

Case No. CO/762/2017

Neutral Citation Number: [2017] EWHC (Admin) 1866
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Tuesday, 18 July 2017

B e f o r e:

MR JUSTICE HOLMAN

Between:

TRAIL RIDERS FELLOWSHIP

Claimant

v

**SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL
AFFAIRS**

Defendant

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(Official Shorthand Writers to the Court)

Mr Adrian Pay (instructed by Brain Chase Coles) appeared on behalf of the **Claimant**
Mr Mark Westmoreland Smith (instructed by the Government Legal Department)
appeared on behalf of the **Defendant**

J U D G M E N T (As approved by the judge)

MR JUSTICE HOLMAN:

The essential facts and the issue

1. This is a statutory application to the High Court pursuant to paragraph 12 of schedule 15 to the Wildlife and Countryside Act 1981 (the 1981 Act) by a claimant who is aggrieved and questions the validity of a modification order made pursuant to section 53(2)(b) of that Act. By paragraph 12(2) of schedule 15 this court may, if satisfied that the order was not within the powers under section 53, quash the order or any provision of the order.
2. The essential facts are as follows. There is within the area of the Hertfordshire County Council a "route" known as Oakridge Lane. This is about 675 metres long from a point identified as point A, where it merges with the A51 road (Watling Street) at its northerly end, to a point F, where it becomes a public vehicular highway near Hill Farm at its southerly end. Between these points Oakridge Lane is a path or track which passes through open fields and countryside. It is common ground that there had formerly been a long-established vehicular right of way which was continuous between points A and F such that it was lawful to ride a motorbike continuously along Oakridge Lane from point A to point F or vice versa.
3. Oakridge Lane did not previously appear at all on the Definitive Map and Statement (DMS) maintained by Hertfordshire County Council pursuant to section 53 of the 1981 Act. The British Horse Society applied to Hertfordshire County Council to modify their DMS to add Oakridge Lane as a restricted byway upon the DMS, thus formally recording the right of horses to be ridden along it. However, a restricted byway does not confer or include a right of way for mechanically propelled vehicles.
4. The claimant in this application is the Trail Riders Fellowship or TRF. The TRF is a national organisation whose objectives are:

"to preserve the full status of vehicular 'green lanes' and the rights of motorcyclists and others to use them as a legitimate part of the access network of the countryside ..."
5. The TRF became aware of the application made by the British Horse Society and contended, and now contend, that the DMS should be modified to show the whole of Oakridge Lane, not as a restricted byway, but as a byway open to all traffic (a BOAT).
6. A lengthy procedure then ensued, which it is not necessary to describe in any detail. Inspectors were appointed by the defendant Secretary of State. The decision of a first inspector was made and later quashed. A second inspector, Susan Doran BA Hons, MIPROW, made three sequential decisions on 14 January 2015, 5 May 2016 and 6 December 2016. The third and last of those decisions is the operative one, although the substance of her reasoning, so far as is material to the present application, remains contained in paragraphs 13 to 23 of her first decision, which is substantially reaffirmed and reiterated in the subsequent decisions.

7. The essential conclusion of the inspector is that Oakridge Lane is a BOAT between point A and a point which she identified as point C, and a BOAT between a point which she identified as point E and point F; but that it is only a restricted byway between points C and E. The modification order now under challenge gives effect to that conclusion by adding to the DMS BOATs from points A to C and from points E to F, but adding only a restricted byway between points C and E. The distance between points C and E is about 110 metres.
8. The practical effect is that, according to the rights now recorded in the DMS, a motorbike or other mechanically propelled vehicle may be lawfully ridden in either direction between points A and C and between points E and F, but not over the 110 metres between points C and E. This in turn means that a motorbike or other mechanically propelled vehicle can no longer lawfully travel the whole length of Oakridge Lane from one end to the other.
9. The issue on this application is whether in reaching her conclusion the inspector erred in law such that the order is not within the powers under section 53 of the 1981 Act and should be quashed. It is common ground that if the inspector made a material error of law, the resulting order is not within the powers.

The statutory framework

(i) Definitive map and statement

10. Part IV of the National Parks and Access to the Countryside Act 1949 first made provision for authorities to make, publish and maintain "a definitive map and statement" (DMS) of the public rights of way in their area. The Act made detailed provisions as to the preparation of such maps and statements in draft and then provisional form, and for challenges to the draft or provisional map and statement. At the conclusion of that process, a DMS was, by section 32(4), conclusive as to the particulars contained within it and, in summary, as to the status of any given right of way. Section 33 of the 1949 Act made provision for periodic review and revisions of the DMS.
11. Part IV of the 1949 Act has been superseded and in substance replaced by Part III of the Wildlife and Countryside Act 1981 which now makes similar provision for preparing, maintaining, reviewing and revising the DMS. Section 56 of the 1981 Act now provides that a DMS "shall be conclusive evidence as to the particulars contained therein ...", substantially as in the replaced section 32(4) of the 1949 Act.
12. Section 53(2)(b) of the 1981 Act requires an authority "by order" to make such modifications to the definitive map and statement as appear to them to be necessary in consequence of certain events specified in subsection (3). These events include at paragraph (c):

"(c) the discovery by the authority of evidence which ... shows -

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist ...;

(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; ..."

13. It was pursuant to section 53(3)(c)(i) of the 1981 Act that the process was first triggered in this case to add Oakridge Lane to the DMS by the modification order ultimately made pursuant to section 53(2)(b).

(ii) List of streets

14. The function and purpose of the DMS is clearly to record in a way which is "conclusive" (in accordance with the provisions of the 1981 Act) the existence and course or alignment of rights of way. Quite separate and distinct are the provisions of Part IV of the Highways Act 1980 (the 1980 Act) which relate to the maintenance of highways which are maintainable at public expense. Section 36(6) of the 1980 act provides that:

"The council of every county ... shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense."

15. The word "street" is very widely defined in that Act and includes "any highway, road, lane, footway, alley or passage", and it is common ground that Oakridge Lane falls within that definition of a street. A list of streets (LoS) is a public document which is required to be kept available for public inspection (see section 36(7) of the 1980 Act). A LoS may serve a range of purposes, but it is apparent that its essential and primary purpose is to enable anyone to find out whether or not a given street or highway is maintainable at public expense and, if so, by which authority. There is no provision in relation to a LoS corresponding to the "conclusive" provisions of section 56 of the 1981 Act in relation to a DMS.

(iii) The Natural Environment and Rural Communities Act 2006 and the extinction of certain rights of way for mechanically propelled vehicles

16. Part 6 of the Natural Environment and Rural Communities Act 2006 (NERCA) made provision for the ending of certain existing unrecorded public rights of way. As is clear from the government's consultative document quoted at paragraph 160 of the judgment of the Court of Appeal in Fortune v Wiltshire County Council [2012] EWCA Civ 334, [2013] 1 WLR 808, the avowed broad purpose of Part 6 of NERCA was to extinguish the right to drive modern mechanically propelled vehicles over so-called "green lanes" in reliance upon ancient, but unrecorded, rights of way based upon horse-drawn vehicles. However, rights which were already recorded in certain forms before the commencement of the Act were preserved. So far as is material, section 67 of NERCA provides as follows.

"67. 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 or statement, or

(b) ...

But this is subject to subsections (2) to (8).

(2) Subsection (1) does not apply to an existing public right of way if -

(a) ...

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (list of highways maintainable at public expense)

..."

17. It is common ground in this case that immediately before the commencement of NERCA on 2 May 2006 there was an existing public right of way for mechanically propelled vehicles over the whole of Oakridge Lane, but, as I have stated, Oakridge Lane was not at that time shown in the relevant DMS. Thus, the existing right of way was, by operation of NERCA on the commencement date, automatically extinguished unless it was saved by the exception made in section 67(2)(b); in short, if the "way" was "shown" in the LoS.

The list of streets

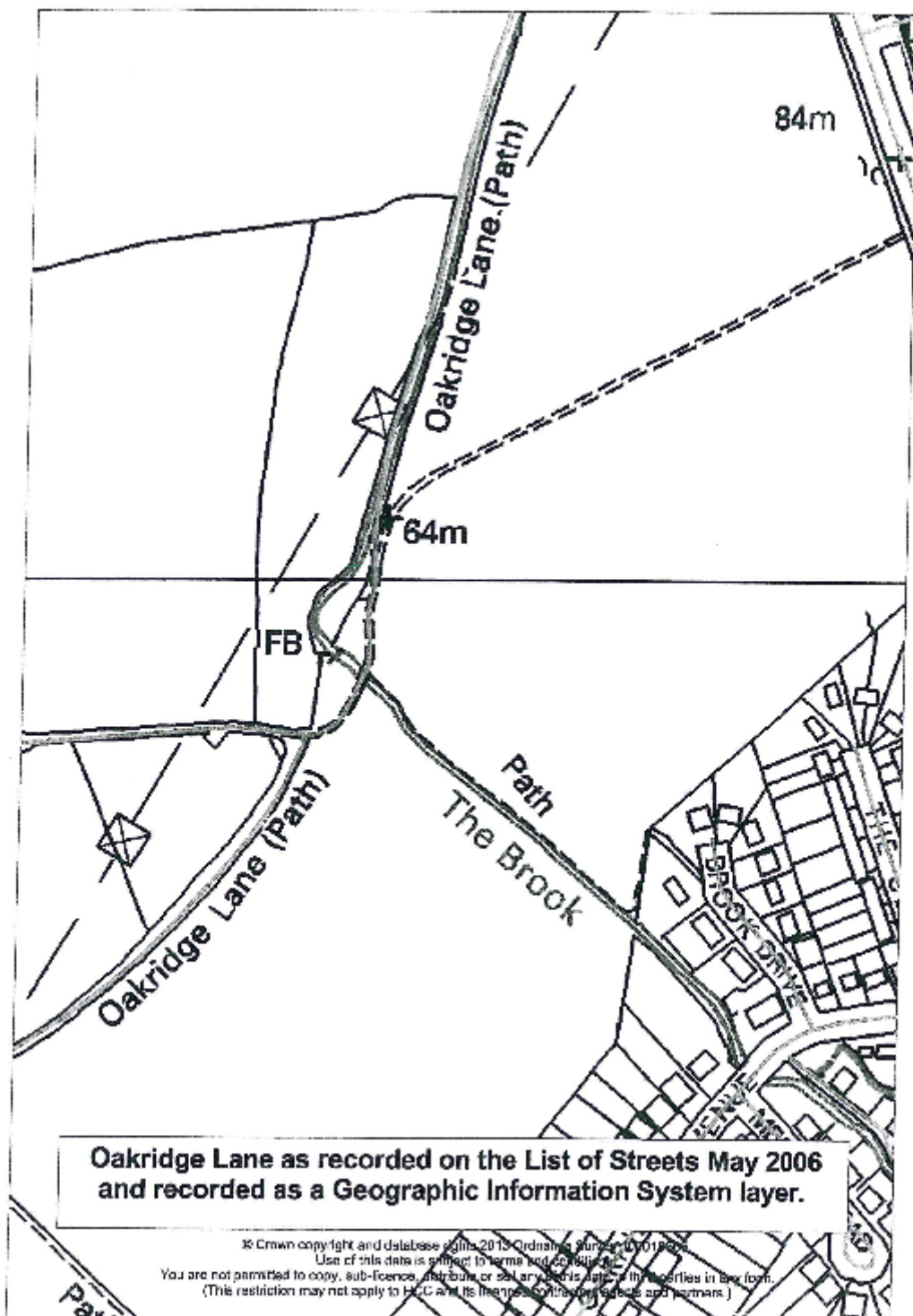
18. The Hertfordshire County Council did maintain a list of streets, and Oakridge Lane was shown upon it immediately before the commencement of NERCA. Hertfordshire have explained, and the inspector accepted, and I accept, that the LoS comprised both a descriptive list in words in the conventional sense of a list, and also an accompanying map recorded as a Geographic Information System layer. The relevant part of the descriptive LoS is now at bundle 1 page 56 and appears as follows:

UNITID	ROADNAME	DESCRIPT	TOWN	DISTRICT	OWNER
4U23/20	OAKRIDGE LANE	(TRACK) SEWAGE WORKS BOUNDARY TO 60M EAST OF HILL	RADLETT	HERTSMERE	HERTFORDSHIRE
4U23/30	OAKRIDGE LANE	(FOOT TRACK) OPPOSITE HILL FARM TO NORTHERN ACCESS	RADLETT	HERTSMERE	HERTFORDSHIRE
4U23/40	OAKRIDGE LANE	(FOOT TRACK) HILL FARM NORTHERN ACCESS ROAD TO A51	RADLETT	HERTSMERE	HERTFORDSHIRE

19. The reference to "sewage works" is to the south of point F, and the reference to "northern access road to A51" is a reference to point A, so the whole of Oakridge Lane from points A to F is clearly encompassed by the verbal description in the written list.

The relevant part of the LoS, as recorded in map form, is now at bundle 2 page 60. This is a highly magnified portion of a much larger and smaller scale map. It clearly depicts a way from north to south which is coloured in magenta and which is clearly marked as "Oakridge Lane (Path)". Those words are printed alongside the depicted way twice, both just above the now disputed section between points C to E and also just below that section, between points E and F. None of these lettered points are themselves marked on the LoS map, as all the lettered points have only been identified and labelled later by the inspector.

20. A black and white scan of the map at page 60 appears below, although it is not reproduced with the magenta colouring nor the blue colouring of the brook.



60

21. For some distance to the north of what is now point C, Oakridge Lane is immediately adjacent and parallel to a brook. For a short distance between points C and E, the brook meanders or deviates in an ark or bow-shape to the left and then turns quite sharply to the right (as one looks at the map) and continues in a south-easterly direction away from Oakridge Lane. Apparently, there are over the brook two bridges, a short distance apart. The way as marked in magenta on the map bows slightly to the right and passes over the more south-easterly of the two bridges shortly before what is now point E.

The decision of the inspector

22. The inspector heard evidence and considered a considerable number of old maps and other documents. She concluded at paragraph 12 of her first decision, now at bundle 2 page 338:

"12. Taking together the historic documentary evidence summarised above, I agree with the parties that public carriageway rights exist over Oakridge Lane. It has existed as a through route since at least 1766. The 1898 Main Roads Order and 1910 Finance Act Map point to it being a public vehicular way and the County Maps, OS, DMS and other records are not inconsistent with that status."

23. However, the inspector also concluded that, between what she identified as points C and E, the historic public carriageway did not follow the slightly bowed course or alignment over the bridge marked in magenta on the map with the LoS, but a more straight course or alignment over the other bridge slightly to the west or left as one looks at the map. The distance between the two alignments is apparently at its widest about 30 metres on the ground.
24. This led the inspector to conclude that the true historic right of way (ie the straight line) between points C and E was not shown on the LoS and, accordingly, that the section between C and E (but not the remainder of Oakridge Lane to the north of C and south of E) was not shown in the LoS, albeit that the slightly bowed alignment marked in magenta clearly was. It is upon the discrepancy (said by Hertfordshire to be due to error) between the precise course or alignment of the historic right of way, as found by the inspector, and the way marked in magenta upon the map that this dispute hinges and turns.

The reasoning of the inspector

25. The reasoning of the inspector is contained within paragraphs 13 to 23 of her first Order Decision dated 14 January 2015. Those paragraphs are too long to quote in full. At paragraph 17 the inspector agreed with the argument on behalf of the TRF and others:

" ... that the LoS was designed to be a record of maintenance, that it fulfils a different role to that of the DMS, and its application to the 2006 Act could not have been envisaged when the 1980 Act was drawn up."

26. The inspector further agreed that the legislation is silent as to what information is required to be contained in a LoS or what form it should take. She continued within paragraph 17 that:

"Some guidance, however, is to be found in Fortune (at paragraph 1135 of the judgment) that it is the responsibility of the Highway Authority to decide how best to make and keep corrected up to date its own section 36(6) list."

27. Pausing there, one can only gaze in awe and wonderment at the mighty first instance judgment of His Honour Judge McCahill QC in Fortune, but it is correct that at paragraph 1135 it does say just that. The inspector continued at paragraphs 18 to 23 of her Order Decision as follows:

"18. With that in mind, and in the absence of any requirements in the legislation as to what form the LoS should take, it follows that I must have regard to what the Council says is its LoS (paragraph 16). Therefore I do not share Mr Kind's view that the details contained in the GIS layer are irrelevant. The GIS layer forms an integral part of what the Council regards as its LoS. As regards Oakridge Lane the descriptive element of the LoS gives details of the length of roads defined by start and end points together with other relevant information, and the mapping element shows its alignment. The essence of Mr Westley's argument is that Oakridge Lane was shown on the LoS in 2006, notwithstanding that the entry on that List required correction. However, whilst it might have been the Council's intention to record the historic alignment of Oakridge Lane, it does not alter the fact that immediately before 2 May 2006, the alignment recorded between points C and E was different to the historic route ...

19. I recognise that earlier records included Oakridge Lane as a publicly maintainable highway long before 2 May 2006 ... However, the question is whether the Order route was shown on the LoS immediately prior to this date, not what was shown before then or after, or what should have been shown. It follows that I do not share the view that the statutory purpose would be frustrated if vehicular rights were extinguished merely because of inaccurate particulars of alignment.

20 ... I have concluded that the List kept by the Council for the purposes of the 1980 Act and relevant to the provisions of the 2006 Act contain both a database and a GIS layer which should be read together.

21 ...

22 ...

23. The length C-E is some 110 metres which represents some 10% of the Order route. I agree with the Council that this is not insignificant such that it could be regarded as a minor discrepancy or departure. As regards

a sideways displacement ... the routes are close together towards point C but the divergence more pronounced towards E. To a degree, the issue depends on the map scale as to how easy it is to distinguish between the two. However, the Council argue the difference between the routes is clearly distinguishable on a 1:10,000 map, this being the scale of their Definitive Map. I am not persuaded that any difference between the two routes can be regarded as sufficiently minor such that the section C-D should be recorded as a Byway. I therefore conclude that whilst Oakridge Lane was recorded in the LoS, it was shown on a sufficiently different alignment between C and E immediately before 2 May 2006. It follows that the exception cannot apply to this length of the Order route which should therefore be recorded as a Restricted Byway."

Analysis

28. In my view this reasoning clearly contains a non sequitur and, with due respect to her and her specialist expertise in this field, the inspector made an error of law. I agree with the inspector at the beginning of paragraph 18 that she "must have regard to what the council says is its LoS." I agree also that "the details contained in the GIS layer" cannot be treated as "irrelevant" or be wholly disregarded. The non sequitur and error is that the inspector then jumped from not treating "the details", viz the precise alignment of the magenta line, as "irrelevant" to making them decisive. In the process, although she had correctly recognised differences between a LoS and a DMS in paragraph 17 of her Order Decision, she treated the map within the LoS as if it was required to contain, and did contain, the cartographic accuracy and precision of a DMS; and treated it as "conclusive", although a LoS is not required to include any map at all.
29. It is in fact very obvious from the map in point in this case at bundle page 60 that the magenta line is only intended to identify, and not precisely to delineate, a given "street". In the bottom right-hand corner of the map are a number of residential streets. The thin magenta line passes through the middle of each such street but does not colour in the whole width of the street. The magenta line over the lower parts of Oakridge Lane (roughly between points E and F) does not colour in the whole width of the lane as clearly printed on the map. At various points where the lane borders the brook the magenta line has obviously been imprecisely drawn and in places runs up the middle of the brook itself. All this is consistent with the purpose of a LoS which is essential to identify and record which streets are maintainable at public expense, but not, in contrast to a DMS, precisely to delineate them.
30. The requirement of section 67(2)(b) of NERCA is simply that immediately before commencement the way "was shown in a list required to be kept under section 36(6) ..." The descriptive list in list form, now at bundle page 56, clearly does "show" and describe a continuous way from beyond or south of point F to point A, and the map at page 60 clearly depicts a continuous path twice labelled as "Oakridge Lane". In my view, the whole of Oakridge Lane was patently "shown" in the LoS, and section 67(2)(b) neither requires nor justifies the decisive concentration which the inspector gave to the precise course of the magenta line on the map. This led her to reach a conclusion which is, frankly, perverse and which Parliament cannot have intended.

31. Whilst the primary purpose of Part 6 of NERCA was clearly to extinguish existing but unrecorded public rights of way for mechanically propelled vehicles, Parliament clearly intended to make exceptions for those which were shown either in a DMS (which may be expected to be accurate and precise) or in a LoS (which may not be). This admitted historic and continuous right of way was so shown in the LoS, and it is perverse that over one section of its length it was automatically extinguished because of imprecision in the magenta line upon the map which is part of, but not the whole of, the LoS.
32. The written and oral submissions of both Mr Adrian Pay on behalf of the TRF and Mr Mark Westmoreland Smith on behalf of the Secretary of State all display great learning in this field, and I was indebted to them. It was a privilege to listen to them. However, none of the authorities cited are directly in point and I do not base my decision on such matters as the differing scales of various maps and what scales any given regulation may require.
33. For the short reason given, I am very clearly satisfied (as paragraph 12(2) of schedule 2 to the 1981 Act requires) that the inspector made an order which is founded upon a clear error of law and is, accordingly, not within the powers under section 53. I am also clearly satisfied that that error has created in this case a perverse result such that the error cannot, in my discretion, be overlooked.

Outcome

34. I will accordingly exercise my power and discretion under paragraph 12(2) of schedule 15 to quash. Counsel agreed at the hearing that if that was my conclusion they would be able to consider and agree whether I should formally quash the whole order, or quash only the material and infected provisions of it. I have no power other than to quash, and I cannot substitute any amended or alternative form of order. However, if this matter is further considered by the same or another inspector, she or he must clearly have regard to the contents of this judgment.

[END OF JUDGMENT]

35. MR JUSTICE HOLMAN: I think you were agreed with Mr Westmoreland Smith that you would be able to draft and agree an appropriate form of order.
36. MR PAY: Yes. I have had communications with Mr Westmoreland Smith. He asked whether we could have until close of play tomorrow to agree a formal order.
37. MR JUSTICE HOLMAN: Certainly. You can certainly have until close of play on Thursday.
38. MR PAY: I am very grateful.
39. MR JUSTICE HOLMAN: I think we agreed that costs would inevitably follow the event.
40. MR PAY: Indeed. I am very grateful, my Lord, and very grateful for the speed at which you have delivered the judgment.