

**Case Name:** *McLeish & anr v Secretary of State for Environment, Food & Rural Affairs & anr* [2024] EWCA Civ 1562

**Full case:** [Click here](#)

**Commentary:** This appeal was concerned with a public footpath in the Village of Doddington, Kent. Local councils are required by section 53 of the Wildlife and Countryside Act 1981 to keep a definitive map and statement of public rights of way, and to keep that map under continuous review and make any necessary changes arising from new developments or new evidence showing that the map or statement are in error.

In the latest version of the definitive map and statement published by Kent County Council in 2013, the footpath was shown as running through the garage and cesspit of a property known as Victoria Bungalow. This was changed by a Definitive Map Modification Order, resulting in the footpath instead running along the edge of the eastern frontage of a neighbouring property, Yew Tree House, owned by the Appellants, Mr and Mrs McCleish.

#### Underlying proceedings

That order resulted in objections from the Appellants, and an Inspector was appointed by the Secretary of State. In determining whether the path ran through Yew Tree Cottages land or Victoria Bungalow land, the Inspector found that the historical line of the path in the 1952 version did not match that shown on the current definitive map, but had drifted subtly eastward on each iterative redraft, albeit with no deliberate intention of forming a legal order to do so. She concluded that the route was indeed incorrectly shown on the current definitive map and statement and should be deleted.

The Inspector's decision was then challenged in the High Court, where the Judge identified two key issues for consideration:

1. What is the effect of the 'conclusive' provision in section 56(1) when the surveying authority are considering whether to make modifications to the map and statement under the provisions of section 53 of the 1981 Act?
2. What is the definitive map and statement which is to be considered when considering whether to make modifications pursuant to section 53?

The Judge in the High Court concluded that there had been no error of law in the Inspector's approach. As to the first issue, the Judge decided that the conclusive evidence provision in section 56 does not apply to the review process. On the second issue, he concluded that when a modification has been made, it is the map and statement as so modified which must be regarded for all purposes of Part III of the 1981 Act as the definitive map and statement, so that the presumption against change applies to the definitive map and statement as modified. For that reason, he rejected the submission

of the Appellants that the definitive map and statement to which the presumption applied was one prepared in 1952.

### Ground of Appeal

Permission to appeal was granted on one ground: whether or not, in dismissing their challenge to the Order, the judge made an error of law in rejecting the Appellants' case that the evidential presumption created by S56(1) of the 1981 Act applied to the original 1952 definitive map and statement of public rights of way, and finding instead that it applied to the later "map and statement as modified", when there had been no relevant "modification" of the 1952 definitive map and statement under the 1981 Act, but rather the section of footpath in question was found by the Inspector to have been copied onto the later definitive maps in error.

Males LJ first set out the difference between the conclusive evidence provision in S56 of the Wildlife and Countryside Act 1981 and the evidential presumption against change expressed by Lord Phillips MR in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266, referring to *R v Secretary of State for the Environment, Ex parte Burrows* [1991] 2 QB 354. Section 56, Males LJ held, means that a definitive map is conclusive: 'In an action for trespass, for example, the map will be conclusive and it will not avail either party to say that it is mistaken.' The 1981 Act and precursory legislation 'prefer certainty to accuracy in order to achieve the legislative purposes...that does not mean that mistakes cannot be corrected [only that] the means by which that must be done is the review process. [35].'

Against this backdrop, Males LJ took the current version of the map as his starting point. He agreed with the first-instance judge that when a modification is made, it is the map and statement as modified that becomes definitive. The conclusive evidence provision in section 56 will apply to the current map, while for the purposes of the next review the evidential presumption against change will apply. Males LJ concluded that in principle if it is shown during the review process that the latest version of the definitive map is in error, it would be sensible to apply the evidential presumption to the previous version, but noted that this had not occurred in this case.

The Inspector had indeed concluded that it was clear that the current version of the map was the result of copying errors, which was sufficient to rebut any presumption applying to that version. However, she had also made findings which demonstrate that the route shown on the 1952 version could not be right either as the path ran through what were then existing buildings. The Inspector had to reach a conclusion on the balance of probabilities, without any presumption, and with regard to all of the evidence before her, that the path ran along the eastern frontage of Yew Tree House.

For this reason, the Appeal was dismissed.

*Case summary prepared by Gregor Donaldson*