Mr James Turnill
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28 April 2011

Our ref:
JP/NG

& BY E-MAIL: james.turnill@defra.gsi.gov.uk

For the urgent attention of Mr James Turnill

Dear Sir

Trustees of the Viscount Folkestone 1963 Settlement & Mr William Wallis
Application under Schedule 15 Wildlife and Countryside Act 1981 against Secretary of State for the Environment, Food & Rural Affairs

A. Introduction

1. This is a letter of claim within the meaning of the Civil Procedure Rules. It anticipates an application/appeal under Schedule 15, para.12(1) Wildlife and Countryside Act ("WCA") 1981 to the Administrative Court.

2. The decision of which our clients complain is that contained in an Order Decision (ref: FPS/Q9495/7/21) of S M Arnott FIPROW, acting as an Inspector on your behalf. The Order Decision is dated 9 March 2011. Notice of the Order Decisions was published by Hampshire County Council ("HCC") on 21 April 2011 in accordance with Schedule 15, para.11 WCA 1981.

3. By letter of 28 June 2009, objections were made by Mrs Patricia Newby on her own behalf to The Hampshire (New Forest District No.49) (Parishes of Damerham and Rockbourne) Definitive Map Modification Order 2009 ("the DMMO") and to The Hampshire (New Forest District No.50) (Parish of Martin) Definitive Map Modification Order 2009. (In her 28 June 2009 letter, Mrs Newby acknowledged that, additionally, she represented our clients in this matter.) By letter of 16 July 2009, Graham Plumbe FRICS, acting on our clients' behalf, objected to the DMMO. The objections were not withdrawn and, in consequence

and pursuant to Schedule 15, para.7(1) WCA 1981, both Definitive Map Modification Orders were submitted to the Secretary of State for confirmation. Mrs Arnott was appointed by you pursuant to Schedule 15, para.10(1) WCA 1981 and the matter was considered by way of a public local hearing on 25 January 2011.

B. Claimants

4. We act for the following persons aggrieved by the DMMO:

4.1 The Trustees of the Viscount Folkestone 1963 Settlement, being the Earl of Radnor, Mr Peter Pleydell-Bouverie and Ms Sue Laing c/o Mr C R Whalley, Longford Estate, Estate Office, Longford Castle, Salisbury, Wiltshire SP5 4ED.

4.2 William Wallis of F Wallis & Son, Down Farm, Rockbourne, Fordingbridge Hants SP6 3NY.

5. Please correspond with us, rather than with our clients direct. Our address for service is below. The fee-earner with the conduct of this matter is our Mr Pavey, whose e-mail address is: james.pavey@knights-solicitors.co.uk . For the avoidance of doubt, we will accept service by e-mail.

C. Documents

6. We enclose (by post only) copies of the following documents:

(1) HCC's plan showing the relevant routes in this matter.
(2) Statement of Case of Mrs Patricia Newby (ie, for the local public hearing) (undated).
(3) Statement by Mrs Patricia Newby on "The Presumption of Regularity" (undated).
(4) Statement of Case of Hampshire County Council (undated).
(5) Statement in Support of the Order by Alan Kind on behalf of Mrs Brenda King (16 December 2010).
(6) Response by Mrs Patricia Newby to the representations made by David Tilbury and Alan Kind (undated).
(7) Order Decision of Mrs Arnott and attached maps (9 March 2011).
(8) Hampshire County Council Notice of Order Decision, published on 21 April 2011.

7. The documents appended to this letter of claim are to assist you in quickly understanding the grounds of claim, given the short time-period for response that is the consequence of the 42-day limitation period under Schedule 15, para.12 WCA 1981. To focus your reading further, the essential documents are: 1, 2, 6 and 7. The Planning Inspectorate, of course, has copies of the further documents that were before the Inspector.

8. As to legal materials, we suggest that you have the following to hand when reading this letter:

- Section 53 and Schedule 15 WCA 1981.
- Sections VIII and IX of the General Inclosure Act 1801.

9. If proceedings are issued, Mrs Newby will provide a detailed witness statement in support, on our clients' behalf. As you will see, this letter expressly anticipates her witness evidence below.

D. Chronology

10. For convenience, the material sequence of events in this matter is as follows:

- 29 July 2002: Application by Dave Tilbury to HCC for a DMMO to upgrade Damerham Footpath 20 and Rockbourne Footpath 31 from footpaths to byways open to all traffic ("BOAT").
- 27 June 2007: Decision of Regulatory Committee of HCC to make DMMOs to record (i) a BOAT along the length of Damerham Footpath 20 and a small part of Rockbourne Footpath 31, (ii) a restricted byway along most of the length of Rockbourne Footpath 31 on its post-diversion route, and (iii) a restricted byway along the length of Martin Footpath 16.
- 3 September 2008: Decision of Regulatory Committee of HCC to make DMMOs to record the lengths of Damerham Footpath 20, of Rockbourne Footpath 31 on its post-diversion route and of Martin Footpath 16 as restricted byways. (No DMMOs had been made in consequence of the 27 June 2007 decision and the judgment of the Court of Appeal in *R(oao Warden & Fellows of Winchester College and Humphrey Feeds Ltd)* v *Hampshire County Council* (2008) was applied.)
- 4 June 2009: the DMMO and The Hampshire (New Forest District No.50) (Parish of Martin) Definitive Map Modification Order 2009 were both made (notice on published 5 June 2009).
- 25 January 2011: local public hearing.
- 9 March 2011: Inspector's Order Decision proposing to confirm the DMMO and The Hampshire (New Forest District No.50) (Parish of Martin) Definitive Map Modification Order 2009.
- 21 April 2011: Notice of Order Decision published by HCC.
- 1 June 2011: expiry of period for appeal/application under Schedule 15, para.12(1) WCA 1981.

E. Grounds of challenge

11. Our client's grounds of challenge fall very broadly within three categories: errors of fact and law; want of fairness; and *Wednesbury* unreasonableness.

Ground 1 – errors of law: incorrect interpretation of Inclosure legislation and/or misapplication of presumption of regularity

12. Ground 1 relates to the length of what was formerly Damerham Footpath 20.

13. In considering Ground 1, you should have particular regard to:

- Document (2): paras.22-25.
- Document (7): paras.21-33, 72, 76 and 78.

Factual and legal background: Inclosure legislation and Award

14. In 1818 Parliament passed the Damerham South Inclosure Act ("the 1818 Act"), a private local statute. This was the enabling Act for the 1830 Damerham South Inclosure Award. As was normal, the 1818 Act adopted the provisions of the General Inclosure Act 1801 ("the 1801 Act"). The provisions adopted included sections VIII and IX of the 1801 Act.

15. Rather than repeat the summary of relevant evidence and arguments made, we invite you now to turn to and read paras.22-25 of document (2) before proceeding further with this letter.

16. In particular at para.24, Mrs Newby explained the legislative requirements for certification by two or more of His Majesty's Justices that the public carriage roads for which an Award made provision were "fully and sufficiently formed, repaired or completed". Contingent on that certification process having been completed, the liability fell on the Parish to repair the way. For completeness, the 1818 Act also required such a certificate to be "filed of Record by the Clerk of the Peace for the said County".

17. At para.25, Mrs Newby drew attention to deficiencies, borne out in the documentary record, in the execution of the Damerham South Inclosure Award, which precluded the route along Damerham Footpath no.20 ("No.4 Damerham and Salisbury Road – 30'" in the Award) from having been created as a public carriage road by that statutory process. Those deficiencies included, but were not limited to:

17.1 A failure to fence the way, as evidenced by subsequent maps. (Section IX required that "such Carriage Roads ... shall be well and sufficiently fenced on both sides[.]")

17.2 A failure of the Justices of the Peace to certificate that the road had been "fully and sufficiently formed, completed and repaired" and, as an obvious consequence, (i) no filing of a certificate (ie, a physical document) and (ii) no repair/maintenance by the parish /Highway Board or later highway authority.

18. As it is material to Ground 1, we should clarify that, from extant Quarter Session records running up to and including 1830, it is clear that the Justices had been asked to and did certify that two public carriage roads were "fully and sufficiently formed, completed and repaired" ("No.1 Cranbourne and Salisbury Road – 40'"; and "No.2 Damerham and Martin Road – 40'"). By contrast, after proper searches by HCC officers, the documentary record is blank as far as No.4 Damerham and Salisbury Road – 30': ie, there is no extant evidence whatsoever of its certification.

19. Mrs Newby also canvassed in paper submissions (documents (2), (3) and (6)) and before the Inspector a number of relevant points of law and the underlying cases.

20. First, *Cubitt* v *Lady Maxse* (1873) LR 8 CP 704 (AB 12-26), which is authority for the proposition that an Inclosure Award made pursuant to a local Inclosure Act incorporating the provisions of the 1801 Act (including sections VIII-IX) cannot be relied on for the creation of highway rights over the route of a public carriage road appointed by Inclosure Commissioners under it, unless that road had been fully and sufficiently formed, completed

and repaired and declared by the local Justices of the Peace to be such, in accordance with section IX. Until that was done it became neither maintainable at the public expense nor a public highway by virtue of the award:

> "The object of the general Act was that the roads set out should not be highways repairable by the parish until they had been formed and completed under the direction of the surveyor. Assuming that to be so, it is said that it may still have been the intention of the legislature that a road so set out should be a highway, though the parish might be under no liability to repair it. I do not assent to that argument. I take the intention of the legislature to have been, that the moment a way was ascertained to be a highway, it became repairable by the parish as at common law; and, when the Act of Parliament says that the road shall not be repairable by the parish until certain preliminaries are gone through, it appears to me that it was not intended that it should be a highway until all these were done. ..." per Keating J.

21. Secondly, in document (2) Mrs Newby drew the Inspector's attention to the dicta of Lord Justice Farwell in the Court of Appeal in *Cababé* v *Walton-on-Thames UDC* (1913). He stated, in the parallel context of the formalities required for compliance with s.23 Highways Act 1835, that the production of a Justices' certificate was "the proper evidence of this, and it may be possible to prove it by other evidence if the absence of the certificate was accounted for, or the period of time during which the parish has in fact repaired the road be such as to raise the inference or justify the presumption *omnia praesumuntur rite esse acta*... the fact of its non-production is not fatal if there are *facts* from which the inference that it was granted can fairly be drawn". (Emphasis added) (In fact, Lord Dunedin, in the same case when it reached the House of Lords[1] thought it was not the sort of case where the presumption applied, though he too acknowledged that there might be "a case where, if, for instance, the lapse of time was long, and the parish had all along repaired the road, there mere absence of direct proof of the formalities might be held not to be fatal.")

22. Thirdly, she also handed up a copy of *Buckland* v *Secretary of State for the Environment, Transport and the Regions* (2000) WL 434 to the Inspector and in document (6) referred to the dicta of Kay J, to highlight the proposition of law underlying the point that she was making as to the formalities required under the Inclosure legislation for a public carriageway to become a public way: "It is clear that a public highway may be created in a number of ways. It may be expressly so created by statute. An Act of Parliament may authorise the creation of a highway in some other way but any provisions and conditions of the Act will have to be satisfied before the purported creation of the highway becomes effective in law."

23. In fact, Kay J went on to say, "In either of these cases, the way becomes a public highway without any necessity for the public accepting it and using it unless that it is a condition imposed by the statute. If the way is not created as a highway in this way, it will only become a public highway if the evidence establishes either express dedication or user such as to give rise to the presumption of dedication." This is relevant to Ground 3 below.

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[1] [1914] AC 102.

24. The interpretation of *Cubitt* v *Lady Maxse* was contested by Mr Kind, though his focus in document (5) was the continuation of rights and repair liability in cases where public rights did pre-exist - ie, in contrast to the situation here. (See paras.12 and, in particular, 26 of the Inspector's Order Decision.)

25. HCC's answer to the points made by Mrs Newby was, essentially factual (document (4):

- First, "It is not considered relevant that there is no surveyor mentioned in the award, because the declaration and certification that the public carriage roads set out were *'fully and sufficiently formed, repaired and completed'* was in the hands of the Justice of the Peace, allowing for the transfer of the usual maintenance arrangements for public carriage roads to the inhabitants of the parish, under the modifying terms of the local act."
- However, secondly, "No certificate for the other two public carriage roads set out at this inclosure, *including the Order route* has been found, but that does not mean that one was never given. Survival of these certificates is notoriously patchy and some are no longer in the public domain." (Emphasis added)

26. Lastly, Mrs Newby handed up document (3) on "The Presumption of Regularity" (ie, *omnia praesumuntur rite esse acta*), which we invite you to read before proceeding further with the contents of this letter. The document was drafted by Mrs Newby, after collaboration with Ross Crail of New Square Chambers on another very similar case. The drafting is Mrs Newby's, not Miss Crail's or ours, but we endorse the contents and draw your particular attention to the proposition that the person seeking to invoke the presumption must be able to present some *subsequent* evidence, such as an act or state of affairs which justifies an inference that the act was done. It is, of course, trite that:

- It is not just for someone relying on the presumption simply to assert it without evidence and sit back and let his opponents disprove it.
- If there is sufficient evidence to raise the presumption, it is, of course, only a presumption and is capable of being displaced by contrary evidence.

The Inspector's position

27. The Inspector canvassed the Damerham Inclosure records at paras.21 to 33 of her Order Decision (document (7)), coming, at para.32, to the view that "without evidence of that final stage by which liability for maintenance of the road was transferred to the Surveyor of Highways for Damerham Parish [ie, compliance with the Justices' certificate procedure under the 1818 Act], I am not inclined to accept the Award alone as conclusive evidence of the intended public carriageway although I regard it as very strong."

28. We invite you to read paras.21-33 before proceeding to the Inspector's overall conclusions at paras.69-77. In particular, at para.72 she recorded that:

> "There is no evidence that this road was ever fenced, made up, declared to be 'fully and sufficiently formed, repaired or completed' by the Justices or subsequently maintained at the public expense other than for the southern-most section at

Allenford Pond. All those things may have happened by [sic] there is no later evidence to suggest they probably did and from which any 'presumption of regularity' might arise."

29. At para.73, she went on to say:

"However in 1835, 1846 and 1862 respectively the landowner, the Tithe Commissioners and the Church Commissioners all acknowledged this public carriage road by recording it on their maps in accordance with the Damerham Inclosure Map, even though in 1839/40 the Rockbourne Tithe Commissioners recorded no way at all in that parish (save one of the two east-west roads that is now BOAT 32)."

30. At para.76, she concluded:

"Although on balance there is insufficient evidence to show that the formalities required under the terms of the 1818 Act were followed such as to transfer liability for the maintenance of this road to the inhabitants of Damerham, I conclude that there is sufficient to show that Route X[2] within that parish did come into existence on the line XA-XB as a public carriageway."

Errors of law

31. The Inspector erred in law in the following ways.

Error of law (i): misapplication of the presumption of regularity

32. First, she found as a matter of fact that there was no evidence of compliance with the necessary procedures to complete the creation of the public carriageway pursuant to the 1818 Act (paras.32 and 72 of her Order Decision – document (7)). Moreover, her finding of fact was sufficiently strong that she was able to conclude at para.72, "All those things may have happened by [sic] there is no later evidence to suggest they probably did and from which any 'presumption of regularity' might arise."

33. On the basis of that finding of fact and that conclusion that the presumption of regularity did not even arise, the Inspector ought to have reached the overall conclusion that no public carriageway was created pursuant to the Inclosure legislation – and stopped there. In going on to conclude at para.76 that, nonetheless, "there is sufficient to show that Route X within that parish did come into existence on the line XA-XB as a public carriageway", the Inspector erred in law.

34. Further or alternatively, if, perversely and contrary to her own words in para.72, the Inspector was impliedly contending that the presumption of regularity *did* arise by reason of the subsequent evidence cited in para.73, she erred by taking no or insufficient account of the substantial body of evidence inconsistent with there having been compliance with the formalities required under the Inclosure legislation.

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[2] See para.3 of the Inspector's Order Decision (document (7)) as to Route X being that in question here.

35. Incidentally, if your client is minded to contend in its response to para.34 above that the Inspector had in mind that the route in question became a public carriageway after 1830, notwithstanding the likely procedural failings under the Inclosure legislation and, instead, as a matter of common law dedication, we invite her to consider the following:

35.1 The Order Decision does not support such an account of the Inspector's reasoning: ie, reaching a conclusion on the basis of an inference of common law dedication. To the contrary, she does not mention subsequent dedication at the relevant paragraphs of her Order Decision and paras.31 and 76 together make clear that the basis of her decision to upgrade Damerham Footpath 20 to a restricted byway is the Inclosure Award.

35.2 As Mrs Newby will attest, the Inspector stated at the hearing that there was no evidence of user before her and that user evidence played no part in her deliberations.

***Error of law (ii): as to Inclosure legislation and* Cubitt *v* Lady Maxse**

36. At para.27 of her Order Decision, the Inspector indicated that, in relation to the lack of a Justices' certificate, "I concur with the submission of Mr Kind that, under the provisions of the 1801 Act, the requirement for a declaration by the Justices has been shown by the relevant caselaw generally to relate to the question of liability for repair, not the status of the way as a highway, but is dependant [sic] on the terms of the individual Act."

37. Quite apart from the lack of clarity in the Inspector's own logic at para.27:

37.1 Even if the case law on Inclosure Awards generally related to the liability to repair, as distinct from status (which appears to us to be incorrect), that is not the same as providing authority that the two consequences (status and liability to repair) could differ in the absence of the proper formalities provided by the Inclosure legislation.

37.2 As indicated at para.24 above, Mr Kind's focus was the continuation of rights and repair liability in cases *where public rights did pre-exist*. On the Inspector's own factual finding, this matter can be distinguished from such cases.

38. In preferring Mr Kind's interpretation of the Inclosure legislation, as viewed through his own, rather narrow, interpretation of *Cubitt* v *Lady Maxse*, the Inspector erred in law. Had she correctly applied *Cubitt* v *Lady Maxse*, properly interpreted, to her own factual findings, she would have come to the view that no public carriageway came into existence along the line of Damerham Footpath 20 pursuant to the 1818 Act and subsequent Award.

Ground 2 – error of law – fairness: Inspector taking own evidence as to the route of historic carriageway in Rockbourne

39. As the Inspector recorded at para.10 of her Order Decision (document (7)), there was a secondary issue which she was anticipating: "In 1988, the northernmost part of Route X was diverted by Court Order under section 116 of the Highways Act ('the 1980 Act') along with a number of other routes in the vicinity. Three different submissions have been made

as to the implications of this diversion – from HCC, from the objectors, and from Mr Kind of Hodology Ltd acting on behalf of the British Horse Society."

40. For reference, the HCC Committee report plan (document (1)) shows both the claimed route and the diverted route north from point "F": the former to point "C"; the latter to point "B".

41. At para.77 of the Order Decision, the Inspector wrote:

> "As regards the continuation within Rockbourne Parish, the situation is complex. I find that, despite the lack of acknowledgement in any of the available records originating from the parish itself, that there is sufficient evidence (in the form of the myriad of county maps published and by implication from the clear records for Damerham Parish) to show that this road did continue northwards in the general direction of Toyd Farm. *However, I am satisfied that the majority of the maps which portray this continuation (in 1773, 1785, 1796, 1801, 1808, 1810, 1820, 1826, 1832 and 1855) show this to be wholly in Rockbourne Parish and on a reasonably direct line between XB and YB via XC (though not all these maps show the road continuing to YB).*" (Emphasis added)

42. By way of explanation, the implication is that the historic route followed the line of the *diversion route* shown on document (1): ie, F-E-C-D, not F-B-C-D.

43. As Mrs Newby will say in evidence if the matter proceeds, this finding came as a complete surprise to her when she read the Order Decision: there had been no suggestion or argument by any party prior to or at the 25 January 2011 hearing that the line of the historic route was other than that shown on the pre-1988 Definitive Map, ie, prior to diversion. Nor did the Inspector canvass this possibility at the hearing.

44. Mrs Newby will also say in evidence that, had this proposition been ventilated prior to or at the 25 January 2011 hearing, she would have sought to refute it on our clients' behalf. In her own words:

> "The inspector relies on ten maps identified at paragraph 77 of the Order Decision. I have studied all those maps and conclude that they are not detailed enough to reasonably conclude from them that the diversion route is distinguishable from the historic route accepted by all parties. The finding in the Order Decision obfuscates the distinction in referring to "a reasonably direct line". I prefer to look at the OS 1:2500 County series maps of 1895 and 1909, both of which were produced to the inspector by HCC, and both of which show clearly the two routes. The historic line proceeds *"on a reasonably direct line"* straight across what is now Rockbourne BOAT 32 and onwards to the Salisbury Road, whereas the diversion line is shown as an unfenced track which turns eastwards (to serve Down Farm which did not exist prior to 1802) without reaching BOAT 32. I also point out that the substantial displacement of the route where it crosses BOAT 32 was caused by the diversion in 1988. Before that, the displacement was very small and was consistent with small variations in the route north of BOAT 32. Those variations in themselves are consistent with differing records as to whether YA-YB was in Martin or Rockbourne, as the route runs along the parish boundary."

45. By introducing this argument into her Order Decision as the basis of her decision-making without first canvassing it with the parties, the Inspector has effectively taken her own evidence. She has, thereby, acted unfairly and unlawfully and has substantially prejudiced our clients, as represented by Mrs Newby. What the Inspector ought to have done is to reconvene the hearing or to invite the parties to the hearing to make written submissions on this proposition, when it occurred to her in the formulation of the Order Decision.

46. We draw your attention to the House of Lords' decision in *Fairmount Investments Ltd* v *Secretary of State for the Environment* [1976] 1 WLR 1255, which appears to us to be on point in relation to Ground 2. See, in particular, the dicta of Viscount Dilhorne:

> "In my opinion there is great substance in the respondents' complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion, which investigation might have shown to be erroneous, that the foundations were not taken down deep enough, and an opinion, which also might have been shown to be erroneous, that the inadequacy of the foundations showed that rehabilitation was impractical.
>
> By the failure to give the respondents any opportunity to deal with these matters, they were in my opinion substantially prejudiced and, for the reasons I have given, in my view the Court of Appeal came to the right conclusion and this appeal should be dismissed[;]"

and of Lord Russell:

> "I would only add two points. The first is the suggestion that the inspector should perhaps have kept silent about his views or inference as to the foundations. With this I wholly disagree: it was not suggested by Fairmount. What he should have done was either to reconvene the hearing, or to invite the department to do so; or, in a relatively straightforward case such as this, have in writing invited views on his provisional conclusions as to the foundations and financial feasibility. There is nothing either in the statute or in any rules to prevent this."

Ground 3 - *Wednesbury* unreasonableness: Inspector's factual finding as to the route of historic carriageway in Rockbourne

47. Further to Ground 2 and for the reasons canvassed in the quotation from Mrs Newby at paragraph 44, the Inspector acted irrationally in reaching her conclusion that the line of the historic route in Rockbourne ran along the diversion route.

Ground 4 – error of fact: speculation as to restoration of vehicular rights following extinguishment of any public highway pre-existing Rockbourne Inclosure Award

48. Parliament passed the Rockbourne Inclosure Act in 1798 and the Rockbourne Inclosure Award was made in 1802.

49. The Inspector's findings of fact in this regard may be summarised as follows:

49.1 There was insufficient evidence to support the existence of a public vehicular route along the line of the Order route prior to the 1798 Rockbourne Inclosure Act and 1802 Rockbourne Inclosure Award (Order Decision, paras.17 and 43).

49.2 The effect of the Inclosure Award was to extinguish any existing rights that were not set out in the Award (Order Decision, para.19).

49.3 No route in Rockbourne was awarded that ran along or near to the line of Rockbourne Footpath 31 (Order Decision, para.17).

50. The Inspector, nevertheless, came to the following conclusion at para.78:

> "On a balance of probability I consider this to be sufficient to show that XB-XC was the continuation in Rockbourne Parish of the public carriageway leading up from Allenford Pond. Even if this short section was extinguished in law as a consequence of the Rockbourne Inclosure Award (the Commissioners failing to set it out), *its continued depiction on county maps for at least 50 years after* [reference to footnote 19] *indicates to me that the public would have re-asserted any rights theoretically lost.*" (Emphasis added)

51. For completeness, the Inspector's footnote 19 reads: "As noted above, it is shown on Crutchley's Railway Map of Wiltshire in 1855."

52. In reaching the conclusion at para.78 of her Order Decision, the Inspector erred:

52.1 First, the Inspector's finding that "XB-XC was the continuation in Rockbourne Parish of the public carriageway leading up from Allenford Pond" rests on the premise that what was formerly Damerham Footpath 20 was, indeed, a public carriageway: so, if Ground 1 succeeds, that finding must be incorrect.

52.2 Further, the Inspector's finding at para.78 of her Order Decision is apparently also in conflict with her own acceptance at para.17 of her Order Decision that there is nothing evident from the supporting maps to indicate that a public carriage way subsisted along a line similar to the Order routes prior to 1802. If there was no public carriage way there in 1802, how could it have been *extinguished* by the 1802 Rockbourne Inclosure Award? What way was there to *re*-assert?

52.3 Further, the Inspector herself admits that, in relation to the post-1802 evidence, there was inconsistency between the Wiltshire and Hampshire Crutchley's Railway Maps

(para.58 of the Order Decision) and simply disregards conflicting evidence provided by other topographical surveys (eg, the Rockbourne Tithe Map and later OS maps).

52.4 Further, at para.74 of the Order Decision, together with footnote 17, the Inspector concludes that by the 1870s the route of the way in question lay along the more westerly pre-1988 diversion line. That is not only inconsistent with her conclusion at para.77 as to the route in the first half of the nineteenth century, but raises the following question: which route (F-B or F-E-B on document (1) was the public supposed to have been re-asserting in the nineteenth century? That question goes unanswered by the Inspector.

53. In this context, it is worth re-emphasising, as at para.35.2 above, that the Inspector stated at the hearing that there was no evidence of user before her and that user evidence played no part in her deliberations: ie, from which an inference of common law dedication could be drawn.

54. The errors set out at paras.52.1-52.4 together go to an error of fact in the Inspector's conclusion as to the re-assertion of rights: ie, a finding of common law dedication. This amounted to nothing more than evidential speculation: ie, she offended against the "no evidence rule" and/or made a material error of fact, acting, as she did, on the basis of no evidence. In consequence, the decision to confirm the DMMO based on this reasoning was unlawful.

Ground 5 - *Wednesbury* unreasonableness: as to restoration of vehicular rights following extinguishment of any public highway pre-existing Rockbourne Inclosure Award

55. The Inspector's fact-finding and/or reasoning, as set out in relation to Ground 4 above, was irrational and/or perverse.

F. Remedy

56. If our clients require to pursue their appeal under Schedule 15, para.12 to the Administrative Court, they will seek:

56.1 An Order quashing the DMMO. (There is no separate power simply to quash the Order Decision.)
56.2 Declaratory relief as to the Inspector's errors in law going to Grounds 1, 3, 4 and 5.
56.3 Costs.

57. To avoid the cost of proceedings, we invite you in your response to this letter to agree to the quashing of the DMMO – subject, of course, to the satisfaction of the Court as to reasons. We confirm that we are, in those circumstances, instructed to liaise with you in the production of a draft Order and a Statement of Matters justifying the making of that Order. In those circumstances, we will, of course, seek our clients' costs on the standard basis.

G. Reply

58. Given that the limitation period for making an appeal under Schedule 15, para.12 WCA 1981 is only 42 days from the date of the notice given under Schedule 15, para.11, we invite your response by 4:30pm on Friday 13 May 2011. The normal timeframe for response

to a letter of claim under the Judicial Review Pre-action Protocol is 14 days. Given that a claimant has up to three months, rather than six weeks, within which to commence judicial review proceedings, the request for a response by 13 May 2011 is reasonable.

59. We put you on notice that we propose on Monday 16 May 2011 to instruct Counsel (Ross Crail of New Square Chambers) to settle proceedings. This notice is intended to enable your client to concede the claim promptly without incurring any additional adverse liability to pay our clients' Counsel's costs.

60. When you respond, we invite your confirmation that you concur with our calculation that the latest date on which proceedings can be issued is 1 June 2011.

H. Nature of client retainer

61. Please note that we are currently instructed on a normal retainer basis: ie, without an uplift/success fee becoming payable if our clients succeed in this matter. Also to give your client an opportunity to avoid unnecessary costs, we put you on notice that we expect to revisit with our clients the basis of our retainer before any proceedings are issued.

62. Please acknowledge receipt by return to the e-mail address at paragraph 5 above and please identify the lawyer who will have the conduct of this matter on behalf of the Secretary of State.

Yours faithfully