Appendix 2

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

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Court of Appeal

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

[2013] EWCA Civ 553

B

2013 April 23; May 20

Maurice Kay, Black, Rafferty LJJ

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

C

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking

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modification orders in respect of the authority's definitive map and statement in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the map and statement. Accompanying each application was a map of the route in question. Each map had been taken from computer software with digitally encoded mapping "sourced from the Ordnance Survey". Each had originally been drawn to a scale of 1:50,000 and then printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the

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basis that the maps did not comply with the requirement in paragraph 1(a) of Schedule 14 to the 1981 Act that they be drawn to the prescribed scale, which, by regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[2], was a scale of not less than 1:25,000. The judge dismissed the claim, holding that in order to comply with the requirements of the 1981 Act and the 1993 Regulations a map had to have been originally drawn to a scale of not less than 1:25,000.

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On appeal by the claimants—

Held, allowing the appeal, that paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981, read together with regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, required that an application to which Schedule 14 applied be accompanied by something that (i) was identifiable as a map, (ii) was drawn to a scale of not less than 1:25,000 and (iii) showed the way or ways to which the application related; that the statutory

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scheme did not specify that the map had to be one produced by the Ordnance Survey or any other commercial or public authority, nor was the scheme prescriptive as to the features which had to be shown on the map beyond the way or ways to which the application related; that "drawn" in paragraph 1(a) of Schedule 14 to the 1981 Act was not to be construed as being confined to "originally drawn" but should be given a

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[1] Wildlife and Countryside Act 1981, s 53(5): "Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

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

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

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

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

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

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

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

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

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

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

The following additional cases were cited in argument:

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

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

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

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

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

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

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

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

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

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

APPEAL from Supperstone J

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

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

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

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

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

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

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

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

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

The court took time for consideration.

20 May 2013. The following judgments were handed down.

MAURICE KAY LJ

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

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

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

The statutory requirements

3 Paragraph 1 of Schedule 14 to the 1981 Act provides:

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

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

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

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

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

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

B *The issue*

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

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

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

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

H *Discussion*

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

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

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

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

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

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

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

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

> "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 Ltd* [1975] Ch 185.

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

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

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

Conclusion

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

BLACK LJ

17 I agree.

RAFFERTY LJ

18 I also agree.

Appeal allowed.

ALISON SYLVESTER, Barrister