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Neutral Citation Number: [2020] EWHC 3346 (Admin)

Case No: CO/780/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

VENETIA CRAGGS

Claimant

and

SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS

Defendant

and

SOMERSET COUNTY COUNCIL
MR PRS & MRS EB SCOTT
AGGREGATE INDUSTRIES UK LTD
MR M HEAL
MR J SMITH
MR KELLY

Interested Parties

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- -

Mr Horatio Waller (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Hugh Flanagan (instructed by **Government Legal Services**) for the **Defendant**

Hearing dates: **11 November 2020**

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Approved Judgment

Mrs Justice Lieven DBE :

1. This is a challenge to the decision of an Inspector, Susan Doran, to dismiss an appeal by the Claimant against the decision of the First Interested Party, Somerset County Council. The Council had decided not to make an order under s.53(2) of the Wildlife and Countryside Act 1981. The Claimant had applied for a modification to add a bridleway / restricted byway / byway open to all traffic to the definitive map and statement. The route in question is known as Callow Drove and I will refer to it below as "the Route".

2. The issue in the case is whether the Shipham and Winscombe Inclosure Award of 1799 ("the Award") was effective to create a public bridle road (now known as a public bridleway) over the Route. This turns on whether (a) any such purported creation was within the powers of the Shipham and Winscombe Local Act 1797 ("the Enabling Act") and (b) if it is, whether that intra vires element is capable of being severed from the unlawful parts of the Award. The case is to some degree a continuation or refinement of the decision in *Buckland v Secretary of State for the Environment Transport and the Regions* [2000] 1 WLR 1949. This judgment will adopt the terminology of public bridle roads / public carriage roads set out in the Enabling Act.

The Background

3. The history of the impact of Enclosure Acts upon local highways is set out by Sedley J in *Dunlop v Secretary of State for the Environment* (1995) 70 P&CR 307 and Lord Dyson MR in *R (Andrews) v Secretary of State for Environment Food and Rural Affairs* [2016] PTSR 112. Enclosure was the process by which traditional communal farming land in open fields was abolished and put to the use of a single owner. Enclosure awards were drawn up by enclosure commissioners who acted pursuant to the relevant Act of Parliament, normally a local Act of Parliament.

4. The effect of an Enclosure Award was to extinguish existing rights of way over land and the Award would then grant, or presumably in many cases regrant, rights of way, both private and public. The issue in *Dunlop* was the meaning of "private Carriage road" in the Award in question and whether in its context it created public, and not merely private, rights. In *Andrews*, Lord Dyson refers at [41] to the fact that "*public bridleways and footpaths were crucially important in the late 18th and early 19th centuries for those who wished to travel on foot or on horseback (the majority of the population)…"*

5. In the present case, the Enabling Act is the Shipham and Winscombe Inclosure Act of 1797, which made provision for the creation of both public and private rights. The most relevant parts of the Act are in the following two extracts:

> *"That the said commissioners, or any Two of them, shall, and they are hereby authorized and required to set out and appoint such public carriage roads in, over, and upon the said commons and waste lands respectively, hereby intended to be divided and inclosed as they shall think necessary and proper, all which said public Roads shall be and remain of the Breadth of forty feet at the least (which Breadth of Forty*

> *Feet as to such public carriage roads so to be set out and appointed as aforesaid, …"*

At page 9 of the Act there was a requirement that for public carriage ways a surveyor had to be appointed to form the roads and put them in good and sufficient repair. In practice the position was that once the public carriage roads were formed, the obligation to keep them in repair fell upon the Parish.

At page 10 of the Enabling Act it said:

> *"… and the said Commissioners, or any Two of them, shall, and they are hereby also empowered and required to set out and appoint, and cause to be made, erected and completed such public Bridle Roads and Footways and private Roads and Ways, and also such Banks, Ditches, Drains, Watercourses, Bridges, Tunnels, Stiles and other Conveniences in, over, upon and leading to and from such Commons and Waste Lands hereby intended to be divided and inclosed as they shall think requisite; and the same shall be made and erected, and at all Times hereafter repaired, cleansed, maintained, and kept in Repair by such Persons, and in such Manner, as the said Commissioners, or any Two of them, shall direct and appoint; …"*

6. It can be seen from these extracts that in respect of the "public carriage roads" there was a requirement that they be a minimum of 40 feet wide. Whereas there was no width prescription in respect of private roads, or bridle roads.

7. The relevant Award is the Shipham and Winscombe Inclosure Award 1799. This is a lengthy document, of which a number of parts are relevant. The first is the following passage in the Preamble:

> *"…we the said commissioners after setting out and appointing the several roads or ways and foot ways (<u>no public carriage or bridle roads being thought by us necessary</u>) and other conveniences in over and upon and leading to and from the said commons or wastelands according to the purpose and directions of the said act have agreed upon such orders regulations and determinations respecting the same as appear to us necessary and proper conformable to the true intent and purport of the said Act of Parliament and as hereinafter are given expressed and contained now therefore know ye and these presents witness that we the said commissioners do in pursuance and by virtue of the powers directions and authorities in and by the said act to us given make this our award or instrument in writing in the manner hereinafter set forth and do declare the several and respective roads ways paths passages and other conveniences hereinafter set out appointed and directed in through over and upon the said commons or wastelands with such orders directions regulations and determinations in and concerning the premises as are hereinafter particularly mentioned and contained of and concerning the same that is to say…"* [emphasis added]

8. The relevant section relating to the Route appears under a heading "Private Roads or Ways in Winscombe". The two sections which are relevant to the Route are Upper

Callow Road and Lion's Den Way. At the end of the section on "Private Roads or Ways" the Commissioners made provision for "New Road" which was to be 30 feet wide and is expressly said to be for the "use and benefit of all and every person and persons ….". In respect of the other roads and ways which had been set out, the Award states:

> *"We the said commissioners do hereby order direct and award that the several private roads or ways hereinbefore particularly mentioned and described to be set out and appointed in on over and along the commons or wastelands hereinbefore mentioned shall always be and remain of their several and respective widths and breadths … for the use and benefit of all and every the owners tenants and occupiers of the several and respective divisions and … with free liberty power and authority for them and all and every other person and persons whomsoever having any occasion whatsoever to go travel pass and repass through upon and over the same roads and ways and every or any or either of them on foot or on horseback with horses cattle carts and other carriages loaded or unloaded at their and every of their free wills and pleasure or otherwise howsoever as and when and as often as they or any or either of them shall think fit and proper and … shall from time to time and at all times for ever hereafter be maintained and repaired and kept in good and sufficient repair and condition by and at the charges and expenses of all and every the owners tenants …."* [emphasis added]

9. The clear intent of this clause was to give the public unfettered rights to use the roads which had been described above in the Award as "private", and to place the maintenance liability on the owners and occupiers of the land rather than on the Parish. It can immediately be seen that there is a tension between the creation of rights under the heading of "private roads and ways" but with a user provision which clearly gives rights to the general public to use the Route.

10. These provisions were considered by Kay J in *Buckland v SSETR*, which concerned the same Act and Award, but a different route. The case concerned an Inspector's decision that the Award created a public vehicular right of way along Barton Road, one of the routes identified under the Award in the section headed "private road or way" and was measured at less than 40 feet. It is important to note that in *Buckland* the Inspector had found a vehicular right of way and it was not argued before the High Court that the Inspector should (or could) have found there to be a lesser right, namely a bridleway.

11. The Judge held that the creation of a public highway was ultra vires the Enabling Act and therefore that the Inspector had erred in law. At 1960E he said:

> *"In this case, I am in no doubt that the commissioners did not have power under the Act of 1797 to create a public highway otherwise than in accordance with the precise powers given under the statute. It was not open to them to circumvent the conditions necessary before a road would become a public highway by purporting to create a private way but to make it open to the public at large. Thus, irrespective of the precise meaning of the user provision in the award, the inclosure award cannot have created a public highway. Mr. Hobson is right, in my*

> *judgment, to concede that the commissioners did not have the power to set Barton Road as a public carriageway."*

12. When the Judge referred to the "conditions necessary" for the creation of a public highway he must have been referring back to the conditions he had referred to at 1958G-H, namely that the route had to be a minimum of 40 feet and that a surveyor should be appointed to put the routes in repair. The Judge quashed the Inspector's decision because he held that the Inspector had erred by not appreciating that the purported creation of the public carriageway was ultra vires.

The law on severability

13. The degree to which a legal instrument can be severed in order to preserve the intra vires element whilst removing the ultra vires element has been the subject of considerable judicial consideration. In *Thames Water v Elmbridge Borough Council* [1983] 1 QB 570 the local authority had acquired land for planning purposes in circumstances where one part of the land, the green land, fell outside the powers of acquisition. The Court of Appeal held that the resolution of the local authority was valid in respect of the main part of the land, and could be upheld, because the invalid part could be identified and severed.

14. In that case Thames Water was arguing that the invalid part could only be severed if it could be segregated and identified on the face of the document, see 576G. This is described by Dunn LJ as a "blue pencil test". In considering the argument Dunn LJ referred to the decision in *Dunkley v Evans* (1981) 1 WLR 1522 where Ormrod LJ said:

> *"We can see no reason why the powers of the court to sever the invalid portion of a piece of subordinate legislation from the valid should be restricted to cases where the text of the legislation lends itself to judicial surgery, or textual emendation by excision."*

15. Dunn LJ then considered severance in cases concerning the law of contract and said at 580E:

> *"…The question in the instant case is not as to the true construction of the resolution but whether, and to what extent, the urban district council had power to give effect to it. For that purpose the court is entitled, and indeed bound, to look outside the document itself to see whether the urban district council, in fact and in law, had power to do what the resolution on the face of it purports to authorise. In this case it finds an easily identifiable part, namely the green land, which the urban district council had no power to appropriate. There is no more difficulty in deciding whether the resolution was invalid in respect of that part and valid in respect of the remainder than if the green land had been identified in the resolution itself, and no difficulty in the court declaring that the resolution is invalid in respect of the green land and valid in respect of the remainder. It does not seem to me to matter whether one calls that process severance or whether one calls it modification of the resolution, or whether one uses some other word, or expression, to describe it. In the realm of judicial review it could be dealt with by*

declarations that the purported appropriation of the green land was ultra vires and of the remainder intra vires."

16. The issue of severance in public law was subsequently considered by the House of Lords in *DPP v Hutchinson* [1990] 2 AC 783. As Mr Flanagan accepts, *Hutchinson* was a materially different case because it concerned criminal liability under the impugned byelaw where the Court will take a strict approach in determining the vires for a criminal prosecution. The case concerned protestors at Greenham Common who had been arrested under the impugned byelaw. The Divisional Court found that the byelaw was ultra vires because it prejudicially affected the rights of common, contrary to the enabling statute. The DPP argued that the unlawful parts of the byelaw could be severed, and the prosecutions upheld, whereas the Defendants argued that severance was impossible.

17. Lord Bridge rejected the argument that the byelaw could be severed, but also the very high test for severability advanced by the Defendants' counsel, see i.e. 786D-F. At 804B-G Lord Bridge set out the relevant tests as follows:

"When a legislative instrument made by a law-maker with limited powers is challenged, the only function of the court is to determine whether there has been a valid exercise of that limited legislative power in relation to the matter which is the subject of disputed enforcement. If a law-maker has validly exercised his power, the court may give effect to the law validly made. But if the court sees only an invalid law made in excess of the law-maker's power, it has no jurisdiction to modify or adapt the law to bring it within the scope of the law-maker's power. These, I believe, are the basic principles which have always to be borne in mind in deciding whether legislative provisions which on their face exceed the law-maker's power may be severed so as to be upheld and enforced in part.

The application of these principles leads naturally and logically to what has traditionally been regarded as the test of severability. It is often referred to inelegantly as the "blue pencil" test. Taking the simplest case of a single legislative instrument containing a number of separate clauses of which one exceeds the law-maker's power, if the remaining clauses enact free-standing provisions which were intended to operate and are capable of operating independently of the offending clause, there is no reason why those clauses should not be upheld and enforced. The law-maker has validly exercised his power by making the valid clauses. The invalid clause may be disregarded as unrelated to, and having no effect upon, the operation of the valid clauses, which accordingly may be allowed to take effect without the necessity of any modification or adaptation by the court. What is involved is in truth a double test. I shall refer to the two aspects of the test as textual severability and substantial severability. A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance

> *is essentially unchanged in its legislative purpose, operation and effect."* [emphasis added]

18. Lord Bridge then went on to consider whether a test of textual severability alone should be adopted:

> *"But I have reached the conclusion, though not without hesitation, that a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases, of which Dunkley v. Evans and Daymond v. Plymouth City Council are good examples, have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the scope of that power, the text, as written, has a range of application which exceeds that scope. It is important, however, that in all cases an appropriate test of substantial severability should be applied. When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But when the court must modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision."* [emphasis added]

19. Lord Bridge applied these tests to the facts before him and found that textual severance would not be possible because of the degree to which the valid and the invalid were intertwined. Further, it would not be possible to achieve the absolute prohibition on unauthorised access, which the byelaws intended, if the commoners rights were maintained, and therefore the purpose of the byelaw could not be met by the severed version. It was plainly material in this analysis that the byelaws were creating a criminal liability.

20. Mr Flanagan referred to *R v Secretary of State for Transport ex p Greater London Council* [1986] 1 QB 556 and McNeill J's summary of the principles at 586. This predates *DPP v Hutchinson* [1990] 2 AC 783. and the only point which is made clearer in that case is that the court, when seeking to achieve substantial severability, must be careful not to rewrite such an order or decision, see 578H.

21. In *Public and Commercial Services Union v Minister for Civil Service* [2011] 3 All ER 74, Sales J (as he then was) had found that the Civil Service Compensation Scheme was unlawful in certain respects. The issue then arose in the subsequent judgment as to whether that finding should lead to the whole Scheme being quashed, or only certain parts of it. The only aspect of the Scheme in which the issue of severance ultimately arose was that relating to age discrimination.

22. Sales J found that the unlawful elements could be textually severed at [24]. He then went on to find that those elements were *"completely distinct"* from the other amendments to the Scheme. He concluded that *"these are amendments which are*

conceptually and substantively distinct from the unlawful amendments set out in the scheme" [27]. He therefore found that the tests for textual and substantial severability were satisfied.

23. My understanding of the approach under this caselaw is as follows:

(a) Firstly, the court must determine what are the ultra vires elements of the instrument in question;

(b) In determining severability, the court must consider whether there is vires for the element which is being sought to be retained. The court must be careful not to, in effect, legislate for a new or different provision;

(c) The court should then apply the test of textual severability, which will be met if the offending words can be disregarded and the text remain grammatical and coherent, Hutchinson [805F];

(d) If textual severance is possible, then the court applies a test of substantial severability, which will be met if what remains is essentially unchanged in its legislative purpose, operation and effect Hutchinson [805G];

(e) However, if textual severance is not possible then the court can still sever the provision, but it must be satisfied that in upholding only part of the impugned provision, there is no change in the "substantial purpose and effect of the impugned provision", Hutchinson [812G-H].

Submissions and Conclusions

24. Mr Waller, who appears for the Claimant, argues that the intention of the Award to create public rights of way along the Route is clear. Although they are created under the heading of "private roads or ways", that must yield to the user provision which is in express terms. He argues that the Award is laid out as it is because if the various routes had been described as public carriage road, they would have had to be at least 40 feet wide and this would have caused unnecessary expense and complication.

25. He submits that Buckland was only concerned with the creation of public carriage roads and the 40 feet requirement and the court therefore did not consider whether the Commissioners could have exercised their powers to create public bridle roads, which had no such minimum width requirement.

26. He then argues that it is possible to sever the unlawful part of the Award, namely that in respect of creating rights for vehicles to pass (i.e. the public carriage roads) from the intra vires part (i.e. the creation of bridle roads).

27. Mr Flanagan argues that the ultra vires finding in ***Buckland*** is broader and covers all non-private rights along the route. He then argues that whatever the finding on vires, it is not possible to sever the ultra vires element here and therefore any purported creation of rights for the public to use the Route, other than on foot, must fail.

28. Applying the analysis at paragraph 23 above to the facts of this case, the starting point is defining what is the nature of the ultra vires elements of the Award. Mr Flanagan argues that ***Buckland*** held that the Enabling Act created different and distinct regimes for public and private ways, both in terms of width and maintenance requirements. He argues that Kay J's ratio was that the Commissioners had no power to create private roads and then open them to the public. As such he argues that the ultra vires finding in ***Buckland*** applies as much to bridle roads as to carriage roads.

29. Mr Waller takes a narrower approach to ***Buckland*** and argues that the ultra vires finding only attached to the making of public carriage roads. This was because the finding was specifically tied to the requirements in the Award for a specified width and maintenance regime in respect of public carriage roads and these requirements do not apply to public bridle roads.

30. I think Mr Waller's analysis of ***Buckland*** is correct but, in any event, I would not find that the ultra vires element extends to the creation of public bridle roads. The Act, as set out above, made separate provision for the creation of public carriage roads (p8) and public bridle roads (p10). The public carriage roads were subject to the 40 feet requirement and the maintenance provisions in respect of the surveyor. However, the public bridle roads power at p.10 was not subject to any such provisos. It is therefore in my view clear that the Commissioners had the power to create public bridle roads, separate from public carriage roads, and without any requirement for a specified width or maintenance.

31. This entirely accords with the analysis in ***Dunlop v SSETR*** where Sedley J sets out the history of public carriage roads as being quite distinct creatures from private carriage roads and drift ways, see p.5-6 of the judgment. It also accords with the Court of Appeal decision in ***Andrews*** where the Court took a purposive approach to the Enabling Act in order to support a finding of the creation of public bridleways and footpaths. As the Court of Appeal and Foskett J said at first instance in ***Andrews***, it is very difficult for a 21st century court to analyse the intentions of Parliament in the late 18th century when creating Enclosure provisions. However, it is apparent in my view that Parliament intended there to be a right to create public bridle roads separately from public carriage roads, and that they did not have to be subject to the same provisos as public carriage roads.

32. It is also clear that the Commissioner intended that the various routes under the heading of "private roads and ways" should be open to the public. It seems likely, though it is not possible to be sure, that the Commissioners were seeking to avoid the width and maintenance requirements that would have applied if they had created public carriage roads. This was probably both to minimise disruption but also to reduce the burden on the Parish of having to maintain public carriage roads. I accept Kay J's analysis that the Commissioners approach led to any purported creation of public carriage roads being ultra vires. However, a purposive approach would seek to retain the vires for the creation of the public bridle roads. I am further fortified in this conclusion by Mr Waller's point that if the creation of public bridle roads is also ultra vires then the effect is that the Commissioners only created a very small number of public rights of way across the area of the Award. This is plainly not what they intended and would have been very strongly contrary to the interests of the area at the time given the dependence on horses for transportation.

33. In ***Buckland*** it was not argued in the alternative that if the route was not a public carriage road then it could still be a bridleway. There is no hint in the judgment, or the references to the decision letter, as to why this was not argued, but it was not an issue before the Judge. Further, in my view, it is clear that Kay J's analysis on vires turned specifically on the criteria for the creation of a public carriage road as set out in the Enabling Act. This appears from his reference at 1958G-H to the width prescription and to the role of the surveyor, and then at 1960E when he says the Commissioners could not "circumvent the conditions necessary" before a road could become a public highway. The conditions necessary were the two statutory criteria which applied to a public carriage road and not a public bridle road. Therefore, in my view, my finding as to the vires for a public bridle road is not inconsistent with the conclusions in ***Buckland***. Further, there is nothing inconsistent or unlikely about the Commissioners creating private rights to drive carriages and carts along the routes, and public rights on horseback along the same routes. Such a legal arrangement would have been common in the 18th century and remains common today.

34. For these reasons I find that the creation of a public bridle road along the Route is itself intra vires.

35. The next question is whether the Award is capable of textual severance to preserve the intra vires public bridle road whilst accepting the conclusion in ***Buckland*** that any public carriage road would be ultra vires. I accept Mr Flanagan's argument that pure textual severance is difficult here. That is because the relevant words create private rights for the use of the Route including with carts and carriages (i.e. a public carriage road or what would now be termed a vehicular route) as well as public rights. If words relating to carts and carriages are excised, then the private rights would be extinguished at the same time as the public rights and that would plainly alter the purpose and effect of the provision as well as removing important private rights. Therefore, if the ultra vires element (public carriage road) is to be removed pure textual severance is not possible.

36. However, applying the last stage of Lord Bridge's analysis in ***Hutchinson***, in my view the tests for substantial severability can be met without the purpose and effect of the provision being unacceptably altered, see para 31(e) above. The purpose was to create public rights over the routes in question. I appreciate that the Commissioners said at the start of the Award that public carriage roads and bridle roads were not "being thought by us necessary". However, the user provision which is very specific as to there being public use must override the generality of the earlier words. The Commissioners having made in effect two inconsistent statements in the Award, in my view the correct approach must be to look at the clear words in the user clause, and the broader purpose of the Award, which is highly likely to have been to create routes open to the public. The substantial purpose and effect, namely not to create public carriage roads of 40 foot with maintenance falling on the Parish but to allow the public to use the route on horseback, is maintained.

37. For these reasons I consider the tests for substantial severability are met. So far as the Award creates a public carriage road on the Route that is ultra vires, but the creation of public bridle road along the Route is not.