Neutral Citation Number: [2022] EWHC 3049 (Admin)

Case No: CO/3499/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2022

Before :

MRS JUSTICE LANG DBE

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Between :

THE KING	**Claimants**
on the application of	
(1) PIERS MONCKTON **(2) SOMERFORD HOME FARM PARTNERSHIP**	
- and -	
STAFFORDSHIRE COUNTY COUNCIL	**Defendant**
MARTIN REAY	**Interested Party**

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George Laurence KC and Matthew Dale-Harris (instructed by **Michelmores LLP**) for the **Claimants**
William Webster (instructed by **Staffordshire Legal Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 1, 2 and 3 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 1 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Mrs Justice Lang :

1. The Claimants apply for permission to seek judicial review of a resolution by Staffordshire County Council Countryside and Rights of Way Panel, made on 16 July 2021, to order modification of the Definitive Map and Statement of Public Rights of Way ("the DMS") for the District of South Staffordshire, pursuant to the Wildlife and Countryside Act 1981 ("the 1981 Act").

2. The Council received an application from the Interested Party, Mr Martin Reay, pursuant to the 1981 Act, for an order to modify the DMS by the addition of the public footpath from Stretton to the highway to the east of Bickford Grange Farm ("the claimed footpath").

3. Objections were received from the First and Second Claimants who were, at the material time, the owners of most of the land across which the claimed footpath runs. Some of that land has since been transferred to the ownership of the First Claimant's son, but that change has no bearing on this claim.

4. An officer's report ("OR"), dated 21 March 2021, was prepared for the Panel. It recommended that an order be made to add the claimed footpath to the DMS since the evidence submitted by the Interested Party, and the evidence discovered by the Council, was sufficient to show that the claimed footpath, which is not shown on the DMS, was reasonably alleged to subsist along the route marked A-B-C, on the plan attached at Appendix B to the OR (Supplementary Bundle ("SB"), page 227) (hereinafter "the Appendix B plan").

5. On 16 July 2021, the Panel resolved to make the order as recommended in the OR.

6. The claim for judicial review was issued on 13 October 2021. The Council deferred the making of a modification order pending the determination of the claim.

7. On 20 December 2021, I made an order, on the papers, that the application for permission should be adjourned to a hearing so that the Court could determine the Council's submission that permission should be refused on the basis that there was a suitable alternative statutory remedy in Schedule 15 to the 1981 Act. The Claimants' position was that the Panel's resolution was plainly wrong in law, and therefore the Court should intervene to halt the statutory procedure by making an order restraining the Council from acting on the resolution and making a modification order (see the relief claimed in paragraphs 62 and 63 of the Re-amended Statement of Facts and Grounds).

8. To avoid unnecessary duplication, I directed that there should be a rolled-up hearing, so if permission to apply were granted, the Court would determine the substantive claim on the same occasion.

9. The rolled-up hearing was listed in June 2022, but it was adjourned by consent and relisted.

Permission

10. I have decided to refuse permission for two alternative reasons. First, there is a statutory scheme under the 1981 Act for the determination of disputes over proposed modification orders of this kind, which is a suitable alternative remedy to a claim for judicial review. The alternative procedure, which includes an Inquiry by a specialist Inspector, is more appropriate than judicial review, as it will include an independent examination of the facts, followed by an expert judgment on the facts and the law. An aggrieved party may then apply for statutory review by the High Court on a point of law. The second reason is that the Council has given a comprehensive undertaking that the Panel will review its resolution of 16 July 2021, in the light of the new evidence and submissions which have emerged in the course of these proceedings. Therefore the Panel's review decision will, in effect, supersede the resolution under challenge.

The statutory scheme

11. The DMS is a record maintained by the surveying authority (usually the local authority) of the public rights of way within its area. Its purpose is to ensure that existing public rights of way are properly identified and maintained.

12. By section 53 of the 1981 Act, the Council is under a duty to keep the DMS under continuous review. It provides, so far as is material:

> "(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;
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> (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 or a restricted byway;

(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 or restricted byway;

(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) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to -

(a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

…

(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.
>
> ….."

13. In this case, it is claimed that the relevant "event" for the purposes of subsection (2), came within sub-paragraph 3(c)(i):

> "(3)(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 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….."

14. Schedule 14 to the 1981 Act sets out the procedure to be followed when an application for a modification order is made. The application must be in the prescribed form with a map and any evidence which the applicant wishes to adduce in support of the application (paragraph 1). Every owner and occupier of land to which the application relates must be notified (paragraph 2). The authority must investigate the matters in the application and decide whether or not to make the order (paragraph 3).

15. Schedule 15 to the 1981 Act sets out the procedure to be followed when the authority makes an order. Paragraph 3 provides that, upon making an order, the authority shall notify persons affected, publish it and make it available for inspection. Notice of the order shall specify a period of at least 42 days within which representations or objections with respect to the order may be made.

16. An order made by the authority shall not take effect until confirmed by the Secretary of State (paragraph 2). Paragraph 6 provides for confirmation of the order where there are no representations or objections. Paragraph 7 provides for confirmation of the order where there are representations or objections, in which case the Secretary of State shall cause to be held either a local inquiry or a hearing. The Secretary of State may appoint an Inspector to act on his behalf (paragraph 10). In practice, Inspectors with specialist expertise in rights of way are appointed in inquiries under Schedule 15. Paragraph 11 provides for notification of the decision whether or not to confirm the modification order.

17. Paragraph 12 of Schedule 15 confers a right to apply for a statutory review by the High Court, with an ouster clause:

> "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 interest 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."

18. Schedule 4 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 provides, at paragraph 3, that where an authority submits a modification order to the Secretary of State for confirmation, it shall be accompanied by *inter alia* a statement of the grounds on which the authority consider that the order should be confirmed and any representations or objections which have been duly made, together with the observations of the authority on them.

Suitable alternative remedy

19. Judicial review is a discretionary remedy. The Court may, in its discretion, refuse to grant permission for judicial review if a suitable alternative remedy exists, as judicial review is a remedy of last resort. The general principle applied is that the judicial review jurisdiction will not be exercised where alternative remedies are available and have not been exhausted, save in exceptional circumstances.

20. This general principle is confirmed in the case law in many different contexts. It has been helpfully re-stated in *R (Glencore Energy UK Ltd) v Revenue & Customs Commissioners* [2017] EWCA Civ 1021, by Sales LJ, as follows:

> "53. The principle that judicial review will be refused where a suitable alternative remedy is available is not in doubt. However, Mr Grodzinski submits that the section 101 review, taken with an appeal under section 102, is not a suitable alternative remedy, in particular because of one or more of the following features of the case. Under the statutory regime, GENUK has had to pay in excess of £21 million as DPT charged as set out in the Charging Notice and will be out of its money (without the possibility of appealing) for the 12 months of the review period under section 101 and then for the further period of any appeal, even though it may transpire as a result of the appeal that no sum of DPT was due at all. If a court can see in judicial review proceedings that there was an error (or at any rate what could be regarded as a "fundamental" error) on the part of the Designated Officer in issuing the Charging Notice, the reviewing court should step in immediately to quash the notice without waiting for the review and appeal procedure to be followed. Further, the complaints made by GENUK under grounds (1) to (3) only affect the issuing of the Charging Notice in the first place, which triggered the obligation of GENUK to pay the sum claimed in it, and do not go to the ultimate question whether that amount of DPT was or

was not due from GENUK. The FTT on an appeal will address that ultimate question, but it has no jurisdiction to exercise a review function in relation to the issue of the Charging Notice in the first place. Instead, the review court should be prepared to step in to address the distinct complaints about the lawfulness of issuing the Charging Notice in the first place and to quash it if they are made out.

54. In order to evaluate these submissions, it is necessary to consider the basis for the suitable alternative remedy principle. The principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the Designated Officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.

55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.

56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two

sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

57. In my judgment the principle is applicable in the present tax context. The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the tax collection process has been initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that sort of problem will be by way of appeal.

58. For reasons of this kind it has long been established at the highest level that "Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision": *In re Preston* [1985] 1 AC 835, 852D per Lord Scarman; see also p. 852F ("I accept that the court cannot *in the absence of special circumstances* decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair" [emphasis in original]); and p. 862B-F per Lord Templeman, with whom the other members of the appellate committee agreed ("Judicial review process should not be allowed to supplant the normal statutory appeal procedure"; unless the circumstances are exceptional and involve an abuse of power of a serious character, as explained at pp. 864F-H and

866G-867C). In that case, the allegation was that the Inland Revenue Commissioners had made a promise not to collect tax in certain circumstances (i.e. had created what would today be called a legitimate expectation not to collect an amount of tax), and although the allegation was not made out the House of Lords was prepared to accept that such a claim could be made by way of judicial review. In fact, the tax appeal process would have been incapable of dealing with such a claim of unlawfulness on the part of the commissioners, which did not go to the merits of whether the criteria for imposition of tax were or were not met (a subject fit for examination on appeal) but rather to enforcement of fundamental rule of law standards against the commissioners if they had in fact made a promise not to initiate the tax collection process in the first place.

59. In my view, *Preston* provides relevant guidance in the present case. Apart from the review procedure under section 101 FA 2015, the statutory context here is a typical one of assessment by the HMRC of a taxpayer to tax with the taxpayer having a right of appeal against that assessment on the merits. There is nothing exceptional about the nature of the objections which GENUK has raised in relation to the Charging Notice.

60. The arguments GENUK puts forward under Ground (4) go directly to the underlying merits of the assessment to tax which has been made and are clearly suitable for determination on an appeal, which is where they should be dealt with. If GENUK wishes to contend that the objections it makes to the charge to DPT are obvious and can be disposed of in a summary way, it is open to it to apply to the FTT to exercise its wide case-management powers on the appeal to do that. Recourse to judicial review in an attempt to achieve such an objective is not appropriate.

61. The arguments GENUK puts forward under Ground (1) (wrong test applied) also relate to the merits of the assessment, even though the precise way in which it is put, as a challenge to the issue of the Charging Notice, would not be the form in which the argument would be examined on an appeal. But that is not enough to turn GENUK's case into an exceptional one, of a kind in relation to which the House of Lords in *Preston* would have accepted that judicial review should be available. Parliament must of course have contemplated that sometimes HMRC would make errors of law in their assessment of DPT as set out in a Charging Notice, and the appeal process laid down by Parliament allows any error of assessment to be rectified. It is not any and every arguable error of law by a Designated Officer in issuing a Charging Notice which takes a case outside the contemplation of Parliament that an appeal is the appropriate remedy and which outweighs the general arguments why

> ordinarily judicial review should not be available, but only where there is some serious error amounting to an abuse of power. It is only in that exceptional type of case that there is a compelling need for the court to intervene by way of judicial review in order to vindicate the rule of law, overriding the usual considerations which ordinarily mean that the appeal should be treated as the suitable remedy to be pursued."

21. There are two relevant authorities concerning modification orders under the 1981 Act. However, I should make it clear at the outset that there is no special principle applicable to modification orders under the 1981 Act, nor to the tax regime considered by the Court of Appeal in *Glencore*. The general principles identified by Sales LJ in *Glencore* apply in all judicial review claims, though obviously the specific statutory context may affect the way in which the court's discretion is exercised.

22. In *R v Cornwall CC, ex parte Huntingdon & Anor*, heard with *R v Devon CC, ex parte Isaac & Anor* [1994] 1 All ER 694, the Court of Appeal held that the court had no jurisdiction to quash a decision to make a modification order or the order itself by way of judicial review. Simon Brown LJ approved the judgment of Brooke J. when refusing permission to apply for judicial review of the modification order made by Cornwall County Council, at 700J-701C:

> "I would approve what Brooke J. said to substantially the same effect in the Cornwall application ([1992] 3 All ER at 576):
>
> > "it is quite clear, in my judgment, that Parliament intended to prescribe a comprehensive programme of the events which should happen from the time the relevant authority sets in motion the consultation process mentioned in para 1 of Sch. 15, and that once the order is made the prescribed procedure then follows, without any interruption for legal proceedings in which the validity of the order is questioned, until the stage is reached, if at all, when notice of a decision is given pursuant to the procedure prescribed in para 11. It is then, and then only that Parliament intends that a person aggrieved by an order which has taken effect shall have the opportunity of questioning its validity in the High Court provided that he takes the opportunity provided for him by para 12(1) of Sch 15 ….."

23. In *R v Wiltshire County Council, ex parte Nettlecombe Ltd* Knights Local Government Reports 96 LGR 386; [1998] JPL 707, Wiltshire County Council had resolved to make a modification order but undertook not to make the order until the claim for judicial review was determined. Dyson J. held that the decision was "plainly erroneous" (at 393A) and ought to be quashed. At 394A, he cited *R v Camden London BC, ex p. Comyn Ching and Co (London) Ltd* (1984) 57 P & CR 417 in which:

> "The council had resolved to make a compulsory purchase order, but had not made it. Woolf J held that the court was not deprived of jurisdiction by reason of section 25. He then went on to consider whether he should exercise his discretion to grant

judicial review. He said that in the majority of cases, notwithstanding his interpretation of section 25, it would be wrong for the court to hear an application for judicial review. In the normal situation, it would be preferable for the court to defer any application to the court until after the matter had gone before the Secretary of State. Nevertheless, on the facts of that case, he did exercise his discretion in favour of granting relief. He regarded it as a clear case. He said, at p 426:

> "The difficulties with regard to evidence make it clear that whereas the court should intervene when it is necessary to do so, it also must bear in mind the danger of intervening in those situations where there is no obvious and clear requirement that it should do so. In my approach to the matters which are before me, I propose to bear very much in mind the desirability as a matter of discretion of the court not intervening and dealing with matters where it is not clear that it is necessary to do so, and in particular where it is not clear that all the material which could be put before the court has been put before the court.""

24. Dyson J. held that the court had jurisdiction to hear the claim and allowed the claim for judicial review in the exercise of his discretion, at 395A – 395C:

> "In my judgment, the court does have jurisdiction to entertain the application in the instant case. No good reason has been advanced against the existence of such jurisdiction. The existence of the statutory regime alone, in circumstances where it is accepted that the ouster clause does not bite, is not enough ... It might be said that the fact that the ouster clause deals with certain situations gives rise to the inference that Parliament did not intend to exclude the availability of judicial review in other situations. I prefer, however, to rest my decision on wider considerations. There has to be a good reason to deny jurisdiction. Prima facie, a party is entitled to have recourse to the courts. It seems to me that the existence of the statutory remedy of public inquiry by an inspector and statutory appeal thereafter is relevant to the question of whether I should refuse relief in the exercise of my discretion. I do not consider that it goes to jurisdiction. I find it difficult to detect any material distinction between the present case and *ex parte Comyn Ching* (*supra*). Mr Gordon did not identify any such distinction. His argument involves the proposition that, where a council is threatening to commit a plain error of law (as I have found to be the position in the present case), an aggrieved party cannot seek the intervention of the court. Instead, he or she is obliged to embark on the often time consuming and costly procedure of a public inquiry, in which objectors can make representations, possibly involving detailed factual investigations, with the risk that the inspector may repeat the council's error of law. Mr

> Gordon did not seek to justify this, save by reference to the existence of the statutory regime.
>
> There is nothing in *Isaac* (*supra*) which supports the proposition that errors of law made by a council ought not to be reviewed by the court in advance of the council acting on its decision by making an order. That case is distinguishable from the present case, in that it was not concerned with a prospective, but with a retrospective challenge to the making of an order.
>
> Mr Gordon did not seek to argue that if the jurisdiction exists I should not exercise my discretion to quash the council's decision. I propose, therefore, to grant judicial review. It is important to add that, in my view, the discretion should be exercised cautiously, and only in clear cases where there has been a plain error of law. In any case where the position is uncertain, and especially where the issues raised involve questions of fact, it is most unlikely that it would be appropriate to exercise the court's discretion in favour of granting relief. That is not, however, this case."

25. Applying these principles to this case, as no modification order has been made, I consider that the ouster clause in paragraph 12(3) of Schedule 15 to the 1981 Act does not exclude this Court's jurisdiction. However, as Sales LJ confirmed in *Glencore*, at [54], the suitable alternative remedy principle does not apply as the result of any statutory provision to oust the jurisdiction of the Court on judicial review. It is applied in the exercise of the Court's discretion, to give effect to the principle that judicial review is ordinarily a remedy of last resort (at [55]).

26. It is apparent from the judgment in *Nettlecombe* (at 395B) that Wiltshire County Council did not seek to argue that, if the jurisdiction existed, the court should not exercise its discretion to grant relief because of the existence of a suitable alternative remedy. The principle that the Court should not grant permission where there is a suitable alternative remedy does not appear to have been relied upon by Wiltshire County Council at permission stage either. Probably because of the way the case was presented to the court, Dyson J. dealt briefly with the issue, in a pragmatic manner. He did not address the principle that judicial review is a remedy of last resort and so the court should only intervene by way of judicial review in exceptional circumstances. He placed significant weight on the benefit for the claimant of bypassing "a time-consuming and costly procedure of a public inquiry" (at 394G), but gave little weight to the legislative intention of Parliament that the making of modification orders should be subject to the safeguards of an Inquiry and consideration by the Secretary of State. The principles have now been fully considered in *Glencore* by Sales LJ at [55] – [57]. Therefore, in my view, the recent judgment of the Court of Appeal in *Glencore* is a more authoritative guide to the suitable alternative remedy principle than the High Court judgment in *Nettlecombe*.

27. There is ample authority to the effect that the issue as to whether or not there is a suitable alternative remedy should usually be considered at permission stage (see Fordham: Judicial Review Handbook (7th ed.) at paragraph 36.3.12). In *Glencore*, Sales LJ said at [71]:

> "For the reasons given above, I consider that the judge was correct to hold that there was a suitable alternative remedy in this case and to refuse to grant permission to apply for judicial review. If I had been in his position I would have done the same. Since permission to apply for judicial review has been granted by the order of Hickinbottom LJ, we are considering the claim for judicial review at the substantive hearing stage, but the same reasoning leads me to conclude that this court should exercise its discretion to refuse to grant any relief by way of judicial review on the grounds that a suitable alternative remedy exists."

28. The suitable alternative remedy in this case is the statutory procedure in Schedule 15 to the 1981 Act, under which a proposed modification order made by the Council has to be confirmed by the Secretary of State. Where there are objections to the proposed order (as in this case), the Secretary of State will appoint a specialist Inspector, with expertise in rights of way, to hold an Inquiry and decide on behalf of the Secretary of State whether or not the proposed modification order should be confirmed.

29. An aggrieved person may apply to the High Court for a statutory review of the Inspector's decision to confirm an order. An ouster clause in paragraph 12(3) of Schedule 15 provides that the validity of an order shall not be questioned in any other legal proceedings.

30. Applying the guidance of Sales LJ in *Glencore* at [55] and [56], Parliament has made it clear by its legislation that this is the procedure which is to be followed in a standard case. It reflects Parliament's judgment as to the procedures which are appropriate in this context, and that judgment should be respected by this Court.

31. In my view, the statutory procedure is clearly a suitable alternative remedy; indeed, I consider it is a more suitable remedy than a claim for judicial review in this case because of the Inspector's fact-finding role. The factual and legal issues will be examined in depth by a specialist Inspector, with expertise in rights of way, and experience in the interpretation of plans and other historical records typically relied upon in such cases. The Inspector will also conduct site visits, which are likely to assist in clarifying some aspects of the evidence in this case.

32. Other local people, not just the Claimants, will be able to attend the Inquiry, and benefit from a transparent public process which may affect public rights of way. It is possible that local people will have relevant information to contribute about the use of the disputed footpath. The Claimants will have ample opportunity to make their case, as will the Council.

33. In contrast, this Court does not have the expertise of an Inspector who is a specialist in rights of way and it is not equipped to make findings of fact, nor to interpret the evidence, in the way that is required in this case. The process of preparing for an Inquiry will also focus the minds of the Claimants and the Council on the importance of searching for, and disclosing, all relevant material. Until now, evidence has emerged erratically from both parties, without adequate excuse for delay, even as late as the final day of the hearing before me. In my view, it is more than likely that there is further relevant evidence available which will be material to the issues in dispute.

34. In so far as issues of law arise, it is plainly preferable that they are determined on the basis of clear findings of fact made by the Inspector, rather than upon the assumptions and inferences that I have been invited to draw, but cannot substantiate. If the Claimants identify any arguable error of law in the Inspector's approach, they will be able to apply for a statutory review of the decision in the High Court. The Court hearing the statutory review will have the benefit of the Inspector's findings of fact, which I do not.

35. So the question I have to consider is whether, despite the benefits of the statutory procedure, this is an exceptional case in which there has been some serious error of law by the Council which gives rise to a compelling need for the Court to intervene by way of judicial review, in the public interest, and which overrides the usual considerations in favour of pursuing the statutory procedure (per Sales LJ at [55] and [61]). Sales LJ gave as an example a case where it is clear that a public authority is acting in defiance of the rule of law (at [55]).

36. In *Nettlecombe*, Dyson J. considered, at 395B-C, that this Court's discretion to intervene "should be exercised cautiously, and only in clear cases where there has been a plain error of law. In any case where the position is uncertain, and especially where the issues raised involve questions of fact, it is most unlikely that it would be appropriate to exercise the court's discretion in favour of granting relief."

37. Applying these criteria, in the exercise of my discretion, I do not consider that this is an exceptional case in which the Court should intervene so as to allow a claim for judicial review to proceed part way through the statutory procedure laid down by Parliament. There are factual issues to be examined and determined. The parties are likely to obtain further evidence to address those factual issues in the course of preparation for an Inquiry. Further, I am not persuaded that there is any serious error of law in the Council's resolution which gives rise to a compelling need for the Court to intervene in the public interest at this stage. I consider the specific grounds of challenge below.

The duty of the surveying authority under the statutory scheme

38. In *R (Roxlena Ltd) v Cumbria CC & Anor* [2019] EWCA Civ 1639, the Court of Appeal gave important guidance on the duty of the surveying authority under section 53(3)(c)(i) of the 1981 Act, which provides:

> "(3)(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 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….."

39. The Court of Appeal held that the question for the surveying authority was whether it was at least reasonable to allege that the right of way subsists. It was not its task to decide whether, on the balance of probabilities, the claimed right of way subsists, as

this would anticipate the outcome of an Inspector's consideration of the evidence presented to him and tested at an Inquiry. In a legal challenge to the surveying authority's decision, public law standards of review applied. The questions for the court to consider were (1) did the Panel misdirect itself on the relevant statutory provisions, and if so, (2) was its decision irrational or otherwise unlawful.

40. Lindblom LJ held as follows:

> "*Was there sufficient evidence to justify making the order for the footpaths?*
>
> 31. Before the judge, and again before us, Mr Laurence argued that there was insufficient evidence to justify adding the claimed footpaths to the definitive map and statement. The clear, and correct, advice in the officer's report in December 2016 was that the county council should not make an order for the footpaths because the officers were not satisfied they could mark the routes on the draft order map precisely enough. In reaching this conclusion the officers had departed from the view they had expressed in the March 2016 report. They had done so in the light of the argument presented by Roxlena's solicitors' letter dated 22 March 2016. Their revised view was rejected by the committee for no obvious or good reason. Their advice that the committee did not need to follow their recommendation was tantamount to saying, wrongly, that even though the footpaths could not be accurately drawn on the draft order map without a site survey, it would still be reasonable to allege they subsisted - as the officers had advised in the March 2016 report.
>
> 32. Mr Laurence submitted that the "reasonably alleged to subsist" test in section 53(3)(c) of the 1981 Act could not be satisfied, for the purposes of making an order, if the evidence would be insufficient to demonstrate, on the balance of probabilities, that the asserted right does in fact subsist. In this case the evidence was insufficient to demonstrate that. At its January 2017 meeting the committee should have been advised that the uncertain evidence about the position and alignment of the claimed footpaths was insufficient to justify confirmation. That advice was not given, nor did the committee consider the question. This was fatal to the county council's decision to make the order. It was a "plain error of law" (see the judgment of Dyson J., as he then was, in *R. v Wiltshire County Council, ex p. Nettlecombe Ltd. [1998] 96 L.G.R. 386*, at p.394).
>
> 33. Kerr J. did not accept those submissions. In his view the "exacting standard of precision" demanded by Mr Laurence was higher than the law requires and would often be impossible to meet - for example where, as in this case, a "determined and hostile landowner" exercises his right not to co-operate in the process by permitting access to the land (paragraph 61 of the judgment). Agreeing with observations made by Sir George

Newman in *Perkins v Secretary of State for Environment, Food and Rural Affairs [2009] EWHC 658 (Admin)*, the judge said the surveying authority must make a judgment on the best evidence it has. Here the county council's committee was entitled to take the view that the evidence of the alignment and width of the footpaths was sufficient (paragraph 62). It would be a rare case where the court was prepared to "second-guess" the outcome of an inquiry to determine the force of the objectors' case, when the objection was an attack on the exercise of the surveying authority's judgment. This would normally only be done where "the high *Wednesbury* threshold" was reached (paragraph 63). At its meeting on 4 January 2017 the committee had accepted Councillor McGuckin's contention that it was able to "take a reasonable decision that these paths exist" (paragraph 65). The "strength or weakness" of an order, said the judge, is "what the inspector is there to determine" (paragraph 66). The committee had not acted unlawfully by preferring the officers' view in the March 2016 report to that in the December 2016 report. Roxlena's attack on the adequacy of the map and other evidence could be made to an inspector in an objection to the order's confirmation (paragraph 69).

34. Mr Laurence submitted that the judge's approach was wrong. The judgment in *Perkins* did not support the proposition he drew from it. The fact that a landowner exercises his right to deny access to his land is wholly irrelevant to the standard of evidence required to support the making of an order under section 53. The judge was also wrong, said Mr Laurence, not to conclude that if the evidence was insufficient to demonstrate on the balance of probabilities that the claimed footpaths did subsist on the alignments shown on the draft order map, and thus to justify the confirmation of the order, it could not have been reasonable to allege their subsistence, to justify making the order. It was not right to conclude, as he did, that the question of whether the evidence would support confirmation could be put off to an inquiry. Every authority faced with an application under section 53(5) must ask itself whether, if the order were unopposed, the evidence taken at its highest in favour of the public would support confirmation.

35. I cannot accept this argument. I think the judge's approach and reasoning were correct. The court's role here is to consider whether the county council could lawfully make the order it did. In a more refined form, that question is essentially whether, at its meeting on 4 January 2017, the committee could lawfully decide to take a different course from that recommended to it in the December 2016 report. As the judge recognized, the test by which this question is to be answered is a public law standard of review. Did the committee misdirect itself on the relevant statutory provisions? And if it did not, was its decision

unreasonable in the "Wednesbury" sense, or otherwise unlawful? The answer to both questions, in my opinion, is "No".

36. I see no basis for concluding that the committee misunderstood the relevant statutory provisions. There is nothing in the minutes of its meeting on 4 January 2017, or in either of the officer's reports, to suggest it did.

37. Under the 1981 Act the order-making part of the process is separate from confirmation, and involves a different approach to the evidence. This has been consistently recognized by the courts. The procedure under Schedule 14 to the 1981 Act was described by Roch L.J. in *ex p. Emery* (at p.377b) as "preliminary". He said (at p.377e-h) that "[where] there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, … then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists". However, where there is "conflicting evidence on one or other or both issues", an authority "must bear in mind that an order under [section] 53(2) made following a [Schedule] 14 procedure still leaves [objectors] with the ability to object to the order under [Schedule] 15 when conflicting evidence can be heard and those issues determined following a public inquiry". He went on (at p.379c) to approve observations made by Owen J. in *R. v Secretary of State for the Environment, ex p. Bagshaw (1994) 68 P. & C.R. 402* (at pp.407 to 409) - that the words of section 53(3)(c)(i) indicate "that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right of way does subsist", and that "bearing in mind the structure of [the 1981 Act], this seems to be clear". He also endorsed Owen J.'s formulation of the relevant question as being "Does the evidence produced by the claimant together with all the other evidence available show that it is reasonable to allege a right of way?". Consistent with this is another observation made at first instance, by Evans-Lombe J. in *Todd v Secretary of State for Environment, Food and Rural Affairs [2004] EWHC 1450 (Admin)* (at paragraph 51(iii)) - that the provisions of paragraph 6 of Schedule 15, which confer on an authority a discretion to confirm unopposed modification orders, "… imply a revisiting by the authority … of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage".

38. As Mr Alan Evans submitted for the county council, the statutory regime does not provide, or imply, that the surveying authority may only make an order under section 53 of the 1981 Act if it has first concluded not merely that a right of way

actually "subsists" or is "reasonably alleged to subsist", but also that, on the balance of probabilities, the order will actually be confirmed after all the relevant evidence, whatever it may be, has been considered by an inspector at an inquiry. This would be a much more onerous requirement than Parliament saw fit to impose on a surveying authority at the order-making stage.

39. The submissions made by Mr Laurence seem to conflate the two stages of the statutory process: the making of the order and its confirmation. As the judge held, this is inappropriate. It is not the surveying authority's task, when considering whether an order should be made, to anticipate the outcome of an inspector's consideration of the evidence presented to him and tested before him at an inquiry, effectively forestalling that stage of the process. This would be the consequence of substituting the balance of probabilities standard of proof for the reasonable allegation test at the order-making stage. The crucial question for the surveying authority at that stage is whether it is at least reasonable to allege that the right of way subsists. Sometimes it will be clear that this is not a reasonable thing to allege - for example, where there is a conflict of evidence and it becomes obvious that the allegation of a right of way subsisting will be impossible to maintain. But if in the view of the authority the allegation is reasonable, it may make the order.

40. There are two alternatives under section 53(3)(c)(i): either that the right of way subsists or that it is reasonably alleged to subsist. If the surveying authority were obliged to apply the balance of probabilities test to the allegation of a right of way subsisting, that distinction would be eroded or removed. This cannot have been what Parliament intended by including the second alternative. The statutory purpose is not hard to discern: that orders may be made where the relevant allegation is reasonable, but not unless it is.

41. Mr Laurence's argument does not draw strength from *ex p. Emery*, or any other case law to which he referred - including *O'Keefe v Secretary of State for the Environment [1996] J.P.L. 42*. In *ex p. Emery* Roch L.J. accepted (at p.379d-f) that in some circumstances a claim could be rejected "as an unreasonable allegation, because a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail". By contrast, however, "where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under [section] 31 [of the 1980 Act], then the allegation that the right of way subsists is reasonable …, unless there is documentary evidence which must inevitably defeat the claim either for

example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that the use of it by the public could not give rise at common law to any presumption of dedication" (ibid.). This reasoning, with which I agree, lends no support to the concept that in such a case the surveying authority must, at the order-making stage, suspend or disapply the test of reasonable allegation and scrutinize the case for confirmation by applying the balance of probabilities.

42. At its meeting on 4 January 2017 the committee was correctly advised on the task it had to perform, and the approach required under the statutory scheme. The advice in paragraphs 7.5 and 7.6 of the December 2016 report shows no legal error. It properly reflects the separate stages of order-making and order confirmation, and the different evidential requirements in each. The committee only had to resolve, on the material then before it, whether the proposed order should be made. The decision was, of course, for the members to make, not the officers. The committee was guided by the December 2016 report, to which the March 2016 report was appended. The advice given in the December 2016 report was presented to the members both with a justification for deciding to make the order and with a justification for deciding not to do so. It set out, and discussed, the various contentions put forward on behalf of Roxlena in opposition to the making of the order, including the legal arguments. The officer acknowledged that the case was "complex … with conflicting evidence" (paragraph 9.1), and "finely balanced" (paragraph 9.2). In view of his misgivings about the evidence on "the exact alignment" of the claimed routes, he recommended that the order should not be made, but he expressly advised the committee that it did "not need to follow" his recommendation (paragraph 9.4): in effect, that it was reasonably open to them to take a different view on the evidence before them - which they clearly did.

43. The committee's decision, though contrary to the officer's recommendation, was not irrational. The members were entitled to take the view they did of the material before them, to conclude that the shortcomings of the evidence on the exact alignment of the claimed routes did not prevent the order being made, and to accept the opinion expressed by the officer in the March 2016 report that the evidence was sufficient to show a "reasonable allegation" that the rights of way subsisted. This was a matter for their own judgment. Unless the exercise of that judgment was flawed by some significant error of fact, it could only be impugned on "Wednesbury" grounds.

44. As Sir George Newman said in *Perkins* having referred to observations made by Purchas L.J. in *R. v Secretary of State for the Environment, ex p. Burrows and Simms [1991] Q.B. 394*, "…

if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question"; and "[where], as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes … there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence" (paragraph 14). In that case the inspector appointed to decide whether or not to confirm two footpath orders, had dealt with various issues relating to the precision with which the claimed footpath should be shown on the definitive map and described in the statement. In Sir George Newman's view, "[her] conclusions on those various points were a matter of judgment for her on the evidence available and, to a degree, were for her discretion as to how things should be shown within the Order" (paragraph 16). The inspector had concluded, on the material before her, that the description in the statement, taken with the map, would enable a reasonable person to understand where the footpath was. Sir George Newman saw this as "a matter for the planning judgment of the Inspector" and saw no grounds for interfering with her conclusion (paragraph 17).

45. A similar conclusion applies no less in this case - where we are concerned only with the evidence being considered at the order-making stage, not the evidence as it might eventually be before an inspector at an inquiry. The committee did not make any error of fact, nor did it overlook any relevant material available to it, and in my view its impression of the evidence falls within the range of reasonable judgment. The judge's conclusion to this effect is unimpeachable. There is nothing to suggest that the committee decided as it did because it thought it was unnecessary, or unimportant, in the course of the statutory process, to establish the location and alignment of the claimed paths with as much accuracy as was possible. This was not the tenor of comments made by members, including Councillor McGuckin, in the discussion at the meeting on 4 January 2017. It was not being said that all the committee required was evidence, however slight, of the public using some, though indeterminate, route across the land. The real thrust was that the evidence of the location and alignment of the claimed routes, though by no means perfect, and not as good as it might have been had the land been surveyed, was still sufficiently clear.

46. The judge recognized this. He did not misunderstand the reasoning in *Perkins*. He did not gauge the reasonableness of the committee's exercise of judgment by the false criterion that even if the evidence of location and alignment was likely to prove inadequate for the depiction of the route on the definitive map and its description in the statement, the evidence as it was would

> have to suffice. That is not what was said in *Perkins*. And it is not what Kerr J. said in his judgment here. He simply concluded (in paragraphs 61 and 62) that the committee was reasonably entitled to find the evidence of location and alignment good enough to justify making the order. This was not to reduce the accuracy envisaged in *Perkins*. It was entirely consistent with the reasoning there, and in my view correct."

Challenges to an officer's report

41. The Panel did not give a statement of reasons and therefore the Claimants' challenge was directed at the OR which recommended that the resolution should be made. In my view, the principles which apply to challenges to reports of planning officers apply by analogy to this case. Reports are not to be read with undue rigour but with reasonable benevolence. The question is whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing on their decision so that, but for the flawed advice it was given, the Panel's decision would or might have different. Minor or inconsequential errors may be excused.

42. The principles to be applied when considering a challenge to a planning officer's report were summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> > (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
> >
> > (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he

then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

Grounds of challenge

Grounds A - D

43. In relation to the southern part of the claimed footpath (A-B), the Claimants submitted that the Council's conclusions were founded on an unlawful approach to the two orders made by the Justices at the 1827 and 1828 Quarter Sessions (under the 1773 and 1815 Highway Acts) in that:

    i) **Ground A**: on its proper construction the confirming 1828 order did not reserve a footway, as held by the Council.

    ii) **Ground B**: as a matter of statutory interpretation, the 1773 and 1815 Highway Acts under which the orders were made contained no power by which a footway could be reserved.

    iii) **Ground C**: in the alternative, even if the Justices had intended to reserve a footway it could only have taken effect in relation to the southernmost section of the claimed footpath, marked as A to A1 on Map 1 (a plan submitted by the Claimants as Appendix 9 to their pre-action letter of 29 September 2021 (Core Bundle page 249)).

    iv) **Ground D**: in any event, the 1827 Order did not provide a basis for a lawful conclusion that a footway had existed prior to 1827.

44. In response, the Council submitted that the 1827 decision of the Justices at the Quarter Sessions, which stopped up several highways, bridleways and footpaths, expressly did not stop up the existing footpath between points C and K, as shown on the Plan. The decision stated that the stopping up was "subject to a right of footway from the point marked C to the point marked K on the said plan".

45. The Council submitted that the Justices did not purport to create or reserve a new right of way, as this was outside their powers. They merely recorded the presence of an established footpath which was preserved, despite the stopping up of an adjoining right of way for vehicular and equestrian traffic. It was reasonable to assume that they made their order, and preserved the claimed footpath, on the basis of the evidence adduced before them at the time.

46. The Council further submitted that the 1828 order merely confirmed the order of 1827. It listed the ways that were to be stopped up but there was no mention of the footpath which the 1827 order stated was to be kept open. However, unlike the order of 1827, the 1828 order was not accompanied by any map or reasoned decision. As Mr Laurence KC accepted, the 1828 order had to be read by reference to the map attached to the 1827 order, which expressly identified the existing rights of way which were to "remain open", in coloured ink, including the claimed footpath. In 1828, the Justices did not purport to vary the 1827 order, by stopping up the footpath that the 1827 Justices had identified as remaining open. Furthermore, these orders were never challenged on appeal.

47. There was a factual dispute between the parties as to the length of the claimed footpath referred to in the 1827 order, its alignment, and whether it was intended to lead to the two named settlements (Whiston and Bigford (now Bickford)).

48. After the resolution was made, the material was reviewed by the two experts instructed by the Claimants (Mr Rocks and Mr Carr) and the Council's in-house expert cartographer, Ms S. Frost. Their work generated further information and disputed issues.

49. Ms Frost used Ordnance Survey ("OS") base mapping to clarify the older mapping, in particular the 1827 map. The parties disagreed as to whether the improved image of the plan attached to the 1827 order did or did not show that there was a separate freestanding footpath, alongside the highway that was stopped up. Ms Frost also referred to OS maps from 1880 and 1902 which showed footpath routes, including the claimed footpath. The Claimants conceded that there was a pedestrian route in 1827, but questioned whether its alignment corresponded with the alignment of the route later shown on the 1880 and 1902 OS maps.

50. In my judgment, Grounds A to D raise issues of fact finding, and in particular, resolving disputed interpretation of maps, which are better suited to determination before a specialist Inspector at an Inquiry, than in a judicial review claim. In so far as they also raise issues of law (e.g. the effect of the 1828 order), the answer is far from clear on the evidence currently before me. These issues are well within the competence of a specialist Inspector to determine, and of course, a statutory review is available in the event of an error of law. In my judgment, Grounds A to D do not disclose any serious and obvious error of law in the Council's decision which gives rise to a compelling need to intervene by way of judicial review, in the public interest.

Grounds E and F

51. The Claimants submitted that the Council also erred in relying upon:

    i) **Ground E**: the Finance Act 1910 material; and

    ii) **Ground F**: on Parish Surveys or other material prepared under the National Parks and Access to the Countryside Act 1949 ("the 1949 Act").

    Properly construed, neither source of information provided a defensible or rational basis for the conclusion that the route was reasonably alleged to subsist between points B-C on the Appendix B plan. The Council recognised that the 1827/28 Quarter Sessions material only related to points A-B on Appendix B plan, and so this evidence was crucial in relation to points B-C.

52. Ground E concerned the Finance Act 1910 which introduced a tax on land. Landowners were able to apply for a reduction in the tax payable in respect of their land where the land was crossed by public rights of way. Therefore documents and plans produced under the Finance Act 1910, namely, the Field Book and Plan under hereditament reference 610, were relied upon in the OR as evidence of the existence of footpaths across 3 fields, and a deduction of £20 from the tax payable because of the right of way use.

53. The OR stated:

> "25. The Finance Act material submitted by the Applicant shows that tax relief was granted for footpaths that crossed the plots referred to. An examination of the maps shows that there are 3 footpaths in lot 610 and the routes are annotated on the accompanying map.
>
> 26. ….For plot 610 the landowner did make a claim for footpaths.
>
> 27. The valuers did note that there were public footpaths and made a note on the field book. They granted relief for the paths that crossed the land which they would not have done unless satisfied of their existence."

54. The Claimants submitted that the OR was misleading, as the material showed that tax relief was only granted for one footpath. There were three footpath routes across hereditament 610 and it was not possible to be satisfied which route the claim was for.

55. The Council conceded that the OR erred in stating that tax relief was granted for more than one footpath. However, with the benefit of base mapping and analysis by Ms Frost (after the date of the resolution), the Council submitted that the Field Book entries related to a public footpath running across 3 identified fields in hereditament 610. The other footpaths referred to by the Claimants could not possibly be the public footpath, for various reasons.

56. In my judgment, the admitted error in the OR did not amount to a serious and obvious error of law which gave rise to a compelling need to intervene by way of judicial review. The remaining dispute between the parties as to the correct identification of the public path for which tax relief was granted is an issue of fact and judgment. It is better suited to determination before a specialist Inspector at an Inquiry, than in a judicial review claim.

57. Ground F concerned Parish Survey records produced for the purposes of the 1949 Act. The OR stated, at paragraphs 35 and 81, that the Penkridge Parish survey cards supported the claimed footpath from B-C on the Appendix B map. They showed that there was an objection received regarding the omission of the alleged route, and in consequence, the route was added to the Parish Survey as a footpath.

58. The Claimants submitted that this advice was misleading. The section of the footpath that was recommended for inclusion, and eventually included in the DMS, ran south of point D as far as C. However, the section of the claimed footpath which ran south of point C to points PI/P2 (on the plan at Exhibit SF10 to Ms Frost's second statement) was struck out from the Provisional Map and Statement ("the PMS"), following a declaration by the Quarter Sessions, on 5 November 1965, that there was no right of way.

59. The Council conceded that the OR was in error in advising that the Penkridge survey cards supported the existence of the claimed footpath, and no longer relied upon this point. The evidence regarding the declaration by the Quarter Sessions on 5 November

1965 only came to light after the resolution was made. However, the Council submitted that there was sufficient other material to satisfy the "reasonably alleged to subsist" test in section 53(3)(c)(i) of the 1981 Act.

60. In these circumstances, I conclude that this error in the OR did not amount to a serious and obvious error of law which gave rise to a compelling need to intervene by way of judicial review.

Ground F1

61. Under Ground F1, the Claimants submitted that the Council erred in acting contrary to, and without regard for, the effect of the order of the Quarter Sessions of 5 November 1965, made pursuant to section 31(3)(a) of the 1949 Act, which declared that no public right of way subsisted over the section of the route proposed to be added by the PMS (the section of the footpath between points C and points P1/P2 shown on the plan at Exhibit SF10 to Ms Frost's second statement). The declaration was conclusive of the non-existence of public rights over this section of the claimed footpath, by virtue of section 31(8) of the 1949 Act which provided that "a declaration made under this section shall be conclusive evidence of the matters stated in the declaration".

62. Although the 1949 Act was repealed by the 1981 Act, the Claimants relied upon subsections 16(1)(b)-(c) of the Interpretation Act 1978 ("IA 1978") which provides:

> "1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—
>
> …
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
>
> …"

63. The Claimants submitted that there was nothing in the 1981 Act which either expressly or impliedly evinced a statutory intention that the review provisions newly introduced in section 53 were effective to override declarations made under section 31(3) of the 1949 Act. The 1981 Act replaced the review provisions in the 1949 Act with comparable, if slightly wider, provisions. It did not replace section 31 with an equivalent right for landowners to apply to courts for declarations but it was silent as to their continuing effect. It therefore evinced no "contrary intention" sufficient to rebut the presumption introduced by the language of subsection 16(1)(b) of the IA 1978 that declarations should continue to have effect.

64. In response, the Council accepted that the declaration granted by the Quarter Sessions on 5 November 1965 was a right within the meaning of section 16(1)(c) IA 1978, but it submitted that the right could be overridden because the provisions of the 1981 Act did demonstrate a "contrary intention".

65. The 1981 Act introduced a comprehensive and self-contained statutory code for the ascertainment of public rights of way over land. It replaced the statutory scheme under the 1949 Act.

66. Section 31 of the 1949 Act, including the "conclusive evidence" provision in subsection (8), was repealed by the 1981 Act. The power to make declarations as to public rights of way, which was exercised by Quarter Sessions, was replaced by an entirely different statutory scheme. Under Schedule 15 to the 1981 Act, modification orders made by surveying authorities now have to be confirmed by the Secretary of State, and where there are objections to a proposed modification, an Inquiry will be held. An aggrieved party may apply to the High Court for a statutory review of an adverse decision.

67. Section 53 of the 1981 Act imposes a duty on an authority to keep the definitive map under continuous (as opposed to periodic) review. Section 53(3) sets out the events which may require modification of the definitive map. The various events (which can occur either before or after the coming into force of the 1981 Act) include, at section 53(3)(c)(i), the discovery by the authority of evidence which (when considered with all other relevant evidence) shows that a public right of way which is not shown on the definitive map "subsists or is reasonably alleged to subsist" over land in the area to which the map relates. Section 53(3) now allows for paths wrongly shown on the definitive map to be deleted on review.

68. If section 31(8) of the 1949 Act overrode the provisions of section 53(3)(c)(i) of the 1981 Act, it would mean that the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision following discovery of evidence. Such a state of affairs would be inimical to the statutory scheme under Part III of the 1981 Act. It would mean in practice in this case that only evidence of implied dedication arising after 5 November 1965 would be admissible to justify new entries in the definitive map and it certainly precludes the admissibility of historic evidence to correct errors in the definitive map. This would emasculate the 1981 Act and cannot have been the intention of Parliament.

69. In order to be a comprehensive code, section 53 had to include a power to add a public right of way not shown on the DMS where the evidence relied on is unknown or has not been considered. This may result in the correction of a previously mistaken decision. See *R v Secretary of State for the Environment, ex parte Sims and Burrows* [1991] 2 QB 354, per Glidewell LJ at 380E-G, 384H -385A; *Roxlena* per Lindblom LJ at [62] – [63].

70. I accept the Council's legal analysis, in preference to that of the Claimants. Therefore I do not accept the Claimants' submission that Ground F1 discloses a serious and obvious error of law which gives rise to a compelling need to intervene by way of judicial review. In my view, what is now required is an investigation by the Council to find out why and on what basis the claimed footpath was included in the PMS in 1965, and why the Council subsequently accepted that no public right of way subsisted over this section of the claimed footpath. Was the Council aware of the 1827/1828 order at that time? The late evidence submitted by the Claimants on the final day of the hearing (which should have been disclosed by them at a much earlier stage in the proceedings), indicates that the Council made enquiries, and decided not to contest the application for a declaration, but the reasons for this conclusion are not apparent. To my surprise, a week after the hearing had concluded, and without any prior warning to the Court or to

the Defendant, the Claimants' solicitors applied to adduce yet further evidence which they had failed to disclose at the appropriate time. As I had already prepared my draft judgment by this time, and the Defendant had had no opportunity to consider this further material, I refused the Claimants' application. At an Inquiry, an Inspector will be able to examine all the evidence and make findings of fact. The Inspector will be able to determine the Claimants' point of law under the IA 1978, with the assistance of counsel, and his decision will be subject to the safeguard of a right of statutory review by the High Court.

Ground G

71. Under Ground G, the Claimants submitted that paragraph 65 of the OR erroneously referred to the lost modern grant doctrine in support of its recommendation, as the doctrine applies to private rights of way, not public rights of way.

72. The Council accepts that this was an error in the OR. However, it submits that it would not have made any difference to the eventual outcome. I agree. I think it is highly likely that the Panel made its decision on the specific evidence that the claimed footpath was a public right of way, not on the officer's observations in paragraph 65.

73. I do not consider that Ground G discloses a serious error of law which gives rise to a compelling need to intervene by way of judicial review.

Ground ZA

74. Under Ground ZA, the Claimants submitted that there was a significant gap of approximately 340 metres between points K3 and B1 on map MTR 9, appended to the report of Mr Rocks, in respect of which there was no evidence of the existence of the claimed footpath. Therefore the Council erred in finding that there was evidence before them to support the conclusion that public rights of way existed over this gap.

75. The Council asked Ms Frost to investigate this issue and she concluded that there was indeed a gap in the evidence, as it did not cover the claimed footpath between points B and B1 (on the plan at Exhibit SF1 to Ms Frost's first statement). She calculated the length of the gap as approximately 300 metres. However, Ms Frost explained that a footpath was clearly shown on the OS maps of 1880 and 1902 running on the ground both before and after these points, and the alignment of the path remains unchanged. Therefore it may be inferred that the claimed footpath continued over the gap, as it is unlikely that it simply came to a dead end in the middle of the countryside.

76. In my view, it is a matter for the Inspector to determine whether or not there was a continuous footpath running between points B and B1, having regard to the available evidence, and drawing such inferences as he considers appropriate in the exercise of his specialist judgment. An Inspector is better equipped to undertake this exercise than this Court. It is possible that further evidence on this issue will emerge prior to an Inquiry. I do not consider that Ground ZA discloses a serious and obvious error of law which gives rise to a compelling need to intervene by way of judicial review.

The Council's undertaking that the Panel will review its resolution of 16 July 2021

77. Since the Panel made its resolution in July 2021, significant new evidence has emerged, adduced by the Claimants and the Council, which was not considered by the Panel when it made its resolution. Also, the Claimants have made a number of criticisms of the OR, some of which the Council has accepted as valid, without conceding that they are such as to render the resolution unlawful.

78. Mr Webster's initial view was that the Council could refer the resolution to the Secretary of State for confirmation with revised reasons, relying in part on evidence which post-dated the decision, such as the witness statements from the cartographer Ms Frost, I reminded Mr Webster that in judicial review the lawfulness of a decision should be assessed on the basis of the evidence available to the decision-maker at the time, not on the basis of evidence which post-dated the decision. I also invited him to consider whether the principle established in the different statutory context of planning in the case of *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, per Jonathan Parker LJ, at [126] (namely, if after the passing of the resolution a material new factor has arisen, the officer ought to refer the application back to the authority for reconsideration), should be applied, by analogy, to the circumstances of this case.

79. After discussing the matter with his client, Mr Webster informed the Court that the Council now intends to refer the Interested Party's application for a modification order back to the Panel so that it can review its decision of 16 July 2021, in the light of the further evidence and submissions which have emerged during the judicial review proceedings. The Council intends to draw up an addendum OR, which will be made available to the public, as well as those affected. Representations or objections will be invited. The Panel will then conduct its review on the basis of the addendum report and any further representations or objections made. The Council will give a formal undertaking to the Court as to the steps it will take; I have been shown the wording in draft form. The Claimants seek a deferral of the review until after any appeal has been finally determined. However, I accept the Council's submission that it is in the interests of good administration for the matter to be resolved by the Panel without further delay, as the decision under challenge was made as long ao as July 2021.

80. In my view, the decision that the Panel reaches, following its reconsideration of the new material, will effectively supersede the decision of 16 July 2021, and therefore there is no purpose in further consideration of the lawfulness of the earlier decision, beyond the ruling I have already given that there is no proper legal basis for this Court to intervene to prevent the statutory procedure under Schedule 15 to the 1981 Act from taking its course.

81. In the light of my conclusions, it is not appropriate for me to rule on the Council's submission, made under Grounds E, F and G, that if the conduct complained of had not occurred, it is highly likely that the outcome would not have been substantially different for the Claimants, applying section 31(2A), (3C) and (3D) of the Senior Courts Act 1981.

Final conclusion

82. For the reasons I have given, permission to apply for judicial review is refused.