Hilary Term
[2015] UKSC 18
On appeal from: [2013] EWCA Civ 553

JUDGMENT

R (on the application of Trail Riders Fellowship and another) (Respondents) *v* Dorset County Council (Appellant)

before

Lord Neuberger, President
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

18 March 2015

Heard on 15 January 2015

Appellant
George Laurence QC
Kira King
(Instructed by Dorset Legal and Democratic Services)

Respondents
Adrian Pay
Thomas Fletcher
(Instructed by Brain Chase Coles Solicitors)

Intervener
Graham Plumbe
James Pavey
(Instructed by Thomas Eggar LLP)

LORD CLARKE:

Introduction

1. This is an appeal by Dorset County Council ("the council") from an order of the Court of Appeal (Maurice Kay LJ, who is Vice President of the Court of Appeal, Black LJ and Rafferty LJ), [2013] EWCA Civ 553; [2013] PTSR 987, allowing an appeal by the respondents from an order of Supperstone J ("the judge") dated 2 October 2012, [2012] EWHC 2634 (Admin); [2013] PTSR 302, in which he dismissed an application for judicial review of the decision of the council to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act") for modification orders to a definitive map and statement ("the DMS"). The claim concerns five routes over which the respondents say that the public enjoy vehicular public rights of way (including with mechanically-propelled vehicles) which were not recorded on the DMS.

2. The first issue in this appeal and the principal issue which was considered in the courts below is whether, for the purposes of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to the prescribed scale only if it is derived from a map originally so drawn without being enlarged or reduced in any way. The judge answered that question in the affirmative but the Court of Appeal disagreed. In this appeal the council seeks the restoration of the order made by the judge. If the appeal succeeds, any public rights of way which were the subject of the five applications will have been extinguished.

3. In this judgment I will focus on the first issue. There is a second issue, which only arises if the council's appeal on the first issue fails.

4. The applications were submitted by Mr Jonathan Stuart, who is a member of the Friends of Dorset's Rights of Way ("FDRW"). The first respondent, the Trail Riders Fellowship ("TRF"), took over the conduct of the applications from FDRW in October 2010. The second respondent, Mr David Tilbury, is a member of FDRW. The council is the surveying authority, as defined in section 66(1) of the 1981 Act, for the area in which the proposed "byways open to all traffic" ("BOATs") are located. The intervener, Mr Graham

Plumbe, represents the interests of the Green Lanes Protection Group and affected land-owners. He supports the council's appeal.

The legal framework

5. Section 53 of the 1981 Act imposes a duty on a surveying authority to keep a DMS of the public rights of way in its area under continuous review. So far as material, it provides:

> "(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 -
>
> ….
>
> (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 to which this Part applies;

(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.

…

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

6. As the judge put it in his para 6, there are three categories of public highway: footpaths, bridleways, and "byways open to all traffic", known as "BOATs". Section 66 of the 1981 Act defines a BOAT as

> "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used."

7. Schedule 14 to the 1981 Act provides:

> "1. Form of Applications
>
> An application shall be made in the prescribed form and shall be accompanied by –
>
> (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and

(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

2. Notice of Applications

(1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates.

…

(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

(4) Every notice or certificate under this paragraph shall be in the prescribed form.

3. Determination by authority

(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall -

(a) investigate the matters stated in the application; and

(b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates.

…

5. Interpretation

(1) In this Schedule …

'prescribed' means prescribed by regulations made by the

Secretary of State."

8. The material regulations made by the Secretary of State are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 ("the 1993 Regulations"), which provide:

> "2. Scale of definitive maps
>
> A definitive map shall be on a scale of not less than 1:25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose.
>
> …
>
> 6. Provisions supplementary to regulations 4 and 5
>
> Regulations 2 and 3 above shall apply to the map contained in a modification or reclassification order as they apply to a definitive map.
>
> …
>
> 8. Application for a modification order
>
> (1) An application for a modification order shall be in the form set out in Schedule 7 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case.
>
> (2) Regulation 2 above shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order."

The form of application set out in Schedule 7 provides for an applicant who wishes, for example, to add a BOAT to the DMS (whether by upgrading an existing path shown on the map or by adding the path for the first time) to identify the points from and to which the proposed BOAT runs and its route as "shown on the map accompanying this application".

9. Section 67 of the 2006 Act provides:

> "Ending of certain existing unrecorded public rights of way
>
> (1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement -
>
> > (a) was not shown in a definitive map and statement,
> >
> > or
> >
> > (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.
>
> But this is subject to subsections (2) to (8).
>
> …
>
> (3) Subsection (1) does not apply to an existing public right of way over a way if -
>
> > (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,
> >
> > (b) before commencement, the surveying authority has made a determination under

paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or

(c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles -

(i) was reasonably necessary to enable that person to obtain access to the land, or

(ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

(4) 'The relevant date' means-

(a) in relation to England, 20th January 2005;

…

(6) For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act."

10. Section 130(1) of the Highways Act 1980 provides:

"It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it."

The factual background and procedural history

11. I take this from the agreed statement of facts and issues. The following five applications were made for modification orders under section 53(5). (1) On 14 July 2004 application T338 was made in relation to a route at Bailey Drove

so as to add a BOAT to part of the route and to upgrade to a BOAT on two other parts of the route, which were at the time shown as a footpath (to the west) and a bridleway (to the east). (2) On 25 September 2004 application T339 was made in relation to a route consisting of two bridleways in the parishes of Cheselbourne and Dewlish so as to upgrade them to a BOAT. (3) On 21 December 2004 application T350 was made in relation to a route in the parish of Tarrant Gunville so as to add a BOAT to part of the route and to upgrade to a BOAT the remainder of the route, which at the time was shown as a bridleway. (4) On 21 December 2004 application T353 was made in relation to a route in the parish of Beaminster so as to upgrade the same to a BOAT from its existing status of bridleway. (5) On 21 December 2004 application T354 was made in relation to a route in the parish of Beaminster so as to add a BOAT to two parts of the route not shown on the DMS and to upgrade to a BOAT two further parts of the route which were at the time shown as bridleways.

12. Accompanying each application was a map showing the route in question. Each map was produced using a computer software program entitled "Anquet" and digitally encoded maps which derived originally from OS maps drawn to a scale of l:50,000. The computer software program allowed the user to view or print out maps (or parts of maps) at a range of scales. In my opinion importantly, it was expressly agreed in the statement of facts and issues that the enlarged maps that were reproduced as a result of this process were all to a presented scale of 1:25,000 or larger, in that measurements on the maps corresponded to measurements on the ground by a fixed ratio whereby a measurement of 1 cm on the map corresponds to a measurement of no more than 250 metres on the ground.

13. It does not appear that the council had any difficulty in considering the applications. Each of the applications was acknowledged by the council by early 2005 and there was no indication that the applications were defective until 2009. The council made no complaint about them until 7 October 2010, when, perhaps because of objections to the applications on their merits, a meeting took place of the council's Roads and Rights of Way Committee, at which it rejected all five applications on the ground that they "were accompanied by computer generated enlargements of OS maps and not by maps drawn to a scale of not less than 1:25,000".

14. As the judge noted at his para 13, under the heading "Reasons for Recommendation", the following was recorded:

> "For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that public rights of

> way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question were accompanied by computer generated enlargements of OS maps and not by maps drawn to a scale of not less than 1:25,000. In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused."

On 2 November 2010 the council communicated its decision to Mr Tilbury, who appealed to the Secretary of State on behalf of TRF but the Secretary of State declined to determine the appeals on the basis of lack of jurisdiction.

15. Subsequently permission to apply for judicial review seeking an order that the decision of 2 November 2010 be quashed and that a mandatory order be granted requiring the council to determine the applications was refused on paper. It was however subsequently granted after an oral hearing before Edwards-Stuart J and the matter was fully argued before the judge, who on 2 October 2012 upheld the decision of the council on the ground that the application map did not comply with the legal requirements. He further held that the extent of the non-compliance was not within the scope of the principle *de minimis non curat lex*.

16. The judge refused permission to appeal to the Court of Appeal. Permission to appeal was granted on the first point by Sullivan LJ. It was however refused on the *de minimis* point. As stated above, on 20 May 2013, the Court of Appeal reversed the decision of the judge on the first point. However, it refused an application for permission on the *de minimis* point on the basis that, if the appeal had failed on the first point, the non-compliance "could not sensibly be described as *de minimis*".

17. The parties agreed that the first question can be stated as follows. Does a map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where it has been "digitally derived from an original map with a scale of 1:50,000"?

Discussion

18. This is a short point. It involves the construction of two particular provisions which I have already set out. By paragraph 1 of Schedule 14 to the 1981 Act, an application for a modification order must be made in the prescribed form and must be accompanied by a map (a) which was drawn to the prescribed scale, (b) which was not less than 1:25,000 and (c) which showed the way or ways to which the application related. No distinction has been drawn between the five applications. They either all complied or they all failed to comply. It is accepted that they were each accompanied by a map. It is I think also accepted that each of the maps showed the way or ways to which the application related.

19. The question is therefore whether each of the maps was drawn to a scale of not less than 1:25,000. On the face of it that question must be answered in the affirmative. Paragraph 1 of Schedule 14 provides that the map must be drawn "to the prescribed scale" and by paragraph 5 "prescribed" means prescribed by the 1993 Regulations. By regulation 2 of those Regulations, "A definitive map shall be on a scale of not less than 1:25,000" and, by regulation 8(2), regulation 2 applies to a map accompanying an application. As I read these provisions, no distinction is drawn between a map "drawn to the prescribed scale" and a map "on a scale of not less than 1:25,000".

20. On the ordinary and natural meaning of these provisions it appears to me that the map referred to in paragraph 1(a) of Schedule 14 is the map which must be drawn to the prescribed scale. Only one map accompanied each application. In each case it was the map produced as described above to a presented scale of 1:25,000 or larger, in that measurements on the map corresponded to measurements on the ground by a fixed ratio whereby a measurement of 1 cm on the map corresponds to a measurement of no more than 250 metres on the ground. Thus each such map was on a scale of not less than 1:25,000 and, in my opinion, satisfied regulations 2 and 8(2) of the 1993 Regulations. In my opinion each such map also satisfied paragraph 1(a) of Schedule 14 on the basis that it was drawn to the same scale.

21. To my mind only one map had to comply with the prescribed criteria in each case, namely the map which accompanied the application, which I will call "the application map". So far as I am aware no-one has suggested that the application map was not a map, whether it was a photocopy of an existing map or an enlargement of a map. In any event I would hold that it was plainly a map. It was submitted on behalf of the council (and held by the judge) that, where the application map was based upon or drawn from a previous map, the relevant map was any map from which the application map was derived

but not the application map itself. I agree with the Court of Appeal that there is nothing in the language of the relevant statutes or regulations to warrant that conclusion.

22. It was also suggested that it must have been intended that the application map should be on a scale of 1:25,000 and exhibit all the detail which would appear on an OS map on that scale. Of course, it could have been so provided by statute or regulation. As Maurice Kay LJ said at his para 10, such a statutory requirement is not unknown. For example, section 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an OS map shall, if possible, be used". More recently, regulation 5 of the Petroleum (Production) (Landward Areas) Regulations 1995, which is concerned with licence applications, requires an application to be accompanied by two "copies of an OS map on a scale of 1:25,000, or such other map or chart as the Secretary of State may allow". I agree with Maurice Kay LJ that the scheme with which we are concerned is not so specific. Nor is it prescriptive as to features which must be shown on the map, apart from the requirement that it must show the way or ways to which the application relates.

23. It is of course well known (and not in dispute) that an original OS map with a scale of 1:25,000 depicts more physical features than an original OS map of the same site with a scale of 1:50,000. However, again I agree with Maurice Kay LJ that, since paragraph 1(a) permits the use of a map which is not produced by OS (or any other commercial or public authority), it cannot be said to embrace a requirement that the application map must include the same features as are depicted on an original 1:25,000 OS map.

24. I appreciate that, as was submitted on behalf of the council, an original OS map on a scale of 1:25,000 might well have been of more use to the council than an enlarged OS map originally produced on a scale of 1:50,000 but, for good or ill, no such requirement was included in the statutory provisions. In any event this point seems to me to have been afforded more emphasis that it merits. The council of course already has OS maps on a scale of 1:25,000 which it can readily consult. If it has any questions which are relevant to the application it can raise them with the applicant.

25. Further, it is in my opinion important to note that the council expressly concedes in its case that in theory an applicant might himself be able to create an accurate map at 1:25,000 which nevertheless contained only such detail as an OS 1:50,000 map. Moreover, he could do so in manuscript without reference to an OS map. It seems to me to follow from that concession that, if used as the application map, such a map would comply with the statutory provisions. Moreover, that is so even if one would ordinarily expect the

application map to be based on the OS 1:25,000 map. Some reliance was placed on the fact that an OS map would ordinarily be used but I do not see how that helps to construe a provision which defines what must be done but makes no reference to such a requirement.

26. There is in evidence an extract of an online road map (not an OS map) on a scale of 1:25,000 which shows the claimed route in red but on which a number of public roads and village names are missing. It satisfies the relevant provisions notwithstanding the fact that it contains very little information. It satisfies the provisions because it is a map, because it is on a scale of not less than 1:25,000 and, critically, because it shows the way to which the application related. So far as I am aware, the council accepts that an application map so drawn is not objectionable but, even if it did not, I would so hold. If that is correct, it follows that it is not necessary that the application map should be an OS map. As Maurice Kay LJ said in his para 10, the application map may include more or fewer features than those marked on an OS map of the same scale. And, as he said at para 11, the provision that the map must show "the way or ways to which the application relates" is a flexible requirement; sometimes more details will be required and sometimes fewer, depending on the way in question and its location. This is I think a critical point because it shows that the application map may have very few of the details on the ordinary OS map on a scale of 1:25,000.

27. I recognize that, without any requirement of scale, an applicant (who is quite likely to be a lay person) might produce a map of any scale. It is therefore understandable that the application map should have to be on a reasonable scale for the purposes of clarity. Any scale chosen would have an element of arbitrariness but, since the DMS has to be on a scale of not less than 1:25,000, it was no doubt thought to make practical sense for the application map to be on the same scale. It does not follow that it should have all the same features as the OS map.

28. Some reliance is placed on the fact that the prescribed scale applies in the same terms to the application map as it does to the DMS (regulations 2 and 6) and that, whatever might be reasonable for an applicant, it would be odd if the DMS itself could be prepared on something other than an OS base. In my opinion, that argument ignores the different contexts in which the rule applies. The authority is under a public law obligation to prepare and maintain the DMS in proper form, which duty must itself imply that it should be at least professionally prepared to a quality and detail equivalent to the OS map. Given the availability of the OS map, it would be irrational for the authority not to use it. The same does not apply to a lay applicant, who has no public law duty, and whose sole function is to put the relevant material before the authority for investigation by them. Indeed the draftsman may

deliberately have adopted a form of definition which is sufficiently flexible for both contexts.

29. It is not, so far as I am aware, part of the council's case that the application map was not "drawn" within the meaning of paragraph 1(a) of Schedule 14. However, there have been some suggestions to this effect, notably by Mr Plumbe, which Maurice Kay LJ considered at paras 12 to 14. He considered in para 12 whether the words "drawn to" a scale of not less than 1:25,000 mean that the application map in question must have been originally drawn to that scale rather than enlarged or reproduced to it. He said that he could see no good reason for giving the requirement such a narrow construction. What was important was the scale of the application map. The word "drawn" did not need to imply a reference to the original creation but was more sensibly construed as being synonymous with produced or reproduced. He said at para 13 that he reached that conclusion on the basis of conventional interpretation but that he was fortified by an approach which takes account of technological change. He referred to *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2003] 2 AC 687 at para 9, where Lord Bingham said that courts had frequently had to grapple with the question whether a modern invention or activity falls within old statutory language, and approved the decision of Walton J in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, where he held that a tape recording fell within the expression "document" in the Rules of the Supreme Court.

30. Maurice Kay LJ concluded in para 14:

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

I agree.

31. Finally, some reliance was placed upon evidence provided by OS at the request of the council. They were asked this question:

> "Where:
>
> 1.1 digital raster mapping is originally produced by the OS at 1:50,000 scale ('the Original Product');
>
> 1.2 an image is taken from the Original Product and enlarged to a 1:25,000 scale; and
>
> 1.3 a facsimile copy of that enlarged image is produced in printed form ('the Map')
>
> Is the Map properly to be regarded as being at a scale of 1:50,000 or 1:25,000?"

The answer was as follows:

> "As described in the question the map would be properly to be regarded as a 1:50,000 scale OS map enlarged to 1:25,000."

It was submitted on behalf of the council that the scale of the maps as presented by the respondents was indeed (larger than) 1:25,000, but this was only because they had all been enlarged from their original scale. It was submitted that the answer to the issue posed in para 2 above, namely whether an application map is drawn to the prescribed scale only if it is derived from a map originally so drawn without being enlarged or reduced in any way, is no.

32. In my opinion the true answer to that question was yes. The Map is a reference to the application map. It was conceded that the scale of the map as presented was larger than 1:25,000. Since, as I see it, the question is what was the scale of the map as presented, ie the application map, it follows that the map complied with the statutory requirements. For the reasons given above, the fact that it was taken from a map on a smaller scale is irrelevant.

33. For all these reasons I would dismiss the appeal on the first issue. The question posed in para 17 above was this. Does a map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where it has been ″digitally derived from an original map with a scale of 1:50,000"? I would answer the question yes, provided that the application map identifies the way or ways to which the application relates.

The second issue

34. Since Lord Carnwath and Lord Toulson answer the first question in the same way, it follows that the appeal will be dismissed and the second question will not arise. I am sympathetic to Lord Carnwath's general approach to the construction of provisions like section 67(3) of the 2006 Act and I am doubtful whether Parliament can have intended such a narrow approach as was approved by the Court of Appeal in *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 280 to which he refers at para 65. However, I am conscious that we heard no submissions on the correctness of *Maroudas* and I see the force of the conclusions expressed by the other members of the Court. In these circumstances, since it is not necessary to do so, I prefer to express no view upon the second question unless and until it arises on the facts of a particular case.

LORD TOULSON:

35. On the question whether the applications submitted by Mr Stuart to the council satisfied the statutory requirements, I agree with Lord Clarke and the Court of Appeal.

36. Paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 required applications for the modification of a definitive map and statement to be in the "prescribed form" and accompanied by (a) "a map *drawn to* the prescribed scale and showing the way or ways to which the application relates" (emphasis added), and (b) any documentary evidence on which the applicant wished to rely. "Prescribed" means prescribed by the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 ("the Regulations").

37. Regulation 8(1) required each application to be in the form set out in Schedule 7 to the Regulations or in a form substantially to the like effect; and

regulation 8(2) provided that regulation 2 should apply to the map which accompanied the application in the same way as it applied to the map contained in a modification order. Regulation 2 provided that a definitive map "shall *be on* a scale of not less than 1/25,000" (emphasis added).

38. I do not construe the words "*drawn to* the prescribed scale" as meaning more than "*be on* a scale of not less than 1/25,000". More particularly, I do not see the word "drawn" as mandating a particular method of production. I agree with Maurice Kay LJ that linguistically "drawn" may sensibly be regarded as synonymous with "produced". But the construction of a statute is not simply a matter of grammar, and the question arises whether in the particular context the expression "drawn to the prescribed scale" should be given a narrower interpretation in order to serve its statutory purpose. While I respect the arguments of Lord Neuberger and Lord Sumption, I am not persuaded by them. I regard the OS as a red herring. It does not feature in the Regulations. I do not see a proper basis for the admission of the evidence given by the OS, and I do not consider it legitimate to use the OS as a tool in construing the Regulations.

39. As Maurice Kay LJ pointed out, the application for a modification order triggers an investigation. It is the start of a process. The natural purpose of the requirement placed on the applicant is to enable the council properly to understand and investigate the claim. For that purpose one would expect a plan on a 1/25,000 scale as presented to be sufficient, and this case provides an illustration. (On receipt of the applications in 2005, an officer prepared maps in the usual way for the Roads and Rights of Way Committee, but the applications had not been considered by the committee when the *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138 case was decided.) The reason for requiring a plan showing the way or ways to which the application related is self-evident. As to the purpose underlying the prescription of a scale of 1/25,000, rather than simply requiring "a map", I respectfully consider that para 27 of Lord Clarke's judgment offers a sufficient and credible explanation.

40. For those reasons, which I am conscious are no more than a summary of the reasons given by Lord Clarke and Maurice Kay LJ, I agree with their conclusion.

41. The issue regarding the effect of section 67(6) of the Natural Environment and Rural Communities Act 2006 therefore does not arise for decision, but it has been fully argued and I have come ultimately to agree with Lord Neuberger and Lord Sumption.

42. The context of the 2006 Act was that off road use of motorised vehicles had become a subject of considerable controversy in rural areas. The 2006 Act was the culmination of a lengthy process involving considerable public consultation and pre-legislative parliamentary scrutiny, in the course of which a large number of applications were made for modifying definitive maps to re-classify former RUPPs (roads used as public paths) as BOATs (byways open to all traffic). The publication in January 2005 of the Bill which became the 2006 Act coincided with the publication of a lengthy joint report by the Department for the Environment, Food and Rural Affairs and the Countryside Agency of a research project on the use of motor vehicles on BOATs.

43. The purpose of the relevant part of the 2006 Act was to extinguish any unrecorded public rights of way for motor vehicles (by section 67) and to place restrictions on the creation of any fresh rights (by section 66).

44. Section 67 is subject to certain exceptions, the relevant one being under subsection (3)(a). This exception applies to an existing right of way if

> "before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic."

45. The relevant date was 20 January 2005: subsection (4)(a). The obvious purpose of setting this date was to exclude applications made during the legislative process in an attempt to avoid the guillotine.

46. Section 53(5) of the 1981 Act included the words that

> "the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

47. I have referred in para 36 to the requirement under paragraph 1 of Schedule 14 for the application to be made in the prescribed form and to be accompanied by (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and (b) any documentary evidence on which the applicant wished to rely.

48. Those provisions, ie section 67(3) of the 2006 Act read with section 53(5) and Schedule 14 paragraph 1 of the 1981 Act, might have been considered sufficient as an ordinary matter of construction to limit the exception created by section 67(3) to cases where an application conforming with the requirements of the 1981 Act had been made before 20 January 2005. But the drafter provided reinforcement by section 67(6):

> "For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act."

49. That subsection, as it appears to me, made it clear for the removal of doubt that section 67(3) of the 2006 Act applied only to an application made in time and in compliance with the formal requirements of paragraph 1 of Schedule 14. Put in negative terms, the saving provided by section 67(3) does not include applications purportedly made before the cut-off date which were substantially defective, whether or not the defects might otherwise have been cured in one way or another. It is well understandable in the circumstances in which the 2006 Act was passed that Parliament should not have wished councils to be burdened potentially with a mass of non-conforming applications made in an attempt to beat the deadline.

50. I was initially attracted by Lord Carnwath's argument for a more flexible approach, based on the precedents of the *Oxfordshire City Council* case and the *Inverclyde District Council* case which he cites, but it is a truism that every statute must be construed in its own context. On full consideration I am persuaded that Lord Neuberger and Lord Sumption are right, having regard to the language of the statute and the legislative context to which I have referred.

LORD CARNWATH:

Ground 1 – prescribed scale

51. My initial reaction on reading the papers in this case was that the appeal should succeed on the first ground, substantially for the reasons given by Lord Neuberger and Lord Sumption. It is an easy assumption that the draftsman must have had in mind an OS 1:25,000 map, or something of equivalent detail and quality. However, I am persuaded that this approach is too simplistic. The draftsman could have so specified but did not. Once it is accepted (as it is) that the word "drawn" does not connote any particular form

of physical production, and that the plan need not be as detailed as an OS map (even one of 1:50,000 scale), nor professionally prepared, I see no convincing answer to the Court of Appeal's analysis. The fact that in practice applicants do normally use OS maps, or that there would be no hardship in requiring them to do so, does not seem to me to assist on the question of construction. I would therefore dismiss the appeal on the first ground for the reasons given by Lord Clarke.

52. This conclusion makes it strictly unnecessary to decide the second ground. This challenges the principle that only "strict compliance" will suffice to save an application under section 67(6) of the 2006 Act (as decided in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2008] EWCA Civ 431, [2009] 1 WLR 138). However, since the point has been fully argued and may be material in other cases, it may be helpful to consider it. Furthermore, as will be seen, I regard it as somewhat artificial to separate the two issues, as the courts below have had to do (being bound by the decision of the Court of Appeal in that case). At this level we are able to take a broader view.

Ground 2 – strict compliance

53. The second issue turns on the construction of section 67(6) of the 2006 Act. It needs to be read in its full statutory context, as already set out by Lord Clarke. The starting point is section 53 of the 1981 Act in Part III, which imposes a duty on authorities to keep the definitive map "under continuous review", and to make modifications so far as required by the occurrence of any of the events specified in subsection (3). Those events are (in summary): (a) the coming into operation of "any enactment or instrument, or any other event" whereby a highway is stopped up, altered or extinguished or a new way created; (b) the expiration of a period sufficient to give rise to a presumption of dedication; or –

> "(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 to which this Part applies;

> (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; …."

54. Subsection (5) allows any person to apply to the authority for an order under subsection (2) making such modifications "as appear to the authority to be requisite" in consequence of an event within paragraph (b) or (c) of subsection (3); and provides that:

> "the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

Schedule 14 paragraph 1 provides that the application is to be made "in the prescribed form", and accompanied by (a) a map "drawn to the prescribed scale and showing the way or ways to which the application relates" and (b) copies of "any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application".

55. Section 67 of the 2006 Act provides for the extinguishment, subject to defined exceptions, of hitherto unrecorded rights of way for mechanically propelled vehicles. It applied generally from the date of "commencement", which for England was 2 May 2006 (defined under section 107(4)). This date applied also to the exceptions under subsection (3)(b) and (c). By contrast subsection (3)(a), which applies in this case, was related to an earlier "relevant date", defined for England as 20 January 2005 (section 67(4)). As explained to Parliament, this was the date on which ministers, following consultation, announced their intention to legislate, in the form of a document "The government's framework for action". That paper did not contain any proposal for a cut-off date for applications prior to the commencement of the Act. That was introduced in the course of the parliamentary proceedings, in response to concerns that the authorities would be flooded by protective applications in the period before the 2006 Act took effect.

56. The critical subsection is section 67(6), by which for these purposes an application under section 53(5) of the 1981 Act is made "when it is made in accordance with paragraph 1 of Schedule 14 to that Act". In the *Winchester* case an application for modification had been made before the relevant date, but had not been accompanied by the supporting "documentary evidence" as required by Schedule 14 paragraph 1(b). In those circumstances the court held that it had not been "made in accordance" with that paragraph before the

relevant date and therefore did not come within the exception. Dyson LJ, with whom the other members of the court agreed, said:

> "In my judgment, section 67(6) requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things (*de minimis non curat lex*). Indeed this principle is explicitly recognised in regulation 8(1) of the 1993 Regulations. Thus minor departures from paragraph 1 will not invalidate an application. But neither the Tilbury application nor the Fosberry application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances, I consider that neither application was made in accordance with paragraph 1." (para 54)

That approach was followed in *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWCA Civ 280, in which the only substantive judgment was again given by Dyson LJ.

The present proceedings

57. In the present case, before Supperstone J, it was argued that the defect which he had found in relation to the scale of the plan was no more than a "minor departure" permissible under the *Winchester* principle. He rejected that submission, holding that there were "material differences between the presentation of the claimed ways on the application maps and their presentation on a 1:25,000 scale map", and that there was no difficulty in compliance (paras 41-43). Permission to appeal that aspect of the judgment was refused.

58. In this court, Mr Pay asks us to hold that the reasoning in the *Winchester* case was erroneous, with the consequence that failure to comply strictly with the Regulations was not necessarily fatal to the application. In short, he submits that Dyson LJ was wrong to adopt a different approach under section 67(6) than would have been applied to an application under section 53(5) apart from the 2006 Act. Under general principles, he submits, failure to comply with procedural requirements, even those of more than "minor" significance, does not necessarily make an application void, and so incapable of having

legal effect. Under the modern law, the question depends not on whether the procedural provision is mandatory or directory, or indeed whether the defect can be described as minor or *de minimis*, but (as Lord Steyn explained *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340, para 23) the emphasis is "on the consequences of non-compliance, ... posing the question whether Parliament can fairly be taken to have intended total invalidity".

59. Applying those principles, he submits, the alleged defects in this case were not such as to render the application void. Their consequences were of no serious significance, since the authority were given all the information they needed to identify the proposal, to prepare their own more detailed plans (as indeed they did shortly after receipt of the application), and to carry out their own investigations. It was therefore properly treated from the outset as a legally effective application for the purposes of Schedule 14 paragraph 1 of the 1981 Act, even if the authority would have been entitled to require the substitution of a compliant plan. It was thus, as at the date of its submission, "made in accordance with" that paragraph under section 67(6) of the 2006 Act.

60. For the authority, Mr Laurence QC supports the *Winchester* decision substantially for the reasons given by the Court of Appeal (in substance accepting his own submissions on behalf of the landowners in that case). Before discussing those submissions it is necessary to look in more detail at the reasoning of Dyson LJ in the earlier cases.

Dyson LJ's reasoning

61. The *Winchester* case involved two separate applicants. It is sufficient to refer to the facts relating to the first, Mr Tilbury. His application, made in June 2001 to the Hampshire County Council, was to modify the definitive map to upgrade a bridleway to a BOAT. The application referred to an appended list of documents, which identified some 25 maps and plans (the earliest dating back to 1739) with his comments. He did not include copies of these maps. It was treated as a valid application by the authority, which on 22 March 2006 resolved to make modifications accordingly. This decision was challenged by landowners affected by the route, on the grounds that there had been no valid application or determination within the time-limits set by section 67 (inter alia) because the application had not been accompanied by copies of all the documentary evidence relied on.

62. The application was heard in the High Court by George Bartlett QC (President of the Lands Tribunal, and a judge with great practical experience

in this field), who rejected the challenge ([2007] EWHC 2786 Admin). In short he held that the requirement to submit documents was a procedural requirement which could be waived by the authority without affecting the validity of the application (paras 38-40). Alternatively, he interpreted the requirement to "adduce" the evidence to be relied on as not extending to evidence already before the council (para 45).

63. In the Court of Appeal, Dyson LJ did not disagree with the judge's approach in relation to the treatment of an application under section 53(5) of the 1981 Act itself. He distinguished this from the question before the court under section 67:

> "This question is not the wider question of whether it was open to the council to treat an application which was not made in accordance with that paragraph as if it had been so made because the failure could be characterised as a breach of a procedural requirement rather than a breach which was so fundamental that (to use the judge's language) the application failed to 'constitute an application' at all. I readily accept that the wider question is relevant and important in the context of applications made under section 53(5) generally and whether an authority has jurisdiction to make a determination pursuant to paragraph 3 of Schedule 14.
>
> But the question that arises in relation to section 67(6) is not whether the council had jurisdiction to waive breaches of the requirements of paragraph 1. It is whether the applications were made in accordance with paragraph 1 …." (paras 36-37)

The purpose of section 67(6), he thought, was –

> "to define the moment at which a qualifying application is made because timing is critical for the purpose of determining whether subsection (1) is disapplied …" (para 38)

That moment was when an application was "made in accordance with paragraph 1". A subsequent waiver of the obligation to accompany the application with copies of documentary evidence could not operate "to treat such an application … as having been made in accordance with paragraph 1 when it was not" (para 38).

64. In his view section 67(6) required strict compliance with each of the elements of paragraph 1, regardless apparently of considerations of practical utility. He rejected, for example, an argument that "strict insistence" that an application be accompanied by copy documents "serves no real purpose and confers no obvious advantage" over providing a list of the documents "particularly where the authority is already in possession of, or has access to, such documents". Such considerations might be relevant to the question whether a failure to comply with paragraph 1 should be waived, but not to whether an application has been made "in accordance with" paragraph 1 (paras 44-45). Similarly he was unmoved by arguments that strict interpretation could lead to absurdity, for example if the application listed a number of documents but by oversight omitted some of them, the absurdity possibly being "sharpened by the fact that the authority has the originals in its possession …". Even a defect of that kind was relevant only to the question of waiver, not to validity for the purpose of section 67(6) (paras 48-49). The only exception he allowed was if copies were impossible to obtain, on the basis of the principle that "law does not compel the impossible" (para 50).

65. The consequences of that narrow approach are strikingly illustrated by the following case, *Maroudas v Secretary of State* [2010] EWCA Civ 280. The court reversed the judgment of the Administrative Court ([2009] EWHC 628 (Admin), Judge Mackie QC), to which reference can be made for a fuller account of the history. The proceedings had taken the form of an application to quash the decision of the Secretary of State, made by an inspector in May 2008 following a hearing, to confirm a modification order made in response to an application originally made under section 53(5).

66. The application had been made as long ago as February 1997, several years before the cut-off date later adopted in the 2006 Act. It had not itself been signed or dated, nor accompanied by a plan showing the way in question. However the council had helpfully responded a month later enclosing a summary and plan, and asking for confirmation that the proposed reclassification extended to the whole of the identified route. The applicant replied by signed letter asking for the whole route to be included. The authority apparently proceeded to deal with it on that basis as a valid application. As far as one can judge from the reports, no objection was taken to the form of the application until the hearing before the inspector some 11 years later. By an unfortunate coincidence (from the applicant's point of view) the hearing took place on 30 April 2008, the day after the promulgation of the *Winchester* judgment, on which the objector was thus able to rely.

67. On these facts the judge upheld the inspector's decision to treat the application as validly made by the relevant date. As he observed, there had been nothing "opportunistic" about the application, made long before any

hint of the proposals which led in due course to the 2006 legislation. Although he was bound by the *Winchester* decision, and he accepted that the defects in the original application could not be treated as "minor", he was entitled to look "at the substance of the matter", which was that -

> "… by the time the letter of 22 April 1997 was written it was perfectly clear what the application related to. There was a map, as one sees from 'enclosed is a summary plan of the application' in the letter of 25 March 1997, and a signature and a date. No one would, or could, have been misled about what happened after that. Mr Maroudas rightly had to accept that he would have no grounds at all for his application if, instead of the exchange of letters, the council had gone through the bureaucratic, or some would say necessary, step of returning the form to [the applicant] to sign and amend, rather than resolving the matter on an exchange of correspondence. That seems to me to move proper strictness into unnecessary bureaucracy …." (para 25)

68. The Court of Appeal disagreed. In particular, the applicant's failure to sign and date the application, and his failure to submit a plan, were not cured by the subsequent exchanges:

> "… the lack of a date and signature in the application form can in principle be cured by a dated and signed letter sent *shortly* after the submission of the form, where the omissions are pointed out and the council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter. But the lack of a date and, in particular, the lack of a signature are important omissions. The signature is necessary to prove that the application is indeed that of the person by whom it is purportedly made. If the application form remains unsigned for a substantial period of time, I would not regard that as a minor departure from the statutory requirement that it should be signed. The fact that the application was unsigned for some 10 weeks in this case is of itself a strong reason for holding that there was a substantial departure from the strict requirements of paragraph 1 of Schedule 14. …
>
> The final point is that the plan enclosed with the council's letter of 25 March was not sent back by Mr Drinkwater with his letter of 22 April. Mr Drinkwater never sent an accompanying map. The absence of an accompanying map is an important omission

> just as is the absence of documentary evidence on which an applicant wishes to rely (as *Winchester* demonstrates). Mr Coppel's case is that the plan which was enclosed with the council's letter of 25 March was the accompanying map and that by his letter Mr Drinkwater was agreeing with the council that it should so treat it. But Mr Drinkwater's letter says nothing about the enclosed plan. There is nothing to indicate that he even looked at it. In view of his indifference to what the council was asking, it seems unlikely that he would have had any interest in the plan at all." (paras 36, 38)

Discussion

69. I start from the general principle that procedural requirements such as those in the 1981 Act should be interpreted flexibly and in a non-technical way. There are close parallels with the provisions relating to applications to register village greens, considered by the Court of Appeal in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 (approved on this point by Lord Hoffmann in the House of Lords: [2006] 2 AC 674, para 61). The question there was the power to amend an application for registration, in the absence of any specific provision in the regulations permitting amendment. In giving the judgment of the Court of Appeal (paras 101-112), I cited the guidance of Lord Keith, dealing with similar arguments in a case concerning the amendment of details submitted under an outline planning permission: *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375. He said:

> "This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon." (p 397)

70. The *Inverclyde* case has added relevance in the present context since it also involved a time-limit. Conditions on the permission imposed a three-year time limit for submission of details. Further, the Act in question there provided that an application for approval made after that date should be treated as not made in accordance with the terms of the permission. The general development order governing submission of details contained no specific provision for amendment. The authority accepted that amendments

could be made within the three-year time-limit, but not after it had expired. Of that Lord Keith said simply that:

> "… an amendment which would have the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent."

71. Such a flexible approach is particularly appropriate in the context of an application to modify the definitive map. A developer submitting details under an outline planning permission is doing so generally for his own benefit, and it is his responsibility to make sure that the details comply with the planning permission and other requirements. In a case of any complexity, the details will generally be professionally prepared. By contrast, under section 53 of the 1981 Act the primary duty to keep the definitive map up to date and in proper form rests with the authority, as does the duty (under section 53(3)(c)) to investigate new information which comes to their attention about rights omitted from the map. An application under section 53(5), which may be made by a lay person with no professional help, does no more than provide a trigger for the authority to investigate the new information (along with other information already before them) and to make such modification "as appears to [them] to be requisite. …"

72. The deputy judge in the *Winchester* case cited the guidance given by Lord Woolf MR in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354 (a judgment noted with approval by Lord Steyn in *R v Soneji* para 19). In a passage headed "What should be the approach to procedural irregularities?", Lord Woolf referred to recent authority qualifying the traditional mandatory/directory test, and said:

> "… the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.
>
> 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

> 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
>
> 3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequence question.)
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver." (p 362C-F)

73. I find this passage particularly helpful since it distinguishes clearly between two logically distinct issues: first, whether as a matter of construction a particular procedural rule is capable of being satisfied ("fulfilled") by "substantial compliance"; secondly, whether even if the rule is not so satisfied a failure to comply can as a matter of discretion be waived by the relevant authority. For most practical purposes the distinction is immaterial. However, it can be significant in a case such as the present where timing is important. In my view, if the statutory rule properly construed can be satisfied by substantial compliance, it is no misuse of language to say that an application made before the relevant time, in a form which meets that standard, is made "in accordance with" the rule.

74. As I understand his two judgments, Dyson LJ proceeded on the basis that any flexibility in the exercise of the section 53(5) procedure could only be explained as a matter of waiver by the authority. It therefore had no relevance to whether the application itself had been made "in accordance with" the statutory requirements for the purpose of section 67 at the relevant time. Indeed, in *Maroudas* he appears to have gone even further. The only latitude allowed was the possibility of curing the defects by a submission made "shortly" after the initial application. Later waiver by the authority of any procedural deficiencies, even if made long before the cut-off date, would not be enough.

75. In my view, with respect, this approach was too narrow. For the reasons I have given, this is not a context in which either statute needs to be read as requiring more than substantial compliance to achieve validity.

76. The words "in accordance with" in section 67(6) do not necessarily imply anything more than compliance which would in any event be required by the terms of section 53(5) and Schedule 14. Dyson LJ appears to have attached importance to the statutory purpose of "defining the moment" by reference to which section 67(1) is disapplied. But the same could have been said of the planning condition in the *Inverclyde* case. It is not clear why that consideration should require a different approach under section 67 than under the governing section.

77. There remains a legitimate question as to the purpose of section 67(6). If it merely reproduces the effect of section 53(5) taken with Schedule 14, why was it necessary to include it at all? Mr Pay's answer is that it was probably intended to make clear that the date was to be fixed by reference only to paragraph 1 of Schedule 14, without regard to the provision (in paragraph 2) for service on landowners. I see some force in that suggestion. It can be said against it that paragraph 2 as it stands leaves no room for ambiguity on that point, since it requires in terms a notice that "the application *has* been made". On that view section 67(6) adds nothing. However, the same point could be made of section 67(7). Even without it, there would have been no reason to read subsection (3)(c)(i) as requiring the applicant to be using, or able to use, the right of way in question. Alternatively, it may be that the purpose of section 67(6) was simply to make clear that what was required was a substantially complete application; in other words a bare application would not be sufficient, if it was not accompanied by the relevant information required by the rule (whether or not precisely in the prescribed form).

78. It has to be remembered that section 67(3) was retrospective in effect. In the *Inverclyde* case there would have been no obvious hardship in tying the applicant to the three-year limit set by the condition, of which he had notice at the time of the permission. By contrast, the cut-off date under section 67(3) was deliberately fixed by reference to the date of the announcement of the legislation, and so as to allow no further opportunity for an applicant to improve his position. The legislative purpose no doubt was to identify for preservation genuine applications made before that date. This was understandable as a means of limiting pre-emptive applications in the period before the Act came into effect. But that purpose did not justify or require subjecting them retrospectively to standards of procedural strictness which had no application at the time they were made.

79. It is unnecessary for present purposes to determine whether the *Winchester* case was correctly decided on its own facts. Nor should this judgment be seen as encouragement to resurrect applications rejected in reliance on it. I would however question its extension to a case, such as *Maroudas* where the defects in the original application had been resolved to the satisfaction of the authority, and waived by them, long before the cut-off date. I would respectfully echo the comment of the deputy judge in *Maroudas* that this was "to move proper strictness into unnecessary bureaucracy". As was conceded, it would have been simple for the applicant, if required to do so, to have resubmitted the application in strictly correct form, but neither the authority nor anyone else thought that necessary. Without a crystal ball he would have had no reason to do so. Yet that wholly excusable failure resulted more than a decade later in the application and all that followed being declared invalid. I would have expected the draftsman to have used much clearer wording in section 67(6) if he had intended to achieve such a surprising and potentially harsh result.

Conclusion

80. As I suggested at the beginning of this judgment, there is some overlap in the two grounds of appeal. Under ground 1, for the reasons given by Lord Clarke, the wording of the definition does not on an ordinary reading bear the interpretation urged on us by the appellants. By the same token, under ground 2, the fact that the draftsman has not thought it necessary to define more precisely the form and contents of the application map can itself be taken as an indication against implying a requirement for unusually strict compliance, under either section 53 or section 67.

81. For these reasons I would dismiss the appeal on both grounds.

LORD NEUBERGER: (dissenting)

Introductory

82. The relevant facts and statutory provisions have been set out by Lord Clarke, and they need not be repeated. Two questions arise. The first is whether the applications submitted to the Dorset County Council by Jonathan Stuart on behalf of the Friends of Dorset's Rights of Way ("the Applications"), purportedly made under section 53(5) of the 1981 Act ("section 53(5)"), complied with the requirements of paragraph 1(a) of Schedule 14 to that Act ("Schedule 14"), in the light of the requirement in regulation 8(2) of the 1993

Regulations. The second question, which only arises if the answer to the first question is "no", concerns the consequences of such non-compliance in the light of the provisions of section 67 of the 2006 Act.

83. In disagreement with Lord Clarke and the Court of Appeal, and in agreement with Supperstone J, I consider that the answer to the first question is that the Applications did not comply with the requirements of paragraph 1(a) of Schedule 14 as the accompanying map was not to the required scale, and that the answer to the second question is that the Applications were ineffective as a result of section 67, and in particular subsection (6) thereof. My reasons for these conclusions are as follows.

The validity of the Applications: the 1:25,000 scale requirement

84. The Applications were accompanied by documents which were enlarged photocopies of plans which had been prepared on a scale of 1:50,000, and which, as a result of the enlargement exercise, were on a scale of around 1:20,000. In those circumstances, the first question is whether such enlarged photocopies constituted maps "drawn to the prescribed scale" within paragraph 1(a) of Schedule 14, which as a result of regulation 8(2) and regulation 2 of the 1993 Regulations had to be "on a scale of not less than 1:25,000".

85. A map of a particular area is a document which shows in reduced, two-dimensional form, normally with markings, symbols or annotations, what is on the ground in that area. It is almost inevitable that the "map" accompanying an application under section 53(5) will be a copy (either in printed form or a photocopy of a printed form) of an original map drawn by an individual, a group of individuals or a machine. The court was told that, in the experience of those involved in these proceedings, a photocopy of the appropriate section of a published copy of the relevant OS map is invariably used by applicants under section 53(5). That is entirely unsurprising, although there is no reason why the map accompanying a section 53(5) application should not be a copy of another published map, or an original plan, drawn for the purpose of the application, provided, of course, that it is "drawn to the prescribed scale".

86. Where an applicant uses a copy of an original map, the appellant council contends that the document only complies with the requirements of paragraph 1(a) of Schedule 14 if it is a copy of a map which was prepared on a scale of at least 1:25,000, whereas the respondent applicants argue that it complies

with these requirements if the copy is on a scale of at least 1:25,000, even if the map from which the copy was made was on a scale of less than 1:25,000.

87. The words used in paragraph 1 of Schedule 14 and in regulations 8(2) and 2 of the 1993 Regulations could justify either contention as a matter of pure language, although, as explained in para 90 below, I consider that the more natural meaning is that contended for by the appellant council. For that reason, but also for two other reasons, I prefer the appellant's case.

88. First, the purpose of imposing a minimum scale for the accompanying map was, in my view, because it could be expected to show a level of detail which would not normally be shown on a map prepared on a smaller scale. That would enable the council to appreciate the nature of the land and the various features close to the way in question. The only justification for the imposition of a minimum scale on the respondents' case could be that a smaller scale plan would not show the way clearly, but that is a fanciful suggestion in my opinion, not least because paragraph 1(a) of Schedule 14 already contains a requirement that the way be "show[n]" on the plan, and that must mean "clearly show[n]".

89. It is true that applicants could draw their own map showing no detail, but that unlikely possibility is not an answer to the point that those responsible for the 1993 Regulations must have envisaged (rightly as events have turned out) that an OS map would normally be the document from which the copy map was made. Given that OS maps to a scale of 1:25,000 are easily obtainable in respect of all parts of England and Wales, it would be very eccentric for an applicant to incur the cost and time of preparing, or paying someone else to prepare, a new plan or map to that scale for the purpose of a section 53(5) application. That point is underlined by the fact, already mentioned, that applicants appear invariably to use photocopies of OS maps, and the fact that definitive maps are always based on OS maps.

90. Secondly, it is not an entirely natural use of language to describe an enlarged photocopy of a map originally prepared on a scale of 1:50,000, as "drawn" on a higher scale. To my mind at any rate, a map is "drawn" to a certain scale if it is originally prepared to that scale. One might fairly describe a doubly magnified photocopy of a 1:50,000 map as "being on" a scale of 1:25,000, but I do not think that it would be naturally described as having been "drawn to" a scale of 1:25,000. The word "drawn" in paragraph 1 of Schedule 14 must, of course, be given a meaning which is appropriate in the light of modern technology and practice, but I do not see how that impinges on the natural meaning of the expression in the present case.

91. Thirdly, the operative regulation in the present case, regulation 8(2) of the 1993 Regulations, states that regulation 2 is to apply to an application. Regulation 2 contains the express requirement "A definitive map shall be on a scale of not less than 1:25,000". It appears to me therefore incontrovertible that if a map satisfies regulation 8(2), it must also satisfy regulation 2. With due respect to those who think otherwise, I do not see how regulation 2 can have one meaning in relation to a definitive map and another meaning in relation to a map accompanying an application. Bearing in mind the public importance of a definitive map, it strikes me as very unlikely that the drafter of the 1993 Regulations could have envisaged that such a map could be an enlarged photocopy of a map which had been prepared on a scale of significantly less than 1:25,000. I also note that regulation 2 is foreshadowed by section 57(2) of the 1981 Act, which refers to "Regulations" which can "prescribe the scale on which maps are to be prepared": again, it does not seem to me to be a natural use of language to describe a doubly magnified photocopy of a 1:50,000 scale map as "prepared" on a scale of 1:25,000.

The effect of section 67 of the 2006 Act on the Applications

92. The status of the Applications if the maps which accompanied them failed to comply with the requirements of paragraph 1 of Schedule 14 requires a little analysis. Confining myself for the moment to the 1981 Act and the 1993 Regulations, it appears to me that the following three propositions are correct. First, the council could have treated the Applications as valid, and effectively waived the failure to comply with the map scale requirements. Secondly, if the council had taken the point that the enlarged photocopies did not comply with the requirements of paragraph 1 of Schedule 14, then the defect could not simply have been treated as if it had not existed. Thirdly, in such an event, subject to any special reason to the contrary (eg the applicants not having availed themselves of ample opportunity to do so after warnings), the applicants would have been entitled to remedy the defect on the Applications by submitting maps which were properly compliant with paragraph 1 of Schedule 14.

93. In relation to each of these three propositions, it seems to me that Lord Steyn's observations in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, paras 14 and 23, are in point. He said that where "Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply", "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity", which is "ultimately a question of statutory construction".

94. As to the first proposition, it seems to me that the purpose of the requirement in paragraph 1(a) of Schedule 14 is to enable the council to whom a section 53(5) application is made to be assisted as to the identity, location, extent and surroundings of the way, when dealing with the application. Accordingly, if the council is content to accept a less helpful or informative map than it was entitled to insist on, that is a matter for the council, and there is no basis for holding the application invalid.

95. As to the second proposition in para 92 above, the notion that the defect could simply have been overlooked seems to me to fly directly in the face of the conclusion that paragraph 1 of Schedule 14, when read together with the 1993 Regulations, requires a section 53(5) application to be accompanied by a map drawn to a certain minimum scale. If an application does not comply with that requirement, and the failure is not waived by the council, the application is invalid as it stands. Unless it can be said that the failure is *de minimis* (a suggestion which was rightly rejected by Supperstone J in this case), the court would not be giving effect to the statute if it simply overlooked the defect.

96. That brings one to the third proposition in para 92 above. I do not consider that it would be consistent with the purpose of the 1981 Act, and in particular section 53 and Schedule 14, if an application which was defective because it was accompanied by a map on too small a scale, could not be validated by the subsequent provision of a map on the appropriate scale. On the contrary. The point was well put in *Inverclyde District Council v Lord Advocate* (cited and followed by Carnwath LJ in *Oxfordshire County Council v Oxford City Council* [2005] EWCA Civ 175, [2006] Ch 43, paras 106-109), by Lord Keith, who held that it was open to an applicant to amend an application after the final date by which the application had had to be made. He said that "[t]he planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage".

97. Accordingly, in the absence of any other statutory provisions, I would have held that, although the Applications were invalid for the purposes of section 53(5) because they did not comply with the requirements of Schedule 14, they could effectively be saved by the applicant submitting maps drawn to the stipulated scale.

98. Having said that, such a conclusion is not available in my opinion in this case, because the provisions of section 67 of the 2006 Act, on which Mr Plumbe (a chartered surveyor who intervened on this appeal) rightly placed great emphasis in his brief submission, apply in this case. Section 67(1)

extinguishes a certain type of public right of way (namely one "for mechanically propelled vehicles") if it is not "shown in a definitive map". Paragraphs (a) to (c) of section 67(3) exclude certain ways from the ambit of section 67(1); only para (a) is directly in point, and it refers to ways in respect of which "an application was made under section 53(5) of the [1981 Act]". However, and here lies the problem for the respondents, section 67(6) states that "[f]or the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act".

99. As Mr Laurence QC says on behalf of the appellant council, the observations of Lord Steyn in *Soneji* cannot apply to the position under section 67, because this is a case where "Parliament … [has] expressly spel[led] out the consequences of a failure to comply" with its "command", in that section 67(1) expressly provides that a right of way is extinguished unless (for present purposes) section 67(3)(a) applies. To adopt the words of Lord Woolf MR in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, quoted by Lord Carnwath in para 72, Parliament in section 67(1) and (6) has spelled out "the consequence of the non-compliance", and as "the result of non-compliance goes to jurisdiction … jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver".

100. Unless section 67(6) is mere surplusage, it seems to me that it can only sensibly be interpreted as meaning that, if a section 53(5) application has been made, but that application does not comply with the requirements of paragraph 1 of Schedule 14, then it is not to be treated as an application for the purposes of section 67(3)(a). As that is what happened in the present case, it must follow that the ways the subject of the Applications have been extinguished pursuant to section 67(1).

101. It seems to me impossible to give section 67(6) any meaning if it does not have the effect for which Mr Laurence QC contends. The ingenious notion that it was intended to make it clear that only paragraph 1, and not paragraph 2, of Schedule 14 had to be complied with is wholly unconvincing, because, as Lord Carnwath says in para 77, it is clear from the wording of paragraph 2 itself that it only applies after an application has been made.

102. I find the notion that section 67(6) is surplusage very difficult to accept. It is not as if the choice was between a strained meaning and no meaning, as the natural effect of the words of the subsection is as I have described. And that meaning appears to me to be entirely consistent with the purpose of section 67, which is to extinguish certain rights of way if they are not registered,

subject to certain exemptions including those ways subject to section 53(5) applications. While it may seem harsh, it seems to me quite consistent with the purpose of the section to exclude from that class of exemption cases where the application is defective (even though it may otherwise be saveable). I do not consider that the court would be performing its duty of reflecting the intention of Parliament as expressed in legislation if it effectively ignored or discarded a subsection simply because it did not like the consequences, or it considered that they were rather harsh.

103. It is said on behalf of the respondents by Mr Pay, who presented his arguments very well, that section 67 was retrospective in its effect and it is therefore appropriate to interpret a provision such as section 67(6) generously to a party who has made a defective section 53(5) application. I am unpersuaded by that. First, the effect of section 67 was only backdated to the moment when the Government announced its intention to enact it. Secondly, the respondents' case does not involve interpreting section 67(6) so much as discarding it. Thirdly, there is no correlation between the retrospectivity and the timing of the failure to comply or opportunity to remedy the failure to comply.

104. It is also said that there is some surplusage in section 67 anyway. Although that was not gone into in any detail, I am unconvinced that it is true. However, even if it is, I do not see how it would assist the respondents' case.

105. The notion that my conclusion as to the effect of section 67(6) leads to absurdity, because an application could thereby be invalidated by virtue of a small oversight, does not impress me. It is an argument which can be raised in relation to any provision, whether contractual or statutory, which requires a step, which has potentially beneficial consequences for the person who is to take it, to be taken by a certain date which cannot be moved. An obvious example is the service of a statutory or contractual notice: if a defective notice is served and is not corrected before the stipulated date, then the right to serve the notice, and the consequential benefits, are irretrievably lost, even if the defect was due to an oversight.

Conclusion

106. For these reasons (which on the second question are very similar to those contained in the judgment of Dyson LJ in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2008] EWCA Civ 431, [2009] 1 WLR 138), and for the reasons given in the brief judgment of Lord Sumption, I would have allowed this appeal.

LORD SUMPTION: (dissenting)

107. There are two reasons why regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12) might have prescribed the use of a map on a scale of not less 1:25,000. One is because a map on that scale showing the relevant byway could be expected to show more of the surrounding detail than a map on a smaller scale. The other is that it was desired to ensure that the map should be visible without unduly straining the eyesight of those using it. In my opinion it is manifest that the requirement was imposed for the first of those reasons and not for the second. It is true that the Regulations do not specify what maps of the prescribed scale must be used and that different maps may vary in the amount of surrounding detail shown. It is also true that an applicant supplying a map under regulation 8 might in theory satisfy the requirement by producing a 1:25,000 scale map with less surrounding detail than some 1:50,000 scale maps. It is also true that he might satisfy it by producing a home-made map on which the byway was shown with little or no surrounding detail (although this course would clearly not be open to a local authority producing a definitive map under regulation 2). But I do not regard this as relevant to the construction of the Regulations, because I decline to construe them on the assumption that applicants could be expected to complete their applications in the most obtuse and unhelpful manner consistent with the language. In my opinion the Regulations have been drafted on the assumption that a map would be used in which a 1:25,000 scale map would have sufficient surrounding detail, and in any event more than a 1:50,000 map. A magnified copy of a 1:50,000 map is therefore not the same thing as a 1:25,000 map, and does not comply with regulation 8.

108. Section 67(6) of the Natural Environment and Rural Communities Act 2006 provides that for the purposes of subsection (3) an application seeking modifications to the definitive map means one which complies with Schedule 14, paragraph 1 of the Wildlife and Countryside Act 1981. That means one which includes a map drawn on the prescribed scale. The application in this case was therefore not an application of the kind referred to in section 67(3) of the 2006 Act. It follows that on the relevant date any right of way for mechanically propelled vehicles was extinguished. Since the defect might in theory have been made good after the relevant date, this may be described as a technical point. But sometimes technicality is unavoidable. Where the subsistence of rights over land depend on some state of affairs being in existence at a specified date, it is essential that that state of affairs and no other should be in existence by that date and not later.

109. For these reasons, which are the same as those of Lord Neuberger, I would have allowed the appeal.