

[BAILII](#) [[Home](#)] [[Databases](#)] [[World Law](#)] [[Multidatabase Search](#)] [[Help](#)] [[Feedback](#)]

England and Wales High Court (Administrative Court) Decisions

You are here: [BAILII](#) >> [Databases](#) >> [England and Wales High Court \(Administrative Court\) Decisions](#) >> Trail Riders Fellowship v Secretary of State for Environment, Food And Rural Affairs [2016] EWHC 2083 (Admin) (12 August 2016)
URL: <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2083.html>
Cite as: [2016] EWHC 2083 (Admin)

[\[New search\]](#) [\[Printable RTF version\]](#) [\[Help\]](#)

Neutral Citation Number: [2016] EWHC 2083 (Admin)

Case No: CO/1437/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
12/08/2016

Before:

MR JUSTICE GILBART

Between:

TRAIL RIDERS FELLOWSHIP

Claimant

- and -

SECRETARY OF STATE FOR ENVIRONMENT,
FOOD AND RURAL AFFAIRS

Defendant

-and-

DORSET COUNTY COUNCIL

Interested Party

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
Hearing dates: 20th July 2016

HTML VERSION OF JUDGMENT APPROVED↑

Crown Copyright ©

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

- 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)
- 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.
- 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].
- 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 omissionshould 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 routehad 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* [2001] 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 then 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*.

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.

BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

URL: <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2083.html>

