IN THE HIGH COURT OF JUSTICE **CO/3499/2021**

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

PLANNING COURT

BETWEEN

R (PIERS ALASTAIR CARLOS MONCKTON and SOMERFORD HOME FARM PARTRNERSHIP)

Claimant

-and –

STAFFORDSHIRE COUNTY COUNCIL

Defendant

-and-

MARTIN REAY

Interested Party

DEFENDANT'S SUPPLEMENTARY SKELETON

for hearing on 1-3 November 2022

Preliminary

1. The need for supplemental skeletons on both sides arises because C is relying on provisions within the Interpretation Act 1978 which is new to the case.

2. The 1978 Act is material but D considers that a further application by C to amend would be a waste of costs and court time so close to the trial and that additional skeletons will have to suffice to deal with the point. D will be seeking wasted costs for having to dealing with these matters which would otherwise have been in the mix in the statements of case and previous skeletons filed in June 2022.

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Issues

3. **(ISSUE 1)** Did section 31(8) of the National Parks and Access to the Countryside Act 1949 survive the repeal of Part IV of the 1949 Act?

4. **(ISSUE 2)** If the answer to 3 is YES then is the absence of direct evidence that an order was made by Quarter Sessions on 5 November 1965 or of clear evidence to explain what actually occurred when the matter was determined by QS sufficient to justify a finding that a declaration was actually made by QS on the basis of an informed consideration of the evidence that no footpath existed between points C-P1-P2 on SF/10 (see attached)?

ISSUE 1

5. Sections 27-35 of the 1949 Act (which were concerned with the ascertainment of footpaths, bridleways and certain other highways) were repealed by the Wildlife and Countryside Act 1981, s.73 and Sched.17, which came into operation on 28 February 1983 (S.I. 1983 No.20).

6. D submits that a declaration made on an application under section 31(1)(a) of the 1949 Act is not conclusive ad infinitum (section 31(8) does not even say this) so as to preclude the operation of section 53(3)(c)(i) of the 1981 Act (i.e. discovery of new evidence).

7. D submits that section 53(3)(c) of the 1981 Act was intended to operate retrospectively whereas section 53(3)(a) and (b) relate to events which have happened since the DMS was prepared. The whole tenor of section 53(3)(c) is that it is concerned with the correction of mistakes as a result of newly discovered information.

8. In order to be a comprehensive code section 53(3)(c)(i) must include a power to add a PROW not shown on the DMS where the evidence relied on is unknown or has not been considered which may even result in the correction of a previously mistaken decision. See *Mayhew v Secretary of State for the Environment* [1992] 65 P&CR 344 at 351-353 (Potts J – citing from Glidewell L.J in *R v Secretary of State for the Environment, Ex p. Sims and Burrows* [1991] 2 QB 354); and *R (Roxlena) Ltd) v Cumbria County Council* [2019] EWCA Civ 1639 at [62]-[63].

Legal framework underlying ISSUE 1

9. The Interpretation Act 1978, section 16(1), applies where an Act repeals an earlier enactment. In such a case the repeal does not, *unless the contrary intention appears*, (and C relies on sub-paras (b) and (c))

> (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; ...

10. Subject to the *contrary intention* rule, D accepts that section 16(c) was probably engaged at the time of the repeal of section 31(8) on 28 February 1983. This is because (subject to the finding of the court on ISSUE 2) C's case, at its highest, is that on this date the determination of QS on 5/11/1965 purported to be conclusive as to the non-existence of a PROW crossing C's land between points C-P1-P2 on the attached plan.

11. D says that operation of section 31(8) was always subject to later review under section 53(3)(c)(i) as a result of the discovery of evidence triggering the right to apply for modification. If C's case on ISSUE 2 is accepted the process under section 31(1)(a) will have played itself out in C's favour at QS such that after the relevant date in 1954 until later modification under section 53(3)(c)(i) there was no PROW over C's land between points C-P1-P2. Whether the right can be characterised as an *'accrued'* or *'acquired'* right at the date of repeal is, as D concedes, likely to be made out in that Kerr J held in *R (York City Council) v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2699 (Admin), (applying *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778, CA) that an entitlement, even if inchoate or contingent, sufficed provided it was more that a mere hope or expectation of acquiring a right.

12. Section 16(1)(b) of the 1978 Act is unlikely to apply. The reference to *'anything duly done'* avoids the need for procedural matters, such as the giving of notices, to be done over again as arose in *Aitken v South Hams District Council* [1995] 1 AC 262. This section is likely to concern whether procedural steps taken under a previous enactment continue in force when replaced by updating or consolidating legislation.

13. The true ISSUE 1 point is whether D is able to invoke the *contrary intention* principle.

14. As the 1981 Act contains no saving or transitional provisions preserving section 31(8) it is necessary to decide

> ... whether there is anything contained within the repealing enactment which expressly or by necessary implication shows that Parliament did not intend that section 16 of the Act of 1978 should apply.

This was one of the questions certified by the Divisional Court that allowed the appeal in *Aitken v South Hams District Council* ([1995] 1 AC 262 at 270) to be determined by the House of Lords on a point of law of general importance.

15. There are a number of cases falling on one side of the line or the other but there is no one case on or even remotely analogous to the 1949 or 1981 Acts.

16. *Bennion, Bailey and Norbury on Statutory Interpretation (8th Edition)* cites from the dictum of Lord Morris in *Blue Metal Industries Ltd v Dilley* [1970] AC 827 (a decision of the Privy Council) at 846-848. This was a case where an enactment made provision for the compulsory transfer of shares by one company to another single company which clashed with the appellant's scheme which involved multiple transferees.

At page 846E-G Lord Morris stated:

> By section 21 of the Interpretation Act, 1897 (N.S.W.), it is enacted that in all Acts, unless the contrary intention appears, words in the singular shall include the plural and words in the plural shall include the singular. Such a provision is of manifest advantage ... Prima facie it can be assumed that in the processes which lead to an enactment both draughtsman and legislators have such a provision in mind ... But in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole. (See *Sin Poh Amalgamated (H.K.) Ltd. v. Attorney-General of Hong Kong* [1965] 1 W.L.R. 62).

And at page 848D-E

> The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different kind of acquisition with different consequences. It would presuppose a different legislative policy.

17. In *Floor v Davis* [1980] AC 695 Lord Wilberforce (in his dissenting opinion) said at 706E that by 'change of character' in *Blue Metal* he took Lord Morris to be referring

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... to the different legal result which would follow if the plural is used from which that which would be produced by the use of the singular. Similarly – and I cite this simply as an example – the expression "a particular purchaser" in section 5(3) of the Land Compensation Act 1961 "cannot include the plural without altering the meaning": see Frank Boot Stores Ltd v City of London Corporation (1971) 22 P&CR 1124, 1132.

18. In his dissenting opinion Viscount Dilhorne said at 712A that:

> Applying the Interpretation Act does not change the character of the transaction as it did in the Blue Metal case ... Applying that Act and paragraph 3 of Schedule 18 does not appear to me to make paragraph 15(2) unworkable; nor do I think the width of that paragraph when they are applied, is such that it cannot properly be said that the result is one which Parliament cannot have intended.

19. Pulling these threads together it seems tolerably clear that a *contrary intention* may be shown where elements of the statutory scheme that applied under the 1949 Act in relation to the determination by QS of disputes as to provisional maps and statements would be incompatible with the duty of surveying authorities under section 53(2) to keep the DMS under continuous review including, where evidence has been discovered, the duty to take steps to correct a previously mistaken decision.

The legislative landscape (re ISSUE 1)

20. The 1949 Act set up a new machinery for deciding whether or not there was a PROW over land. It began with a duty on surveying authorities to survey and prepare a ***draft map*** and statement showing, in their opinion, the highways within their area. Once the draft map was published the authority were required to consider any objections with a view to making any changes. This was then followed by the production of a ***provisional map*** and statement (PMS). Section 31 allowed challenges to the PMS to be made to QS within 28 days of publication of the PMS.

21. QS had power to make four types of declarations: (a) that at the relevant date (and it was in 1954) there was no PROW over the land (s.31(1)(a)); (b) that public rights were other than those stated in the PMS (s.31(1)(b)); (c) that the alignment or width of the PROW was not as stated in the PMS (s.31(1)(c)); and (d) that the PROW in the PMS was in fact subject to limitations or conditions (s.31(1)(d)).

22. Section 31(3)(a) provided that where it was not proved at the relevant date (1954) that there was a PROW over the land the Court at QS *"shall make the declaration sought"*. The right of appeal was limited in that section 31(7) provided for an appeal by way of case stated to the High Court on a point of law.

23. Section 31(8) provided that declarations made under the section *"shall be conclusive evidence of the matters stated in the declaration"*. It does not say that such a declaration would remain conclusive for ever. Section 31(8) should be read with the review provisions contained in section 33 which accommodate additions to the DMS on the discovery of new evidence between the relevant date (1954) and the review date, whenever it occurs.

24. Once the time had passed for challenges to the QS it was the duty of the authority to prepare a map in ***definitive*** form (i.e. the DMS) for the area and to publicise the same (s.32). The DMS is stated to be conclusive as to the particulars contained therein (s.32(4)). Section 33 is important as it makes provision for periodic revision of maps and statements (at least every 5 years – see s.33(3)) having regard to the occurrence of events between the relevant date (1954) and the date of review. One of the events (s.33(2)(e)) involves the discovery of new evidence *"such that if the authority were then preparing a draft map ... they would be required ... to show on the map ... a way not so shown on the definitive map ..."*.

25. It should be noted that section 33(2)(e) did not enable paths wrongly shown on the DMS to be removed following a periodic review.

26. One turns next to the Countryside Act 1968 which made various amendments to the 1949 Act. The important ones are set out below.

27. Part 1 to Schedule 3 allows for paths shown on the DMS to be removed where new evidence shows that there was no PROW although this was subject to the proviso that a landowner had to show that he had not neglected to bring such evidence forward before the relevant date (1954).

28. Part II to Schedule 3 removed challenges to reviews from the jurisdiction of QS. Instead where challenges were made to draft revisions that were not withdrawn the decision on the objection was that of the Secretary of State after holding a local inquiry.

29. Part III substituted the expression a "byway open to all traffic" (BOAT) for a "road used as a public path" leaving every highway to be shown on the DMS as a BOAT, a bridleway or a footpath.

30. After the coming into force of Part III of the 1981 Act on 28 February 1983 the position radically altered. Part III deals with the ascertainment of PROW.

31. Section 53 also brings into force Schedules 14 and 15. These Schedules deal with the procedures to be followed in making an application for a modification order. Regulations made under Schedule 15 include the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12) and the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 (SI 2007/2008) which set out procedures for hearings and inquiries held by the Secretary of State for certain orders made under Pt 3 of the 1981 Act.

32. It is noteworthy (i) that opposed modification orders must be confirmed by the Secretary of State (Schedule 15, para 7), and (ii) that anyone questioning the validity of an order which has taken effect may also appeal to the High Court (Schedule 15, para 12). This is an infinitely fairer regime than that available under previous enactments.

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

34. Part II of the 1981 is now a self-contained statutory code for the ascertainment of PROW.

35. It is submitted that if section 31(8) overrode the provisions of section 53(3)(c)(i) 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. Such a state of affairs would be at variance with the purpose and scheme of the 1981 Act (which is a comprehensive and self-contained statutory code) as well as good sense.

ISSUE 2

36. Two initial points: (i) the plan attached to this skeleton was discovered and produced by D by letter dated 5 October 2021, shortly before the commencement of these proceedings, and (ii) D's in-house cartographer (Shona Frost) says in her second witness statement (Vol/2 at 55) that the notation and crossing out shown on PO/19B (i.e. the attached plan) *"indicates that this section of the claimed way must have been removed from the provisional map"*.

37. The case against D under this head loses some of its cogency in that no declaration has been produced and without it no one can say with any certainty to what issue it was directed or as to the evidence which may have been considered by the Court or whether the authority even appeared at the hearing to contest the application.

William Webster

3 Paper Buildings

TEMPLE **6 October 2022**

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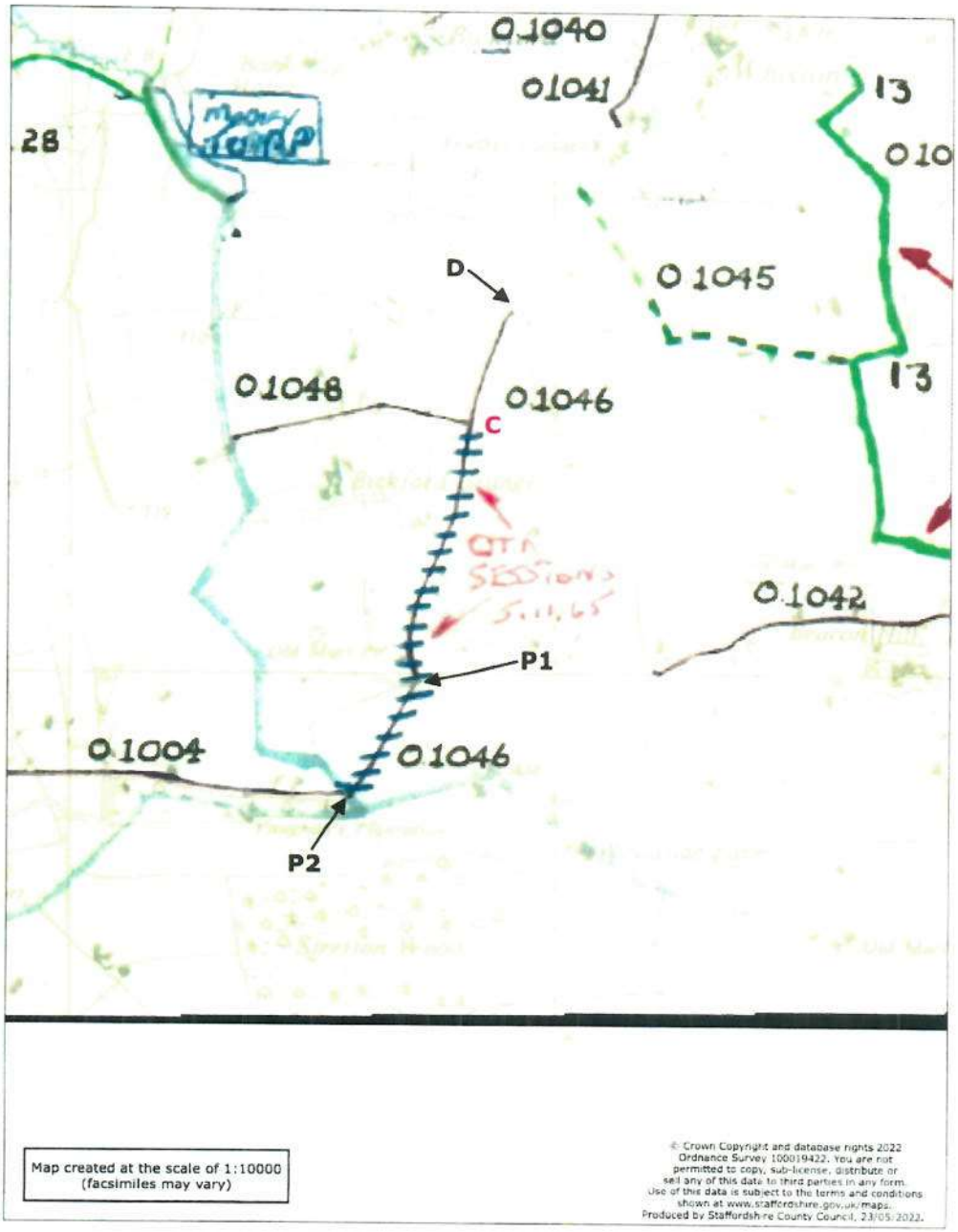
Section 53 Application-
LG614G - Extract of Sheet B - Draft and First Definitive Map.

Staffordshire County Council



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