MODIFICATION OF THE DEFINITIVE MAP AND STATEMENT
ON THE BASIS OF DISCOVERED EVIDENCE

By Philip Petchey
Barrister

1. I recently engaged in a footpath inquiry where it was urged, in effect, that it was not necessary for there to be discovered evidence for jurisdiction to amend the definitive map to arise: if an error had been made in assessing the evidence first time round, that error could be corrected if re-examination of that evidence demonstrated that mistake. Reference was made to dicta that said that the provision as regards the requirement of new evidence shouldn’t be interpreted too strictly; and to Kotarski a case where there was no new evidence at all. This approach cannot be correct. This paper which examines the matter in some detail may be helpful to those who are faced with a similar argument.

2. Let us begin by reminding ourselves of the terms of section 53.

3. Section 53 provides as follows:

   (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—

   (a) the coming into operation of any enactment or instrument, or any other event, whereby—

      (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
      (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
      (iii) a new right of way has been created 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 or a restricted byway;

   (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path or restricted byway;

   (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 (emphasis supplied).

4. The starting point is evidently the relevant words of the statute itself:

...(c) the discovery by the authority of evidence which (when considered with all other
relevant evidence available to them) shows ...

5. Self-evidently, the surveying authority must rely on evidence and that evidence must be
discovered.

Potts J held that

.... evidence in section 53 (3) (c) must be given its full and natural meaning and natural
meaning and should not be restricted to “new evidence” or “evidence not previously
considered”.

7. As an interpretation of the meaning of evidence, this is unexceptional; however since taken
out of context it might be taken to suggest that the evidence in question does not need to be
discovered, it is necessary to look at the facts of that case in more detail.

8. This was a case where the documentary material that was relied upon to reclassify three
public footpaths as byways open to all traffic was at all material times within the archives of
the county council. There was however no suggestion that the material relied upon was before
the decision making surveying authority at the time that it decided to show three rights of way
as footpaths. The case was after R v Secretary of State for the Environment, ex parte Burrows
(No 2)2, a case we shall look at in a moment; for the present we can simply observe that Potts
J did not suggest that it was not necessary for the evidence relied upon to be discovered.
Indeed, to have done so would not be consistent with Burrows (No 2).

9. I should also refer, by way of introduction, to Trenchard v Secretary of State3, in which Pill
LJ said that “discovery of evidence” should not be narrowly or technically construed. In that
case, the DMS came into effect in the 1950s. In 1987, the Country Landowners’ Association
made an application to modify the DMS to delete a bridleway and in the course of
proceedings reference was made to an arbitration award made in 1936 relating to the
existence of a public footpath. The arbitrator had determined that the public footpath existed.
On the back of this in 1990 a member of the public applied to add the footpath to the DMS
and the County Council made the order. In due course the Inspector confirmed the order
relying on the award. Pill LJ said that it was difficult to determine when the award came into
possession of the County Council, but it did not appear that it had done so before 1987. The
landowner, who appeared in person, did not argue that there had not been the discovery of
evidence before Ognall J. However he subsequently wanted to take the point before the Court

2 23 January 2003 (unreported). I refer to it as “No 2” to distinguish it from the 1991 case which we shall refer
to as “No 1”; see footnote 18 below.
3 7 November 1997. It is a case subsequent to Mayhew: to which it refers.
of Appeal: the point apparently being that when the County made the order (sometime after 1990) it had in its possession the 1936 arbitration award. He subsequently did not seek to rely on the argument; or at least did not seek to rely on it as a separate argument. Nonetheless the Court of Appeal dealt with the point. It held that the Inspector was entitled to have regard to the 1936 award. It had of course been discovered after 1950. This is the context for Pill LJ’s obiter dictum that “the discovery of evidence” should not be narrowly or technically construed. As he said it is not necessary in this case to consider what, if any, limit should be put upon the introduction of further evidence in relation to a proposed modification of the definitive map.

10. The key case is Burrows v Secretary of State for the Environment (No 2) which, as you will have noted, unfortunately is not reported.

11. This was a case where the Inspector’s decision to reclassify a public footpath as a bridleway was justified on the basis of 20 years use. In these circumstances it did not matter whether the order could also be justified on the basis of documentary evidence. However the Inspector had so justified it. The position was that the public footpath shown on the DMS had been shown on the draft DMS as a bridleway. The landowner had objected to this and it is not clear from the available record of the case what the subsequent hearing held under section 29 (3) of the 1949 Act concluded. However that may be, it was a footpath that was ultimately shown on the DMS. In Burrows (No 2), the claimant argued that what the Inspector had done as regards this aspect of the case was to look again at the evidence that had been considered when the DMS was previously drawn up. Andrew Nichol QC, sitting as a Deputy Judge of the High Court, held as follows:

26. However, I do think that the Inspector's decision in this regard is open to a different criticism. His jurisdiction was dependent on 'the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows ... 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.' — see section 53(3)(c)(iii). It is plain that the section intends that a definitive map can be corrected, but the correction (via this route as opposed to section 53(3)(a) or (b)) is dependent on the 'discovery of evidence'. An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification.

12. Andrew Nichol QC, sitting as a Deputy Judge of the High Court, held as follows:

13. This is evidently correct and clearly accords with the intention of the legislation that a DMS was intended to be definitive and therefore not readily unseated. Simon J was to exactly the same effect in Kotarski v Secretary of State6: The precondition for the exercise of the statutory power of review is the discovery of evidence which (when considered with all other relevant evidence) shows that particulars contained in the map and statement require modification.7. The effect of these authorities is that it is settled law that there does have to be new evidence (despite Mayhew) in the sense of evidence which was not considered at the time of the original decision. One may put it thus: the evidence does not have to be intrinsically new or of any particular quality; but it does have to be discovered.

4 See the pre-penultimate paragraph of his judgment.
5 Its case was that no right of way should be recorded at all.
7 See paragraph 24. The actual decision will be examined in due course.
14. In *Burrows* it was suggested that a handwritten note as to an annual payment of £5 that was considered at the hearing into the objection to the draft DMS could be discovered evidence; Mr Nichol held that it could not. It was evidence, evidently, that had been before the surveying authority at the time that the DMS was made.

15. Counsel for the Secretary of State also pointed to

... the new evidence from users that was assembled for the present Inquiry (in most cases, these statements were dated some considerable time before the Inquiry was held). Some of these users were able to speak to the use of the lane by horse riders going back to the 1940s or even the 1930s.

16. In the judgment it does not appear when the definitive map and statement were published but it must have some time after 1957. So the potential relevance of the evidence as to use of the lane by horse riders is that it was evidence that had come into being recently and was potentially at least evidence recently discovered which went to show that the DMS was incorrect.

17. Mr Nichol didn’t reject this evidence of use on the basis that it was not discovered. Rather he said:

*The difficulty with this argument is that the Inspector did not rely on any of this new evidence. It was not therefore this evidence which showed the need to modify the map.*

18. The point was that at the hearing that under section 29(3) before the DMS was first made, there was already extensive evidence of use. The conclusion that the original DMS was wrong was based on a re-evaluation of the pre-existing evidence; the new user evidence that was put before the Inspector didn’t contribute to his conclusion that the original DMS was wrong. There will be cases (at least theoretically) where the Inspector will be able to say that additional evidence of eg historic use makes all the difference. Intellectual honesty is required here.

19. I said that we would return to *Kotarski* and I do so now.

20. The facts were that the statement included a description of a spur to public footpath, but that spur was not shown on the definitive map. Thus there was on the face of the DMS a conflict between the map and statement. Claiming that there was jurisdiction to look at the matter under section 53, the surveying authority re-examined the evidence that was before it when the DMS was made. The contemporary evidence indicated that the spur was a public footpath:

... *there are contemporary documents showing that it was agreed as a public footpath by the Parish Council, including a farmer who had lived near the route all his life, and no-one had questioned its inclusion in the Draft, Provisional or Definitive Statements.*

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8 See paragraph 26.
9 It is worth setting it out: *The Inspector commented that there was no evidence as to the date of the notices on which BTC had presumably relied. He observed that the user evidence went back 71 years. The Inspector thought that it was significant that other landowners had not objected to the designation of the lane as a bridleway. He had also observed earlier in his decision that although the archived survey forms did not record the nature of the uses, the County claim at the time that the way should be recorded as a bridleway was presumably because of more detailed user statements which had since been lost (see paragraph 22 of Mr Nichol’s judgment).*
10 The words used do not appear in the judgment.
21. In the 1980s the route was considered private by the relevant landowners and _Private_ notices were put up; and some people were granted permission.

22. The Inspector considered that what had happened in the 1980s was of some relevance as evidence of reputation.

23. The landowners were able to find evidence, 50 years on, of two people who said that it was not a public footpath at the time of the making of the DMS.

24. The Inspector concluded:

   ... _there are contemporary documents showing that it was agreed as a public footpath by the Parish Council, including a farmer who had lived near the route all his life, and no-one had questioned its inclusion in the Draft, Provisional or Definitive Statements. Against this is the recollection of two local people that fifty years ago the route carried no public rights. I have no reason to doubt the sincerity of these two people, but I prefer the contemporary evidence._

25. Note that under section 56 the definitive map was not conclusive evidence of the spur not being a public footpath, and the statement (as in all cases) was not conclusive evidence of anything.

26. The landowners argued that no evidence had been discovered that the definitive map was wrong and the judgment of Mr Nichol in _Burrows_ was cited to Simon J in support of the argument that there was no power to correct it.\(^{11}\)

27. Note that the only new evidence spoke against the claimed way being a public footpath, and what the Inspector had done was essentially what Mr Nichol in _Burrows_ had said he could not do:

   _An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up._

28. Simon J upheld both Mr Nichol’s judgment and the argument of the Secretary of State that evidence had been discovered:

   _The precondition for the exercise of the statutory power of review is the discovery of evidence which (when considered with all other relevant evidence) shows that particulars contained in the map and statement require modification._

29. The difficulty arises however in identifying what the evidence had been discovered. Simon J went on to say:

   _The discovery that there is a divergence between the two is plainly the discovery of such evidence, and it is unnecessary that it should be characterised as ‘new evidence.’_

30. With respect it is not immediately obvious that a divergence between the map and statement is evidence at all (Mayhew) and in any event it is not, on the face of it, (in the words of Mr Nichol) _some new evidence which in combination with the previous evidence justifies a modification._

31. Simon J went on to say:

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\(^{11}\) _The point was not taken that the DMS, taken together, with the Statement did show the footpath._
It is sufficient that there was the discovery of what the Inspector described as ‘a drafting error’, which was itself the result of what the Court of Appeal in [R v Secretary of State for the Environment, ex parte Burrows (No 1)]12 characterised as ‘recent research.’

32. The reference is to the following passage in the judgment of Purchas LJ in [R v Secretary of State, ex parte Burrows (No 1)]13:

Parliament never removed the duty to revise and keep the record up to date so that not only changes of status caused by supervening events, e.g. the stopping up of a highway under statute or otherwise; or the creation of prescriptive rights, but also changes in the original status of highways or even their existence resulting from recent research or discovery of evidence should all be taken into account in order to produce the most reliable map and statement that could be achieved14.

33. The question thus arises as to what the recent research in Burrows (No 1) was. Burrows (No 1) in fact comprises two appeals, one by Mr Burrows and one by Mr Simms. In Mr Burrows’s appeal, the Secretary of State had dismissed the appeal without considering the merits15; accordingly it is not possible to tell from the law report what the case was about. As regards Mr Simms’s appeal, Purchas LJ explained:

The Simms application seeks an order of mandamus directed to the minister in similar terms to that in the Burrows appeal, namely, to consider an appeal against a decision by the Buckinghamshire County Council refusing to make an order modifying the definitive map and statement prepared by them under section 53 of the Act of 1981 by deleting two bridleways, numbers 21 and 21A, under the provisions of section 53(3)(c)(iii) of the Act of 1981. Mr. Birts informed the court, and he was not challenged in any way, that his client, Mr. Simms, had available a substantial body of evidence to show that the inclusion of bridleways BR.21 and BR.21A on the definitive map for Buckinghamshire was an administrative error for which there was no historical or factual justification. As he submitted, his client seeks the opportunity to redress this injustice16 (emphasis supplied).

34. This might suggest that the case is similar to the present, but Purchas LJ immediately went on to say:

Mr. Simms’ case is that bridleways BR 21 and BR 21A, far from being used as a bridleway, have never been used to his recollection or that of his father even as footpaths. It is not necessary in this judgment to go into further details except to record that in March 1980 solicitors acting for the Simms family made formal objections to Buckinghamshire County Council and were informed by a letter of 11 November 1980 that a public inquiry would be held into their objections. This was overtaken by the passing of the Act of 1981. The matter was, however, pursued to the point where an appeal under the Act of 1981 was made to the minister. This received from the minister in his decision letter of 20 July 1988 a similar reference to the judgment of Taylor J in Rubinstein v. Secretary of State for the Environment, 57 P. & C.R. 111. Thus, the argument before the court in both causes was directed to the

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13 See p 385.
14 See p385H.
15 See p 362E. It will be recalled that this was the case that overruled Rubinstein v. Secretary of State for the Environment (1989) 57 P & CR 111 that had precluded the making of orders under section 53 of the Act which seek to delete a right of way from a definitive map and statement by reference to the provisions of section 53(3)(c)(iii), and also the making of orders which purported to downgrade a right of way shown on the map and statement by reference to section 53 (3) (c) (ii), e.g. from bridleway to footpath.
16 See p 362 G.
justification, or otherwise, of the minister's refusal to hear the appeals under the provisions of the Act of 1981 because of the decision in Rubinstein's case.

35. This does not sound like recent research; and there is no explanation of why the recollection of Mr Simms and of his father had not been before the surveying authority at the time that BR 21 and BR 21A were first included in the DMS. But the case was about the correctness of Rubinstein and not the meaning of discovered evidence; so it does not take us further.

36. Finally, in Kotarski, Simon J expressed the following views:

25 I note that this approach is consistent with (a) the general approach of the Court of Appeal in [R v Secretary of State for the Environment, ex parte Burrows No 1] referred to in paragraphs 13 above and 'the importance of maintaining an authoritative map and statement of the highest attainable accuracy'; (b) a generally beneficial purpose that there should be powers to make definitive maps and statements consistent when they are found to be inconsistent; and (c) the decision of Potts J in Mayhew v. Secretary of State for the Environment (1993) 65 P & CR 344 at 352–3, in which he specifically rejected the argument that the s.53(3)(c) modifications should be restricted to cases where 'new evidence' had been discovered.

37. The only matter that calls for comment in this passage is to emphasise that the power to amend the DMS is not at large. This being so the generality articulated in the passage is not with respect really helpful in discovering the nature of the limitation to discovered evidence: although it is important that the DMS should be as accurate as possible, Parliament did not give surveying authority a power at large to correct mistakes; but only upon the discovery of evidence.

38. Kotarski is plainly wrong, however convenient a decision it is. It should be confined to its own facts – error on the face of the record, so speak – and in all other cases the excellent judgment in Burrows (No 2) be followed.