in mind what paragraph 1(a) of Schedule 14 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, 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) 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 Council. 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 Council 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 Council'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 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 Secretary of State for Health* [2003] 2 AC 687, Lord Bingham said (at paragraph 9):

> "There is, I think, no inconsistency between the rule that statutory 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 Limited* [1975] Ch 185, where Walton J had to decide whether a tape recording falls within the expression 'document' in the Rules of the Supreme Court. Pointing out, at p190, 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 a the speech of Lord Wilberforce on *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 where he said (at page 822):

> "… 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 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* (above).

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, upon 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 Ordnance Survey map.

15. It is submitted on behalf of the Council 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 relates" for the purpose of service of a notice pursuant to paragraph 2(1) of Schedule 14. 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: paragraph 2(2). Ultimately, it is for the surveying authority "to investigate the matters stated in the application": paragraph 3(1)(a). 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": section 53(1). I am unconvinced by the protestations of inconvenience advanced on behalf of the Council. 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 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.

Lady Justice Black:

17. I agree.

Lady Justice Rafferty:

18. I also agree.