



Neutral Citation Number: [2024] EWCA Civ 1562

Case No: CA-2024-000761

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**PLANNING COURT**  
**Neil Cameron KC (sitting as a Deputy High Court Judge)**  
**[2024] EWHC 532 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/12/2024

**Before:**

**LORD JUSTICE COULSON**  
**LORD JUSTICE MALES**  
and  
**LORD JUSTICE HOLGATE**

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**Between:**

1) **DERREN McLEISH**  
2) **KATHRYN JOAN McLEISH**

**Appellants/**  
**Claimants**

**- and -**

1) **THE SECRETARY OF STATE FOR**  
**ENVIRONMENT FOOD AND RURAL AFFAIRS**  
2) **KENT COUNTY COUNCIL**

**Respondents/**  
**Defendants**

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**Noemi Byrd** (instructed by **Brachers LLP**) for the **Appellants**  
**Ned Westaway** (instructed by **Government Legal Department**) for the **First Respondent**  
The **Second Respondent** did not appear and was not represented

Hearing date: 4 December 2024  
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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on Friday 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **LORD JUSTICE MALES:**

1. Since 1949 county councils have been required to prepare a definitive map and statement of public rights of way in their area, to keep that map and statement under review from time to time, and to make such modifications to them as appear to be required as a result of new developments or the discovery of evidence showing that the map and statement are in error.
2. This appeal is concerned with a public footpath in the village of Doddington in Kent which was shown in the latest (2013) version of the definitive map and statement published by Kent County Council as running through a property known as Victoria Bungalow. However, by a Definitive Map Modification Order dated 11<sup>th</sup> February 2021 and confirmed on 2<sup>nd</sup> December 2022 the definitive map and statement was modified so that the footpath runs along the eastern frontage of a neighbouring property, Yew Tree House, owned by the appellants, Mr and Mrs McLeish.
3. The appellants challenged the Order but their challenge was dismissed by Mr Neil Cameron KC in the Planning Court. They now appeal to this court.
4. I have concluded that the appeal must be dismissed.

## **The legislation**

5. The requirement that county councils should prepare a definitive map of public rights of way was introduced by the National Parks and Access to the Countryside Act 1949. Sections 27 to 32 of that Act prescribed a detailed process for a definitive map and statement to be published. The process began with surveys of public paths by local people within each parish, leading to the preparation of a parish map, then (in sequence) a draft map, a provisional map and the final published map. In each case a written schedule was to be prepared, which eventually formed the definitive statement. Provision was made for consultation with local and parish councils, for publication and inspection, for representations and objections to be made, and for appeals to be determined.
6. Section 33 of the 1949 Act then provided for councils to review the definitive map and statement from time to time and to prepare a revised map and statement, ‘consisting of the definitive map and statement, or of the revised map and statement last prepared under this section, as the case may be, subject to such modifications (if any) of the particulars contained therein as may appear to the authority to be requisite having regard to the review’.
7. The 1949 Act was repealed and replaced by the Wildlife and Countryside Act 1981, section 53 of which provides, so far as relevant, as follows:

### **‘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) and 57A(1),—

(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).

(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.

(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;

(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.

...

(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.

...’

8. Thus section 53(3)(c) provides for modifications to be made as a result of evidence showing that the existing definitive map and statement is incorrect. As Lord Phillips MR explained 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:

‘12 ... The court held, in effect, that, if evidence came to light to show that a mistake had been made in drawing up the definitive map, then such a mistake could be corrected in either of the three ways envisaged in section 53(3)(c) of the 1981 Act. The objective of these provisions was to ensure that the definitive map provided as accurate a picture as possible of the relevant rights of way.’

9. In this respect section 53(3)(c) may be contrasted with other provisions in subsection (3) which provide for modifications as a result of events occurring after the relevant date.
10. The effect of publication of a definitive map and statement is explained in section 56 of the 1981 Act, which provides as follows:

**‘Effect of definitive map and statement**

(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely—

(a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right;

...

(e) where by virtue of the foregoing paragraphs the map is conclusive evidence, as at any date, as to a highway shown thereon, any particulars contained in the statement as to the

position or width thereof shall be conclusive evidence as to the position or width thereof at that date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date.

(2) For the purposes of this section “the relevant date”—

(a) in relation to any way which is shown on the map otherwise than in pursuance of an order under the foregoing provisions of this Part or an order to which section 53A applies which includes provision made by virtue of subsection (2) of that section, means, subject to subsection (2A), the date specified in the statement as the relevant date for the purposes of the map;

(b) in relation to any way which is shown on the map in pursuance of such an order, means the date which, in accordance with subsection (3) or (3A), is specified in the order as the relevant date for the purposes of the order.

...

(3) Every order under the foregoing provisions of this Part shall specify, as the relevant date for the purposes of the order, such date, not being earlier than six months before the making of the order, as the authority may determine.

...’

11. Supplementary provisions are contained in section 57, which provides as follows:

**‘Supplementary provisions as to definitive maps and statements**

(1) An order under the foregoing provisions of this Part shall be in such form as may be prescribed by regulations made by the Secretary of State, and shall contain a map, on such scale as may be so prescribed, showing the modifications to which the order relates.

...

(3) Where, in the case of a definitive map and statement for any area which have been modified in accordance with the foregoing provisions of this Part, it appears to the surveying authority expedient to do so, they may prepare a copy of that map and statement as so modified; and where they do so, the map and statement so prepared, and not the map and statement

so modified, shall be regarded for the purposes of the foregoing provisions of this Part, and for the purposes of section 57A(1), as the definitive map and statement for that area.

(3A) Where as respects any definitive map and statement the requirements of section 53(2), and of section 55 so far as it applies, have been complied with, the map and statement are to be regarded for the purpose of subsection (3) as having been modified in accordance with the foregoing provisions of this Part whether or not, as respects the map and statement, the requirements of section 54 have been complied with.

(4) The statement prepared under subsection (3) shall specify, as the relevant date for the purposes of the map, such date, not being earlier than six months before the preparation of the map and statement, as the authority may determine.

(5) As regards every definitive map and statement, the surveying authority shall keep—

(a) a copy of the map and statement; and

(b) copies of all orders under this Part modifying the map and statement,

available for inspection free of charge at all reasonable hours at one or more places in each district comprised in the area to which the map and statement relate and, so far as appears practicable to the surveying authority, a place in each parish so comprised; and the authority shall be deemed to comply with the requirement to keep such copies available for inspection in a district or parish if they keep available for inspection there a copy of so much of the map and statement and copies of so many of the orders as relate to the district or parish.’

12. It is plain from these provisions, and is common ground on this appeal, that the legislation contemplates that modifications to a definitive map and statement made as a result of a review pursuant to section 53 should be made by order. That degree of formality is consistent with the conclusive effect afforded to the definitive map and statement (or revised definitive map and statement, as the case may be) by section 56.
13. One object of this legislation was said by Lord Justice Purchas in *Burrows* to be ‘to avoid tiresome and expensive litigation between individuals over disputed rights-of-way’. More broadly, as he also put it, the purpose of the legislation was ‘the preparation and maintenance of an authoritative record in the form of a definitive map and statement showing those highways over which the public have rights of way whether as “ramblers” only or as “ramblers and riders”.’ The definitive map and statement provide certainty to the public, showing them where they are entitled to go, while the legislation also provides for the map and statement to be kept up to date and for errors in its preparation to be corrected through the review process.

## The facts

14. The Order in this case was made as a result of the county council becoming aware of a discrepancy between the route initially claimed as a public path in 1952 and the route shown on the current 2013 version of the definitive map. The footpath in question is footpath ZR281 in the parish of Doddington in Kent. It runs northwards from The Street, the main road in the village. The contending routes are shown on the plan which I attach as Annex A. The route shown on the current version of the definitive map is the solid line C-D which runs through the Victoria Bungalow land. The new route which the appellants challenge is the broken line A-B-X-C which runs through their property, Yew Tree House (shown on the plan as Yew Tree Cottages). The discrepancy came to light as a result of the checks carried out in response to a planning application to replace the garage at Victoria Bungalow. These checks revealed that the line representing the route of footpath ZR281 shown on the current definitive map ran through the present garage and cesspit of Victoria Bungalow.
15. Investigation by the county council led it to conclude that successive re-drafts of the definitive map from 1951 onwards had seen the line of the route drift gradually eastwards, but without any formal legal process underpinning the change. That is to say, although orders were made from time to time which modified the definitive map, leading to a new definitive map being prepared pursuant to section 53, none of the modifications were concerned with footpath ZR281. In these circumstances the council concluded that the eastward drift of that footpath shown on the successive definitive maps was not the result of any deliberate realignment, but effectively a series of errors in copying, and that the correct route was that shown as A-B-X-C.
16. This led to objections by the appellants and the appointment of an inspector by the Secretary of State. The inspector visited the site of the footpath and held a public hearing, at which she considered six main sources of documentary information, namely (1) the tithe map for Doddington of 1840, (2) successive editions of the Ordnance Survey map of the area, (3) an aerial photograph taken in 1946, (4) documentary evidence in relation to the planning process in 1959 when permission was sought for the construction of Victoria Bungalow, (5) the maps prepared as part of the initial 1949 Act process leading to the 1952 definitive map and (6) successive versions of the definitive map prepared pursuant to the 1949 and 1981 Acts. She also heard evidence from long-standing residents of the village.
17. The inspector was concerned with the definitive map (or with copies of the definitive map prepared pursuant to section 57(3)). At all material times the definitive statement said no more than that the footpath ran 'from Down Court Road and Leeds S and SE via Down Court' and therefore did not assist in identifying the precise route.
18. Ordnance Survey maps dating from before the 1949 Act showed footpath ZR281 running south from Down Court Road and coming to a stop at a stile at the north end of the Yew Tree Cottages yard (point X). That gave rise to the possibility that the footpath was a cul-de-sac which did not run through the Yew Tree Cottages land at all.
19. In Kent the relevant date of the survey carried out as the first stage in the preparation of the definitive map was 1<sup>st</sup> December 1952 although the final map was not published until 1967. The first map in the process, the parish map, showed the



footpath terminating at point X. The draft map showed it continuing south beyond the stile and passing close to the western frontage of what were then 4, 5 and 6 Yew Tree Cottages. However, when the provisional map was drawn, the route of the footpath shifted slightly to the east so as to run through the buildings 4, 5 and 6 before reaching The Street. The final version of the definitive map was identical to the provisional map.

20. A review of the 1952 definitive map was carried out in 1970. It showed no changes from the 1952 definitive map which had been published in 1967. A further review occurred in 1987. On this occasion a further redraft onto a newer Ordnance Survey base map introduced a 'dog-leg' and shift to the east along the line now shown as C-D, again meeting The Street. The thickness of the line drawn on this version of the map encompassed almost the whole of the Victoria Bungalow property.
21. Finally, the latest (2013) version of the definitive map shows the footpath running within the Victoria Bungalow property along its drive and through its garage.

### **The inspector's decision**

22. The appellants' primary case before the inspector was that the footpath did not run through their land at all, but terminated at the north end of the Yew Tree Cottages yard (i.e. at point X shown on the plan annexed to this judgment). This is the cul-de-sac point noted at [18] above. However, the inspector rejected that case. She attributed the absence of any line showing that the footpath continued through the yard to the usual practice of Ordnance Survey surveyors in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries not to show footpaths in private gardens or yards. She referred also to evidence from long-standing local residents that there had been a stile at point X since at least the 1960s and that the path had previously been signposted pointing northward through the Yew Tree Cottages yard from point A.
23. The judge also rejected the appellants' primary case, and the point has not been pursued on appeal to this court.
24. Once the cul-de-sac issue had been disposed of, the remaining issue was whether the correct route of the footpath was through the Yew Tree Cottages land or the Victoria Bungalow land.
25. Referring to the sequence of maps which I have described, the inspector found that:

'35. Tracing these maps through in sequence illustrates the claim by KCC that the historical line of this path does not match that shown on the current definitive map but has been altered subtly eastwards on each redraft but with no deliberate intention in the form of a legal order to do so.'
26. Her conclusion was that:

'46. On the basis of the positive evidence to support the line of this footpath, that is the Ordnance Survey records and the initial parish survey of rights of way in Doddington, and considered on a balance of probability, I conclude that the most likely

explanation was that the public used the route A-B-X to then continue via X-C and along the remainder of Footpath ZR281.

47. Having reached that conclusion, and in the absence of any positive evidence to support the use by the public of the line shown in purple on the Order map as C-D, I conclude that this route is incorrectly shown on the current definitive map and statement and should be deleted.'

### **The judgment**

27. The appellants challenged the inspector's decision pursuant to paragraph 12 of Schedule 15 to the 1981 Act which enables a person aggrieved by an order to make an application to the High Court.
28. The judge identified two main issues for decision, as follows:
  - '27. Two main issues arise in this case:
    - i) 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?
    - ii) What is the definitive map and statement which is to be considered when considering whether to make modifications pursuant to section 53?'
29. As to the first issue, the judge decided that the conclusive evidence provision in section 56 does not apply to the review process. Following *Trevelyan*, he held that an inspector, considering whether a right of way marked on the definitive map exists, must start with the initial presumption that it does, but that this presumption may be rebutted by a finding on the balance of probabilities that an alternative way is the correct route. He followed the approach in *R (Leicestershire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin) to the effect that when the issue is which of two alternative routes is correct, that is best determined by considering first whether there is no public right of way over the land shown on the map and statement, i.e. by considering whether the 'event' described in section 53(3)(c)(iii) has occurred.
30. As to the second issue, the judge 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. He said that, for that reason, he rejected the submission of Ms Noemi Byrd for the appellants that the definitive map and statement to which the presumption applied was the map and statement prepared in 1952.
31. The judge held, however, that there was no error of law in the inspector's approach. She had been entitled to find that the route C-D through Victoria Bungalow land shown on the current definitive map was in error, and reading her decision fairly as a

whole, she had found on the whole of the evidence that route A-B-X-C was the correct route.

### **The ground of appeal**

32. The sole ground of appeal for which permission was granted is that:

‘In rejecting the appellants’ case that the evidential presumption created by s.56(1) of the Wildlife and Countryside Act 1981 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 [Secretary of State’s inspector] to have been copied onto the later definitive maps in error, the learned judge erred in law.’

### **Section 56 and the evidential presumption against change**

33. In order for this ground of appeal to be understood it is necessary to explain the difference between the conclusive evidence provision in section 56 and the evidential presumption against change referred to in the case law.

34. Section 56 means that a definitive map, or as the case may be a copy of a definitive map prepared pursuant to section 57(3) (which once prepared pursuant to this subsection becomes definitive), is authoritative in establishing the existence and location of public rights of way. 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. As Lord Justice Purchas said in *Burrows*:

‘Once prepared, however, and until subsequently revised, the map and statement is to be conclusive evidence in rights of way disputes between landowners and the various categories of persons exercising rights of way.’

35. In this respect, the 1949 and 1981 Acts prefer certainty to accuracy in order to achieve the legislative purpose that walkers and others should know (literally) where they are. However, that does not mean that mistakes cannot be corrected. The means by which that must be done is the review process.

36. It is firmly established by two decisions of this court, *Burrows* and *Trevelyan*, that the conclusive evidence provision in section 56 does not apply to the review process itself. Indeed, this must be so. If it were otherwise, modifications to correct mistakes could never be made pursuant to section 53(3)(c) as it would always be conclusively presumed that the existing definitive map was correct. Or as Lord Justice Glidewell put it in *Burrows*, ‘on a review the conclusive provisions that were in section 32 of the Act of 1949 and are now in section 56 of the Act of 1981 did not and do not operate so as to prevent what proves to have been a mistake of any kind in the definitive map from being rectified’.

37. Rather, on a review the question whether a modification should be made on the ground of a mistake in preparing the existing version of the definitive map (or a copy prepared pursuant to section 57(3)) must be determined on the balance of probabilities. In so determining, there is a rebuttable presumption that the existing definitive map is correct and evidence of some substance is required to rebut it. This may be described as a ‘presumption against change’. It was explained by Lord Phillips MR in *Trevelyan*:

‘38. Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.’

38. This ‘presumption against change’ is not derived from and has nothing to do with section 56, which is not dealing with the review process. Rather, it is a matter of common sense, resulting from the inherent improbability that a definitive map produced in the careful manner set out in the 1949 Act would be in error; and the fact that the longer a right of way has been shown on the definitive map, the harder it will generally be to obtain evidence to demonstrate that it was marked there by mistake.
39. Thus the conclusive evidence provision in section 56 and the evidential presumption against change described in *Trevelyan* are entirely distinct. As it was succinctly put by Mr Justice Pitchford in *R (Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin), [2006] 1 WLR 1103:

‘63. ... The only presumption capable of applying at the review stage is thus the evidential presumption identified by the court in *Trevelyan*’s case.’

40. It is important to note the limitations of this presumption. It is rebuttable and is only stated to apply ‘in the absence of evidence to the contrary’. When there is evidence to the contrary, the fact that the definitive map was the result of the careful process described in the 1949 Act remains a factor to be taken into account (cf. section 32 of the Highways Act 1980), but the weight to be given to it will depend on all the circumstances, and it may be, if the map is shown to be in error, that it will be entitled

to no weight at all. Ultimately a decision needs to be made on the balance of probabilities, taking account of all the evidence in the case.

### **Submissions**

41. For the appellants, Ms Byrd insisted that what I have called the presumption against change is derived from section 56 of the 1981 Act. Hence the way in which the ground of appeal is formulated (see [32] above). As I have explained, that submission is mistaken. However, she went on to submit that the evidential presumption against change ought to have been applied to the original 1952 version of the definitive map. As I understood the submission, it was that no such presumption applied to the existing 2013 version of the map because it had been shown that errors were made in copying the line of the footpath, with the consequence that the presumption which had initially applied to the 1952 version was revived.

### **Analysis**

42. The starting point must be the current (2013) version of the definitive map. I agree with the judge that when a modification is made, it is the map and statement as modified (or a copy made pursuant to section 57(3)) that henceforth becomes definitive. There can at any given time only ever be one definitive map. If there could be more than one, neither would be definitive. As against the world, 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 described in *Trevelyan* will apply.
43. In principle I would agree that if it is shown in the course of the review process that the latest version of the definitive map is in error, for example because of a copying error as in the present case, it would be sensible to apply the evidential presumption to the previous version. However, that does not avail the appellants in the present case.
44. In the present case the inspector found that it was clearly proved that the current 2013 version of the definitive map was the result of copying errors, which had caused the line of the footpath to shift eastwards onto the Victoria Bungalow land, with no intention at any stage to make a modification to the route. That was sufficient to rebut any presumption applying to the 2013 version and to demonstrate, in the terms of section 53(3)(c)(iii), that there was no public right of way over the land shown on the current definitive map. But she also made findings which demonstrate that the route shown on the 1952 version of the definitive map cannot be correct either. That is because the 1952 map shows the footpath running through what were then existing buildings. That must be an error and, again, is sufficient to rebut any evidential presumption that the 1952 definitive map is correct.
45. Ultimately, therefore, the inspector had to reach a conclusion on the balance of probabilities without the assistance of any such presumption. That is what she did, having careful regard to all of the evidence which was available and reaching a conclusion open to her that the correct route was A-B-X-C.

### **Section 53ZA**

46. I mention for completeness that Mr Ned Westaway for the Secretary of State, whose essential submissions I have accepted in what I have said above, drew to our attention section 53ZA of the 1981 Act, which was inserted by the Deregulation Act 2015. If brought into force with appropriate regulations being made, this would enable obvious errors in a definitive map and statement arising from administrative error to be corrected in a more streamlined way than applies under section 53, although there would still be scope for dispute whether ‘both the error and the modifications needed to correct it are obvious’.

### **Conclusion**

47. It is unfortunate that the council should over the years have prepared definitive maps and copies of such maps which, as a result of copying errors, showed the route drifting eastwards onto the Victoria Bungalow land in the manner described by the inspector. The result of the order under challenge in this appeal is that the route of the footpath will revert to what it should have been all along, A-B-X-C.
48. For these reasons I would dismiss the appeal.

### **LORD JUSTICE HOLGATE:**

49. I agree.

### **LORD JUSTICE COULSON**

50. I also agree.

ANNEX





