Todd and another v Secretary of State for the Environment, Food and Rural Affairs

[2004] EWHC 1450 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

EVANS-LOMBE J

19–21, 24 MAY, 22 JUNE 2004

Highway – Definitive map – Modification order – Modification order made on discovery by authority of evidence showing that a right of way not shown in the map subsisted or was reasonably alleged to subsist – Secretary of State confirming modification order on basis of evidence from which existence of right of way could reasonably be alleged to subsist – Whether Secretary of State applying correct standard of proof – Wildlife and Countryside Act 1981, s 53(3)(c)(i), Sch 15.

The relevant surveying authority made an order modifying its definitive map of public rights of way under s 53[a] of the Wildlife and Countryside Act 1981, which provided for such modification, inter alia, under sub-s (3)(c)(i), on the discovery by the authority of evidence which showed that a right of way which was not shown in the definitive map and statement subsisted or was reasonably alleged to subsist. The modification made was the inclusion of a byway open to all traffic (a BOAT). Orders made, inter alia, under s 53(3)(c) took effect subject to the provisions of Sch 15 to the 1981 Act. Under para 2[b] of Sch 15, an order was not to take effect until confirmed either by the authority or the Secretary of State under para 6[c], or by the Secretary of State under para 7[d]. Paragraph 6 related to unopposed orders, which the authority could confirm without modification, or submit to the Secretary of State for confirmation if they required any modification. Paragraph 7 required the authority to submit opposed orders to the Secretary of State , who could then either hold a local inquiry or afford objectors an opportunity of being heard. The claimants would not have objected to the inclusion of the way in question as a footpath or bridleway, but they did oppose to its inclusion as a BOAT, as that meant it would be open to motorised vehicles. Accordingly, the authority submitted the order to the Secretary of State; she appointed an inspector and public inquiries were held. The inspector found that the way could 'be reasonably alleged to subsist as a vehicular highway' and confirmed the order. The claimants sought to have the order quashed. They submitted, inter alia, that the inspector had applied too low a standard of proof, namely that the authority could establish facts from which the existence of a BOAT could reasonably be alleged to subsist, as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities. The claimants referred to the history of the legislation and to decided cases relating to appeals at the preliminary stage against a refusal by a relevant authority to make a modification order which held that in considering whether or not to make an

a Section 53 is set out at [9], below
b Paragraph 2 is set out at [15], below
c Paragraph 6 is set out at [15], below
d Paragraph 7 is set out at [15], below

order the authority had to able to demonstrate that a way subsisted or was reasonably alleged to subsist.

Held – Having regard to the legislative history of s 53(3)(c)(i) of the 1981 Act, the burden of proof to be applied by the Secretary of State when confirming orders modifying the definitive map and statement was the civil burden of proof. Although Sch 15 to the 1981 Act gave no express guidance as to the burden of proof applicable on the confirmation of a s 53(3)(c)(i) order, it was reasonable to assume that the legislature intended to replicate the pattern of the predecessor Acts so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof, namely the balance of probabilities. It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence of those same rights to be determined in the course of ordinary litigation in the civil courts. Moreover, there was a clear implication from the principle that a lower standard of proof applied at the preliminary stage and that that was acceptable because where the evidence of the subsistence of a right of way was conflicting, those issues would be determined following a public inquiry, that such determination would take place applying a higher standard of proof than one of a merely justifiable allegation. The provisions in Sch 15, which conferred on the authority a discretion to confirm unopposed modification orders or, if the authority considered that changes to the order should be made required it to submit the revised order to the Secretary of State, who was given a further discretion whether or not to confirm it or to confirm it after a further alteration, implied a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage. Accordingly, the order would be quashed (see [51], [73], below).

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402 and *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367 considered.

R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin) not followed.

Notes

For the modification of maps and statements, and for opposed modification orders, see 21 *Halsbury's Laws* (4th edn) (2004 reissue) paras 597, 609.

For the Wildlife and Countryside Act 1981, s 53, Sch 15, see 20 *Halsbury's Statutes* (4th edn) (2003 reissue) 552, 574.

Cases referred to in judgment

Eyre v New Forest Highway Board (1892) 56 JP 517, Assizes and CA.

Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865, [1976] 1 WLR 1255, HL.

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402.

R v Secretary of State for the Environment, ex p Hood [1975] 3 All ER 243, [1975] QB 891, [1975] 3 WLR 172, CA.

R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin).

R v Secretary of State for Wales, ex p Emery [1998] 4 All ER 367, CA.

Shears Court (West Mersea) Management Co Ltd v Essex CC (1986) 85 LGR 479.
Suffolk CC v Mason [1979] 2 All ER 369, [1979] AC 705, [1979] 2 WLR 571, HL.

Application

The claimants, Philip Napier Todd and Douglas Bradley, applied under para 12 of Sch 15 to the Wildlife and Countryside Act 1981 for the quashing of an order made by Hampshire County Council on 26 May 2000, and confirmed by the Secretary of State on 15 September 2003, modifying the Council's definitive map of public rights of way pursuant to s 53 of the 1981 Act. The facts are set out in the judgment.

George Laurence QC and *Ross Crail* (instructed by *William Sturges & Co*) for the claimants.

Timothy Morshead (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

22 June 2004. The following judgment was delivered.

EVANS-LOMBE J.

[**1**] This is an application for the quashing of the order made by the Hampshire County Council (the council) on 26 May 2000 and confirmed on 15 September 2003 by the defendant's inspector (the inspector), modifying the council's definitive map of public rights of way pursuant to s 53 of the Wildlife and Countryside Act 1981. The modification in question was to include on the council's definitive map as a byway open to all traffic (BOAT) a way over land which in the past had formed part of the Bramshill Estate in the parishes of Bramshill and Eversley. The way is described in the order as running from the junction of the roads C164 and C24 over a distance of 1,690 m to the road U241. The claimants are two persons having an interest in the extent of the rights over the way. The defendant is the Secretary of State for the Environment, Food and Rural Affairs. The actual issue between the claimants and the defendant is not as to the way's status as a highway but as to the extent of the public's rights over it. Whereas the claimants would not object to the way's inclusion on the definitive map as a footpath or bridleway, they object to its being included as a BOAT and thus subjected to motorised vehicular traffic.

[**2**] The way in question is called Sandy Lane. Counsel for the claimants have helpfully included in their written submissions as an appendix a history of Sandy Lane from the middle of the nineteenth century in the form of a chronology with, as a further appendix, a description of the persons referred to in that chronology. I do not understand that any of the events and descriptions set out in those two documents are in issue between the parties. I therefore append them to this judgment as a clear and succinct summary of the background events to this application concluding with the issue of these proceedings on the 12 November 2003.

[**3**] It will be seen that the inspector gave an interim decision by a decision letter dated 18 July 2002 (the interim letter) to which references are made in the chronology as OD 2002. The inspector gave his final decision confirming the council's order by a letter (the final letter) dated 15 September 2003 to which references are made in the chronology as OD 2003. The interim letter indicated the inspector's intention to modify the council's order of 26 May 2000

so as to confirm an entry on the definitive map of Sandy Lane as a way but with user limited to a footpath or bridleway. As a result that modification necessitated re-advertisement of the order and following further objections, a further inquiry. As a result the inspector received further written submissions from the parties which caused him to change his mind so that the final order confirmed Sandy Lane as a BOAT in accordance with the council's initial order.

[4] The claimants seek to have the council's order of confirmation of the 15 September 2003 (the confirming order) quashed under four heads as follows:

> '1. That in confirming the council's order the Inspector applied too low a standard of proof for the existence of a BOAT on Sandy Lane namely that the council could establish facts from which the existence of such a way could "reasonably be alleged to subsist" as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities.
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> 2. That the Inspector's change of mind was caused by a re-evaluation of documents and plans associated with procedures for the purpose of the [Finance (1909–10) Act 1910] which he found to have constituted a dedication of Sandy Lane by its then owner Sir Anthony Cope which dedication was subsequently accepted by user by the public.
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> 3. That the Inspector's conclusion was reached by procedural unfairness in that the objectors were not given a [sic] opportunity to comment upon new material which they submit passages in the final letter show were the product of independent research by the Inspector which plainly affected his decision.
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> 4. That the Inspector's changed conclusion was unsupported by any findings of fact or any findings capable of supporting that conclusion were unsupported by evidence.'

[5] I turn to deal with the first and main issue.

THE BURDEN OF PROOF REQUIRED UNDER SCH 15 TO THE 1981 ACT FOR CONFIRMING AN ORDER

[6] At para 38 of the final letter, having analysed the effect of the material before him resulting from the Finance Act 1910 procedures, the inspector concluded that 'this leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'. He then went on to consider evidence tending against 'this allegation' and concluded at para 54:

> 'Having deduced that the Order route may be reasonably alleged to subsist as a vehicular highway and noting that it is now "used by the public mainly for the purposes for which footpaths and bridleways are so used", I conclude that the Order should be confirmed.'

[7] Although there are other passages in the final letter, notably at para 46, where the inspector appears to have been applying the normal civil standard of proof it is not in issue that the standard he ultimately applied in confirming the order was that he was satisfied that a BOAT could 'be reasonably alleged to subsist'. It is the claimants' case that in doing so the inspector made an error of law.

[8] Part IV of the National Parks and Access to the Countryside Act 1949, under the short title 'Ascertainment of footpaths, bridleways and certain other highways' contained provision for the preparation of maps and statements to

record all footpaths, bridleways and roads carrying vehicular traffic but which were being used primarily as footpaths and bridleways (referred to as 'RUPPs'). The 1949 Act's means of doing so was through the preparation of 'definitive maps' and supporting statements, covering the whole country, on which such public rights of way were recorded, and once so recorded, were deemed unchallengeably to exist until lawfully terminated. The 1949 Act placed a duty on each county council as 'the surveying authority' to prepare, and by periodic reviews, to keep up-to-date such definitive maps and statements. It will be necessary later in this judgment to examine in some detail the provisions of Pt IV. Sections of the 1949 Act were repealed and replaced by the Countryside Act 1968. Again it will be necessary to examine the relevant parts of this Act. That process was continued by the 1981 Act. The issues arising from the first ground upon which the claimants seek to quash the council's order result from the application to the facts of this case of the provisions of s 53 of and Sch 15 to the 1981 Act.

[**9**] Part III of the 1981 Act, which by s 66 applies to footpaths, bridleways or BOATs, under the heading 'Ascertainment of public rights of way' provides by s 53 as follows:

> '**53.** *Duty to keep definitive map and statement under continuous review.*—(1) In this Part "definitive map and statement", in relation to any area, means, subject to section 57(3)—(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or (b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or (c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).
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> (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.
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> (3) The events referred to in subsection (2) are as follows—(a) the coming into operation of any enactment or instrument, or any other event, whereby—(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended; (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or (iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path; (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path; (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.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the map; and (b) any limitations or conditions affecting the public right of way thereover.

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

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).'

[10] Section 53 replaces s 33 of the 1949 Act. Section 53(3) is the subsection with which this part of my judgment is primarily concerned and which replaced s 33(2) of the 1949 Act but also contained a power to remove a right of way shown on the definitive map which was not contained in the 1949 Act and first appeared in the 1968 Act.

[11] It will be seen that s 53 places a duty on the 'surveying authority' (the authority) here the council, to modify the definitive map by an order under sub-s (2) in consequence of the occurrence of any of the events specified in sub-s (3). The present case concerns an event specified in sub-s (3)(c)(i) namely 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 on the map and statement subsists or is reasonably alleged to subsist …'

It will be observed that there are two tests to be met by the authority before making an order. The authority must be satisfied either, that the right of way 'subsists' or, alternatively, 'is reasonably alleged to subsist'. It is accepted that the former test would require the authority to be satisfied of the subsistence of the right of way to the normal civil burden of proof ie on the balance of probabilities, whereas the latter test imposes on the authority a lesser burden, namely one which obliges them only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way.

[12] It is pursuant to sub-s (3)(c)(i) that the council made the order of 26 May 2000.

[**13**] The 'events' specified in sub-s (3)(a) primarily concern alterations to the definitive map consequent on prior 'legal events' such as orders diverting or stopping up existing rights or creating new ones. That subsection has no application to the facts of this case. Subsection (5) permits members of the public to apply to an authority to make an order under sub-s (2) on being satisfied of events falling within sub-s (3)(b) or (c). The 'making and determination' of such applications are governed by Sch 14 to the 1981 Act. Paragraph 2(1) of Sch 14 requires any applicant to 'serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates' and the applicant is required by para 2(3) to certify to the authority that he has done so. Paragraph 3 of the schedule is headed 'Determination by authority' and provides:

> '3.—(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 …
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> (3) As soon as practicable after determining the application, the authority shall give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1).'

[**14**] Paragraph 4 gives the applicant a right of appeal against a refusal by the authority to make an order under s 53(2).

[**15**] Section 53(6) provides that orders consequent on events specified in sub-s (3)(a) shall take immediate effect but those consequent on events specified in paras (b) and (c) of sub-s (3) shall take effect subject to the provisions of Sch 15. So far as material to this judgment that schedule provides as follows:

> '2. *Coming into operation.* An order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7.
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> 3. *Publicity for orders.*—(1) On making an order, the authority shall give notice in the prescribed form …
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> (2) Subject to sub-paragraph (4) [immaterial], the notice to be given under sub-paragraph (1) shall be given—(a) by publication in at least one local newspaper … (b) by serving a like notice on—(i) every owner and occupier of any of that land … (iv) such other persons as may be prescribed in relation to the area in which that land is situated or as the authority may consider appropriate …
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> 6. *Unopposed orders.*—(1) If no representations or objections are duly made, or if any so made are withdrawn, the authority may—(a) confirm the order without modification; or (b) if they require any modification to be made, submit the order to the Secretary of State for confirmation by him.
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> (2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State may confirm the order with or without modifications.

7. *Opposed orders*.—(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.

(3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.'

[16] Paragraph 8 imposes certain restrictions on the Secretary of State's power to confirm orders with modifications and the remaining paragraphs in the schedule provide for local inquiries (para 9), the appointment of inspectors (para 10), the notice to be given of final decisions (para 11), and the power to make regulations 'as to the procedure on the making, submission and confirmation of orders as appears to him to be expedient' (para 13(1)). Paragraph 12 of the schedule provides for any person to challenge an order which has taken effect as not being within the powers conferred by ss 53 and 54, or for non-compliance with Sch 15, by application to the High Court. It is pursuant to para 12 that these proceedings have been brought.

[17] It will be seen, therefore, that modifications to the definitive map by an authority consequent on any of the events specified in s 53(3)(b) or (c), to become effective, must proceed through two stages, the order stage and the confirmation stage. The order stage is governed by s 53(5) and Sch 14 and the confirmation stage is governed by s 53(6) and Sch 15. It is accepted that when the authority after consultation decides 'whether to make or not to make the order' within para 3(1)(b) of Sch 14 it is empowered to make the order even if it is not, on the material before it, able to conclude that the relevant right of way subsists, provided it is satisfied, on the material before it, that it can be 'reasonably alleged to subsist'. The question on this part of the case is whether when such an order comes to be confirmed under s 53(6) and Sch 15 the Secretary of State, in the exercise of the discretion conferred on him by para 7(3) of Sch 15, can confirm that order even if satisfied, only, that the allegation of the subsistence of the way is reasonable, or, alternatively whether he must be satisfied on the balance of probabilities that the way subsists.

[18] I have been shown three internally circulated documents intended to guide the ministry's inspectorate. The first dated 21 October 1997 appears at para 10 to advise inspectors that, at the confirmation stage, they need only be satisfied up to the lesser burden of proof. That guidance appears to be withdrawn by a circular of February 2001 but restored by one of April 2003.

[19] It is submitted by the defendant that the Secretary of State's current view as to the standard of proof required for the confirmation of modification orders under Sch 15 is supported by the recent decision of Collins J in *R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin). The case concerned a public footpath running between two cottages before debouching onto a main road. To get to the main road it had to pass through either the garden of Manor Cottage or the contiguous garden of Glebe Cottage. The existing footpath, as being used at

the time of the application, passed through that of Glebe Cottage but in order to do so it had to do a sharp left turn when reaching the garden fences in order to pass through an existing gate at the top end of Glebe Cottage garden thereafter straightening up to run in a straight line to the road along the boundary between the two gardens, but on the Glebe Cottage side. If the footpath had passed through Manor Cottage garden it would have run in a straight line to the road. The application under the 1981 Act was brought by the owner of Glebe Cottage under s 53(3)(c)(i) for an order modifying the definitive map to make the path run through Manor Cottage garden and under sub-para (iii) of para (c) to remove the existing entry on the map showing the path as running through Glebe Cottage garden. The matter came before Collins J on a renewed application for permission, it having been refused on paper. It is not entirely clear from the report but it seems that the relevant surveying authority, the Leicestershire County Council, had made an order on the application of the owner of Glebe Cottage and the question was whether that order should be confirmed. The authority had referred the order to the Secretary of State who had appointed an inspector to hold an inquiry. It seems that the inspector, regarding himself as at liberty to apply either the test of subsistence on the balance of probabilities or the test of reasonable allegation of subsistence, found that the owner of Glebe Cottage had satisfied the latter test for the purpose of establishing that the footpath should run through his neighbour's garden (s 53(3)(c)(i)) but had failed to establish, to what he regarded as a higher burden of proof, a case justifying the removal from the map of the right of way running through his own garden (s 53(3)(c)(iii)). The inspector regarded the latter finding as taking precedence and accordingly declined to confirm the order under s 53(3)(c)(i) and also that under para (c)(iii). It is to be observed that the dual test only applies to cases brought under para (c)(i). There is no ambiguity, as to the test applicable to cases under para (c)(iii) (or para c(ii)), which is the normal civil burden of proof.

[20] I quote from the judgment of Collins J starting at [20]:

> '[20] The inspector then directed himself as to the correct approach that he should adopt. He relied on a decision which had been put before him, *R v the Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402, a decision of Owen J. In that case Owen J was considering, among other things, the correct approach to s 53(3)(c)(i), and what he said about it (at 407) was this: "It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing 'that a right of way which is not shown in the map and statement subsists' and showing that a right of way which is not shown in the map and statement 'is reasonably alleged to subsist'. Accordingly the questions for the council and subsequently for the Secretary of State were: does the evidence produced by the claimant together with all the other evidence available show that either—(a) a right of way subsists? (I shall call this test 'A'), or (b) it is reasonable to allege that a right of way subsists? (I shall call this test 'B'). To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable

person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist." *a*

[21] The inspector then sets out test A and test B in the terms of the section. When considering test A, he says to establish whether a right of way exists on the balance of probabilities would require clear evidence in favour of the applicant and no credible evidence to the contrary. Mr Richards has submitted that that is an incorrect approach to a finding *b* on the balance of probabilities. There may be credible evidence to the contrary, but that would not necessarily prevent a finding that on the balance of probabilities the existence of the right of way was made out. I suppose it must be obvious that, if there is credible evidence to the contrary, it would need clearer evidence to establish on the balance of *c* probabilities that the right of way existed. But, as it seems to me, it is perhaps unsafe and unnecessary for inspectors, as it was for this inspector, to analyse or to use other words to indicate what is the test on the balance of probabilities. All it requires is that the inspector or the council is persuaded that it is more probable than not on the evidence—and on all the evidence—that the right of way exists. If so, it will be established in *d* conformity with the Act.

[22] The inspector then sets out test B, which he explains thus: "If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that one does exist." That has not been criticised *e* as a proper approach. Indeed, as Owen J made clear, the question is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence, and the council and the Secretary of State in turn must be judges of that. It is perfectly obvious that the evidence necessary to establish test B will be less than that necessary to establish test A. *f*

[23] Mr Morshead has submitted—and, as I understand it, Mr Richards does not dissent from this, although he does not positively put it forward—that the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on *g* the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii).

[24] The circular which is published by the department under the Act *h* makes it clear that the evidence to establish that a public right of way should be removed from an authoritative record will need to be cogent, and indeed that is consistent with what is set out in s 56 as to the effect of a right of way shown on the definitive map.

[25] The inspector then considers the tests under s 53(3)(c)(i). On test A *j* in para 47 he says this: "The evidence in support of the Manor Cottage route, however, looks at the situation only from the point of view of people walking southwards from the open countryside into Main Street. When considered the other way round, I believe the Glebe Cottage route would have been the more inviting choice. To that should also be added what I consider can reasonably be assumed to have been in the mind of the

author of the 1951 Parish Survey Plan and Statement, namely that he knew where the Main Street end of the footpath was, and showed it on his plan accordingly; it therefore did not need also to be recorded verbally. Taken together, these factors lead me to the conclusion that although there is indeed evidence in favour of the applicant, that evidence is not clear-cut because there is likewise credible evidence to the contrary. The order therefore fails test A." Whether or not the language used was wholly satisfactory, it seems to me to be absolutely clear from what the inspector has there said that he took the view that the weight of the evidence was such that he was not persuaded that the right of way over Manor Cottage existed. Indeed, he would not have referred to the Parish Survey Plan and Statement of 1951 and the point about Glebe Cottage being more inviting from Main Street unless he had formed the view that that was the more probable route. But he then went on to consider test B. He made the point that there was evidence in support of Manor Cottage, in particular a substantial body of user evidence, and in those circumstances he was persuaded that test B was satisfied because the footpath was reasonably alleged to subsist over Manor Cottage.

[26] Mr Richards submits that, in the light of those findings, he was in effect obliged to find in favour of the county council because the test under (i) had been fulfilled and therefore the only proper course to adopt would be to allow the application because it was shown that the map ought to have the footpath through the curtilage of Manor Cottage. However, the inspector went on, properly in my view, to consider (iii) and made the point there that cogent evidence was needed to remove a footpath and that there was not sufficient evidence to persuade him that it ought to be removed. Mr Richards submits that that is a perverse finding and that he could not properly have found in favour of the applicant on (i) and against the applicant on (iii).

[27] As I have indicated, it is perhaps unusual for s 53 to come into play where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. In those circumstances it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the placing on the map of, in effect, a new right of way.

[28] As I have already indicated, s 53(3)(c)(i) is usually in play when there is a question as to whether a right of way exists at all, ie when there is no question of any alternative route, merely a battle as to whether the right exists. Likewise, s 53(3)(c)(iii) is normally in issue when there is a battle as to whether the right of way shown on a map should be there at all and it is apparently unusual for the battle to be about alternative routes. If it is, however, it seems to me quite clear that the alternative test B under s 53(3)(c)(i) is the less important. Indeed, it may well be that it is of no importance because what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is

desirable that it should stay in place. Hence the circular indicating that cogent evidence is needed to remove a right of way shown on the map. It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. It would be strange indeed if merely to find that it was reasonable to allege that the alternative existed was in a given case sufficient to remove what is shown on the map. I am not saying it is impossible—it is dangerous to rule out any possibility—but I would be surprised, I am bound to say, if in any given case that amounted to sufficiently cogent evidence to remove the route shown on the map.

[29] As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality s 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong—which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right—that a change should take place. The presumption is against change, rather than the other way around.

[30] It seems that the inspector's approach, albeit perhaps expressed in a way which was somewhat over-complicated, was correct and that there is no reason in the circumstances of this case why what was shown on the map should be changed.'

[21] It seems to me that this decision is not direct authority for the proposition that the lesser standard of proof is available to the Secretary of State in confirming modification orders under s 53(3)(c)(i). The case turned on the application to remove under para (c)(iii) under which the judge concluded that the inspector was correct to apply a higher standard of proof to justify a removal than the reasonable allegation standard although there is no direct reference to the civil standard of proof, 'on the balance of probabilities'. However Collins J did not disapprove of the inspector's initial conclusion that it would have been sufficient for him, on the material before him, to confirm the existence of the footpath over Manor Cottage if satisfied that the reasonable allegation test had been met but for the failure to satisfy the higher test he applied to the application to remove it from Glebe Cottage. Thus, it seems to me, that Collins J's judgment is consistent with the lower test being available on applications for confirmation in respect of cases under para (c)(i) but it was not necessary for him to decide the point, which was not argued before him, and he did not do so.

THE 1949 ACT

[22] Before the enactment of the 1949 Act there were no official records of public rights of way. If a dispute arose about the subsistence of a right of way over land such dispute was determined by litigation in the ordinary courts usually between the landowner and the person or persons asserting the right of way. In *R v Secretary of State for the Environment, ex p Hood* [1975] 3 All ER 243 at 245, [1975] QB 891 at 896 Lord Denning MR described the object of the 1949 Act in these words:

'The object of the Act is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835.

> They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: once a highway, always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968.'

[**23**] The relevant provisions were contained in Pt IV (ss 27–38) of the 1949 Act under the heading 'Ascertainment of footpaths, bridleways and certain other highways'. Section 27 provided:

> *'Surveys of public paths etc., and preparation of draft maps and statements.*—(1) Subject to the provisions of this part of this Act, the council of every county in England or Wales shall, as soon as may be after the date of the commencement of this Act, carry out a survey of all lands in their area over which a right of way to which this Part of this Act applies is alleged to subsist, and shall, not later than the expiration of three years after that date or of such extended period as the Minister may in any particular case allow, prepare a draft map of their area, showing thereon a footpath or bridleway, as may appear to the council to be appropriate, wherever in their opinion such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date.
>
> (2) A map prepared in accordance with the last foregoing subsection shall also show thereon any way which in the opinion of the authority carrying out the survey (herein after referred to as "the surveying authority"), was at the relevant date, or was at that date reasonably alleged to be, a road used as a public path.'

[**24**] Subsection (3) defined 'the relevant date'. Subsections (4) and (5) set out the recording duties of the surveying authority. Subsection (6) described the various forms of right of way to which the 1949 Act applied. Subsection (7) dealt with highways associated with waterways and rights of navigation. Section 29 required notice of preparation of the draft map and statement to be advertised and provided for objections as to anything contained in (or omitted from) them and determination by the authority of such objections with a right of appeal to the minister.

[**25**] Section 29(3) provided:

> 'If any representation or objection is duly made to the surveying authority as to anything contained in or omitted from the draft map and statement, the authority, after considering the representation or objection and affording to the person by whom it was made an opportunity of being heard by a person appointed by the authority for the purpose, shall determine what (if any) modification of the particulars contained in the draft map and statement appears to the authority to be requisite in consequence thereof, and shall serve notice of their determination on the person by whom the representation or objection was made.'

[**26**] Subsection (4) provided for advertisement by the authority of any proposed modifications to the draft map and gave persons affected an opportunity to object and make representations whereupon sub-s (4)(b) required the authority to 'decide whether to maintain or revoke the determination and serve notice of their decision on the person by whom the representation or objection' was made and 'on the original objector'. Subsection (5) conferred a right on 'any person aggrieved' by such determination to appeal to the minister, who, on hearing the appellants and the authority and also the original objector was to dispose of the appeal in various manners including further modification of the draft map.

[**27**] The next stage was the preparation of a provisional map and statement under s 30, being the draft map and statement modified to reflect the outcome of the objection procedures (if any) which had taken place pursuant to s 29.

[**28**] Section 31 provided as follows:

> *'Determination by quarter sessions of disputes as to provisional maps and statements.*—(1) At any time within twenty-eight days after the publication of a notice under subsection (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration—(a) that at the relevant date mentioned in the provisional statement there was no public right of way over the land; (b) that the rights conferred on the public at that date by the public right of way over the land were such rights as may be specified in the application, and not such rights as are indicated in the provisional map and statement; (c) that the position or width of that part of the land on which the public right of way subsisted at the said date was as specified in the application, and not as indicated in the provisional map and statement; or (d) that the public right of way over the land at the said date was not unconditional but was subject to limitations or conditions specified in the application, or, if the said right is indicated in the provisional statement as being subject to limitations or conditions, that the said right was subject to other limitations or conditions specified in the application either in addition to or in substitution for those indicated in the provisional statement …
>
> (3) If on the hearing of an application under subsection (1) of this section, being an app1ication for a declaration under paragraph (a), (b) or (c) of that subsection, it is not proved to the satisfaction of the court or committee—(a) in the case of an application under the said paragraph (a), that there was at the relevant date a public right of way over the land, (b) in the case of an application under the said paragraph (b), that the rights conferred on the public by the public right of way over the land at the said date were rights other than those specified in the application, or (c) in the case of an application under the said paragraph (c), that the position or width of the part of the land therein mentioned was other than that specified in the application, the court or committee shall make the declaration sought by the applicant.
>
> (4) Where the court or committee make a declaration in the case of an application under the said paragraph (a) and it is proved to their satisfaction—(a) that there was at the relevant date a right of way to which this Part of this Act applies over land other than that to which the

application relates, and (b) that the said right is the right of way which the surveying authority had in view when they showed on the map the disputed public path or road used as a public path, the court or committee may, if satisfied that every owner, lessee and occupier of any of the land mentioned in paragraph (a) of this subsection has had an opportunity of appearing before them, make a further declaration that a public right of way as specified in the declaration subsisted over that land at that date.

(5) Where, in the case of an application under paragraph (b) or paragraph (c) of subsection (1) of this section, the court or committee do not make the declaration sought by the applicant, but the true nature of the rights conferred on the public by the public right of way in question or, as the case may be, the true position or width of the part of the land over which the public right of way subsisted at the relevant date (being different both from that specified in the application and from that indicated in the provisional map and statement) is proved to the satisfaction of the court or committee, the court or committee may make a declaration accordingly: Provided that the court or committee shall not make a declaration under this subsection unless they are satisfied that every owner, lessee and occupier of any land which would be affected by the declaration has had an opportunity of appearing before them.

(6) A declaration under paragraph (d) of subsection (1) of this section shall not be made unless the matters to be stated in the declaration have been proved to the satisfaction of the court or committee hearing the application …

(8) Subject to the last foregoing subsection and to the next following section, a declaration made under this section shall be conclusive evidence of the matters stated in the declaration.'

[**29**] It will be seen from s 31 that it gave to the owner, lessee or occupier of the land, over which the right of way was being claimed, a right, within 28 days of publication of notice of the provisional map, to apply to quarter sessions for declarations dealing with matters in sub-s (1)(a), (b), (c) and (d)—issues as to the existence and/or extent of rights of way.

[**30**] The third and final stage was the preparation under s 32 of the definitive map and statement being the provisional map and statement adjusted as necessary to reflect any declarations made under s 31.

[**31**] Paragraph 9 of Sch 1 to the 1949 Act allowed a six-week period from the publication of notice of its preparation for the validity of the definitive map and statement to be challenged in the High Court on the ground that they were not within the powers of the Act or that any requirements of the legislation had not been complied with at any stage of the above process. Subject thereto the map and statement were not to be questioned in any legal proceedings whatsoever (para 10). In addition s 32(4) provided that a definitive map and statement were to be conclusive as to the particulars contained therein to the extent specified in that subsection. Section 56 of the 1981 Act contains similar but more extensive provisions making the definitive map and statement conclusive evidence of the public rights of way recorded in it, covering the provisions of s 32(4) of the 1949 Act, and extending them.

[**32**] Section 33 of the 1949 Act required each surveying authority to review and revise its definitive map and statement at periodic intervals, having regard to any events of the kind specified in sub-s (2) which had occurred since the

relevant date (or the latest review date). These events included in sub-para (e) the discovery by the authority of new evidence such that if the authority were then preparing a draft map under s 27, it would be required to show as a highway of a particular description a way not shown at the time of the review (ie evidence that a right of way not shown on the map subsisted or was reasonably alleged to subsist). The revised map and statement were to be prepared in three stages corresponding to the stages of preparation of the original definitive map and statement, ie in draft, provisional and definitive forms, and the provisions of ss 28–32 inclusive were to apply mutatis mutandis: see s 34.

[**33**] Four relevant comments should be made as to the provisions of the 1949 Act. They are, first, that there was no provision in the 1949 Act for the removal of a right of way from the definitive map and statement which could be shown not in fact to subsist. This omission was provided for, but to a very circumscribed extent, in the 1968 Act.

[**34**] Secondly s 31(3) places the burden of proof in the proceedings at quarter sessions introduced by that section in respect of declarations under paras (a), (b) and (c) (but not (d)) of sub-s (1), as to the existence, user and extent of the rights of way the subject of challenge, on the surveying authority.

[**35**] Thirdly there does not seem to me to be any reason to suppose that in arriving at any conclusion in such quarter session proceedings the court would have done other than apply the normal civil standard of proof.

[**36**] Fourthly, whereas in s 27 the familiar tests of 'subsisted, or is reasonably alleged to have subsisted' appear in sub-ss (1) and (2) of s 27, where they define the standard of proof which the surveying authority must apply in deciding what rights of way to insert on the *draft maps and statements*, there is equally no reason to suppose that the surveying authority or the minister should have applied other than the normal civil burden of proof in determining the matters referred to them by s 29 when objections to the draft map were being resolved. At the s 27 stage the surveying authority was preparing a draft map and statement for publication in order to invite comment and, in an appropriate case, objection from persons interested in the subsistence or otherwise and the extent of rights of way over land. It seems to me to be entirely appropriate that, at the stage up to publication of the draft map and statement, the preparer of those documents should have been concerned to ensure that all reasonable claims to the existence of rights of way should be reflected in them. Thus it was appropriate that s 27 should provide for the inclusion on the draft map and statement of rights of way only reasonably alleged to subsist. At the ss 29 and 31 quarter session stages, by contrast, the rights of parties arising from the existence or otherwise of public rights of way, which would previously have been determined in hostile litigation between individuals in the civil courts, were being determined finally after an extensive procedure of objection inquiry and appeal laid down by the 1949 Act.

[**37**] It is Mr Morshead's submission for the defendant that the reasonable allegation burden of proof was that which should properly have been applied to the provisions of Pt IV of the 1949 Act, and in particular, to the determinations to be made by the surveying authority and the minister under s 29 up to, but not including, decisions to be made on applications to quarter sessions under s 31. He submits that this reflects a policy of Parliament in enacting Pt IV of the 1949 Act, not only to preserve existing public rights of way by a new system for their ascertainment and recording, but also, in certain

circumstances, to create new rights of way where none existed before. That Parliamentary intention is indicated by the absence of any statutory right in a landowner or other person opposing the existence of a right of way, to remove such a right once it has appeared on the definitive map. In those circumstances, he submits, a new right of way could be created where a landowner took no action once the procedure for entry on the map and statement was commenced by a surveying authority. In particular that occurs where the landowner does not apply to quarter sessions within the 28-day period prescribed by s 31. This is consistent, he submits, with the inclusion of the word 'creation' in the long title to the 1949 Act and with the speech of Lord Diplock in *Suffolk CC v Mason* [1979] 2 All ER 369, [1979] AC 705 in particular the passage where, in dealing with a question which has no bearing on the present problem, he embarked upon a survey of Pt IV of the 1949 Act (see [1979] 2 All ER 369 at 373, [1979] AC 705 at 712). Lord Diplock is recorded as saying:

> 'The sections which follow s 27 deal with the further steps which have to be taken before the definitive map is completed and published. They provide an elaborate procedure for enabling representations or objections to be made to the surveying authority (with a right of appeal to the Minister), as to anything contained in or omitted from the draft map. Such representations and objections can be made not only by persons interested in the land, but also by members of the public, so that a person who alleges that a right of way as shown on the draft map ought to be upgraded from "footpath" to "bridleway", or from "bridleway" to a "road used as a public path" has an opportunity at this stage of adducing evidence to make good his claim. The next step in the procedure is the preparation by the surveying authority of a provisional map incorporating any modifications to the draft which, as a result of representations, have been accepted by the surveying authority or upheld by the Minister on appeal. The procedure for verifying the accuracy of what is eventually to be shown on the definitive map does not stop here; though the remaining step is not likely to bring to light the existence of more extensive rights of way than are shown on the provisional map. Its presence may, however, supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map. The owner, lessee, or occupier of the soil over which any right of way shown on the provisional map passes has the right under s 31 to apply to quarter sessions (now the Crown Court) for declarations, inter alia, that a right of way shown on the provisional map either does not exist or is there shown as being more extensive than it really is; and, if he does so, the onus of proving the existence of the disputed right lies on the county council. But failing any proceedings in the Crown Court under this section, an entry of a right of way that originally appeared on the draft map on no firmer basis than that the surveying authority was of opinion that an allegation that it existed was a reasonable one, is carried through to the definitive map unaltered.'

[**38**] I am unable to accept these submissions of Mr Morshead. To start with I do not accept that the process described by Lord Diplock was intended by him to indicate that, where there had actually been no public right of way before the institution of proceedings by the surveying authority, a failure by the

landowner to challenge the mistaken allegation that such a right of way existed created a right of way where none had existed before, with the effect that it could not thereafter be challenged on the basis 'once a highway, always a highway' (see [1979] 2 All ER 369 at 375, [1979] AC 705 at 714 per Lord Diplock). What would result would be a temporarily unchallengeable right of passage by the public over the land in question which would not be capable of challenge pending review by the authority or the exercise of the powers of deletion from the map conferred by the 1968 and 1981 Acts (see [41] below for the limited power of deletion introduced by the 1968 Act and s 53(3)(c)(iii) of the 1981 Act).

[**39**] I do not accept that the creation of new rights of way was part of the statutory policy of Pt IV of the 1949 Act save to the limited extent dealt with in ss 39–41 which have no application to the issues before me. Such a policy runs contrary to the short title to the section of Pt IV dealing with public rights of way namely 'Ascertainment of footpaths, bridleways and certain other highways'. It is also contrary to what Lord Diplock says in *Mason*'s case where he says (at [1979] 2 All ER 369 at 372, [1979] AC 705 at 710):

> 'The purposes for which the Act was passed are set out in the long title. Those that are relevant to the instant appeal are: "… to make further provision for the recording, creation, maintenance and improvement of public paths and for securing access to open country, and to amend the law relating to rights of way …" The provisions which give effect to these purposes are contained in Parts IV and V of the Act; those relating to the recording of public paths by showing them on a definitive map being found in Part IV, ss 27 to 41.'

[**40**] As I have already pointed out the 1949 Act provides a statutory framework for the unchallengeable ascertainment and recording of existing public rights of way replacing, in so far as rights of way were contested, litigation in the civil courts to which the ordinary civil burden of proof would plainly have applied. It includes a right under s 31 for landowners, lessees or occupiers of affected land to seek relief by way of declarations at quarter sessions where any rights would be determined on the normal civil standard of proof. It is not without significance that Lord Diplock in *Mason*'s case, in the passage quoted above, found that the s 31 procedure might—

> 'supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map.' (See [1979] 2 All ER 369 at 373, [1979] AC 705 at 712.)

THE 1968 ACT

[**41**] Section 31 of and Sch 3 to the 1968 Act introduced, for the first time, a circumscribed power to revise the definitive map at the instance of a person prejudiced by the entry of a right of way upon it where no right of way existed. The relevant part of Pt I of Sch 3 to the 1968 Act provides:

> '*Section 33* (*Revision of maps and statements*)
>
> In carrying out a review under section 33(1) the authority shall have regard to the discovery by the authority, in the period mentioned in that subsection, of any new evidence, or of evidence not previously considered by the authority concerned, showing that there was no public right of way

over land shown on the map as a public path, or as a road used as a public path, or that any other particulars in the map or statement were not within the powers of Part IV of the Act of 1949, and their powers of preparing a revised map and statement under subsection (4) or as the case may be proviso (d) to subsection (5), of the said section 33 may be exercised accordingly: Provided that the authority shall not take account of the evidence if satisfied that the person prejudiced by the public right of way, or his predecessor in title, could have produced the evidence before the relevant date mentioned in the said section 33(1) and had no reasonable excuse for failing to do so …'

[**42**] Otherwise Pt II of Sch 3 simplified the procedure applicable to reviews begun under s 33 of the 1949 Act after the commencement of the 1968 Act. Instead of three stages there were to be only two. The revised map and statement were to be prepared in draft form and objections to the revision were to be invited by advertisement. Following a local inquiry the minister was to 'take a decision on' any duly made objections and representations (see para 4(4) of Sch 3) and give the authority such directions to modify the draft map as appeared to him necessary to give effect to his decision. Recourse to quarter sessions cease to be part of this procedure. A similar process was prescribed by Pt III of Sch 3 pursuant to which the minister was to direct modifications resulting from objections in relation to the re-classification of routes used as footpaths and bridleways but which carried vehicular traffic (RUPPs), into BOATs as required by the 1968 Act. I can see no reason why this decision-making process, as to the subsistence of rights of way or their extent, should be arrived at by the application of a burden of proof different from the normal civil burden of proof as I have found applied to similar decisions under s 29 of the 1949 Act.

THE 1981 ACT

[**43**] Part IV of the 1949 Act and Sch 3 to the 1968 Act were repealed by the 1981 Act and replaced with the provisions of ss 53–58 of and Schs 14 and 15 to that Act. The system of periodic reviews of the definitive map and statement was abolished and a rolling review system was introduced in its place. I have described s 53 and Schs 14 and 15. Section 54 requires the surveying authority as soon as reasonably practicable after the commencement date, to review RUPPs remaining on their definitive maps and make modification orders re-classifying them. The provisions of Sch 15 apply to orders made under both s 53 (except s 53(3)(a)) and s 54. Section 56(1) of the 1981 Act provides that a definitive map and statement shall be conclusive evidence as to the particulars contained therein to the extent specified in that subsection.

[**44**] The 1981 Act, therefore, abolished the review system and substituted the procedure under s 53 and Schs 14 and 15. And so, for instance, the provisions of s 31(1)(a) of the 1949 Act permitted any owner, lessee or occupier of any land shown on the map, in proceedings at quarter sessions, to apply for a declaration 'that at the relevant date mentioned in the provisional statement there was no public right of way over the land', such a person and others may now under s 53(3)(c)(iii) apply under sub-s (5) for an order under sub-s (2) modifying the map so as to show 'that there is no public right of way over land shown in the map and statement …'. It will be seen that the power to remove a right of way from the definitive map provided for in that sub-para (iii) is much

less restrictive than that inserted by the 1968 Act. However the *Leicestershire CC* case shows that inspectors are requiring 'cogent' evidence to justify the exercise of the power to remove.

THE INSPECTOR'S CONCLUSIONS

[**45**] The principal conclusions of the inspector contained in the interim letter and the final letter are helpfully summarised in the claimants' written submissions. This summary is not, as I understand it, challenged and I will incorporate it in this judgment. The conclusions of the interim letter are summarised as follows:

• Although Sir William Cope (the then landowner) made a new road along the route of Sandy Lane between 1866 and 1885, and asked the local highway authority to adopt it as a 'public highroad', it was not made up to the satisfaction of the surveyor of highways or adopted. Sir William's intention to dedicate the route as an all-purpose highway was conditional upon its being adopted and that condition not having been fulfilled, it remained at his death in 1892 a private estate road.

• Sir William's description of the road as 'a public convenience' in his 1885 letter to the highway authority requesting adoption suggested current use of the road by the public, but there was no other evidence to support that, and while the 1888 letter from the surveyor of highways referred to 'wheel traffic' having been over it, there was no direct evidence of that being *public* wheeled traffic and it was more likely to be estate traffic.

• Sandy Lane was not included in any taxable hereditament in the valuation carried out by the Inland Revenue for the purposes of the Finance (1909–10) Act 1910; the land on either side was comprised in hereditament no 34 (owner Sir Anthony Cope, Sir William's son and heir), but Sandy Lane (separate OS parcel no 52) was omitted from that hereditament; however, this did not support the county council's contention that Sandy Lane had been dedicated as a public carriageway by 1910.

• In 1922 the Forestry Commission took a 198-year lease of the land adjoining Sandy Lane on both sides. Sandy Lane was not included in the demise but the lease included a grant of a right of way over it for all purposes. The inspector concluded it was 'very unlikely that a mistake was made in 1921/2 about the private status of Sandy Lane'. He also took the view that Sandy Lane was not mentioned as a highway of any kind in the acquisition report prepared for the Forestry Commission in 1921.

• Further confirmation that Sandy Lane was not public was to be found in its omission from the 1929 highway handover records of publicly maintainable highways and the 1949 declaration of the then owner Lord Brocket, as chairman of Bramshill parish meeting, as to what rights of way existed in the parish.

• Lord Brocket showed that he had no intention to dedicate Sandy Lane by that declaration and by telling the Forestry Commission that it was a private road.

• Such pre-1949 user evidence as there was did not give rise to an inference of dedication of Sandy Lane as a public highway.

• But (and this was common ground between the county council and the objectors) there was enough evidence of user by walkers and horseriders after

1970 to support a deemed dedication as a bridleway under s 31 of the Highways Act 1980.

[**46**] The conclusions of the final letter can be summarised as follows.

• The inspector adhered to his view that the new road was not dedicated by Sir William and remained a private estate road at the date of his death in 1892.

• He reiterated his view that the public were enjoying the 'convenience' of the road by 1885, but said that no documentary evidence had been presented to show that this public user was by vehicle, although vehicles were used along Sandy Lane.

• Contrary to his initial opinion, the Finance Act evidence did support the case for public carriageway status. The exclusion of Sandy Lane from valuation, variously:

  • was consistent with Sandy Lane being considered a public carriageway;

  • showed that on the balance of probabilities, Sandy Lane was considered to be a public carriageway in 1910;

  • led to the reasonable allegation that 'in completing the procedures required by the Finance Act', Sir Anthony dedicated Sandy Lane as a public carriageway.

• There was some, 'not strong' evidence of public vehicular user (by four persons) from 1918–1936, and 'stronger' user evidence after that. This user from 1918 was 'evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway'.

• Sandy Lane being treated as a private road by subsequent owners of the estate could not undo that: 'once a highway, always a highway'.

THE AUTHORITIES

[**47**] Save for the *Leicestershire CC* case, counsel have been unable to find any authority which deals with the burden of proof applicable by the Secretary of State in confirming orders modifying the definitive map and statement. In *R v the Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402 Owen J was considering two cases where county councils had refused to make orders under s 53(3)(c)(i) of the 1981 Act at the preliminary ie Sch 14 stage. In that case, therefore, the judge was properly applying the dual test contained in that subsection and quashed both decisions, which had been made on the basis that insufficient evidence had been shown by the applicant to establish, prima facie, the existence of the two public rights of way in question. Owen J is recorded as saying (at 408):

> 'The wording of [section 53(3)(c)(i)] indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under section 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of inquiry with either confirmation or a refusal to confirm.'

[**48**] Later Owen J continues (at 409):

> 'Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user

is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.'

[**49**] Owen J's judgment in *Ex p Bagshaw* was considered by the Court of Appeal in *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367. That again was a case where a local authority had declined to make an order under s 53(3)(c)(i) at the Sch 14 preliminary stage on the basis that the applicant had failed to establish a reasonable allegation of subsistence of the right of way in question in a case where there was conflicting evidence of user of the way by the public between the landowner and the applicant. The Court of Appeal approved the approach of Owen J in *Ex p Bagshaw* and in particular the second passage which I have quoted from his judgment above. The leading judgment was given by Roch LJ. He is recorded as saying this under the heading 'The test that the Secretary of State should apply at the Sch 14 stage' (see 377):

'Section 53(3)(c)(i) relates to discovery by the authority of evidence of two separate things. First, evidence that a right of way which is not shown on the maps subsists and, second, evidence that a right of way which is not shown on the map is reasonably alleged to subsist. Difficulty is caused by these two limbs of this subsection. There can only be discovery by the authority of evidence that a right of way which is not shown on the map subsists if there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public. Where there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s 31(6) of the 1980 Act … then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists. The problem arises where there is conflicting evidence on one or other or both issues. In approaching such cases, the authority and the Secretary of State must bear in mind that an order under s 53(2) made following a Sch 14 procedure still leaves both the applicant objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following a public inquiry.'

[**50**] It seems to me that both these passages from the judgments of Owen J and Roch LJ are similar in effect to the passage from Lord Diplock's speech in *Mason*'s case. Both clearly accept the principle that a lower standard of proof applies at the preliminary stage and that that is acceptable because where the evidence of the subsistence of a right of way is conflicting 'those issues' will be 'determined following a public inquiry'. There would seem to me to be a clear implication that the judges in those cases anticipated that such 'determination' would take place applying a higher standard of proof than one of a merely justifiable allegation.

CONCLUSION UNDER HEAD 1

[**51**] In my judgment this issue is to be determined in favour of the applicants. It follows that to the extent that the decision of Collins J in the *Leicestershire CC* case is authority for a contrary conclusion I must respectfully decline to follow it. I have arrived at this conclusion for the following reasons.

(i) I have already concluded that the purpose of Pt IV of the 1949 Act was to assist in the preservation of existing public rights of way by their ascertainment and by recording them and by providing such record to be conclusive evidence of their subsistence. It seems to me that the pattern of the 1949 Act has been carried through by the legislature into the 1968 Act and on into the 1981 Act although the detailed provisions have developed over the years. That pattern is one of requiring the local authority to prepare a preliminary record in cases where there is evidence of the existence of a public right of way. That preliminary record is then published with the object of inviting comments and objections from persons interested either in the subsistence of the right of way or to deny its subsistence. There is then a procedure for resolving issues thrown up by objections to the preliminary record. Finally there is the preparation of the final record reflecting those decisions which is given the status of conclusive evidence. In the case of the 1949 Act there can be no doubt that the procedure under s 31 at quarter sessions would be subject to the civil burden of proof. I have formed the view that the determinations by the surveying authority and the minister under s 29 would be subject to the same burden. That is because those determinations were quasi-judicial and, in the absence of a further challenge under s 31 would be determinative of the existence or extent of the rights of way in question. The same is true under the abbreviated review system introduced by Pt II of Sch 3 to the 1968 Act (see para 4(4)). Schedule 15 of the 1981 Act gives no express guidance as to the burden of proof applicable on confirmation of a para (c)(i) order. In the absence of an express provision it seems to me to be reasonable to assume that the legislature intended to replicate the pattern of the 1949 Act in the 1981 Act so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof namely the balance of probabilities. The contrary contention that it is sufficient to establish a right having serious consequences for landowners and other users by a mere finding that it was reasonable to allege that such a right subsists seems to me to be counter-intuitive.

(ii) It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence of those same rights to fall to be determined in the course of ordinary litigation in the civil courts. This is illustrated by the decision of Mr Prosser QC sitting as deputy judge of the Chancery Division in *Shears Court* (*West Mersea*) *Management Co Ltd v Essex CC* (1986) 85 LGR 479. In that case the deputy judge was dealing with a claim by residents to use a way over the plaintiff's land as access to a beach. The county council after representation by the residents instituted proceedings under the 1981 Act having concluded that there was a public right of way. Meanwhile the plaintiff landowner issued a writ seeking a declaration that no public footpath existed over its land. The county council sought to have the writ struck out. The deputy judge having considered such authority as there was concluded (at 486):

> 'There is nothing in these cases which supports the contention that once the procedure of the Act of 1981 is under way but not yet completed there is no right to bring a question concerning the alleged right of way before the court. That such an action may be stayed is one thing, but to say that it should be struck out is entirely without foundation.'

He therefore declined to strike it out but ordered the proceedings under it to be stayed pending resolution of the local authority's inquiries and determinations under the 1981 Act. No question of differing burdens of proof appears to have been raised.

(iii) Paragraph 6 of Sch 15 to the 1981 Act confers on the authority a discretion to confirm unopposed modification orders or, if the authority considers that changes should be made to the order requires the authority to submit the revised order to the Secretary of State who is given a further discretion whether or not to confirm it or to confirm it after a further alteration. The provisions of para 6 seem to me to imply a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage.

(iv) There would seem to be little point in having a full public local inquiry with oral evidence and submissions if the inspector is not required finally to resolve material conflicts of fact and adjudicate on disputed issues of law. A distinction between the approach of the authority and the Secretary of State on a Sch 14 appeal to the making of an order, and the Sch 15 inquiry stage for the purposes of confirmation of that order seems to be implicit in the decisions of the courts in *Ex p Bagshaw* and *Ex p Emery* and in the speech of Lord Diplock in *Mason*'s case.

(v) It is anomalous if it is sufficient for the purposes of adding a way to the definitive map under s 53(3)(c)(i) that a test of reasonable allegation is sufficient when the civil burden of proof is required to obtain an order varying the permitted user of a way under para (c)(ii) and in removing a way under para (c)(iii).

(vi) In his judgment in the *Leicestershire CC* case [2003] EWHC 171 (Admin) at [23] Collins J said:

> '… the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii).'

With great respect I do not agree for the following reasons.

(a) The s 53(3)(c)(iii) procedure would not inevitably be available to an applicant to remove a way from the record because of the necessity prescribed in para (c) for there to have been a subsequent 'discovery' of evidence to trigger the power and the duty to make an order under sub-s (2). If the applicant simply wanted to argue his case on the basis of the evidence already known at the Sch 15 inquiry which had resulted in the way being put on the map by the application of the lower test, he might have no forum in which to do so. An application to the High Court under para 12 of Sch 15 to have the order set aside would fail because, on the basis of reasonable allegation only, it would

have been quite properly made. An application for a declaration that the right of way did not exist would be struck out because of the conclusive evidence provisions of s 56.

(b) An applicant under s 53(3)(c)(iii), as has been found by Collins J in the *Leicestershire CC* case, must produce 'cogent' evidence to justify an order. This seems to mean that he must satisfy, at least, the civil burden of proof. If he is alerted in time, raises objections, and takes part in an inquiry under Sch 15 it is theoretically possible that, at the inquiry, he could raise a case that there was no right of way satisfying the civil burden of proof and still lose if it could also be said that the preliminary order by the authority had met and continued to meet the criterion of reasonable allegation.

(c) The proposed solution to the problem produces a duplication of proceedings and costs which would not occur if at the hearing of any inquiry by an inspector or otherwise those supporting and opposing the existence or extent of a public right of way were treated as at any other inquiry to determine rights, namely that in order to win a party must establish his case to the civil burden of proof.

(d) If all that is necessary for a proponent to do to obtain confirmation of an order modifying the map so as to include a new right of way is to satisfy a test of reasonable allegation that places upon his opponent the burden of proof of establishing that no right of way exists to at least the standard of the balance of probabilities and, as I have said, even then he may not succeed. It is also contrary to the pattern of ss 29 and 31 of the 1949 Act.

[**52**] It is Mr Morshead's submission that a higher burden of proof, on the balance of probabilities, is not required at the confirmation stage because if, at that stage, the landowner or other objector satisfies the Secretary of State or his inspector by evidence on the balance of probabilities that no right of way exists it is unlikely that the order will be confirmed because it will no longer be reasonable to allege that it subsists. As I have pointed out this places the burden of proof on the objector at the inquiry stage which seems to be unjust. Alternatively if what is being said is that the stronger the case which the objector can present the more unlikely it will be that the Secretary of State will confirm the order on the basis of reasonable allegation, then the result is that it is being accepted that to confirm the order the Secretary of State must be satisfied of a case for the subsistence of the right of way in question on the balance of probabilities.

THE REMAINING HEADS

[**53**] I turn to consider the claimants' ground 2.

[**54**] Until the enactment of s 31 of the 1980 Act the only way in which a public highway could be created was, at common law, by express dedication by the landowner over whose land it was to be created or by implied dedication by him, to be implied from the public's user of the way over an appreciable period of time and to be treated as accepted by the public as a result of that use. See the judgment of Wills J in *Eyre v New Forest Highway Board* (1892) 56 JP 517 at 517:

> 'All highways, all rights of passage over the property of individuals, have their actual or presumed origin, although it is not often the origin in point of fact, in a dedication by the owner of the soil, that is to say he either says in so many words, or he so conducts himself as to lead the public to infer

> that he meant to say: "I am willing that the public should have this right of passage." If a man has actually conceded that right of passage to the public it is irrevocable, and that is expressed by the maxim with which we are all familiar, I suppose, "once a highway always a highway." Up till the year 1835, when the Highway Act, which is the foundation of our present system, was passed, if there was a dedication of a road to the public by the owner either expressed by deed, as occasionally happens, or inferred from public user for such a time as to any tribunal who judges the case will appear sufficient to found that inference, if the proper inference was that he had said or so conducted himself as to imply that he had granted that right of passage to the public; and the public had on their part accepted it and used the road, from that moment there was not only a right of passage on the part of the public, but there was the liability to repair on the part of the parish …'

[**55**] Thus the creation of a right of way at common law involved a two-stage process: the first-stage dedication by the landowner express or to be implied from his acquiescence in public use of the way over an appreciable period of time, and second, acceptance by the public by use of the way after dedication.

[**56**] Section 31 of the 1980 Act provides for an alternative route to the creation of a public highway so that a way could be established where such a way 'has been actually enjoyed by the public as of right and without interruption for a full period of 20 years'.

[**57**] It is not in issue that the fundamental cause of the inspector's change of mind between the publication of the interim letter and the final letter was a re-evaluation by him of documentary evidence of proceedings in relation to Sandy Lane caused by the provisions of the 1910 Act which imposed a tax on the values of land holdings. A landowner could not be taxed in respect of land which comprised a public highway or could obtain relief from tax in respect of land that was his property but which was subject to public highway rights. In the present case there was documentary evidence which established that Sandy Lane had a separate OS number and was excluded from the valuation of Sir Anthony Cope's land tax although it had plainly formed part of the estate of which he was owner being the route which his father, Sir William Cope, in the late nineteenth century had tried but failed to make into a public road.

[**58**] It is common ground that the inspector's re-evaluation was not as a result of any fresh evidence being put before him, but as a result of fresh submissions as to how the existing evidence before him should be treated.

[**59**] In the final letter the inspector reviewed the Finance Act 1910 evidence between paras 29 and 36. He says this at para 30:

> '30 **Uncoloured**. I have researched the use of large scale maps in relation to Finance Act documentation. Two sets of plans (i.e. base maps with annotations) were produced for each area—Field Plans (working copies) and Official Plans. The base map strips submitted in this case were almost certainly Field Plans. I have discovered that on these, the boundaries of hereditaments were often carelessly delineated and only outlined with coloured crayon. The Official Plans, thought to be held in the Public Records Office at Kew, have each hereditament carefully filled in with colour wash. They could have helped to clarify this case. It is unusual that on the Field Plan submitted, Hereditament 34 was not given

at least an outline colour. However, taking the evidence of the Plan and the associated Field Book together, I think it reasonable to conclude that Hereditament 34 consisted of those OS plots enumerated in the Field Book extract and probably did not include the area of Sandy Lane …'

[**60**] He continues at para 33:

'33 **Bridleway or Footpath rights over Sandy Lane**. I have researched the objectors' contention that Sandy Lane might have been excluded from valuation because commoners had rights of footway along it and it was therefore considered to be a public footpath. If Sandy Lane had been a private carriageway with a public right of way on foot, normal practice would have been inclusion of the Lane in valuation and a deduction made for "Public Rights of Way or User". Such appears to have been the case with the Footpath shown as "F.P." on the Field Plan to the west of Sandy Lane, and with any other paths crossing Hereditaments 34, 84, 98 and 694 …'

[**61**] The inspector's conclusions on this part of the final letter are at paras 37 and 38 as follows:

'37 **Dedication by Sir Anthony Cope**. From paras 29–36 two facts emerge and I now have more confidence in their implications than I did last year. First, Sandy Lane has a unique parcel number on the 1909 base map (no. 52, as on the 1894 OS 1:2500 map). Secondly, this plot was not included in the list of those valued in the Field Book extract. Such exclusion normally indicates public rights, sometimes bridleway but usually vehicular. It could not be reasonably alleged that the exclusion of Sandy Lane from valuation was a "powerful" indication of public carriageway rights along it if the circumstances before and around 1910 suggested otherwise. But they do not. The "Road" was intended to be part of a through route between Hazeley etc and Wokingham (para 19). It was described as a Road in the Book of Reference for the 1871 OS 1:2500 map and shown as a way without obstructions across it on that map, and the 1894 and 1909 OS 1: 2500 maps (para 20). In 1885 it was "a public convenience, being a direct communication between Odiham and Wokingham …" (para 21). Vehicles were used along it (para 22). There is evidence of its reputation as an uninterrupted highway and of vehicular user along it (paras 24, 26). The evidence of its reputation as a "Road" is supported by small scale map evidence (paras 27, 28). I therefore conclude that exclusion of Sandy Lane from valuation does show that, on the balance of probabilities it was considered to be a public carriageway in 1910. I consider it unlikely, in the context of this case and in the light of para 33 above, that it was bridleway or footpath rights that existed along the Order route, as contended by the objectors.

38 There is no evidence to suggest that the procedures laid down for the completion of assessment under the Finance Act were not applied in the case of the Bramshill Estate. These included checks by the landowner of the Field Book entries and of the provisional valuation. Accordingly, the omission of Sandy Lane from valuation and the public carriageway implications of this were open to Sir Anthony Cope's scrutiny. This leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public

carriageway. There then follows a considerable amount of evidence against this allegation and I address it carefully before determining the Order.'

[**62**] The inspector summarised that documentary evidence at para 46 as follows:

'The documentary evidence supporting the claim can be summarised briefly. Between 1866 and 1871 Sir William Cope built a road over a part of his Estate, intended to be a section of a through route between Odiham, Hazeley etc and Wokingham. The public were using it by 1885 but Sir William did not expressly dedicate it as a highway because the Highway Authority did not accept his condition for such dedication: that it should be adopted as publicly maintainable. Finance 1909/10 Act evidence was consistent with Sandy Lane being considered a public carriageway and the circumstances of this evidence indicated that on the balance of probabilities, the Lane was dedicated as such by Sir Anthony Cope …'

[**63**] The inspector's conclusion is at para 53 of the final letter as follows:

'**The Order route as a Vehicular Highway**

Paras 26 and 49–52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918. This was neither challenged nor obstructed until 1958. There is no evidence to show that the gates placed across the Lane in that year and from time to time thereafter were erected with the owners' permission or on their instructions: the public vehicular user continued despite the gates. This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway. The maxim "once a highway, always a highway" has to be applied to the claims of Captain Cope and Lord Brocket that, between 1921 and 1961, the Lane was private.'

[**64**] The claimants' initial submission is that the passages from the final letter which I have set out above, and, in particular the last but one sentence of para 38, show that the inspector was proceeding under a fundamental mistake of law, namely that Sir Anthony Cope's acquiescence in the preparation and submission of documents and plans required by the 1910 Act, which excluded Sandy Lane, constituted dedication by him of Sandy Lane as a public highway. Mr Morshead's answer for the defendant is the suggestion that, when the inspector used the word 'dedication' in these passages from the final letter, he was not using that word in its technical legal sense to describe a landowner making an oral or written express dedication of the land as a public highway but rather as describing acceptance of a situation which had already come into existence as a result of public user of the way before 1910 from which dedication by Sir Anthony or his father could be implied and which his acquiescence in the exclusion of Sandy Lane from the 1910 Act returns confirmed as having taken place.

[**65**] I am unable to accept Mr Morshead's submission. It is absolutely inconsistent with the words in para 38, '[t]his leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway' when read with the words in para 53:

> 'Paras 26 and 49–52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918 … This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway.'

It is true that there are passages in the final letter which support Mr Morshead's submission such as the penultimate sentence in para 46 which I have set out above. However it seems to me to be incontrovertible from para 53 that the inspector was coming to his changed conclusion to confirm the council's order adding Sandy Lane as a BOAT on the basis of a finding 'that in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'.

[66] Mr Morshead does not suggest that the evidence of what took place to complete the Finance Act 1910 procedures could possibly support a conclusion that Sir Anthony Cope's part in those procedures amounted to an express dedication of Sandy Lane as public highway.

[67] It follows that the inspector's change of mind was based on a finding which is shown to be erroneous in law.

[68] I turn to consider the claimants' head 3.

[69] In *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865, [1976] 1 WLR 1255 the House of Lords were considering a case where a local authority had made a compulsory purchase order in respect of certain buildings. That order was challenged and an inquiry held by an inspector appointed by the Secretary of State. The inspector, after the conclusion of the hearing, conducted his own inspection of the premises as a result of which he formed the view that the foundations were defective. His decision letter revealed the fact that this was a ground upon which he came to the conclusion that the compulsory purchase order should stand. Viscount Dilhorne says ([1976] 2 All ER 865 at 869, [1976] 1 WLR 1255 at 1260):

> 'It was on account of his belief as to the inadequacy of the foundations that the inspector, taking that into account with the other defects, ruled out rehabilitation. So it appears that the inspector attached great weight to a factor which formed no part of the council's case, of which the respondents had not been given notice and with which they had been given no opportunity of dealing. In my opinion there is great substance in the respondents' complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion, which investigation might have shown to be erroneous, that the foundations were not taken down deep enough, and an opinion, which also might have been shown to be erroneous, that the inadequacy of the foundations showed that rehabilitation was impractical.'

[70] The claimants complain that the inspector's conclusions are vitiated by procedural unfairness on two grounds: the first that the suggestion that Sandy Lane became a public right of way as a result of express dedication by Sir Anthony Cope in 1910 was a point which was not raised at the first inquiry and they had no notice was being raised in the course of the second inquiry by

the written submissions passed to the inspector for that purpose. Their second complaint is that the text of the final letter reveals, in the passages which I have quoted above, that the inspector conducted his own investigations into the Finance Act 1910 procedures and documents, and into how that material should be treated for the purpose of his inquiry, without notifying the parties and without giving them an opportunity to comment upon the material which he turned up.

[**71**] Mr Morshead for the defendant does not seriously suggest that once it is established that the inspector based his conclusions in the final letter on a finding of express dedication as a result of the Finance Act 1910 material then the conclusion should not follow that it was a breach of natural justice by him, and so procedural error, not to give the claimants notice of this and of any fresh material resulting from his investigations so that they could deal with it.

[**72**] As to the claimants' fourth ground, in the light of the conclusions which I have already reached it is unnecessary for me to deal with this issue which would involve a substantial investigation of the evidence and needlessly prolong this judgment.

[**73**] For these reasons it appears to me clear that the order confirmed by the defendant's decision through her inspector of 15 September 2003 must be quashed.

Application allowed.

Dilys Tausz Barrister.

APPENDIX I

CHRONOLOGY

Date	Event
1850s	Sir William Cope took up residence on his Bramshill Estate (which included the route of Sandy Lane)
15.12.1866	Letter written by Sir William Cope and Mr Mark Wyeth proposing to make a road along the route of Sandy Lane if sufficient subscriptions could be obtained

7.1885	Letter from Sir William Cope to the Hartley Wintney rural sanitary authority (as highway authority) stating that a road (Sandy Lane) had been made (principally at his expense) and indicating an intention to dedicate it to public use conditional upon its being formally adopted by the authority
	Report by the surveyor of highways that the road was too narrow and ended 30 yards short of New Mill Lane
1.9.1885	Eversley vestry meeting (attended by the surveyor and Sir William Cope): following Sir William's promise to gravel the sides of the road and extend it to New Mill Lane, resolution to apply to the justices to declare Sandy Lane a public highway passed [no evidence that such application was made]
8.1888	Surveyor reported to the authority that Sir William had not done the promised gravelling
1892	Death of Sir William Cope Ownership of the Bramshill Estate passed to his son Sir Anthony Cope
1910	Enactment of the Finance (1909–10) Act requiring a survey and valuation of all land in England and Wales to be carried out by the Inland Revenue for the purposes of a tax on land values to be levied on each occasion of a transfer of ownership
1910	The year in which the inspector found it reasonable to allege that 'in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'
1918	The first year in which the inspector found there to be evidence of public vehicular use of Sandy Lane having occurred

Date unknown	Transfer of ownership of the Bramshill Estate to Sir Anthony Cope's son Captain Denzil Cope
18.6.1921	Acquisition report prepared for the Forestry Commission by one of its officers for the purposes of its proposal to take a lease of parts of the Bramshill Estate: Sandy Lane not mentioned as a public highway
5.4.1922	Lease by Captain Denzil Cope to the Forestry Commission of parts of the Bramshill Estate, including the land on both sides of Sandy Lane, together with the grant of a right of way for all purposes over Sandy Lane
1929	Transfer of responsibility for maintenance of highways maintainable at the public expense from rural district council to county council: handover map prepared for that purpose does not include Sandy Lane as a highway
1932	Death of Sir Anthony Cope
1936	Sale of Bramshill Estate to Lord Brocket
5.1949	Lord Brocket (in his capacity as chairman of Bramshill parish meeting) signed map (for sending to the county council) stating that the rights of way shown on it (not including Sandy Lane) were the only ones in Bramshill parish
1952	Bramshill Estate broken up and sold off in lots; some parts retained (it was common ground at the inquiry that these probably included the route of Sandy Lane)
1958	Forestry Commission first locked gates across Sandy Lane

9.9.1958	Letter from clerk to county council to Eversley parish council confirming acceptance of Lord Brocket's 1949 declaration for the purposes of the 1949 Act survey
1967	Bramshill parish meeting made representations to the county council claiming Sandy Lane as a public right of way: county council responded that it was not satisfied that Sandy Lane was a highway
1984	Application to county council by Bramshill parish council for addition of Sandy Lane to the definitive map as a byway open to all traffic
1985	Locked gate installed at northern end of Sandy Lane
1999	County council resolved to make an order in accordance with the application Bramshill parish council produced additional evidence and asked the county council to make an order adding Sandy Lane as a bridleway instead
26.5.2000	Making by the county council of the Hampshire (Hart District No 9) (Parishes of Bramshill and Eversley) Definitive Map Modification Order 2000 (the order), adding Sandy Lane as a byway open to all traffic
	Objections to the order made by the claimants and others (including the Bramshill and Eversley parish councils). Order submitted for confirmation to the defendant's predecessor, the Secretary of State for the Environment, Transport and the Regions
26-28.3.2002 5, 23.4.2002	Public local inquiry into the order held by the inspector

18.7.2002	Issue of inspector's interim decision letter proposing to confirm order subject to modification showing Sandy Lane as a bridleway (instead of a byway open to all traffic) (OD 2002)
	Objections to proposed modification
12.2002) 1. 2003)	Inquiry into proposed modification conducted by way of written representations
15.9.2003	Issue of inspector's final decision letter confirming order as originally made (OD 2003)
3.10.2003	Publication of notice of confirmation of order under para 11 of Sch 15 to the 1981 Act
12.11.2003	Issue of these proceedings

APPENDIX II

LIST OF PERSONS REFERRED TO

The Secretary of State for Environment, Food and Rural Affairs	The defendant, in her capacity as the Secretary of State responsible for definitive map modifications under the Wildlife and Countryside Act 1981 (the 1981 Act)
Hampshire County Council	The surveying authority for its area for the purposes of the 1981 Act; made the definitive map modification order under challenge (the order) adding Sandy Lane in the Parishes of Bramshill and Eversley as a byway open to all traffic

D Brook CB CBE	The inspector appointed by the defendant to conduct the public local inquiry into the order, whose decision to confirm it is under challenge
Philip Napier Todd	The first claimant: resident of Eversley, chairman of Eversley parish council, chairman of Forest of Eversley Trust and Secretary to the Hart & Rushmoor district group of the Campaign to Protect Rural England: objector to the order
Douglas Bradley	The second claimant: owner and occupier of Broom Cottage, New Mill Lane, Eversley, a property which adjoins Sandy Lane: objector to the order
Philip Graham Plumbe FRICS FCI Arb	Chartered surveyor and chartered arbitrator: acted as representative for the objectors to the order: maker of two witness statements in support of this claim
The Reverend Sir William Cope	12th Baronet of Bramshill: owner of the Bramshill Estate (including the route of Sandy Lane) from the 1850s to 1892
Sir Anthony Cope	Sir William Cope's son and heir: owner of the Bramshill Estate from 1892 until a date unknown prior to 18.6.1921
Captain Denzil Cope	Son of Sir Anthony Cope: acquired the freehold to the Bramshill Estate from his father prior to 18.6.1921 and owned it until 1936

Lord Brocket	Purchaser of the Bramshill Estate from Captain Denzil Cope in 1936: sold it off in 1952, in a number of lots none of which included Sandy Lane. Chairman of Bramshill parish meeting 1949	*a* *b*
Forestry Commission	Lessee of the land adjoining Sandy Lane on both sides under a lease for 198 years of that and other land on the Bramshill Estate dated 5.4.1922; grantee of an all-purpose right of way over Sandy Lane for the duration of the lease	*c*