Case Name: *McLeish & Anor v Secretary of State for Environment, Food and Rural Affairs & Anor* [2024] EWHC 532 (Admin) (14 March 2024)

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Commentary: This case concerned an unsuccessful challenge pursuant to paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 (the "1981 Act") to the decision of an inspector appointed by the Secretary of State for Environment, Food and Rural Affairs (the "SoS" or the "First Defendant") (the "Inspector") to confirm the Kent County Council (the "Council" or the "Second Defendant") Definitive Map Modification Order 2021 (the "Order").

Facts

The Order was made by the Council on 11 February 2021 under the provisions of section 53(2)(b) of the 1981 Act in respect of rights of way shown (and not shown) in the Council's definitive map and statement (the "Definitive Map and Statement"). The Council considered that, as a result of successive redrafts of the Definitive Map, a right of way was shown to have moved, with no formal legal process underpinning the change. It was also suggested that an additional right of way subsisted which was not shown.

Mr and Mrs McLeish (the "Claimants"), the owners of Yew Tree House, objected to the Order on the basis that the Council had not had regard to all of the relevant evidence available to it when making the Order, that the existing route in fact terminates at the northern boundary of the Claimants' property, and alternatively if the route is found to extend southwards beyond the northern boundary of the Claimants' property then the route shown on the existing Map and Statement is correct and should not be amended. The Council submitted the Order to the SoS for confirmation and following a hearing the Inspector decided to confirm the Order in her decision letter dated 11 November 2022 (the "DL").

Grounds of challenge

The Claimant's grounds of challenge were:

1. that the Inspector failed to direct herself on the evidential weight to be given to the 1952 Definitive Map and Statement in the light of section 56 of the 1981 Act;
2. that the Inspector failed to identify as the primary question for her determination, and to reach a reasoned conclusion on, the question of whether the 1952 Definitive Map and Statement shows the correct alignment of the footpath; and
3. that the Inspector failed to draw properly reasoned inferences from the primary evidential material before her, left relevant evidence out of account, and gave relevant evidence no weight without explaining why.

Ground One

The Claimants submitted that the Inspector failed to treat the 1952 Definitive Map and Statement as conclusive evidence of the alignment of the footpath and that the starting point should have been a presumption that the Definitive Map and Statement showed the correct route.

The First Defendant submitted, however, that such a presumption is generally rebutted by a positive finding that the alternative route is correct and that the Inspector, in the DL, had followed the approach that the Definitive Map and Statement would be held to be correct unless cogent evidence was provided to the contrary, and on that basis had confirmed the Order.

Neil Cameron KC sitting as a Deputy High Court Judge, hearing the challenge, considered that the Definitive Map and Statement was intended to establish "once and for all" the existence of the right of way, and that the presumption is against change. Whilst the Inspector did not expressly refer to the presumption, she made reference to its basis in case law and that she intended to adopt that approach, before applying the 'balance of probabilities' test as to whether the alternative route was correct.

The Judge also considered the question of which version of the map the presumption should be applied to, finding that the map and statement, as modified, are to be the Definitive Map and Statement for these (and any other) purposes.
Therefore, when the DL is read fairly and as a whole, the Inspector's approach was correct and the ground failed.

Ground Two

The Claimants again submitted that the presumption should have applied to the 1952 map and statement.

The First Defendant submitted that Ground Two added little to Ground One and that the Definitive Map and Statement to be considered were those as modified.
For the same reasons as above, Ground Two failed.

Ground Three

The Claimants submitted that the errors of law resulted from a failure to take a material consideration into account, and Wednesbury irrationality, in that the Inspector failed to take into account the Ordnance Survey 3rd edition map, and the 1910 Finance Act records presented. This meant that the Inspector's conclusion at paragraph 46 of the DL was irrational as it was not supported by evidence.

The First Defendant submitted, and the Judge agreed, that the Inspector did in fact consider this evidence, as it was sufficiently referred to and dealt with in the DL. Further,

the interpretation of maps, and the conclusions drawn from such interpretation, were a matter for the Inspector and not for the Courts.

The submission on Ground Three also sought to raise a new point not put to the Inspector at the hearing, however the Judge found that this raised an issue of fact which should have been put to the Inspector to be dealt with, and not the Court. It also concerned additional land not subject to the Order, so raised the question of fairness. The additional point was not allowed to be taken in the proceedings, and Ground Three failed.

Conclusion

The claim failed on all three grounds and was dismissed.

Case summary prepared by Sophie Bell