Neutral Citation Number: [2015] EWCA Civ 669

Case No: C1/2014/2480

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Foskett
Neutral Citation Number: [2014] EWHC 1435 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2015

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE GLOSTER
and
LORD JUSTICE SALES

- -

Between :

The Queen (on the application of John David Andrews)	**Appellant**
- and -	
Secretary of State for Environment Food and Rural Affairs	**Respondent**

- -
- -

George Laurence QC and Edwin Simpson (instructed by **Winstons Solicitors LLP)**) for the **Claimant**
Jonathan Moffett (instructed by the **Treasury Solicitor**) for the **Defendant**

Hearing dates : 8th and 9th June 2015

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Approved Judgment

Master of the Rolls:

This is the judgment of the court to which each of its members has contributed.

1. The appellant appeals from the dismissal by Foskett J of his claim for judicial review of the decision of one of the Secretary of State's Inspectors to dismiss his appeal against the decision of Wiltshire County Council ("the Council") not to amend the definitive map and statement ("the definitive map") for the county to show two sections of public bridleway across an arable field in the parish of Crudwell. The field is currently owned by the Interested Party, Mr Jonathan Blanch. The two sections of bridleway are 10 and 15 feet wide respectively.

2. The appeal turns on the proper interpretation of the Inclosure Consolidation Act 1801 ("the 1801 Act"). In particular, it raises the question of whether section 10 of the 1801 Act, when incorporated into a local enclosure Act, empowered enclosure commissioners to create *public* bridleways, as opposed to *private* bridleways.

3. Foskett J held, consistently with the decision of Schiemann J in *R v Secretary of State for the Environment, ex p Andrews* (1996) 71 P & CR 1 ("the *Andrews No 1* decision"), that section 10 of the 1801 Act empowered enclosure commissioners to create only private bridleways.

Relevant background

4. Enclosure was the process by which traditional communal arable farming in open fields was abolished and land was enclosed and put to the use of a single owner. Enclosure awards were drawn up by enclosure commissioners, who acted pursuant to the authority of an Act of Parliament. In the 18th century, the most common method of authorising an enclosure project was by a local Act of Parliament.

5. In the late 18th century, with a view to encouraging a second wave of enclosures, which it was hoped would lead to an increase in the gross national output of agricultural produce, it was considered desirable to streamline the process of enclosure and make it cheaper and more attractive to prospective landowners. The result was the 1801 Act whose long title was:

> "An Act for consolidating in one Act certain Provisions usually inserted in Acts of Inclosure; and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts."

6. Subsequent to the enactment of the 1801 Act, local Acts authorising enclosure in a particular area could simply incorporate its provisions by reference, together with any other provisions considered to be desirable.

7. One such local Act was "An Act for Inclosing Lands in the Parish of Crudwell, in the County of Wilts" which received the Royal Assent on 20 June 1816 ("the Crudwell Act"). Pursuant to the first provision of the Crudwell Act, one Daniel Trinder ("the

Commissioner") was appointed as "the sole commissioner for dividing allotting and enclosing the ….open fields and commonable lands" of the Parish of Crudwell.

8. The first section of the Crudwell Act also appointed the Commissioner:

> "for putting this Act in execution; subject to the Rules, Orders, Directions and Regulations of the [1801 Act] (which shall be applied deemed and taken as part of this Act) except in such cases only as the same are hereby varied or altered."

9. The Commissioner made the enclosure award in respect of the Parish of Crudwell in 1841 ("the Crudwell Award"). He purported to award and appoint one 15 foot wide public "bridle road" numbered X on the award map or plan and one 10 foot wide public "bridle path" numbered XVII on the map or plan both across what is now Mr Blanch's land.

10. These are not shown on the definitive map. On 10 January 2012, pursuant to section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act"), the appellant applied to the Council to have the definitive map amended to make good the omission.

11. The circumstances in which the Council may modify the definitive map are set out in section 53 of the 1981 Act, which so far as material, provide:

> "(2) As regards every definitive map and statement, the surveying authority shall—
>
> ……
>
> (b) ….keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after [the commencement] date, of any of [the events specified in subsection (3)], 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.
>
> (3) The events referred to in subsection (2) are as follows-
>
> …….
>
> (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 such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic."

12. The Council rejected the application in reliance on the *Andrews No 1* decision. The appellant appealed to the Secretary of State. His case on appeal was that the relevant public bridleways had been created by the Commissioner acting pursuant to powers conferred on him by the Crudwell Act which incorporated the relevant provisions of the 1801 Act; and that the incorporation of the 1801 Act conferred on the Commissioner the power to create public bridleways.

13. The Inspector appointed by the Secretary of State considered that he was bound by the decision in *Andrews No 1* and dismissed the appeal. In that case, Schiemann J accepted the agreed position of the parties (including the present appellant) that section 10 of the 1801 Act conferred only a power to create private bridleways and footpaths and not public bridleways and footpaths.

14. The appellant sought judicial review of the Inspector's decision. The claim was dismissed by Foskett J. The judge himself gave permission to appeal to this court.

The 1801 Act

15. The 1801 Act is no longer in force. It was repealed by the Commons Act 1899. Nevertheless, it lies at the heart of this appeal since it was in force when the Commissioner purported to set out and appoint the two bridleways with which we are concerned in the Crudwell Award. We have been told that there are believed to be between 500 and 1000 cases in England and Wales where public footpaths and bridleways set out and appointed by commissioners are not currently recorded in the relevant definitive maps.

16. The 1801 Act was a general clauses Act. That is to say that it had no effect in and of itself, but rather set out model provisions that could be incorporated into subsequent local Acts ("the post-1801 Acts") where it was thought to be desirable to do so. Section 44 provided that post-1801 Acts could make provisions different from or additional to those set out in the 1801 Act. The preamble to the 1801 Act explained that:

> "Whereas, in order to diminish the Expense attending the passing of Acts of Inclosure, it is expedient that certain Clauses usually contained in such Acts should be comprised in one law, and certain Regulations adopted for facilitating the Mode of proving the several Facts usually required by Parliament on the passing of such Acts…."

17. In broad terms, the scheme of the 1801 Act was as follows. Where it was necessary to do so, the commissioner was to determine the boundaries of the parishes, manors, hamlets or districts to be enclosed, a determination which could be subject to appeal to the Quarter sessions (section 3). The commissioner was then to carry out a survey and valuation of the land to be enclosed and draw up a plan (section 4).

18. Before making any allotments, the commissioner was to set out and appoint such public carriage roads and highways at least 30 feet wide over the land to be enclosed as he judged to be necessary. This was provided for by section 8 whose heading read:

> "Commissioners before making Allotments shall appoint publick Carriage Roads, and prepare a Map thereof to be deposited with their Clerk, and give Notice thereof, and appoint a Meeting, at which, if any Person shall object, the Commissioners, with a Justice of the Division, shall determine the matter. Where Commissioners may be empowered to stop up any old Road, it shall not be done without the Order of two Justices, subject to Appeal, to Quarter Sessions."

19. The body of section 8 provided:

> "Be it further enacted, That such Commissioner or Commissioners shall, and he or they is and are hereby authorized and required, in the first Place, before he or they proceed to make any of the Divisions and Allotments directed in and by such Act, to set out and appoint the publick Carriage Roads and Highways, through and over the Lands and Grounds intended to be divided, allotted, and inclosed, and to divert, turn, and stop up, any of the Roads and Tracts, upon or over, all, or any Part of the said Lands and Grounds, as he or they shall judge necessary, so as such Roads and Highways shall be, and remain thirty Feet wide at the least, and so as the same shall be set out in such Directions as shall, upon the Whole, appear to him or them most commodious to the Publick, and he or they are hereby further required to ascertain the same by Marks and Bounds and to prepare a Map in which such intended roads shall be accurately laid down and described, and to cause the same, being signed by such Commissioner, if only one, or the major Part of such Commissioners, to be deposited with the Clerk of the said Commissioner or Commissioners, for the Inspection of all Persons concerned; and as soon as may be after such Carriage Roads shall have been so set out, and such Map so deposited, to give Notice in some Newspaper to be named in such Bill, and also by affixing the same upon the Church Door of the Parish, in which any of the Lands so to be inclosed shall lie, of his or their having set out such Roads and deposited such Map, and also of the general Lines of such intended Carriage Roads, and to appoint in and by the same Notice, a Meeting to be held by the said Commissioner or Commissioners, at some convenient Place, in or near to the Parish or Township within which the said Inclosure is to be made, and not sooner than three Weeks from the Date and Publication of such Notice, at which Meeting it shall and may be lawful for any Person who may be injured or aggrieved by the setting out of such roads to attend; and if any such Person shall object to the setting out of the same, then such Commissioner or Commissioners, together with any Justice or Justices of the Peace, acting in and for the Division of the County in which such Inclosure shall be made, and not being interested in the same, who may attend such Meeting, shall hear and determine such Objection, and the Objections of any other such Person, to any Alteration that the said Commissioner or Commissioners, together with such Justice or Justices, may in Consequence propose to make, and shall, and he or

> they are hereby required, according to the best of their Judgement upon the Whole, to order and finally direct how such Carriage Roads shall be set out, and either to confirm the said Map, or make such Alterations therein as the Case make require: Provided always, That in Case such Commissioner or Commissioners shall by such Bill be empowered to stop up any old or accustomed Road, passing or leading through any Part of the old Inclosures in such Parish, Township, or Place, the same shall in no Case be done without the Concurrence and order of two Justices of the Peace, acting in and for such Division, and not interested in the Repair of such Roads, and which Order shall be subject to Appeal to the Quarter Sessions, in like Manner and under the same Forms and Restrictions as if the same had been originally made by such Justice as aforesaid."

20. Section 9 provided that roads and highways set out and appointed under section 8 were to be maintained in the same way as other public roads within the relevant parish.

21. Section 10 had a short internal title or heading in the following terms: "Commissioners shall appoint private Roads &c". The body of the section provided as follows:

> "And be it further enacted, That such Commissioner or Commissioners shall, and he or they is and are hereby empowered and required to set out and appoint such private Roads, Bridleways, Footways, Ditches, Drains, Watercourses, Watering Places, Quarries, Bridges, Gates, Stiles, Mounds, Fences, Banks, Bounds and Land Marks, in, over, upon, and through or by the Sides of the Allotments to be made and set out in pursuance of such Act, as he or they shall think requisite, giving such Notice and subject to such Examination, as to any private Roads or Paths, as are above required in the Case of publick Roads, and the same shall be made, and at all Times for ever thereafter be supported and kept in Repair, by and at the Expence of the Owners and Proprietors for the Time being of the Lands and Grounds directed to be divided and inclosed, in such Shares and Proportions as the Commissioner or Commissioners shall in and by his or their Award order and direct."

22. Section 11 is also of relevance. Its heading was as follows:

> "Grass and Herbage on Roads shall belong to the Proprietors of the Lands adjoining; and all Roads which shall not be set out shall be allocated and inclosed. No Turnpike Road shall be altered without the Consent of the Trustees."

23. The body of the section provided:

> "And be it further enacted, That after such publick and private Roads and Ways shall have been set out and made, the Grass and Herbage arising thereon shall for ever belong to and be the

> sole Right of the Proprietors of the Lands and Grounds which shall next adjoin the said Roads and Ways on either Side thereof, as far as the Crown of the Road; and all Roads, Ways, and Paths, over, through, and upon such Lands and Grounds which shall not be set out as aforesaid, shall for ever be stopped up and extinguished, and shall be deemed and taken as Part of the Lands and Grounds to be divided, allotted, and inclosed, and shall be divided, allotted, and inclosed accordingly; Provided, That nothing herein contained shall extend, or be construed to extend, to give such Commissioner or Commissioners any Power or Authority to divert, change, or alter any Turnpike Road that shall or may lead over any such Lands and Grounds, unless the Consent of the Majority of the Trustees of such Turnpike Road, assembled at some publick Meeting called for that purpose on ten Days Notice, be first had and obtained."

24. The final section to which it is necessary to refer is section 35 whose heading read:

> "After Allotment Commissioners shall draw up their Award, which shall be read and executed at a Meeting of the Proprietors, and proclaimed the next Sunday in the Church, and then considered as complete. Award shall be inrolled in one of the Courts at Westminster, or with the Clerk of the Peace, and may be inspected, and Copies obtained. Award and Copies shall be legal Evidence, and Award shall be binding on all Parties interested. Commissioners may annex Maps to the Award, which shall be deemed Part thereof."

25. The body of section 35 provided:

> "And be it further enacted, That as soon as conveniently may be after the Division and Allotment of the said Lands and Grounds shall be finished, pursuant to the Purport and Directions of this or any such Act, the said Commissioner or Commissioners shall form and draw up, or cause to be formed and drawn up, an Award in Writing, which shall express the Quantity of Acres, Roods, and Perches, in Statute Measure, contained in the said Lands and Grounds, and the Quantity of each and every Part and Parcel thereof which shall be so allotted, assigned, or exchanged, and the Situations and Descriptions of the same respectively, and shall also contain a Descriptions of the Roads, Ways, Footpaths, Watercourses, Watering Places, Quarries, Bridges, Fences, and Land Marks, set out and appointed by the said Commissioner or Commissioners respectively as aforesaid, and all such other Rules, Orders, Agreements, Regulations, Directions, and Determinations, as the said Commissioner or Commissioners shall think necessary, proper, or beneficial to the Parties; which said Award shall be fairly ingrossed or written on Parchment, and shall be read and executed by the Commissioner or Commissioners, in the Presence of the Proprietors who may attend at a special

> General Meeting called for that Purpose, of which ten Days Notice at least shall be given in some Paper to be named in such Act and circulating in the County …
>
> ….and the said Award, and each copy of the same, or any part thereof, signed as aforesaid, shall at all Times be admitted and allowed in all Courts whatever as legal Evidence; and the said Award or Instrument, and the several Allotments, Partitions, Regulations, Agreements, Exchanges, Orders, Directions, Determinations, and all other Matters and Things therein mentioned and contained, shall, to all Intents and Purposes, be binding and conclusive, except where some Provision to the contrary is herein or shall be by any such Act contained, unto and upon the said Proprietors, and all Parties and Persons concerned or interested in the same, or in any of the Lands, Grounds, or Premises aforesaid ….".

The issues

26. The first issue is whether, construing the 1801 Act as a whole and in the light of the evidence of its pre-enactment history, the judge was right to hold that section 10 did not confer a power to set out public bridleways or footpaths.

27. The second issue is whether the doctrine of contemporary exposition (*contemporanea expositio*), applied in the light of the evidence that commissioners routinely set out public bridleways or footpaths less than 30 feet wide in post-1801 Act awards, required section 10 to be interpreted as conferring the power to set out such bridleways or paths.

28. The third issue is whether section 35 of the 1801 Act, read with section 25 of the 1816 Act, precludes any challenge to, or questioning of, the validity of the Crudwell Award.

29. The fourth issue is whether it is in any event now too late after the lapse of so many years for the court to consider whether the Crudwell Award was *ultra vires*. In that regard, Mr Laurence QC relies on *Micklethwait v Vincent* (1893) 69 LT 57.

THE FIRST ISSUE

30. We start by observing that the 1801 Act is not drafted with the degree of accuracy and consistency of language that is found in modern statutes. As Sales J said at para 24 of his judgment in *Edwards & Walkden (Norfolk) v The City of London* [2012] EWHC 2527 (Ch) (a case about an 1860 Act governing Smithfield Market which was drafted in a similar style):

> "The 1860 Act is a Victorian statute enacted before the creation of the Office of the Parliamentary Counsel in 1869 (the office of dedicated statutory drafters now available to the Government), which is not drafted with the precision and clarity which has come to be expected of statutory drafting since then."

31. We find the following examples of inconsistency of language in the 1801 Act. The term "public carriage roads" appears in the heading to section 8. In the remainder of the section appear: "public carriage roads and highways" (line 5), "roads and tracts" (line 7), "such roads and highways" (line 9), "such carriage roads" (lines 18 and 19), "such roads" (lines 22 and 23; "such intended carriage roads" (lines 23 and 24), "such roads" (line 30), "such carriage roads" (lines 40 and 41), "any old or accustomed road" (line 44), and "such roads" (line 48). Nor is the draftsman consistent when referring to what we would today call public bridleways and public footpaths. In section 10, he uses the terms "bridleways" and "footways" (line 4); in line 10 of section 10, he refers to bridleways and footpaths compendiously as "paths". In section 11, he uses the terms "ways" (line 2), "the said…ways" (line 5)" and "ways and paths" (lines 6 and7).

32. As the judge said at para 70 of his judgment, it is possible to read the provisions of the 1801 Act several times and to see apparently different meanings on each reading. He said that Dr Hodson (the appellant's expert) put it attractively in her report: "clarity of meaning still eludes the 21st century reader of 18th century statutes". This is not a promising basis on which to mount a linguistic argument as to the meaning of section 10 of the 1801 Act.

33. Even in relation to modern statutes, which are drafted by skilled specialist draftsmen and are assumed to be drafted with precision and consistency, the courts adopt a purposive (in preference to a literal) interpretation so as to give effect to what is taken to have been intended by Parliament. We use the phrase "purposive interpretation" as shorthand for an interpretation which reflects the intention of Parliament. The court presumes that Parliament does not intend to legislate so as to produce a result which (i) is inconsistent with the statutory purpose or (ii) makes no sense or is anomalous or illogical. A purposive interpretation is all the more appropriate in a statute which is couched in language which is less consistent and more imprecise than that generally found in modern statutes.

34. At para 71 of his judgment, Foskett J held that it was very difficult at this remove in time to evaluate arguments that a particular interpretation should be rejected on the ground that it is so perverse or absurd that it cannot have been intended. He said that what may appear to contemporary eyes to be absurd may not have so appeared "in the way in which these matters were considered in England and Wales during Napoleonic times". We accept that a 21st century court should exercise care before reaching a conclusion as to what Parliament must have intended in enacting a statute at the beginning of the 19th century. But the question of what Parliament must have intended has to be addressed. We would add that it is not necessary to find that a particular interpretation would be perverse or absurd before it can be rejected as one that Parliament cannot have intended. That is to set the bar too high.

35. Before we explain why a purposive interpretation points strongly in favour of holding that section 10 of the 1801 Act gave commissioners the power to set out and appoint new public bridleways and footpaths as well as private bridleways and footpaths, we need to set the scene by referring to pre-1801 Act practice. In our view, this practice provides strong support for the appellant's case that section 10 should be interpreted as having conferred the power to set out and appoint new public bridleways and footpaths.

Pre-enactment practice

36. As we have seen, the principal purpose of the 1801 Act was to consolidate in one statute the clauses "usually contained" in the earlier private enclosure Acts ("the pre-1801 Acts") in order to enable subsequent local enclosure acts to incorporate such provisions of the 1801 Act by reference. It is true that section 44 enabled the post-1801 Acts to depart from the provisions of the 1801 Act if that was desired. But there is no suggestion in the 1801 Act that it was seeking to change the law, practice or procedures of the operative provisions which had usually been contained in the pre-1801 Acts.

37. An analysis of the evidence of Dr Hodson (the appellant's expert) shows that most of the large sample of pre-1801 Acts which she examined contained provisions that authorised commissioners to appoint public (as well as private) bridleways and footpaths. Nothing in the evidence of Dr Hollowell (the Secretary of State's expert) contradicts this.

38. In view of the stated purpose of the 1801 Act, it seems unlikely that Parliament would not have intended to give commissioners the power which they had previously exercised repeatedly pursuant to local Acts to set out and appoint public bridleways and footpaths.

39. Mr Moffett responds by pointing out that the stated purpose of the 1801 Act was not to incorporate every provision usually included in a local Act: the preamble to the 1801 Act referred to "*certain* clauses usually contained in such Act" being comprised in one law. Moreover, it is common ground that a number of powers usually found in local Acts were not included in the 1801 Act. Dr Hollowell gives examples at para 7.3 of his report dated 28 June 2013. These included a provision to exonerate the rector from keeping a bull and boar for the use of the rest of the village; exoneration of tithes; gaps to be left in fencing to allow movement between new and old allotments; a provision to prohibit lambs from new allotments for 4 years; a provision to allow the commissioners to direct the course of husbandry during the period of inclosing the land; a provision to allow the commissioners to award land for the poor; a provision to allow the commissioners to award land for the upkeep of the fabric of the parish church; and a provision for the ring-fencing of the rector's allotment.

40. We accept that some of these powers were important. Dr Hollowell makes the point that the power to direct the course of husbandry was particularly important. As he put it, if commissioners had not enjoyed this power (i.e. overall responsibility for the farming of the parish during the inclosure period), the system "could have collapsed in chaos".

41. We accept that the fact that public bridleways and footpaths were routinely set out and appointed in pre-1801 Acts does not decisively indicate that Parliament *must* have intended the 1801 Act to confer this power on the commissioners. But for the following reasons we consider that it militates strongly in favour of that conclusion. First, we repeat that the purpose of the 1801 Act was to create a standard set of powers which would minimise the complexity and cost of drafting local Acts. Secondly, 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). Thirdly, the 1801 Act made provision for the setting out

and appointing of public carriage roads and highways and private bridleways and footpaths (all of which had been the subject of the pre-1801 Acts). It would have been very odd if the 1801 Act had not also made provision for the setting out and appointing of public bridleways and footpaths when that power too had been conferred by the pre-1801 Acts. No explanation has been provided of why Parliament would not have intended to make provision in the 1801 Act for commissioners to continue to have this power. In our view, it is most unlikely that it did not intend to do so.

42. But even if no account is taken of the pre-enactment practice, we consider that, unless the statutory language compels us to interpret section 10 as applying only to private bridleways and footpaths, a purposive interpretation leads to the contrary conclusion. We shall return to the statutory language after we have discussed the purposive interpretation.

The purposive interpretation

43. There are three factors which lead us to conclude that Parliament must have intended to give commissioners the power to set out *new* public bridleways and footpaths. We should record that Mr Moffett accepts that section 10 did not preclude commissioners from setting out *existing* public bridleways and footpaths if that is what they wished to do.

44. First, in an era before the car and when carriages and carts were expensive, public rights of way on foot and on horseback were as important for the public in getting around in the local area as were the public carriageways for vehicular traffic. A commissioner was required to set out public carriageways (section 8) and to set out private bridleways and footpaths (section 10). The same procedure and opportunity for objection was to apply in both cases. No reason has been advanced to explain why Parliament would not have intended that a commissioner should not also be required to set out public bridleways and footpaths. Public bridleways and footpaths would have had a far greater public importance than private ones and potentially the same public importance in practical terms as public carriageways. Public rights of way (on foot or on horseback) were of major importance for the public who used them. They were also of great importance to landowners (who needed to know what obligations they owed in relation to their land) and to anyone purchasing land from such landowners (for the same reason). There would inevitably be a need in almost all cases for provision to be made in relation to public bridleways and footpaths. In these circumstances, it would have made no sense for Parliament to include a standard set of powers in relation to private, but not public, bridleways and footpaths.

45. No good reason has been suggested as to why Parliament would not have intended that both public and private bridleways and footpaths could be dealt with by a commissioner in any award and also that disputes about both could be ventilated and resolved in accordance with the same procedure. Indeed, it is difficult to identify any strong public interest in a public official like a commissioner setting out *private* roads and footpaths on *private* enclosed land at all. It might be asked: why not leave it to the owners of the newly enclosed land to decide whether and where to create private paths and roads? Be that as it may, if Parliament considered that commissioners had a proper role in relation to *private* roads and footpaths, it is difficult to see any sensible basis on which Parliament could have intended that commissioners would not

have the same role in relation to the setting out and appointing *public* bridleways and footpaths.

46. It is no answer to say that Parliament would have had in mind that the power to set out and appoint public bridleways and footpaths could have been dealt with in local Acts. That is true. But so too could the power to set out and appoint public roads and private bridleways and footpaths have been dealt with in local Acts. The whole point of the 1801 Act was to standardise local Acts and to avoid the need to set out detailed provisions in them. In the absence of any explanation of why Parliament would (or might) have intended to exclude from the 1801 Act the power to set out and appoint public bridleways and footpaths, we consider that, subject to an examination of the language of section 10 to which we shall come, Parliament must have intended the section to include this power.

47. Secondly, under the scheme of the 1801 Act, the whole commissioner process was intended to lead to the creation of an award (incorporating a map) which was admissible legal evidence of all "Allotments, Partitions, Regulations, Agreements, Exchanges, Orders, Directions, Determinations, and all other Matters and Things therein mentioned and contained" and which was "binding on all Parties interested": see the heading and text of section 35. The award and map were intended to create the new root of title for all persons holding or acquiring the newly inclosed parcels of land or claiming to have an interest in respect of them (including, for example, a right of way), who would expect therefore to be able to treat it as definitive. As we have said, Mr Moffett accepts that commissioners could set out *existing* public bridleways and footpaths in the award and map (simply because the 1801 Act does not say that they could not). He submits that they could not properly set out *new* ones. But there is nothing in section 35 to support this distinction. A person reading section 35 would think that the award and map was showing those "Ways" and "Footpaths" "set out and appointed" under the Act (i.e. under section 10). Moreover, it would be very odd if the award and map, which were intended to be definitive, in fact could not be treated as definitive in relation to *existing* public bridleways and footpaths stipulated in the award and shown on the map, because (on Mr Moffet's argument) those would always be vulnerable to inquiry into the pre-existing facts to determine whether or not a public right of way existed before the inclosure award was made. By far the more natural inference is that Parliament intended the commissioner to have full power to deal with all relevant rights with respect to the land for the future, including full power to set out and appoint all public bridleways and footpaths whether pre-existing, with altered course or new; and people (including future generations and future purchasers of property in the area) could simply look at the award and map to know what rights and ways there are. We wish to make it clear that this is an argument which uses section 35 as an indicator of the nature of the intended statutory scheme. It is distinct from the technical argument about whether it is an effective exclusion clause (which is the subject of the fourth issue).

48. Thirdly, the object of an inclosure exercise was to create new private estates over areas of land which previously had been held in common. New parcels of private land would be created out of the common area, inclosed and made into new inclosed fields which did not exist before. The physical landscape was to be changed in radical ways. There was likely to be a strong need in many cases to redraw the network of footpath and bridleway public rights of way in a locality so that it would be coherent

in the new landscape which was being created. For example, it might be necessary to create new routes along the side of fields, to replace several meandering paths with one straight one and so on. There is no doubt that Parliament reflected this reality in section 8 which gave commissioners the power to "divert, turn and stop up "any of the…Tracts, upon or over, all, or any Part of the said Lands and Grounds".

49. Mr Moffett rightly accepts that this gave them power to divert, turn and stop up existing *public* bridleways and footpaths. But it would have made no sense to give commissioners the power to divert, turn or stop up existing public bridleways and footpaths, but not the power to create new public bridleways and footpaths. There is no distinction of substance between the diversion of an existing bridleway or footpath and the creation of a new bridleway or footpath. As Mr Laurence points out, the diversion of an existing footpath may well of itself create a new footpath. Take an existing footpath which lies between points A and D. Let us suppose that the commissioner stops up the section between points B and C and diverts the footpath at point B along a line which returns to the line of the existing path at point C. In substance, the diversion between B and C is a new public footpath. A statutory scheme which gave commissioners the power to create a new public footpath between B and C pursuant to section 8 of the 1801 Act, but not pursuant to section 10 would have made no sense and is, therefore, most unlikely to have been intended.

50. In view of these considerations, we conclude that section 10 should be interpreted as giving commissioners the power to create new public bridleways and footpaths unless the language of the section cannot bear that meaning. It is to the language that we now turn.

The language of section 10

51. Mr Laurence fairly conceded that as a matter of grammar, if section 10 is looked at in isolation and divorced from the rest of the 1801 Act, the word "private" in the third line, at any rate when viewed through the lens of the modern eye, naturally governs all the items in the list set out in the section and not only roads.

52. Understandably, Mr Moffett places great weight on this grammatical interpretation. He also relies on the following points in support of his case that this is the true interpretation. First, it is common ground that all of the features listed in the section were capable of being "private" at the time of the enactment of the 1801 Act. Secondly, there is nothing in section 10 itself to indicate that a distinction was intended to be drawn between "roads" and any of the following features in the list. He submits that "roads" was merely the first item that appeared in a list that was set out and punctuated in the conventional way. Thirdly, this interpretation is supported by the fact that, where Parliament intended that a provision was to apply to both public and private features elsewhere in the 1801 Act, it said so expressly. For example, section 11 expressly referred to "public and private roads and ways". If Parliament had intended that the bridleways and footpaths referred to in section 10 could be either public or private, it would have been a simple matter for it to do so as it did in section 11.

53. We accept the concession of Mr Laurence that, looked at in isolation of the rest of the statute and without regard to its underlying purpose, the most natural interpretation of the first few lines of section 10 is that for which Mr Moffett contends. We also accept

that it may be said that this interpretation is reinforced by the words in lines 9 to 11 "giving such Notice…as to any private Roads or Paths, as are above required in the Case of publick Roads". The phrase "private Roads or Paths" may be contrasted with "publick Roads": it may be said that here too the word "private" more naturally governs both roads and paths, than roads alone.

54. If the 1801 Act were a modern statute, we would see force in the argument that section 10 should be given this meaning. But in the context of a statute which was drafted at the beginning of the 19th century, with the linguistic imperfections to which we have referred, we consider that the argument has limited force.

55. We do not consider that it is impossible to read the word "private" as governing only the first item in the list, namely roads, and to read the remaining items as being unqualified, i.e. as being either public or private.

56. Since section 8 dealt with public roads, that naturally left private roads as a separate item requiring provision in the context of the standard powers to be created by the 1801 Act. When viewed in that light, it is reasonable to think that the draftsman intended to use the word "private" to qualify only roads rather than to qualify all the items in the list. The possibility of reading section 10 in this way is reinforced by the context of the 1801 Act, the purpose of which was to provide general coverage of the principal matters which one would have expected to be dealt with in an inclosure statute. Mr Laurence submitted that, if section 8 were to be imagined as referring to "male horses" and section 10 as referring to "female horses, pigs and cattle", one could, without abuse of language, say that *all* pigs and cattle (male and female) were covered by section 10. We consider that this somewhat fanciful example demonstrates that the most natural interpretation of section 10 is not the only possible interpretation.

Other pointers in the statute

57. There are other indications in the 1801 Act which suggest that the draftsman intended section 10 to cover both public and private bridleways and footpaths.

58. First, we think that there is some force in the submission of Mr Laurence that the words "publick and private Roads and Ways" in section 11 (lines 1 and 2) suggest that the draftsman was assuming in section 11 that both public and private bridleways and footpaths had been fully dealt with in sections 8 and 10. But we do not place great weight on this point.

59. Secondly, there is real force in Mr Laurence's submission that the natural meaning of the words "all Roads, Ways and Paths" in section 11 (lines 6-7) is that it covers both private and public bridleways and footpaths. In the context of what was intended to be a comprehensive scheme leading to a definitive award, the words "as aforesaid" in section 11 (line 8) which govern the power to stop up and extinguish such roads, ways and paths, are used on the assumption that sections 8 and 10 between them cover the six categories of way: public roads, public bridleways, public footpaths, private roads, private bridleways and private footpaths.

60. Thirdly, there is a further important point in relation to section 11. As we have seen, it provides that after "such publick and private Roads and Ways shall have been set

out and made, the Grass and Herbage arising thereon shall for ever belong to and be the sole Right of the Proprietors of the Lands and Grounds which shall next adjoin the said Roads and Ways on either Side thereof, as far as the Crown of the Road". There is no sensible reason why the draftsman would have wished to deal with such a matter in relation to public and private roads, but only in relation to private ways. None has been suggested to us. In fact, one would have expected that there was a greater need to include a statutory provision to deal with the issue in relation to public ways than in relation to private ways. This is because, if a way were private, one would expect the owner of the way to own the herbage on it and a statutory provision to be unnecessary to deal with the matter, particularly in a general clauses statute. On the other hand, significant disputes might arise in relation to the ownership of herbage if the way were a public way. In this connection, it should be remembered that enclosure under the 1801 Act was intended to remove commoners' rights, which might include rights to allow their animals to forage and eat herbage. There is no particular significance in the reference in the first part of section 11 to "the Crown of the Road": this is simply a reference to the middle of the road or way in question.

61. Fourthly, if section 10 were construed as meaning that the word "private" qualified all the items in the list, it would follow that the 1801 Act made no provision for conferring power on commissioners to set out and appoint *any* of the features in the list unless they were private. Dr Hollowell explains at sections 5 and 6 of his report that all the features listed in section 10 could be private or public. On the evidence, some of the features may more obviously have been characterised as public than private. Be that as it may, there is no doubt that *all* of the features could be public. It is, therefore, most improbable that section 10 was intended to make provision only for commissioners to set out and appoint the listed features if they were private and to rely on local Acts to authorise the setting out and appointing of features if they were public.

Previous case law

62. We have earlier referred to the *Andrews No 1* decision in which it was common ground that the word "private" governed not merely roads, but also bridleways and footways; and that section 10 conferred a power to make provision in local Acts for commissioners only to create bridleways and footpaths that were private. Understandably, Schiemann J proceeded on the basis of this agreed position, which, for the reasons we have given, was wrong. It follows that *Andrews No 1* was wrongly decided.

63. Reference was also made by the judge and by counsel in argument to *Harber v Rand* (1821) 9 Price 57, 147 E.R. 20 and *Logan v Burton* (1826) 5 B & C 513, 108 E.R. 191. It became clear during the course of the appeal that it was common ground that these early authorities (which are in any event not binding on this court) provide little assistance in determining the true meaning of section 10 of the 1801 Act.

Conclusion on the construction of section 10

64. For the reasons that we have given, we consider that section 10 did authorise a commissioner to set out and appoint public bridleways and footpaths in an award.

Overall conclusion

65. It follows that the Commissioner had power to make the Crudwell Award and to award and appoint the public bridle road and public bridle path that he did. Accordingly, the Inspector was wrong to dismiss the appellant's appeal against the Council's rejection of his application. The appeal in this court must, therefore, be allowed.

66. In view of the conclusion that we have reached on the first issue, it is unnecessary for us to deal with the remaining issues and we do not propose to do so.