CA-2024-000761

IN THE COURT OF APPEAL

IN THE MATTER OF AN APPLICATION UNDER THE WILDLIFE AND COUNTRYSIDE ACT 1981, SCHEDULE 15, PARAGRAPH 12

BETWEEN:

MR DERREN MCLEISH and MRS KATHRYN MCLEISH

Appellants

and

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

(2) KENT COUNTY COUNCIL

Respondents

APPELLANTS' REPLACEMENT SKELETON ARGUMENT

This replacement skeleton argument amends the appeal skeleton dated 03.04.24 to add hearing bundle references, and by replacing text at paragraphs 1; 2-6; 18 and 62 to reflect the grant of permission to appeal by Lewison LJ on 13 June 2024. Its contents are otherwise unchanged.

References :

[**J1**] refers to paragraph 1 of the judgment of Neil Cameron KC sitting as a Deputy Judge of the High Court, dated 14 March 2024.

[**DL/1**] refers to paragraph 1 of the First Respondent's decision letter dated 11 November 2022, filed with the Appellant's Notice.

[**CB/1**] refers to page 1 of the appeal hearing core bundle.

[**SB/1**] refers to page 1 of the appeal hearing supplementary bundle.

Emphases to quoted text are added unless the contrary is indicated.

The parties have agreed areas of common ground and issues for determination in the appeal [**CB/56**].

INTRODUCTION

1. This is an ~~application for permission to~~ appeal against the judgment of Neil Cameron KC sitting as Deputy High Court Judge dated 14 March 2024 [**CB/58**], under Civil Procedure Rule 52.3(1)(a). Following a hearing on 29 February 2024, the Judge dismissed the Appellants' application under Schedule 15, paragraph 12, of the Wildlife and Countryside Act 1981 ("**the 1981 Act**"), to quash the Definitive Map Modification Order ("**the Order**[1]") made by the Second Respondent[2] and confirmed by an Inspector appointed by the First Respondent on 11 November 2022 [**CB/126**].

~~PERMISSION TO APPEAL TEST~~

2. Schedule 15, paragraph 12 of the 1981 Act provides :

> *"Proceedings for questioning the validity of orders*
>
> **12.—**
> (1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.
>
> 2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.
>
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

3. The High Court thereby has jurisdiction to quash the Order. ~~The Appellant's application under this provision was a "Planning Court claim" within the meaning of Civil Procedure Rule 54.21(2)(iv), being a statutory challenge involving rights of way.~~

[1] The Kent County Council (Public Footpath ZR281 (Part) Doddington) Definitive Map Modification Order 2021 [**CB/135**]

[2] The Second Respondent has not taken an active part in these proceedings and did not appear at the hearing.

~~Proceedings were commenced by way of a Part 8 claim form in accordance with Practice Direction 54D paragraph 5.2.~~

4. ~~It is submitted that the application did not fall within any of the four categories of "appeal to the High Court" within the meaning of s.55 of the~~ Access to Justice Act 1999, ~~("the 1991 Act") identified by the Court of Appeal in ***Clark (Inspector of Taxes) v Perks*** [2001] 1 W.L.R. 17, CA at [13] :~~

   ~~(i) It was not an appeal to the High Court on a point of law pursuant to s.11 of the Tribunals and Inquiries Act 1992;~~
   ~~(ii) It was not an application to the High Court which can be colloquially categorised as an appeal by way of case stated;~~
   ~~(iii) It was not an appeal to the county court on a point of law;~~
   ~~(iv) While the Inspector confirming the Order was *"another body or person"*, the application was not *"any other appeal to the High Court*", because it was an "application" under paragraph 12(1) of Schedule 15, made by way of a Part 8 claim.~~

5. ~~Consequently, this is not a "second appeal" within the meaning of s.55(1) of the 1999 Act, and the permission to appeal test for first appeals under CPR 52.6 applies (a "real prospect of success" or "some other compelling reason for the appeal to be heard").~~

6. ~~Nevertheless, the Appellants submit that the permission to appeal test for second appeals under CPR 52.7(2)(a) is also met : the appeal would (i) have a real prospect of success, and (ii) would raise an important point of principle or practice.~~

SUMMARY

7. The Order changed the legal alignment of part of public footpath ZR281 in Kent ("**the path**") so that it now runs through the rear courtyard of the Appellants' home.

8. The path was first recorded on the 1952 definitive map and statement of public rights of way in Kent, which was then reviewed in 1970, 1987 and again in 2013[3]. In the course of that review process and as a result of being copied onto updated base maps,

[3] See the Second Respondent's delegated officer report ("delegated report"), Appendix A, paras 25-54, [**SB/7-11**]

the features on the ground also having changed, it appeared to the Second Respondent that the alignment of the path on the map had been changed in error and the Order was needed to correct this. On the current (2013) definitive map [**SB/22**], prior to the Order, the path had been recorded as running through the curtilage of the property next door to the Appellants'.

9. The essence of the Appellants' case is that the Judge failed to have regard to the Second Respondent's reason for making the Order, which was to correct an apparent mapping error. The error had, according to the Second Respondent[4] and as accepted by the Inspector[5], first appeared on the 1987 definitive map, and was then copied over to the current (2013) definitive map. The apparent error was not noticed until 2020.

10. In these circumstances, the Judge's decision that the evidential presumption contained in s.56(1) of the 1981 Act that the definitive map and statement correctly show the right of way in question did not apply to the original definitive map of 1952 but rather to the (incorrectly) "modified" map and statement, for the reasons set out at [**J31**, CB/69] and [**J39**, CB/71], was wrong in law.

11. If the Judge had agreed with the Appellants that the evidential presumption in s.56(1) applied to the original 1952 definitive map and statement, it would necessarily have followed that in failing to apply that presumption the Inspector had erred in law. The Order would then have been quashed (either in full or in part) pursuant to the Court's powers under Schedule 15, paragraph 12(2) of the 1981 Act.

FACTUAL BACKGROUND

12. The Appellants own Yew Tree House in Doddington, Kent.

13. Following an application for planning permission in 2020 by the owner of Victoria Bungalow, the property next door to Yew Tree House, it transpired that the existing garage to Victoria Bungalow is built over the line of the path. The two properties were in the same ownership at the date of the original definitive map and statement (1952)[6].

[4] Delegated report at paragraph 112 [**SB/20**]
[5] DL/40 [**CB/131**]
[6] Appellants' grounds of objection to the DMMO, paragraphs 23-28, [**SB/50-52**]

14. The Second Respondent (the order-making authority under Part III of the 1981 Act) then investigated the definitive records, and concluded that the 2013 definitive map incorrectly showed the legal alignment of the path[7].

15. The Second Respondent then made the Order under s.53(2)(b) of the 1981 Act, following the "discovery of evidence" under s.53(3)(c)(i) and (iii) [**CB/135**]. The effect of the Order is to delete the section of the path running through the Victoria Bungalow curtilage, and replace it with a section of path running through the courtyard at the rear of Yew Tree House [**CB/138**].

16. The appellants objected [**SB/47**; **SB/56**]. The Order was submitted to the First Respondent and confirmed by an appointed Inspector, following a hearing, in a decision letter dated 11 November 2022.[8]

17. The Appellants then applied as "persons aggrieved" under paragraph 12 of schedule 15 of the 1981 Act, by way of a Part 8 claim, to quash the Order confirmed by the Inspector.

18. The claim was dismissed by Neil Cameron KC sitting as a Deputy High Court Judge on 14 March 2024 following a hearing on 29 February 2024. That judgment [**CB/58**] is the subject of this ~~application for permission to~~ appeal.

'<u>Mapping anomaly</u>'

19. As this case concerns an apparent error on the face of the 2013 definitive map and statement, it is necessary to consider the sequence of definitive maps and statements showing the path.[9]

20. The path was first recorded on the 1952 definitive map and statement of public rights of way in Kent, prepared under s.32 of the <u>National Parks and Access to the Countryside Act</u> of 1949 ("**the 1949 Act**")[10]. The Second Respondent's view was that the "conclusive evidence" presumption under s.56(1) of the 1981 Act applies to the 1952

[7] Delegated report, paragraphs 111-112 **[SB/19]**
[8] Filed with the Appellant's Notice [**CB/126**]
[9] This was set out in the Appellants' skeleton argument for the hearing on 29 February 2024, at paragraphs 39-48 [**CB/102-105**].
[10] A copy of the 1949 Act as enacted was included in the Authorities Bundle for that hearing.

definitive map and statement. This is set out in the delegated report[11], and repeated verbatim in the Second Respondent's Statement of Case at paragraph 12 [Appendix C, **SB/85-86**]:

> "The County Council is not aware of any evidence that the Draft Map, Provisional Map and 1952 Definitive Map did not follow due procedure. Therefore, it should be assumed that proper procedures were followed, and that evidence existed and weas considered appropriately when recording the footpath on the 1952 Definitive Map and statement. **This document can therefore be considered conclusive evidence in law of the particulars they contain**."

21. In accordance with its duty under s.33 of the 1949 Act, the Second Respondent published a draft revised map with a relevant date of 1st October 1970. The delegated report states that this followed "broad consultation" and concludes that :

> "[..] the draft revised map of 1970 reflects the alignment shown on the 1952 Definitive Map (and the draft and provisional maps) with the statement not adding any further clarification". [paragraph 45, **SB/45**]

22. The definitive map and statement was again reviewed in 1987 and in 2013. The Second Respondent's delegated report identifies the resulting apparent error[12]:

> "It is not until the 1987 Definitive Map that [the alignment of the path] appears to alter.
>
> […] it is therefore reasonable to suggest that an error was made when drafting the 1987 Definitive Map by moving the legal alignment further to the east over what was enclosed land. **It would seem likely that when the 2013 Definitive Map was drafted, this reflect the 1987 alignment, and the alignment error was carried forward."**

23. The Inspector appointed by the First Respondent to consider whether or not the Order should be confirmed,[13] agreed with the Second Respondent's assessment that there had been an incremental shift in alignment of the path, from its position on the 1952 definitive map, to its position on the 2013 definitive map, and that:

---

[11] Delegated report, paragraph 110 at [**SB/19**]
[12] Ibid, paragraphs 111-112 [**SB/20**]
[13] Pursuant to paragraph 4, Schedule 11 to the 1981 Act

> "The most likely explanation for the shift […] is simply down to technical error in interpreting lines when re-drawing these maps on several occasions"[14].

24. The Inspector observes in the same paragraph :

> "I consider it highly unlikely there would have been any inspection of the site by KCC officials to check the route between redrafts of the map in the absence of any specific query. Until the very recent planning enquiry, there is no evidence that the definitive route has ever been questioned".

25. The Inspector accepted[15] the Second Respondent's assessment that:

> […] "the historical line of this path does not match that shown on the current definitive map but has been altered subtly eastwards on each redraft but with no deliberate intention in the form of a legal order to do so".

LEGAL FRAMEWORK

General principles

26. The fundamental principle in this and any rights of way case is "once a highway, always a highway". Per Purchase LJ in *R. v Secretary of State for the Environment Ex p. Simms, [1991] 2 Q.B. 354 (1989)* at [363]*:*

> "At common law the rule was and remains "once a highway, always a highway." […] Apart from the old procedure by way of writ ad quod damnum, in order to extinguish or even vary a right, intervention by statute has always been necessary."

27. Public rights of way pertain to clearly defined routes: an "exactly demonstrated course" is required in most cases : *AG Ex Rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] 1 AC 415 at [434].

[14] DL/40 at **[CB/131**]
[15] DL/35, in the Grounds of Appeal at para 78 and [**CB/130**]

National Parks and Access to the Countryside Act 1949

28. Public rights of way in England were first surveyed, and definitive maps and statements first produced, under Part IV of the 1949 Act.

29. Sections 27 to 32 set out the process of the initial "*ascertainment of footpaths, bridleways and certain other highways*", including surveys, consultation with parish councils, advertisement of provisional and draft maps, consideration of representations and objections. The 1952 definitive map and statement resulted from this process.

30. The content and purpose of these provisions is summarised by Purchas LJ in *R. v Secretary of State for the Environment Ex p. Simms, [1991] 2 Q.B. 354 (1989)* at [364]:

> "Sections 27 and 28 provided for the preparation of a draft map after a comprehensive investigation to ascertain the existence of footpaths, bridleways, etc. Sections 29 and 30 provided for representations and objections by interested parties to the draft maps and statements. Section 31 provided for the judicial determination of disputes between landowners and others by legal process in the quarter sessions. Section 32 provided for the initial recording of the results of the processes under sections 27 to 31 in the form of a "definitive map and statement." Section 33 provided that thereafter at five-yearly intervals, or sooner as appeared appropriate to the authority, the map and statement should be reviewed having regard to "events" as therein defined. There can be no dispute that an object of the Act was to avoid tiresome and expensive litigation between individuals over disputed rights of way. "

Wildlife and Countryside Act 1981

31. On the coming into force of the 1981 Act[16], no further surveys were to be carried out under the 1949 Act.

32. Part III of the 1981 Act replaced the material provisions in Part IV of the 1949 Act. The following sections of the 1981 Act are relevant to the main issue in this appeal.

33. Section 53(1) defines "definitive map and statement" :

> **"53.— Duty to keep definitive map and statement under continuous review.**
>
> (1) In this Part "definitive map and statement", in relation to any area, means, **subject to [section 57(3)** and 57A(1) **]** 1 ,—
> (a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or

[16] Pursuant to s.55 of the 1981 Act which came into force on 28 February 1983.

(b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or
(c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3)."

34. The 1952 definitive map and statement was prepared under s.32 of the 1949 Act[17]. A revised map prepared under s.33 of the 1949 Act was then published in 1970, without any changes to the path in question[18].

35. Section 53(1) is subject to s.57(3), which provides that a copy of a definitive map and statement may be made if this appears to the surveying authority to be "expedient", and the copy then becomes the "the definitive map and statement for that area" :

"**57.— Supplementary provisions as to definitive maps and statements.**
[…]
(3) Where, in the case of a definitive map and statement for any area which have been modified in accordance with the foregoing provisions of this Part, it appears to the surveying authority expedient to do so, they may prepare a copy of that map and statement as so modified; and where they do so, the map and statement so prepared, and not the map and statement so modified, shall be regarded for the purposes of the foregoing provisions of this Part as the definitive map and statement for that area."

"Conclusive evidence"

36. Section 56(1) of the 1981 Act, which contains the evidential presumption in favour of "a definitive map and statement" therefore applies to the copy of the modified map made under s.57(3):

"56.— Effect of definitive map and statement.

(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely—

(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right."

[17] [**SB/34-35**]
[18] Delegated report, paragraph 45 [**SB/10**]

37. *Ex parte Simms* establishes that the "conclusive evidence" provision in s.32(4) of the 1949 Act, precursor to s.56(1) of the 1981 Act, does not prevent changes being made to the definitive map and statement : per Purchase LJ at [387]:

> "In order to maintain the accuracy of the evidence which is to be "conclusive" as long as it appears unrevised on the map and statement it must, unless there is strong and specific provision to the contrary, be capable of revision of all kinds in order to ascertain the true state of affairs on the ground."

38. Evidence *"of some substance must be put in the balance, if it is to outweigh the initial presumption […]"* that the right of way subsists as shown on the definitive map and statement : *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266.

Modifications under s.53 of the 1981 Act

39. The correct approach to definitive map modifications under s.53, with reference to *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266 is set out at [**J16**][19] and is not controversial. The essential points are :

    (i) A mistake on the definitive map may be corrected by modification under s.53(3)(c) of the 1981 Act.

    (ii) When considering whether a right of way as marked on "the definitive map" in fact exists, the authority must start with an initial presumption that it does.

40. Where the Order deletes one path and adds another, engaging both sections 53(3)(c)(i) and (iii) of the 1981 Act :

"[…] what the Inspector is having to do is to decide which is the correct route. If he is doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is desirable that it should stay in place."

[19] [**CB/65**]

Per Collins J in *R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin) at [28] referred to at [**J17**].

Grounds of application to quash the Order

41. In their application[20] as "persons aggrieved" under Schedule 15, paragraph 12 of the 1981 Act, the Appellants relied on three Grounds. Ground C is not pursued.

Ground A: The Inspector failed properly to direct herself on the evidential weight to be given to the 1952 Definitive Map and Statement in the light of s.56 of the 1981 Act.

Ground B: The Inspector failed to identify as the primary question for her determination, and reach a reasoned conclusion on, whether the 1952 definitive map and statement shows the correct alignment of the footpath.

42. The essence of Grounds A and B is that the Inspector should have applied the s.56(1) evidential presumption to the 1952 definitive map and statement. In her assessment of the evidence before her she should have, but failed to :

(i) Determine where the alignment shown on 1952 definitive map now runs on the ground (given that the features on the ground have changed since 1952, as has the base mapping), so that the legal alignment of the path could be determined with reference to those existing features, and

(ii) Compare that physical alignment to the alignment shown on the 2013 definitive map, in order to determine whether the copied map correctly shows the legal alignment, or should be modified in accordance with the Order before her.

[20] [**CB/125B**]

43. It is submitted that those steps were legally necessary in order to "*ascertain the true state of affairs on the ground*".[21]

Main issues

44. The Judge identifies the two main issues in the case as follows [**J27**, CB/68-69]:

> " i) What is the effect of the 'conclusive' provision in section 56(1) when the surveying authority are considering whether to make modifications to the map and statement under the provisions of section 53 of the 1981 Act.
>
> ii) What is the definitive map and statement which is to be considered when considering whether to make modifications pursuant to section 53." (**"the second main issue"**)

45. The First Respondent did not submit, either in the acknowledgment of service of the claim [**CB/117**], or their skeleton argument for the hearing [**CB/76**], that the Appellants were wrong to contend that the s.56(1) evidential presumption applied to the 1952 definitive map and statement.

46. The only criticism of the Appellant's submissions on the application of the presumption to the 1952 map and statement is at paragraph 29 of the First Respondent's skeleton [**CB/29**]. It is not there suggested that the presumption applies to a later copy of the modified map:

> "Contrary to the argument at CSA 69, a presumption does not attach to the 1952 map such that the Inspector is somehow required to ignore the draft map, or other earlier evidence". [22]

47. The Second Respondent's view, set out in its delegated report and Statement of Case,[23] and as drawn to the Judge's attention in oral submissions on behalf of the Appellants,

---

[21] *Ex parte Simms* at [387]. That submission was made (without reference to the judgment) in the Appellants' Grounds of application at paragraph 81 [**CB/125S**]

[22] The Appellants did not submit that the Inspector was required to ignore other map evidence. It was and remains common ground that the Inspector was required to take other map evidence into account (s.32 Highways Act 1980).

[23] See paragraph 20, above.

was that the 1952 map and statement are "conclusive evidence" as to the "particulars" of the path, i.e. its existence and its position on the ground.

48. For those reasons, the Appellants did not anticipate argument at the hearing as to whether or not the evidential presumption applied to the 1952 definitive map. The second main issue was therefore dealt with orally.

Appellants' submissions on the second main issue

49. The Appellant made the following submissions on, and relating to, the second main issue under Ground A, as summarised at [**J24**, CB/68] :

> "i) Ms Byrd refined Ground A in her oral submissions. She submitted that the inspector failed to treat the 1952 definitive map and statement as conclusive evidence of the legal alignment of the footpath.
>
> ii) The essence of the submission on this ground is that inspector's starting point should have been that there was a presumption that the definitive map and statement showed the correct route of the footpath and that cogent evidence was required to displace that presumption.
>
> iii) The definitive map and statement to which section 56(1) applied was the 1952 map and statement.
>
> iv) The inspector did not apply the presumption to any version of the definitive map and statement.
>
> v) The inspector did not identify cogent evidence to displace the presumption."

50. The Appellants made the following related submissions under Ground B, summarised (so far as they remain relevant) at [**J35,** CB/70]:

> "i) […] the inspector took the wrong starting point. The correct starting point was the presumption that the definitive map and statement showed the correct route of the footpath.
>
> ii) The presumption applied to the 1952 definitive map and statement".

51. For the avoidance of doubt the Appellants did not contend that the evidential presumption in 56(1) of the 1981 Act operates to prevent changes to the definitive map

and statement when it is reviewed. As the Judge observes at [**J28**, CB/69] and as is established following *ex parte Simms* :

> "Under the statutory scheme, a definitive map and statement are intended to establish, once for all, the existence of a right of way. That is the purpose and effect of section 56(1) of the 1981 Act. Parliament also provided a mechanism which allows addition of and removal of rights of way from a definitive map. When the surveying authority are considering whether evidence shows that a right of way which is not shown on the map and statement subsists, or evidence which shows that there is no public right of way over land shown in the map and statement as a highway, the map and statement is not conclusive evidence of the particulars contained therein. If, in those circumstances, the map and statement were conclusive evidence, section 53 would be of little or no effect."

First Respondent's submissions on the second main issue

52. The First Respondent's submissions on the second main issue are summarised in the judgment[24] as follows:

> "i) The definition of definitive map and statement in section 53(1) of the 1981 Act is subject to the provisions of section 57(3). The effect of section 57(3) is that if a definitive map and statement is modified, and a copy of the map and statement so modified is prepared, it is the copy which shows the definitive map and statement as modified that becomes the definitive map" [**J25 i)**]
>
> ii) The 'conclusiveness' provision in section 56(1) applies unless and until there is a review. On a review section 56(1) does not apply, but the review is to proceed on the presumption that the map is correct. That presumption can be rebutted on the balance of probabilities" [**J/25 ii)**]
>
> iii) The presumption [that the definitive map and statement showed the correct route of the footpath] applies to the definitive map and statement as modified." [**J36 ii)**].

Findings on the second main issue

53. The Judge's findings on the definitive map and statement to which the evidential presumption applies are at [**J30-J31**] and [**J39**]:

> "30. It is necessary to consider the version of the definitive map or statement to which the presumption applies. Ms Byrd submits that the definitive map and statement to be considered in this case is the map and statement prepared in 1952

[24] [**CB/68 - 70**]

under the provisions of section 33 of the National Parks and Access to the Countryside Act 1949.

31. The definition of definitive map and statement set out at section 53(1) of the 1981 Act is subject to section 57(3). Section 57(3) provides that where a definitive map and statement has been modified, and where the surveying authority consider it expedient to, and do, prepare a copy of the map and statement as so modified, the map and statement so modified shall be regarded for all purposes of Part III of the 1981 Act (including section 53) as the definitive map and statement. **In my judgment, if it were not already clear from section 53 itself, section 57(3) makes clear that the definitive map and statement to which the provisions of section 56(1) applies, is the definitive map and statement as modified. Once a definitive map and statement is modified it the map and statement as modified that is the definitive map and statement. For those reasons I reject Ms Byrd's submission that the definitive map and statement to which section 56(1) applied was the map and statement prepared in 1952 (with no modifications)**.

[…]

39. Further, and for the reasons set out above, I do not consider that the map and statement to be considered was the 1952 version. **If a map and statement has been modified following the statutory procedures that is the definitive map and statement; it is the map and statement as modified to which the presumption against change applies**".

GROUND OF APPEAL

54. It is submitted that the Judge erred in law by rejecting the Appellant's submission that the evidential presumption created by s.56(1) of the 1981 Act applies to the original definitive map and statement of 1952 (as copied without modifications to the map of 1970) and finding instead that it applies to "the map and statement as modified" [**J31, J39**].

Reasons

55. The reasons why the above finding was wrong in law are :

(1) The Second Respondent's reason for making the Order was to correct an apparent drafting error on the face of the 2013 definitive map, stemming from an apparent drafting error on the 1987 definitive map (the error being that the path is incorrectly shown as running through the curtilage of Victoria Bungalow). Therefore, the statutory modification process started from the evidential premise that the 2013 definitive map was wrong, and required modification, because it was different to the original 1952 definitive map (as correctly copied onto the 1970 definitive map). There was no evidence of any flaw in the 1952 survey and map-making process, so it must be presumed, and the Second Respondent did presume,[25] that this was correctly carried out. It must, therefore, logically follow that the 1952 definitive map correctly shows the legal alignment of the path unless and until that map is reviewed and modified. The alignment of the path on the 1952 map was not "modified" following the 1970 review. It was, apparently, then incorrectly copied over to the 1987 and 2013 maps. Therefore, the s.56(1) presumption must apply to the original map "with no modifications", contrary to the Judge's findings at [**J31**].

(2) If, contrary to the above submission, the Judge was correct that the s.56(1) presumption applies to the "modified" copy of the map pursuant to s.57(3) - even if (as here) the evidential starting point is that the copy of the map is wrong - then the result is perverse : the "modified" copy of the map is both wrong in fact, and presumptively correct in law.

(3) Section 57(3) of the 1981 Act accords definitive status to a prepared copy of "*a definitive map and statement for any area which [has] been modified in accordance with the foregoing provisions of this Part*", which includes the modification provisions under s.53. The prepared copy is of the whole definitive map and statement "for any area", parts of which have been modified in accordance with Part III of the 1981 Act. It is not the case that the particulars of any and every right of way shown on a "modified" whole map, which may then be copied, must themselves have been "modified". That explains why the apparent error which first appeared on the 1987 definitive map in relation to the alignment of path was simply copied over to the 2013 definitive map "without a legal order". [26] The Judge does not appear to appreciate this at [**J31**] where he finds, with reference to s.57(3), that

[25] Statement of Case at Appendix C, paragraph 12 [**SB/85-86**]
[26] DL/35 at [**CB/130**]

"once a definitive map and statement is modified it is the map and statement as modified that is the definitive map and statement". The correct position in law is that once a definitive map and statement as a whole is modified, if the authority considers it expedient to prepare a copy of that map, they may do so, and the copy becomes the definitive map and statement. So, the definitive map of public rights of way in Kent was subject to modifications prior to 2013, and a copy of it was made and published in 2013, and that became the definitive map for the purposes of s.56(1). However, the particulars relating to the path were never "modified in accordance with" Part III of the 1981 Act. They were simply copied over to the 2013 map in apparent error. It is submitted that s.57(3) cannot lawfully be interpreted as according definitive status, and thereby applying the s.56(1) evidential presumption, to an error on a copied map. That, however, is the result of the Judge's reasoning at [**J31,** CB/69].

(4) If the copy of the definitive map made under s.57(3) is wrong, then the evidential presumption in s.56(1) still falls to be applied. The correct approach in that event is to identify the "definitive map and statement" with reference to s.53(1), but no longer "subject to section 57(3)", and apply the evidential presumption to that map and statement. In this case the 1970 map and statement is the "latest revised map and statement prepared in definitive form under section 33 of the 1949 Act" and so, under s.53(1)(a), the 1970 map is the definitive map to which the "conclusive evidence" presumption in s.56(1) should apply. However, as there are no material differences between the 1970 map and statement and the 1952 map and statement, the Appellants maintain their submission that the Inspector should have started with the presumption that the alignment of the path on the 1952 map and statement was correct, and the Judge erred in law when he rejected that submission for the reasons given at **[J31]** and [**J39]**.

(5) If the Inspector had started with the presumption that the 1952/1970 map correctly shows the alignment of the path, she would have had to determine where that alignment now runs on the ground. In failing to do so she did not undertake the legally essential exercise of comparing the 1952/1970 alignment with the 2013 alignment, before deciding whether the latter should be modified. The evidential presumption in favour of the 1952/1970 alignment therefore played no part in her decision, contrary to s.56(1) of the 1981 Act. This submission was made in the

Grounds of application[27], the Appellant's skeleton argument[28], and repeated orally. In the course of reaching his determination as to the legal effect of s.57(3) at [**J31**] and [**J39**], the Judge rejected it.

56. As a result of the errors of law set out above, the Order subject to challenge has not been confirmed in accordance with the relevant provisions of the 1981 Act, and is therefore wrong in law.

"<u>Important point of principle or practice</u>"

57. While it is submitted that the first appeal test under CPR 52.6 applies, the Appellants additionally submit that an important point of principle and practice is raised and the second appeal test in CPR 52.7(2)(a) is met.

58. If the Judge's reasoning is applied by the Secretary of State when considering modification orders making 'corrections' to a <u>copied</u> map and statement containing a material error, the consequence is that the evidential presumption in s.56(1) of the 1981 should not be applied to the <u>original</u> "unmodified" definitive map and statement. Therefore, the original definitive map and statement will be taken into consideration only as evidence under section 32 of the Highways Act 1980,[29] and given "*such weight [..] as the court or tribunal considers justified by the circumstances*", rather than presumed to be correct. That outcome is directly contrary to the purpose of s.56(1), which, in treating the definitive map and statement as "conclusive evidence" of the existence and alignment of a right of way until reviewed, is to give it <u>more weight</u> than other map or documentary evidence which falls to be considered as evidence pursuant s.32 to of the Highways Act 1980.

59. The practical effect on landowners/prospective buyers of land and order-making authorities, if the judgment stands, is onerous:

---

[27] Ground B at paragraphs 34-35 **[CB/125I]**
[28] Paragraphs 70, 72 [**CB/111**]
[29] See [J18, **CB/66**]

60. When a difference between the current copy of the definitive map and statement, and the original definitive map and statement (i.e. a 'mapping anomaly') comes to light, and if there is no modification order to explain that anomaly :

    a) Landowners/prospective buyers of land cannot presume that the original definitive map and statement correctly records the right of way. That creates significant uncertainty which does not currently exist.

    b) Order making authorities cannot start with the presumption that the original map and statement is correct, but must assume that the current (incorrect) copy is correct. That creates an evidential conundrum which does not currently exist and is legally unsound for the reasons set out in this skeleton argument.

61. For the reasons set out above it is submitted that the Judge's decision to dismiss the Appellants' application on Grounds A and B was wrong in law.

RELIEF

62. The Appellants request that: ~~permission to appeal on the Ground identified at paragraph 54, above, is granted.~~

    (i) The appeal is allowed.

    (ii) The Definitive Map Modification Order is quashed in its entirety, pursuant to Schedule 15, paragraph 12(2) of the 1981 Act, and Civil Procedure Rule 52.20(1).

    (iii) The First Respondent is ordered to pay the Appellants' costs.

~~03 April 2024~~

16 October 2024

NOÉMI BYRD

SIX PUMP COURT

TEMPLE, LONDON EC4Y 7AR