

**IN THE SUPREME COURT OF THE UNITED KINGDOM
APPLICATION BY DORSET COUNCIL
DORSET COUNCIL**

Appellant

and

TRAIL RIDERS FELLOWSHIP

Respondent

and

GRAHAM PLUMBE

Intervener

Grounds in Support of Dorset Council's Application dated 14 June 2019

Background

1. On 7 October 2010 Dorset County Council considered five applications made by the Friends of Dorset Rights of Way ('the Applications') to modify the Definitive Map and Statement of Rights of Way for Dorset to record a number of byways open to all traffic (BOAT). By the time of the Council's committee meeting on 7 October 2010, the Trail Riders Fellowship (TRF) had taken over management of the Applications.
2. The County Council, through its Committee, resolved to refuse the Applications on the basis that the Applications were not accompanied by a map which complied with the requirements of paragraph 1(a) of schedule 14 to the Wildlife and Countryside Act 1991 ('WCA').
3. The TRF commenced judicial review proceedings against the County Council. The High Court [2012] EWHC 2634 (Supperstone J) stated that 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 ['NERCA'] 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". The High Court held that the maps accompanying the applications did not comply with those

statutory provisions and as a secondary issue that the de minimis principle did not apply.

4. The TRF appealed and the Court of Appeal [2013] EWCA Civ 553 allowed the appeal. It held that the submitted maps satisfied "the requirements of paragraph 1(a) of Schedule 14" (providing it is a map and it shows the application routes).
5. The County Council unsuccessfully appealed to the Supreme Court. Lord Clarke set out the first issue before the Supreme Court at paragraph 2 of his Judgment in the same terms as Supperstone J. There was a second issue set out in Lord Carnwath's Judgment summarised at paragraphs 53 to 56. In short, the second issue was whether an application map which departed from the statutory requirements in only minor ways would prevent the exceptions set out in section 67 of NERCA from applying. This involved considering the line of authorities including the Court of Appeal's decisions in the "Winchester" case ([2008] EWCA Civ 431; [2009] 1WLR 138) and the "Maroudas" case ([2010] EWCA Civ 280).
6. The Supreme Court's Order of 13 April 2015 declared that 'The five applications ... were made in accordance with paragraph 14 of Schedule 1 to the Wildlife and Countryside Act 1981'.
7. On 1 April 2019 Dorset County Council was dissolved and a Dorset Council, a new unitary authority was established (Bournemouth, Dorset and Poole (Structural Changes) Order 2018/648)

The Supreme Court's Judgment

8. The Court refused the appeal by a majority of three to two (Lord Neuberger and Lord Sumption dissenting) on the first issue and held, upholding the Court of Appeal's decision, that the Application maps complied with the statutory requirements of paragraph 1(a) of Sch 14 WCA as being drawn to the prescribed scale.
9. The views of the Justices, albeit obiter dicta, on the second issue are, in summary:
 - Lord Clarke specifically expressed no view [paragraph 34].
 - Lord Toulson [paragraph 41] stated that the second issue did not arise for decision but it had been fully argued and he agreed with Lord Neuberger and

Lord Sumption [that strict compliance with the statutory provisions would be necessary]; also paragraph 50].

- Lord Carnwath considered the second issue in some detail [paragraphs 53 – 80, with conclusions at paragraphs 80 and 81]. In his Judgment it was unnecessary to consider the correctness of the decision in “Winchester” [paragraph 79].
- Lord Neuberger considered that the exceptions in s67 of NERCA could only apply to an application that complied with the requirements of paragraph 1 of schedule 14 of WCA [paragraph 100]. Any defects in the application would mean that section 67 exceptions would not apply [paragraphs 102, 103 and 105].
- Lord Sumption found that an application must comply with paragraph 1, Sch 14 to fall within Section 67(6) NERCA, including a map drawn on the prescribed scale [paragraph 108]. He added that the defect in an application cannot be corrected after the date by which an application had to be made in order for the section 67 exception to apply.

The issue now arising

10. The Council and Mr Plumbe (as Intervener representing Green Lane Protection Group before the Supreme Court) believe that the proceedings before the Supreme Court were about whether the Application maps accorded with the statutory provisions in paragraph 1(a) to schedule 14 to the WCA as being drawn to the prescribed scale. The Council does not consider that the Court determined the second issue.
11. The effect, in brief, of compliance with paragraph 1 of Schedule 14 is that if the Applications comply with all the requirements of paragraph 1, rights for mechanically propelled vehicles may be preserved. If not, rights for mechanically propelled vehicles are extinguished.
12. On 18 January 2019 officers at the County Council wrote to the Respondent (TRF) and the Intervenor stating that three of the Applications were considered to have been made in accordance with paragraph 1 but that the remaining two were not made in accordance with paragraph 1(b). Paragraph 1(b) concerns the evidence

accompanying an application. The TRF responded by bringing the Court's order to the attention of the County Council's officers (the current officers now dealing with the Applications were not involved in the Supreme Court proceedings and were unaware of the precise wording of the Court's Order). Three of the Applications were determined by the Council's Regulatory Committee on 21 March 2019.

13. Of the two applications that officers consider fail to comply with paragraph 1(b); one was made in July 2004 with some evidence listed as accompanying the application provided with the application, some in September 2004 and the remainder in November 2004. On the second, three items of evidence listed as accompanying the application have never been provided to the Council. Officers' view on this follows the decisions of the Court of Appeal in Winchester ([2008] EWCA Civ 431) and Maroudas ([2010] EWCA Civ 280) and the High Court in Trail Riders Fellowship v Secretary of State [2016] EWHC 2083 (Admin).
14. The TRF has responded to say that the Council is bound by the Supreme Court's declaration so that all Applications were made in accordance with paragraph 1. The intervenor, an objector to each of the Applications, has asserted to the Council that it is not bound by the Court's declaration in relation to paragraph 1(b) as the Court was considering only whether the application maps were drawn to the prescribed scale and not whether the maps show the application routes nor whether the Applications complied with paragraph 1(b).
15. The Council considers that it is bound by the Court's Order and Declaration. However, it respectfully submits that, in light of the issues before the Supreme Court, the Court's Declaration should have specifically referred to paragraph 1(a). That would leave the Council to consider and determine whether or not the Applications were made in accordance with paragraph 1(b) and consequently whether or not the exceptions in section 67 of NERCA apply.
16. The Council does not consider that the Court reached a conclusion on the second issue and that even if it did, the Council believes it was on the facts confined to paragraph 1(a). The Council does not consider the Court reached any conclusions about whether the Applications were made in accordance with paragraph 1(b) of schedule 14 of the WCA.
17. The Council's concern is that in light of the TRF and the Intervenor's opposing positions, the Council is likely to face further proceedings relating to the interpretation

of the Supreme Court's Declaration and specifically whether or not the Council can consider whether the applications comply with paragraph 1(b) of Schedule 14 unless the Court is able to clarify its Order.

Order Sought

18. Accordingly, the Council respectfully submits that the Court's declaration should have specifically referred to paragraph 1(a). Therefore its application is to amend paragraph 4 of the Order so that it specifically refers to paragraph 1(a) of schedule 14 to the WCA.
19. The Council submits that the Court has jurisdiction to amend its Order under rule 9 (and in particular rule 9(7) of the Supreme Court Rules 2009

The Respondent's and Intervenor's Positions

20. The TRF opposes the application, as set out in its letters of 2 and 16 April (attached). It considers that this application would contravene the principle of finality of litigation, especially given the passage of time. It submits that the Court's Order mirrors the relief sought in its original application for judicial review. The TRF's position is that the Council is not caught between the Supreme Court's Order and the 'Winchester' line of authorities because it is bound to accept that the applications comply with paragraph 1 of Schedule 14 of the WCA as a whole due to the clear terms of the Court's Order. The TRF points out that the Court's views on the 'Winchester' line of authorities were obiter.
21. The TRF submits that the Court should first determine whether to dismiss this application on the papers as a misconceived attempt to reopen the Court's final determination. Only if the Court considers that the application has any prospect of success will it prepare detailed submissions.
22. Mr Plumbe, the Intervenor, consents to the application providing there is no cost to the Green Lanes Protection Group (which he represents), that the Order is amended to specifically state that the five applications remain subject to determination by the Council on the evidence with respect to;
 - a) the second limb of paragraph 1(a) of Schedule 14; ie whether the application maps show 'the way or ways to which the application relates, and
 - b) paragraph 1(b) of Schedule 14,

and that the change has the approval Jonathan Cheal; solicitor for one of the affected landowners.

The County Council does not believe those additional words are necessary but would not object if the Court was minded to amend the Order in that way.

23. He submits that the second issue before the Court was whether the Winchester case was correctly decided with respect to paragraph 1 of Schedule 14. He further submits that the Court decided, albeit obiter, by a majority of 3:2 that the Winchester decision was correct and binds the Council in determining whether the Applications comply with paragraph 1 of Schedule 14 save in relation to the Application map scales.
24. Mr Plumbe submits that the defect in the wording of the declaration is no more than an ambiguity which needs clarification. His position is that in order for the Court to have declared that the applications complied with paragraph 1 as a whole, the Court must have overruled the 'Winchester' line of authorities and the Court did not so do. Thus he says the Court's decision means that the Applications must comply strictly with paragraph 1 (a) of Schedule 14; the Court having only determined that the Application maps had been drawn to a prescribed scale. Mr Plumbe also wishes to make formal submissions to the Court in respect of this application.

The Council respectfully requests that the Court amends its Order in the terms as set out in paragraph 18 above.