Case No: C1/2006/0343

Neutral Citation Number: [2006] EWCA Civ 1718
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
MR JUSTICE SULLIVAN
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 14th December 2006

Before :

LORD JUSTICE WARD
LORD JUSTICE WALL
and
LORD JUSTICE RICHARDS

- -

Between :

HERTFORDSHIRE COUNTY COUNCIL	**Appellant**
- and -	
SECRETARY OF STATE FOR THE DEPARTMENT OF ENVIRONMENT FOOD AND RURAL AFFAIRS	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Vivian Chapman QC (instructed by Hertfordshire County Council) for the Appellant
Mr Timothy Morshead (instructed by **Solicitor to the Secretary of State**) for the Respondent

- -

Judgment
As Approved by the Court

Lord Justice Wall :

The appeal and the issues which it raises

1. This appeal concerns the powers of a local authority under the Highways Act 1980 (the Act) to create, divert and extinguish footpaths. The appellant is the Hertfordshire County Council (the Council). With permission granted by Neuberger LJ on 27 April 2006 on paper, it appeals against Sullivan J's dismissal on 14 October 2005 of its claim for judicial review of a decision (the decision) made by an inspector appointed by the respondent to the appeal, the Secretary of State for the Department of Environment Food and Rural Affairs (the Secretary of State). The decision, contained in a decision letter dated 6 October 2004, was not to confirm three public path extinguishment orders made by the Council on 2 November 2001 under section 118 of the Act, and followed a public inquiry conducted by the inspector which had taken place on 17 and 18 August 2004. The inspector had also made an unaccompanied site inspection on 16 August and a further accompanied site visit after the close of the inquiry.

2. The judge formulated the issue he had to decide in the following way. There was one question for him to decide, namely: what was the proper interpretation of section 118 of the Act? In the particular context of the case, however, the question raised by section 118 is whether or not the inspector had been right when she had concluded in paragraphs 35 and 36 of her decision letter (set out below at paragraph 23 of this judgment) that the Act "does not envisage paths proposed for creation by agreement being taken into account when determining extinguishment orders in the same way as creation orders". The reason for this, she added pithily, was: "If it had been intended, it (the Act) would have clearly said so". As will be apparent, the judge agreed with the inspector's reasoning, and refused to quash the decision. He also refused permission to appeal.

3. For the record, it should be pointed out that there were in fact four extinguishment orders made by the Council and considered by the inspector. They were identified by the letters A to D. She confirmed one of them, namely C. That part of her decision is not challenged by either party, and is not material to this appeal. Accordingly, apart from identifying it as part of the inspector's decision, I need say no more about it.

4. Finally by way of introduction, I need to say that although, on analysis, this appeal involves relatively clear points of statutory construction (on which, it must also be said, I have reached a clear view) it also both requires a consideration of the overall statutory scheme for the creation, diversion and extinguishment of footpaths, and is of some practical importance to local authorities. I therefore propose to provide extensive citations from the inspector's decision letter, from the arguments advanced on behalf of the Council, and from the judge's judgment. This will, no doubt, make the judgment somewhat longer than is strictly necessary. I will, however, approach the appeal under specific headings, which will enable the reader to select the passages which are material to an individual consideration.

The facts

5. I can, I think, do no better than to recite the judge's summary in paragraphs 2 to 9 of his judgment: -

> "2. The orders related to a number of paths in the Tyttenhanger area near St Albans. The area has a history of mineral workings since the 1940s. It is criss-crossed by a complicated network of rights of way, parts of which had been rendered obsolete or impassable by mineral workings, by the diversion of the River Colne, by the construction of the London Colney Bypass, and by other developments.
>
> 3. The (Council) had been in discussions with interested parties for many years, with a view to rationalising the network. In 1995 it reached agreement with the landowners for a package of alterations to the network that would be implemented in phases. The package proposed the extinguishment of some paths, the diversion of others and the creation of new paths, the intention being to achieve an overall improvement in the network as a whole.
>
> 4. On 23rd April 2001 the (Council) entered into an agreement under section 25 of the Act with the relevant landowners and tenants ("the agreement"). The agreement provided for the creation of new paths in two groups, the schedule 2 paths and the schedule 3 paths. Both groups of paths were to be dedicated for public use. In the case of former such dedications were "to become effective immediately before the extinguishment by means of an extinguishment order or orders of the related length or lengths of paths set out in column B of schedule 2 and shown on the plan annexed here to." (Clause 2.1).
>
> 5. Schedule 2 to the agreement was headed "diversions" and contained three columns. Column A identified the path in question. Column B identified lengths of that path that were to be extinguished…… Column C identified lengths of path to be newly created……For the last three paths listed in the schedule 2 there was no column C, that is to say no new path was to be created to replace them.
>
> 6. Schedule 3 was headed "creations" and listed a number of footpaths and bridleways. The lines of three paths, one in schedule 2 ….. and two in schedule 3, were to be agreed between the parties and the new paths were to be provided forthwith after such agreement.
>
> 7. By a supplemental agreement dated 2nd June 2003 the line of [an identified] path was agreed. Thus by the time the inquiry opened before the inspector on 17th August 2004 the lines of all the schedule 2 paths had been agreed, leaving only the routes of two of the paths in schedule 3 to be agreed.
>
> 8. The (Council) made four extinguishment orders referred to at the inquiry as orders A-D. Order A was dated 2nd November

> 2001 and extinguished a substantial number of the paths listed in column B of schedule 2 to the agreement. All of these paths were to be "superseded" by newly created paths listed in column C of schedule 2.
>
> 9. Order B, also dated 2nd November 2001, extinguished one path listed in column B which was to be superseded by a newly created path listed in column C. Order C was dated 20th July 2001, and extinguished the last three paths listed in schedule 2, which were not to be superseded or replaced by newly created paths. Order D, also dated 20th July 2001, extinguished the path in column B of schedule 2 that was to be replaced by [another] footpath the line of which had been fixed in the 2003 supplementary agreement.

6. For the Council, Mr. Chapman showed us the scheme on a large scale map of the area and took us in detail through all the changes proposed. For the purposes of the point in issue in this appeal, however, I do not think it necessary to identify the changes proposed in any further detail. Whilst I have set out the judge's summary of the proposed alterations, it is, I think, sufficient to record, as the judge does in paragraph 3 of the citation from his judgment set out in paragraph 5 of this judgment, that "the package proposed the extinguishment of some paths, the diversion of others and the creation of new paths, the intention being to achieve an overall improvement in the network as a whole".

The footpath creation agreements of 23 April 2001 and 2 June 2004

7. Although both documents were in our papers, I take the view that the summary provided by the judge and set out in paragraph 5 of this judgment is sufficient for present purposes, and I do not, accordingly, think it necessary to set out the detailed provisions of either document.

The Statutory Provisions

8. Before examining the inspector's reasoning, it is, I think, necessary to set out the relevant provisions of the Act. Although, as the judge rightly observed, the case turns on the proper interpretation of section 118, that section cannot be viewed in isolation, and must be construed within the context of the statutory framework including, in particular, the provisions of section 119. Throughout this section of the judgment, I have limited the citations to sections of the Act which refer specifically to footpaths.

9. I begin, therefore, with section 25, the material parts of which are in the following terms: -

> 25 Creation of footpath …..by agreement
>
> (1) A local authority may enter into an

agreement with any person having the necessary power in that behalf for the dedication by that person of a footpath over land in their area.

An agreement under this section is referred to in this Act as a "public path creation agreement".

(2) For the purposes of this section, "local authority"

(a) in relation to land outside Greater London means a county council…….

(3) Before entering into an agreement under this section a local authority shall consult any other local authority or authorities in whose area the land concerned is situated.

(4) An agreement under this section shall be on such terms as to payment or otherwise as may be specified in the agreement and may, if it is so agreed, provide for the dedication of the footpath subject to limitations or conditions affecting the public right of way over it.

(5) Where a public path creation agreement has been made it shall be the duty of the local authority who are a party to it to take all necessary steps for securing that the footpath... is dedicated in accordance with it

(6) As soon as may be after the dedication of a footpath in accordance with a public path creation agreement, the local authority who are party to the agreement shall give notice of the dedication by publication in at least one local newspaper circulating in the area in which the land to which the agreement relates is situated.

10. Section 26 is headed "**Compulsory powers for creation of footpaths….**" The parts of this section material to the case read as follows: -

(1) Where it appears to a local authority that there is need for a footpath …. over land in their area and they are satisfied that, having regard to—

(a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area, and

(b) the effect which the creation of the path or way would have on the rights of persons interested in

the land, account being taken of the provisions as to compensation contained in section 28 below,

it is expedient that the path or way should be created,the authority may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order, create a footpath over the land.

An order under this section is referred to in this Act as a "public path creation order"; …..

(3) A local authority shall, before exercising any power under this section, consult any other local authority or authorities in whose area the land concerned is situated.

(4) A right of way created by a public path creation order may be either unconditional or subject to such limitations or conditions as may be specified in the order.

(5) A public path creation order 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, defining the land over which a footpath …. is thereby created.

(6) Schedule 6 to this Act shall have effect as to the making, confirmation, validity and date of operation of public path creation orders.

11. Section 27 is of only marginal relevance to this appeal, but I will, nonetheless, set out the material provisions of sub-sections 7(1) and (2). The section is headed **Making up of new footpaths and bridleways.** It continues:

(1) On the dedication of a footpath…..in pursuance of a public path creation agreement, or on the coming into operation of a public path creation order, being –

(a) an agreement or order made by a local authority who are not the highway authority for the path in question, or

(b) an order made by the Secretary of State under section 26(2) above in relation to which he directs that this sub-section shall apply,

the highway authority shall survey the path …. and shall certify what work (if any) appears to them to be necessary to bring it into a fit condition for use by the public as a footpath ….. and shall serve a copy of the

certificate on the local authority mentioned in paragraph (a) above or, where paragraph (b) applies, on such local authority as the Secretary of State shall direct.

(2) It shall be the duty of the highway authority to carry out any works specified in the certificate under section (1) above …..

12. The judge summarised the effect of the remaining sections of Part III of the Act in the following way, which does not appear to be controversial, and which I am content to adopt: -

> "Section 28 makes provision for compensation for loss caused by a public path creation order and section 29 requires councils to have due regard to agricultural, forestry and conservation considerations when making either public path creation agreements or public path creation orders."

13. The relevant sections in Part VIII of the Act are headed: ***Stopping up and diversion of highways.*** Section 116 gives magistrates' courts the power to authorise the stopping up or diversion of a highway where it appears to the court that the highway in question is either unnecessary or can be diverted so as to make it nearer or more commodious to the public. Section 117 is not relevant. The material parts of sections 118, which is headed **Stopping up of footpaths and bridleways**, and which is at the heart of this appeal, read as follows.

(1) Where it appears to a council as respects a footpath …. in their area …. that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.

An order under this section is referred to in this Act as a "public path extinguishment order"

(2) The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

(3) A public path extinguishment order 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, defining the land over which the public right of way is thereby extinguished.

(4) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path extinguishment orders.

(5) Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering—

(a) under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or

(b) under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public,

the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.

(6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.

14. Section 119, as set out in his judgment by the judge, provided as follows: -

(1) Where it appears to a council as respects a footpath … .in their area …. that, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier), the council may, subject to subsection (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order-

(a) create, as from such date as may be specified in the order, any such new footpath or bridleway as appears to the council requisite for effecting

the diversion, and

(b) extinguish as from such date as may be specified in the order or determined in accordance with the provisions of subsection (3) below, the public right of way over so much of the path or way as appears to the count requisite as aforesaid.

An order under this section is referred to in this Act as a 'public path diversion order'.

(2) A public path diversion order shall not alter a point of termination of the path or way-

(a) if that point is not on a highway, or

(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.

(3) Where it appears to the council that work requires to be done to bring the new site of the footpath or bridleway into a fit condition for use by the public, the council shall-

(a) specify a date under subsection (1)(a) above, and

(b) provide that so much of the order as extinguishes (in accordance with subsection (1)(b) above) a public right of way is not to come into force until the local highway authority for the new path or way certify that the work has been carried out.

(4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.

(5) Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him (i) to enter into an agreement with them to defray, or to make such contributions as may be specified in the agreement towards,

(a) any compensation which may become payable

under section 28 above as applied by section 121(2) below, or.

(b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public, or

(c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.

(6) The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be affected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the affect which-

(a) the diversion would have on public enjoyment of the path or way as a whole,

(b) the coming into operation of the order would have as respects other land served by the existing public right of way, and

(c) any new public right of way created by the order would have as respects the other land over which the right is so created and any land held with it,

so, however, that for the purposes of paragraphs (b)and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (5)(a) above.

(8) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path diversion orders."

15. The judge did not think it necessary to set out the provisions of schedule 6 in any detail. It sufficed to mention only that the schedule required public notice to be given of the submission of orders made by a council under section 26, section 118 or section 119 to the Secretary of State for confirmation. If there were objections, the Secretary of State could, and in certain circumstances must, arrange for a public local inquiry or hearing and consider the inspector's report before reaching any decision. He also noted that whether an order was opposed or unopposed the Council had power to confirm it with or without modifications; and that schedule 6 gave the Secretary of State power to make procedural regulations by virtue of paragraph 3(2), which was in the following terms: -

> Provision may be made by regulation of the Secretary of State for enabling proceedings preliminary to the confirmation of a public extinguishment order..... to be taken concurrently with proceedings preliminary to the confirmation of a public path creation order [or] …..a public path diversion order .....

16. The Regulations referred to in paragraph 3 of Schedule 6 are the Public Paths Orders Regulations (S.I. 1993 No. 11). Like both sections 118 and 119, they relate exclusively to orders, and there is no reference in them to public path creation agreements. Thus, for example, by regulation 4(2): -

> Any proceedings preliminary to the confirmation of a public path extinguishment order …. may be taken concurrently with any proceedings preliminary to the confirmation of a public path creation order, [or] a public path diversion order…..

The particular sub-sections which fall to be construed

17. I pause at this stage only to note that the critical aspects of the construction of section 118 for the purposes of this appeal are: (1) the use of the present tense in the words "is not needed" in section 118(1); (2) the meaning of the words "apart from the order" within the phrase "would, apart from the order, be likely to be used by the public" in section 118(2); and (3) the meaning and significance of section 118(5).

The inspector's report

18. Having identified the proposed orders she was being asked to confirm, and having pointed out that all four of the orders stated that they would come into effect on the date of confirmation, the inspector identified the main questions she had to decide as follows: -

> 11. The orders are all made under section 118 of the 1980 Act. The requirements of this section are that, before confirming the Orders, I must be satisfied, in each case, that it is expedient to stop up the sections of footpath proposed having regard to: -
>
> (a) the extent to which it appears that the footpath(s) would, apart from the Order, be likely to be used by the public; and
>
> (b) the effect which the extinguishment of the rights of way would have as respects land served by the footpaths, account being taken of the provisions as to compensation.
>
> 12. Section 118(6) of the 1980 Act requires that I disregard any temporary circumstances preventing or diminishing

use of the paths in question when determining the likely use that might be made of them.

19. Having then set out the background, the inspector turned to what she described as ***Technical Issues***. Under this heading, she stated: -

> 19. The first and quite fundamental matter relates to the interpretation of sub-section (5) of section 118 of the 1980 Act (which refers also to the Public Path Orders Regulations 1993). This enables any proceedings preliminary to the confirmation of an extinguishment order, which is taken concurrently with any similar proceedings relating to a creation or diversion order, to take into account the effect of any alternative path to be provided in one of those related orders. However, this facility is not applied to related extinguishment orders and creation agreements. Appendix C of Circular 2/93 makes reference (at paragraph 36) only to concurrent orders; again no mention is made of agreements in this context.
>
> 20. For the (Council) and supporters of the orders, Mr. Park argued that it is not surprising to find only references to creation orders in the Circular since this reflects the Regulations which are essentially giving guidance on the setting out of orders, not agreements. Agreements are intended to be a more flexible tool, enabling highway authorities to work with landowners so as to more easily achieve the creation of new paths for the public than by having to rely on the law of prescription. Landowners usually prefer to work by agreement and are encouraged to do so. However, the lack of a reference to concurrent creation agreements should not prevent all material circumstances from being taken into account in determining the expediency of the proposed extinguishments.
>
> 21. He highlighted the fact that several years of negotiations had resulted in the present package of proposals, the result of which would be over five miles of public rights of way, not the present three miles. The public could be able to enjoy the amenity and conservation value of the lakes through a series of circular walks, linking the community at large with the local countryside. The (Council) had chosen to implement this package through agreements under section 25 of the 1980 Act, rather than section 26 not with any ulterior motive but because it was their usual practice where they had the co-operation of the landowners.
>
> 22. I acknowledge that the inquiry appears to have been the culmination of many years of difficult negotiations and

> that it would be regrettable to miss this opportunity to resolve the problems with the rights of way network and to provide a better solution if that is indeed what the overall package of proposes will achieve. I therefore have considered this issue with that purposive approach in mind.

20. Having so directed herself, the inspector continued as follows: -

> 23. An essential element of any of the statutory mechanisms for altering public rights of way is certainty. The public need to be assured they will not be substantially disadvantaged by the change. In general terms the tests set out in the relevant sections of the 1980 Act seek to ensure that rights are not lost without satisfactory alternatives first being available (if they are in fact needed). In the case of diversion or concurrent extinguishment and creation orders the advice (in paragraph 6 of Circular 2/93) is that the new route should be available for public use before the old route is closed. Since a highway authority has no powers to enter onto land before the new right of way exists legally, adequate time should be provided between confirmation and the order(s) taking effect for the new route to be put into a fit condition.
>
> 24. In this case, the four extinguishment orders would come into effect upon confirmation. The 2001 creation agreement states that the owners and occupiers were to provide, at their expense, two groups of footpaths, that is the Schedule 2 and the Schedule 3 paths. Through the agreement, the owners dedicated for public use (immediately) the Schedule 3 paths, whereas the Schedule 2 dedications were "to become effective immediately before the extinguishment by means of an extinguishment order or orders of the related length, or lengths of path set out in column B of Schedule 2" and shown on the accompanying plan.

21. The inspector then pointed out that notwithstanding the terms of the agreement, a number of the Schedule 3 paths were simply not in place. She accepted the explanation from one of the landowners that he personally had not been aware that the paths were required to be in place before the order routes were extinguished. At the same time, she also found it unsurprising that the objectors to the scheme expressed a degree of scepticism about the degree of commitment that the parties to the agreements had shown towards the scheme's implementation.

22. Turning to the Schedule 2 paths, the inspector pointed out that these had not been dedicated as public rights of way although the 2001 agreement expressed an intention on the part of the landowners to do so (retrospectively) if or when the order routes were

extinguished. She then commented:

> "29. I am not a lawyer but simply as a matter of logic I find it difficult to fully accept the concept that a series of new public rights of way will retrospectively arise immediately *before* confirmation of the Orders (since that is the moment the extinguishments would become effective) when the extinguishments may need to depend on their (pre-) existence for that confirmation. If this 'package' were before me as concurrent orders under sections 26 and 118 of the 1980 Act (for creation and closure) both could be confirmed at the same time and (subject to any period being required for works) both could come into effect at the same time and the matter would be quite certain. The question is whether there is the same degree of certainty and reliability within a creation agreement that [is] clearly not before me for determination and which rests on the respective parties to ensure its full implementation."

23. After further discussion, the inspector reached her conclusion in paragraph 35 and the following paragraphs of her decision: -

> 35. In conclusion, it seems to me that the legislation does not envisage paths proposed for creation by agreement being taken into account when determining extinguishment orders in the way as creation orders. If it had been intended, it would have clearly have said so.
>
> 36. That aside, I have considered very thoroughly whether or not I can take into account the new routes proposed by the two agreements as material circumstances that.....should not be ignored. If I were to decide to confirm one, some or all the four orders, immediately afterwards I would discover that the corresponding creation had come into existence. Yet at this point in time none of these alternatives exist as public rights of way. Had these routes been proposed by creation order, the situation would have been different. In view of the various differences between creation orders and agreements which leave the latter generally less reliable when used in this context, with limited public input, and particularly the 'chicken and egg' timing of the proposed creations in relation to the extinguishments, I conclude that the Orders before me must stand or fall on their own merits, without account being taken of the creation agreements……..
>
> 39. If, as I have concluded, the corresponding alternative routes proposed in the creation agreement cannot be taken into consideration, extinguishment of these three

> Order routes would leave a wholly disjointed network of public rights of way. However, I am not required to address the question of *need* for the Order routes, either collectively or individually. The question for me is their *likely use* if the order is not confirmed.
>
> 40 .....without any alternative public rights of way in existence, it is difficult to see why the Order routes would *not* be used, assuming access along them is restored.

24. It was common ground before the judge, and in this court, that if the inspector was correct in her conclusion that she was not entitled to take into consideration the new paths proposed in the agreements, she was entitled, indeed bound, to refuse to confirm the three orders in dispute. There was also agreement that if her conclusion was not correct and she was, as a matter of law, entitled to have regard to the new paths proposed in the agreements, her decision would have to be quashed, so that she could then consider the detailed merits of the provision made under the agreements.

The judgment of Sullivan J

25. The reasons the judge dismissed the claim for judicial review, are, as I read his judgment, as follows. He began by expressing the view that in Part VIII of the Act a clear distinction was to be drawn between sections 118 and 119. The former addressed those cases, as he put it, where a footpath between points A and D is not needed (and therefore there is no need for a path between those points to be maintained on a different route). The latter addressed those cases where there is a need for a path between points A and D, but where it is expedient that it should be re-routed so as to run from A-C-D rather than A-B-D. In the latter case, because there was a need for a path between points A and D, section 119 ensured that the new route would still provide such a path (with a limited degree of flexibility if those points are located on a highway; see section 119(2)), and that the new route A-C-D would not be substantially less convenient to the public than the old route A-B-D: see section 189(6). He went on: -

> The (Council)'s difficulties in the present case have stemmed from the fact that it has sought confirmation of orders under section 118 for the stopping up of ways that are needed, but which it is expedient (in the (Council)'s view) to re-route. It is clear from schedule 2 to the agreement that all of the ways listed in column B, with the exception of the last three paths which are the subject of order C, are still needed. That is why they are to be replaced by the new paths in column C. Section 118(1) gives the (Council) power to deal with a path that "is not needed", not with a path that is needed but will not be needed if and when an alternative route between the two termination points is provided.

26. The judge rejected submissions made by the Council; (a) that his construction of “is not needed” in section 118(1) of the Act as referring only to the immediate present and not

to the future was “over–literal”; and (b) that the word “is” covered not merely the time when the Council made the order but extended to the point at which the order was confirmed, when the new path in question would be dedicated to public use. In the instant case, the judge pointed out, the Council accepted that the dedication could not take place before some uncertain future event.

27. The judge further rejected the Council’s interpretation of the words “apart from the order” in section 118(2). In paragraph 30 of the judgment, he said: -

> In many cases it would make no practical difference whether the defendant considered the extent of likely usage of a path on the assumption that there was no extinguishment order or on the assumption that the way was not extinguished by an extinguishment order. Parliament could have required the defendant to consider the extent which a "path or way would, if it was not extinguished by the order, be likely to be used by the public". But it chose the more straightforward course of requiring the defendant to consider what usage would be likely "apart from the order," ie, simply leaving the order out of account altogether. If that is done, it is common ground that the paths listed in column B of schedule 2 to the agreement are likely to be used, because the paths in column C will not have been dedicated.

28. The judge then considered section 118(5) of the Act. He took the view that this sub-section was a powerful indication that the use of the present tense in sub-section (1) was deliberate. In paragraph 31 of his judgment, he made the point that: -

> Subsection (5) would have been unnecessary if, when considering whether a path or way "is not needed", a council could look to the future and have regard to the extent to which an alternative path would be provided by a public path creation order, or public path diversion order, if such an order was to be confirmed.

29. The judge then addressed the central issue. Was the decision maker entitled to take the public path creation agreement made between the Council and the landowners into consideration when deciding whether or not to confirm the extinguishment orders in question? In his judgment, the answer was in the negative. As this point goes to the heart of the case, I propose to set out the judge’s reasoning in full: -

> 34. For present purposes I am prepared to accept Mr Chapman's submission that clause 2.1 of the agreement should be construed as though it provided that dedication of the schedule 2 paths would become effective immediately upon the extinguishment of the related lengths of path in column B of the schedule.
>
> 35. Section 25 expressly envisages that councils and

landowners may agree that dedication is to take place at some future date: see subsections (2) and (6) of section 25. If it was permissible to take into consideration an alternative path that is proposed to be dedicated upon the happening of some future event when considering whether an existing path "is not needed", it would be necessary for the decision taker to form a view as to whether, if so when, the event was likely to occur, whether it was likely the agreement would be complied with, and whether in the event of failure to comply, the court would be likely to grant discretionary relief in order to secure compliance. Mr Chapman would argue that these would all be matters of weight for the decision taker to assess.

36. But if decision takers can look to the future when applying the tests in subsections (1) and (2) of section 118, why should they not consider the future prospects of an order under section 26 or section 119 that has been made but not confirmed? In such a case the (Secretary of State's) task under subsection (2) would be far more straightforward since he would know, before reaching any decision under subsection (2) as to likely use, whether or not he proposed to confirm the order under section 26 or 119, creating the alternative route.

37. Subsection (5) is not to be treated as though it was otiose. It was enacted because, absent such provision, an alternative path proposed in a creation or diversion order submitted for confirmation could not be considered by decision takers under subsections (1) and (2).

38. Looking at section 118 as a whole, subsections (1) and (2) are concerned with the position as it exists on the ground when the order is made and when it is confirmed. Subject to the provisions of subsection (5) the decision taker under section 118 is not entitled to have regard to possible or probable future diversions of, or additions to, the rights of way network. Subsection (5) creates a limited class of exceptions to this general rule. For it to apply it is not sufficient merely that orders have been made under section 26, or 119 proposing alternative paths. The orders must have been submitted for confirmation and there must be concurrent confirmation proceedings so that the defendant will be in a position to consider the merits of all the orders, and is able to ensure that all of them come into effect, with or without modifications, contemporaneously.

30. Finally, the judge rejected the Council's submission that there were no policy reasons for treating public path creation agreements under section 25 differently from public path creation orders made under section 26. The judge accepted that from the point of view of the Council and the landowners, an agreement may well be preferable to an order, and that as between a local authority and those interested in the land, there need be no, or no significant difference between proceedings under sections 25 and 26 since, subject to section 118 (5) anything that could be achieved by a public path creation order could be achieved by way of a public path creation agreement and vice versa. The judge continued: -

> 42. However, from the point of view of those who are entitled to use the rights of way network, the public, there are significant differences between the two procedures. A council may choose to carry out a non-statutory consultation exercise before entering into an agreement under section 25, but it is not obliged to do so. This contrasts with the provisions of schedule 6 to the Act, which ensure the public are given notice of a making of a creation order under section 26. Those who object to the order, or who seek modifications to it, then have an opportunity to put their arguments to an independent inspector who has the power to refuse to confirm the order or confirm it either without modifications or with modifications which may meet their objections either in whole or in part. The same procedural safeguards apply to diversion orders made under section 119.
>
> 43. Thus, the concurrent proceedings referred to in subsection 118(5) will be in respect of order making processes in which the public has a statutory right to participate, and where the Secretary of State has power to respond (for example, by making appropriate modifications) to such participation.
>
> 44. There are no such safeguards in section 25. As Mr Morshead (for the Secretary of State) put it, whilst the public could object to the (Council)'s stopping up order under section 118, they were presented with the alternative routes in the agreement on a take-it-or-leave-it basis. If, as in the present case, a public path creation agreement under section 25 is used in conjunction with section 118 stopping up order to effect what is in reality a diversion of a path, the public is not merely deprived of these procedural safeguards and presented with the proposed diversion element of the package on a take-it-or-leave it basis, it is also deprived of the safeguards in subsections (1), (2), (3) and (6) of section 119: that the diversion must be expedient in the interests of those interested in the land or the public; that the points of termination must remain the same (subject to the flexibility afforded by paragraph (b) in subsection (2));

> that the old path is not extinguished until the replacement is in a fit condition for the public to use it; that the diverted way will not be substantially less convenient to the public; and that the diversion must be expedient having regard to the effect of the diversion on the public enjoyment of the path as a whole.
>
> 45. There are therefore powerful policy reasons for requiring section 119 to be used where what is proposed is not in reality the creation of a wholly new path, but the re-routeing of an existing path.

31. The judge summarised his conclusion in paragraph 53 and 54 of his judgment in the following words: -

> 53 The Act contains a very detailed code for the extinguishment and diversion of existing paths and the creation of new paths. The procedures in the Act cannot be ignored on the basis that they are "unmeritorious technicalities". They are there for a purpose, to ensure that the public interest in our extensive network of public rights of way rightly described in Circular 2/93, Public Rights of Way, "as a unique legacy", are fully protected. To a significant extent the mechanism adopted by the (Council) side-stepped the procedural provisions intended to protect this public interest.
>
> 54. Looking at the statutory scheme as a whole, there are therefore powerful policy reasons, quite apart from the need to give the words of section 118 their ordinary and natural meaning ... why the section should not be interpreted so as to facilitate the (Council)'s scheme, whatever its merits may be.

The attack on the judgment in this court

32. For the Council, Mr. Chapman launched a sustained and skilful attack on the judgment, which I propose to rehearse in some detail. He acknowledged that the principal question in the appeal was not covered by any authority which either side had been able to find. It was, accordingly, he accepted, essentially a matter of statutory construction.

33. Mr. Chapman was at pains to explain to us why the Council had proceeded as it had. He began by accepting that what he described as the Council's "rationalisation scheme" could not be wholly analysed into a collection of public path diversions, even within the wide statutory power to alter the termination point by way of diversion under section 119(2) of the Act. However, he pointed out that most of the "new" paths were already in public use and there was a possibility that some had already acquired highway status by long use under section 31 of the Act. He submitted that it was not possible for the Council to use a public path diversion order if the proposed new path was already a

public path, citing ***R v Lake District Special Planning Board ex p. Bernstein*** (1982) The Times 3rd February 1983. In the light of this case it would, he said, have been a waste of time and costs to seek a ruling from the court as to the existing status of the proposed new way if the landowner was willing to dedicate it in any event as part of an overall rationalisation scheme. In any event, section 26 of the Act related to the creation of new rights of way and not to routes that already existed as rights of way.

34. Mr. Chapman accepted that the precise routes of some of the new paths remained to be agreed after completion of extraction and reinstatement of the land. The Council was anxious to secure immediate commitment to the provision of these ways. Neither a creation order nor a diversion order, he submitted, could certainly achieve this objective. In any event, the Council was understandably anxious to proceed so far as possible by agreement rather than compulsion, not only because it preferred in principle to operate in this way, but also because, as Mr. Chapman frankly acknowledged, compulsion could lead to the need to pay compensation under section 28 of the Act.

35. In relation to the two public footpath creation agreements, the relevant terms of which are summarised in the extract from the judge's judgment at paragraph 5 above, Mr. Chapman accepted that a dedication expressed to take effect immediately before a proposed future extinguishment order could not take effect literally in accordance with its terms. He acknowledged the intellectual difficulty of a legal act conditioned upon an uncertain future event taking place before that event happens. He argued, therefore, that the clause must be construed to take effect immediately upon the making of the relevant extinguishment order – that is to say when the condition was fulfilled.

36. Mr. Chapman also acknowledged that the fact that part of the precise routes remained to be agreed raised the question as to the effect of the dedication. He submitted, however, that there was no reason why there should not be a dedication conditional upon agreement of the route, although he accepted that no public right of way could come into existence until the route was agreed. It was, therefore, he argued clearly an implied term of each of the public path creation agreements that the landowner could not unreasonably refuse to approve a route proposed by the Council. Otherwise, the provisions relating to the routes to be agreed would be simply an unenforceable agreement to agree. Whatever test of implication is adopted (business efficacy, necessity, the officious bystander) it was plain, he submitted, that the parties intended these provisions to have legal effect as part of the larger agreement.

37. Turning to the statutory provisions, Mr. Chapman submitted that section 25 (4) provided for considerable flexibility in the terms of a public path creations agreement. Section 25(5), he submitted, showed that it was expected by Parliament that dedication as a public highway would follow after the agreement rather than take effect immediately upon the making of the agreement. There was, he submitted no reason why a public path creation agreement could not provide for the creation of new paths (a) at a future date; (b) over a route to be agreed; or (c) subject to a condition. It was also possible to use a public path creation agreement in effect to confirm the status of a path which might may already be a public path by prescription

38. Mr. Chapman submitted that public policy should favour the creation of new paths by agreement rather than by exercise of compulsory powers. In support of this proposition, he cited DEFRA's Circular ***Rights of Way Improvement Plans: Statutory Guidance to Local Highway Authorities in England*** (November 2002) paragraph 2.4.8:

> Local highway authorities are encouraged to use voluntary means to secure improvements to their rights of way network wherever possible. Thus they would seek to negotiate the creation of routes…by agreement with landowners using their powers under section 25 of the Highways Act 1980. Local highway authorities should approach such negotiations constructively and be prepared to consider changes to the network that landowners might seek as corollaries to agreements, provided that they meet the criteria set out in sections 118 and 119 of the Highways Act 1980.

39. As to Section 26 of the Act, Mr. Chapman submitted that the terms of the section would allow a creation order to have a postponed effect or to take effect subject to fulfilment of a condition precedent, for example, the confirmation of a related extinguishment order. However, he acknowledged that a public path creation order could not cover a route to be agreed with the landowner, as this would leave the landowner in practical control of the decision whether to create a new path.

40. Mr. Chapman submitted that it was hard to see any good reason of policy to require a public path creation order in any case where a public path creation agreement could be entered into. The importation in section 26(1) of the requirements for "need" and "expediency" were simply safeguards for the landowner which were not required where a new path is created by agreement with the landowner. Whilst an agreement under section 25 was contractual and so might have to be enforced by legal proceedings against a recalcitrant landowner, so might a public path creation order. Moreover, the two were treated as equivalent for the purposes of section 27 (making up new paths) and section 29 (protection for agriculture and forestry).

41. Turning to section 118, Mr. Chapman described the exercise identified in section 118(1) as a two stage exercise. Firstly, the council had to consider whether the path was needed for public use. If the answer was "no", the second stage was for the council to consider whether it is expedient that the path should be stopped up. Mr. Chapman invited us to reject the "literalist" argument that it could not be said that a path "is" not needed for public use merely because it is to be replaced in the future, albeit that the date of replacement is to coincide with confirmation of the order. He submitted that if section of the Act 118 had been intended to cover only the present situation it would read "on the ground that the path is not (or will not, after confirmation), be needed for public use".

42. Mr. Chapman was constrained to accept that the new rights of way under Schedule 2 of the 2001 Agreement were not yet in existence at the time of the extinguishment order. This, however, he submitted was because; (a) their creation was conditioned upon confirmation of the extinguishment order; and (b) they did not come into existence until there has been both dedication and acceptance. However, the construction favoured by

the judge, he argued, took too narrow a view of the ordinary usages of the English language. It was, Mr. Chapman argued, common usage to employ the present tense to cover an event which is continuing from the present into the future. As a matter of ordinary usage, the council could properly conclude that a path was not needed for public use on the ground that it was to be replaced under a creation agreement. The phrase "is not needed" in section 118(1) thus covered the period of time from the making of the order to its confirmation.

43. That this was the right grammatical construction, Mr. Chapman argued, was confirmed by s. 118(5). By virtue of that sub-section a council could properly conclude that a path **is** not needed for public use on the ground that an alternative path is prospectively to be created by a public path creation order or public path diversion order. There was thus nothing in the wording of s. 118(1) which prevented a council from taking into account a public path creation agreement. The agreement was an existing fact which would inevitably give rise to a certain result upon confirmation of the extinguishment order

44. Mr. Chapman further pointed out that the grounds in section 118 (1) were the grounds on which the council could make the order and not the grounds on which the order could be confirmed. This, he submitted, was an application for judicial review of a decision under s. 118(2): it was not a decision on the merits under section 118(1).

45. Mr. Chapman went on to argue that the conditions contained in section 118(2) provided a much broader test than the subsection (1) test and thus clearly authorised the inspector to take account of a creation agreement which created prospective rights of way in deciding whether or not to confirm. The only fixed test was one of expediency: the other matters were only ones which had to be taken into account.

46. On the relationship between the tests in subsections (1) and (2), Mr. Chapman relied on ***R v Secretary of State for the Environment ex p. Stewart*** **[1980] JPL 175** and ***R v Secretary of State for the Environment ex p. Cheshire CC*** **[1991] JPL 537**. In the latter case, Auld J (as he then was) had taken the view that the test for the confirming body to apply was expediency rather than need. In the present case, the inspector appeared rightly to have taken the view that she was not required to consider the question of need.

47. Mr. Chapman invited us to reject the judge's construction of the phrase *"*apart from the order*"* in section 118(2). If the words meant "on the assumption that the order is not made", then Mr. Chapman accepted that the inspector would have been right to disregard the paths which were created by agreement conditional upon the confirmation of the section 118 order. He accepted that if there were no order, the condition would not be fulfilled and the new paths would not come into existence. However, he submitted that the words had to be construed in their context and given a purposive construction. What they were doing was to qualify the test of likely use by the public. The words were not directed to the question whether or not there was an alternative path. The purpose of the words was to direct the confirming body to have regard to the likely use of the path proposed to be extinguished, but to disregard the effect on that use of the fact that the path was to be extinguished. In context, therefore, the words

should be construed to mean "on the assumption that the public right of way over the path is not extinguished by the order". The judge had been wrong not so to construe them.

48. As to section 118(5), Mr. Chapman submitted that both the inspector and the judge misunderstood its purpose. An unconfirmed creation order was of no legal effect at all. Logically, therefore, it could not be taken into account in considering whether the path to be extinguished was needed for public use or whether that path, apart from the order was likely to be used by the public. It was therefore necessary to have a provision in the statute which authorised the Council or Secretary of State to have regard to it. By contrast, a public path creation agreement did have an existing legal effect (even if conditional and future) and so could be taken into account in applying the statutory tests. The purpose of section 118(5) was therefore to bring creation and diversion orders into consideration and not to exclude creation agreements from consideration in applying the tests under section 118. In short, Mr. Chapman submitted, there was nothing in section 118 which precluded the inspector as a matter of law from taking account of the public path creation agreement. That accorded with common sense. There could be no possible policy reason for giving different legal consequences in this context to a public path creation agreement and a public path creation order so as to force a local authority to make a creation order against a landowner in circumstances where the authority could otherwise enter into a creation agreement. The inspector had been wrong to reach the opposite conclusion, and the judge had been wrong to uphold her reasoning.

49. As to section 119, Mr. Chapman submitted that there was nothing in s. 118 or s. 119 which provided that s. 119 must be used in preference to s. 118 (or indeed *vice versa*) in circumstances where either might apply. In any event, a diversion order could not be used in a case where the proposed alternative route was possibly already a public path. The judge's view that there was a bright line distinction between sections 118 and 119 was not a practical one: it failed to address the real difficulties that arose, as in the present case, where (a) the scheme was one of general rationalisation which could not be placed within the straitjacket of a diversion order and (b) the new path may already be a prescriptive public path. Sections 118 and 119 were simply different statutory routes under which a path may be extinguished. Provided that the statutory grounds for extinguishment were duly met, Mr. Chapman submitted, a council may proceed down either route in cases where the sections overlap.

50. As to the protection of the public, the judge had been wrongly influenced by the argument that the course adopted by the Council deprived the public of a measure of protection. He had overlooked the following matters: (1) the fact that there was no requirement for general public consultation before either a creation agreement or a creation order; (2) that the creation agreement in relation to the Schedule 2 paths was conditioned upon confirmation of an extinguishment order; (3) that the Schedule 3 paths were wholly new paths and a bonus to the public and; (4) both extinguishment and diversion orders required confirmation by the Secretary of State, consultation and general publicity inviting objections, so that the creation agreement in relation to the Schedule 2 paths could not take effect until the Secretary of State had approved the overall rationalisation scheme after taking account of all objections.

51. The inspector had, accordingly, Mr. Chapman submitted, misdirected herself in a number of material respects. She had relied on the specific mention of creation orders and the absence of any mention of creation agreements in section 118(5). However, she had been wrong to read section 118(5) as precluding the consideration of a creation agreement in applying the expediency test under section 118(2). The lack of any mention of creation agreements in para. 36 of Annex C of the Department of the Environment. Circular 2/93, on which she had relied, merely reflected section 118(5) and could not be used to construe section 118.

52. Mr. Chapman properly acknowledged that the inspector had been right in a number of respects. He accepted that she had been right to stress the importance of the principle that the public should not disadvantaged by the extinguishment of public rights of way before replacement rights of way were available. She had also been right both to point out and to take into account that, of the four Schedule 3 paths which were expressed to be subject to immediate dedication, two could not be provided until the routes were agreed and two were obstructed. She was further plainly correct in her view that the effect of clause 2 of the public path creation agreement was that each stretch of new path mentioned in column C was only dedicated as each equivalent stretch of old path listed opposite it in column B (if any) was extinguished.

53. Mr Chapman acknowledged that the inspector was further right in stating that, logically, a new right of way cannot be dedicated with effect immediately before future confirmation of an extinguishment order. However, she had been wrong not to construe the right of way as taking effect upon confirmation. He also accepted that she could legitimately take the view that in considering expediency she would place more weight upon a creation order than upon a creation agreement under which the paths along routes which still had to be agreed were dependant upon the parties for full implementation. None of that meant, however, that she was entitled to disregard the agreement.

54. Furthermore, the inspector had been wrong to say that a creation agreement was less satisfactory than a creation order because of the uncertainty over the period of time before the public can use the route. That, Mr. Chapman argued, was not a good point because the statutory obligations in relation to the making up of new paths were the same whether the path was created by agreement or order: - see section 27 of the Act. She herself acknowledged that this presented little problem in relation to most of the routes because they were already passable.

55. Mr Chapman accepted that in deciding whether it was expedient to confirm Order D, the inspector had been entitled to take into account the fact that one path was not yet passable. However, this point did not turn on there being a creation agreement rather than creation order. The same point would have arisen if there had been a creation order in relation that particular route.

56. Mr. Chapman submitted that the inspector's fatal mistake was to adopt the position that creation agreements had to be wholly disregarded in applying the test of expediency. It was this legal error which vitiated her analysis of expediency. It led her to consider the effect of the public path extinguishment orders on the footing that no alternative or

additional routes were to be provided. Unsurprisingly, in these circumstances, she had concluded that this would leave a wholly disjointed network of public rights of way. These considerations had led directly to her conclusion that that it would not be expedient to confirm Orders A, B & D. If she had applied the correct test and taken account of the public path creation agreements, she would have had to weigh them in the balance in applying the test of expediency. She might have decided that there were weaknesses in the agreements which rendered confirmation of the extinguishment orders inexpedient. She might have decided that it was expedient to confirm the Orders despite the weaknesses that she identified in the creation agreements. However, one simply cannot tell because she never addressed that issue.

57. Turning to the judge's judgment, Mr. Chapman submitted that the judge had given too restrictive an interpretation to section 118 of the Act in holding that the Secretary of State had to disregard the existing creation agreement when considering whether to confirm the extinguishment order, even though the existing creation agreement would lead to the creation of new public paths immediately upon confirmation of the extinguishment order. The judge had thus failed to give a purposive construction to the legislation which would give the highway authority sufficient flexibility to meet the practical issues thrown up by the particular facts of the case.

58. Mr. Chapman submitted that it was worth standing back to take a broad overview of the issues in this case. The scheme proposed by the Council was subject to extensive and prolonged consultation and consideration. It produced a rationalisation of the rights of way network over Tyttenhangar Estate which could and should be considered on its merits by the Secretary of State. There was in fact no real doubt that existing rights of way would not be extinguished before appropriate new rights of way were lawfully in place. The public were fully protected by the statutory requirements of Section 118 of the Act. If the Council had to start all over again it would cost a great deal of money to the taxpayer and a great deal of delay in rationalising the network of paths on the Tyttenhanger Estate. The Council would not be able to use diversion orders or creation orders which required the provision of new paths without first resolving the issue whether the existing *de facto* routes were or were not public rights of way. Mr. Chapman submitted, accordingly, that we should allow the appeal, set aside the judge's order, quash the decisions of the inspector in relation to Orders A, B & D and remit those Orders to the inspector for further consideration on the merits.

The case for the Secretary of State

59. Unsurprisingly, Mr. Tim Morshead, for the Secretary of State, supported the reasoning of the inspector and the judge. In a helpful speaking note, which both summarised and supplemented the arguments contained in his much fuller skeleton argument, he submitted that the language of the Act was straightforward and clear, and that the judge had been right to give it its natural meaning. He argued that the statutory scheme contained detailed provisions which were designed to accommodate a scheme such as that proposed by the Council in the instant case, and that there was, accordingly, no need to strain the natural meaning of the words in section 118 in an attempt to produce a different result. He further argued strongly that the public interest in rights of way was best served by respecting the detailed provisions made by the 1980 Act. He pointed out that the Council had not challenged the fact that it could have gone down the order

route contained in the Act. Nor had it addressed the point that if its approach was correct, then no authority acting with a co-operative landowner would ever trouble itself with satisfying the more stringent requirements of a diversion order, with or without concurrent creation orders, if section 118 coupled with a creation agreement could be used instead.

60. Mr. Morshead submitted that the facts of the present case illustrated the dangers to which the public became exposed if the Council's approach to section 118 was correct. Two of the proposed new paths followed routes which were yet to be determined. The Council described some of the new routes as "bonuses" to the public; but this could not disguise the fact that they were relied on to help show the expediency of the extinguishment of existing paths. Even assuming that a term should be implied to prevent the landowner from resisting a "reasonable" choice of route made by the Council, this by-passed Parliament's expectation that the choice of additional routes would be controlled by the Secretary of State in the public interest.

61. As I have set out the inspector's reasons and the thinking of the judge in some detail, I mean no disrespect to Mr. Morshead's able submissions in limiting my recital of his arguments to the brief summary set out above.

Discussion

62. I readily acknowledge that I come to this jurisdiction as an outsider, and someone whose experience of highways law is limited. It is for that reason that I have set out the reasoning of the inspector and the judge at such length, and have also given a great deal of space to the arguments advance on behalf of the Council.

63. Skilfully as the case was presented by Mr. Chapman, however, I am in no doubt that I prefer the reasoning contained in the judge's judgment and in the decision letter. In my judgment the inspector did not commit any error of law, and the judge was right to dismiss the application for judicial review for the reasons which he gave. I add only a short passage of explanation as to why I have reached the same conclusion as the judge.

64. Although, as I have already acknowledged, I regard myself an outsider so far as this area of the law is concerned, it seems to me that the outcome of this appeal depends upon a relatively straightforward exercise in statutory construction. In particular, as the judge observed, what is the correct interpretation of section 118?

65. I preface my approach to the argument, however, by making the obvious point that local authorities are the creatures of statute, and have only the powers given to them by Parliament. It is equally clear to me that in Parts III and VIII of the Act, Parliament has laid down a carefully structured scheme for the creation, extinguishment and diversion of footpaths. Self-evidently, therefore, the scheme proposed by the Council in the instant case must fall within the structure laid down by Parliament. I approach section 118 in this light.

66. The first question is the meaning of the phrase "is not needed for public use" in section 118(1). I can see absolutely no reason not to give these words their natural meaning. The moment in time identified in the section is the moment the Council makes its order and submits it to the Secretary of State. If, at that moment, the path is in use, and will remain in use unless and until replaced by an alternative path at some indeterminate time in the future, it follows that the path is needed for public use.

67. In my judgment, this interpretation fits exactly with section 118(2). The Secretary of State "shall not confirm a public path extinguishment order" unless satisfied "that it is expedient to do so having regard to the extent (if any) to which it appears to him … ..that the path or way would, apart from the order, be likely to be used by the public". Once again, I agree with the judge that the phrase "apart from the order" should be given the natural meaning of the words it contains, namely if the public path extinguishment order was not made. If the order was not made, and if no alternative is immediately available, the path will continue to be used, and the Secretary of State will be entitled not to confirm the order.

68. I also agree with the judge's conclusion that if the Council is right in its submission that a public path creation agreement can be taken into account when considering public path extinguishment and diversion orders, then section 118(5) is otiose. Like the judge, I take the view that section 118(5) is there for a purpose and that, moreover, it means what it says. I also agree with the inspector that, if Parliament had intended that public path creation agreements should be taken into account when considering public path extinguishment and diversion orders, it would have said so. It would have been very easy to have said so. The exclusion of public path creation agreements from section 118(5) is, accordingly, in my judgment, deliberate and fits in with the overall statutory scheme. In turn, section 118(5) fits into the scheme for the policy reasons explained by the judge.

69. In my judgment, section 25 is limited to the creation of new paths which do not involve the extinguishment or diversion of other paths. As Mr. Chapman put it, albeit in a slightly different context, where the public is, by agreement between a landowner and a local authority, being provided with a wholly new path, it is getting what can, I think, properly be described as a "bonus". The interest of the public in the physical state of the path in question is protected by the duties owed to the public by the local authority and contained, for example, in section 27 of the Act. In such a case there is no need for a public inquiry or for the public to be consulted about the route of the path.

70. By stark contrast, where the creation of a new path or paths involves the extinguishment of existing paths, it seems to me as a layman that the interest of the public is very much engaged. That which existed previously is being taken way. That process, as it seems to me, should not be the subject of a private agreement between a landowner and a local authority, however well motivated both may be.

71. Speaking for myself, I have no difficulty in accepting Mr. Chapman's argument that in the instant case the Council is acting in good faith, and has genuinely taken the view that the scheme of the rationalisation of the footpaths which it has proposed is best achieved by agreement. The Council has, however, in my judgment, gone down the

wrong route, and has attempted to do something which the Act simply does not permit. Mr. Chapman's attempts to mould the statutory framework to fit the Council's scheme requires the words of the Statute to be stretched and distorted in a way which, in my judgment, is inconsistent with their plain meaning, and the public policy considerations which underlie them. Equally I gain no assistance from the cases which he cites, which seem to me to address a different issue.

72. I acknowledge the force of the point that it may seem illogical in these circumstances to shut one's eye to the fact of an agreement which is part and parcel of an overall scheme. But in my judgment, the policy arguments advanced by the Secretary of State in this context are extremely powerful. Firstly, as I have already made clear, the interest of the public is plainly engaged, and must be accommodated under the statute. Secondly, the Act does not necessarily prevent what the Council is attempting to achieve: it simply provides a different mechanism for achieving it, with specific criteria which must be met. Thirdly, it is in my judgment wholly contrary to the statutory framework and the public interest in the context of a scheme such as the present for extinguishment orders to be made without alternative routes, where needed, being in place. Such alternatives should not, in my view, be dependent on uncertain future events deriving from a private agreement between landowner and local authority.

73. I also take into account here the timing element. Agreement, we are told, was reached in 1995. The agreements are dated 2001 and 2003 respectively. The Council asserts that the rationalisation scheme is now complete. Mr. Chapman was not, however, able to tell us when it would be in operation. The time scale is not encouraging, and gives colour to the inspector's report of the scepticism expressed by some of the objectors about the commitment of the landowners to the overall scheme.

74. This is, of course, an application for judicial review and not a decision on the merits of the Council's scheme. I have to say, however, that even if I did not take the view which I do of section 118, I would, on the facts of this case, be of the opinion that the inspector was fully entitled to disregard the agreements when issuing her decision. My reasons for this view are similar to those which lead me to the conclusion that the inspector was right to disregard the public path creation agreement as a matter of law, namely that at crucial points in the scheme, nothing was actually in place to replace the paths which were being extinguished. In such circumstances, as the inspector herself pointed out, it would not in any event be a proper exercise of her powers to approve the order.

75. I therefore reach the same conclusion as the judge, and for essentially the same reasons. Indeed, I am content to adopt his judgment as my own. It follows that I would dismiss the appeal.

Footnote

76. I have, of course, had the opportunity to read the judgments prepared by Ward and Richards LJJ in this case. As we are agreed that this appeal falls to be dismissed, I do not think it would be helpful if I were to add to the length of this already over-long

judgment by commenting further on the points they make.

Lord Justice Richards:

77. I agree that the appeal should be dismissed and, subject to one qualification, I too would adopt the reasons given by Sullivan J for rejecting the Council's claim.

78. The qualification concerns the extent to which it is permissible to look at future events when deciding whether a footpath "is not needed for public use" under section 118(1) and whether it is expedient to confirm an order under section 118(2). I accept that the essential focus under both subsections is on the position as it exists on the ground when the order is made and when it is confirmed. But in order to answer the question whether a footpath is or is not needed at that time, the decision-maker has to look at likely future use. That is clear both from the terms of section 118(2), whereby regard must be had "to the extent (if any) to which it appears … that the path or way would, apart from the order, be likely to be used by the public", and from section 118(5), whereby regard may be had, in the circumstances specified, to the extent to which a relevant order "would provide an alternative path or way". Likely future use may be affected by future events, and I am not satisfied that the decision-maker is required to close his eyes to all future events save those brought about by orders made in the circumstances specified in section 118(5). Whether a future event would in practice have any impact on the assessment of likely future use is of course a different issue; and the more uncertain the event, the less weight one would expect to be given to it.

79. Consider, for example, a case in which a council meets to make a decision under section 118(1) in respect of an existing footpath in circumstances where it is certain that a new footpath will come into existence within a few weeks under a public path creation order which has already been confirmed but has not yet come into operation, and it is clear that the new footpath will be fit for public use (without further work under section 27) and will in practice provide an overwhelmingly attractive alternative to the existing footpath. In my view it would be very surprising if the council were required to close its eyes to the new footpath when considering the extent to which the existing footpath was likely to be used by the public.

80. It seems to me that the same principle should apply if the new footpath is due to come into existence under an existing and unconditional public path creation agreement rather than a public path creation order. Implementation of an agreement may be less certain than implementation of an order, but that goes to weight rather than to whether regard can be had to it at all.

81. None of that, however, assists the Council in the present case. We are concerned here with public path creation agreements that are conditional on the making of an order under section 118, and I am in complete agreement with the judge below and with Wall LJ that this gives rise to insuperable difficulties. First there is the somewhat technical, but very important, point that the words "apart from the order" in section 118(2) require the decision-maker to assume that the order has not been made. On that assumption, the agreements do not come into effect and the new footpaths provided for under the

agreements will not be created. Secondly, the way in which the Council has sought to combine section 25 and section 118 for the purpose of re-routeing existing footpaths runs counter to the statutory framework and avoids the specific criteria laid down in section 119 for the protection of the public interest. On those matters I have nothing to add to what Wall LJ has already said.

Lord Justice Ward:

82. The issue here is whether the Inspector erred in law in directing herself that:

> "… the legislation does not envisage paths proposed for creation by agreement being taken into account when determining extinguishment orders in the same way as creation orders. If it had been intended, it would have clearly said so."

The answer depends upon the proper construction of s. 118.

83. S. 118(2) is the material provision. The language is ordinary enough but two words and one phrase are said to create problems. The first is the word "is" in the clause "satisfied that it *is* expedient [to confirm a public extinguishment order]". The second is "would" in the clause "it is appears to him … that the path … *would* … be likely to be used by the public". The third is the phrase "apart from the order" in the clause "the extent to which the path would, *apart from the order*, be likely to be used by the public".

84. In the first, "is" is in the present tense. So the Secretary of State has to ask himself the fundamental question posed by this subsection: "Is it expedient at this moment I have to take the decision?" He does not ask whether it was expedient last week or whether it will be expedient next week. He looks at the matter as it comes before him there and then. .

85. The test for judging the expediency of extinguishment is the extent (if any) to which it appears to the Secretary of State that the path would (and for the moment I omit the words "apart from the order") be likely to be used by the public. "Would" is a word of the future tense. So the Secretary of State does not ask himself what use are the public making of this path at that very moment but rather what use will the public make of it in the future? He is quite clearly assessing future use.

86. How does he do that? There is no further guidance in the subsection as to what he might or might not take into account. The language is wide and general. Consequently he goes about his task by taking all relevant facts and matters into account – anything and everything. What they are will vary from case to case. If there is proper evidence before him of a future diversion of the path or an addition to the rights of way network, then that must be taken into account. It is simply not possible to determine the extent of the use of the existing path A-B-D without considering whether the public will not be more likely to be diverted along and therefore make greater use of a new path A-C-D, or, indeed, to use the wholly new path X-Y thereby rendering use of A-B-D redundant.

Why, I foolishly ask, should a public path creation agreement be excluded from consideration if a newly created path will be available for the public to use? Nothing in the language of s. 118(2) excludes it. Assume that the Secretary of State is taking his decision on 1st February and evidence is placed before him of a public path creation agreement unconditionally establishing that a new path will be created a week later on 8th February. He knows that under s. 25(5) of the Act that the Council has the duty to take all necessary steps for securing that the footpath is dedicated in accordance with the creation agreement. It seems to me to be utterly absurd to suggest that kind of agreement has to be excluded yet that is the effect of the Inspector's decision. Her conclusion is much too wide to be supported.

87. Nothing in the language of s. 118(2) makes an agreement inadmissible but s. 118(5) is said to make all the difference. Ss. (5) is not of universal application. It only applies "where in accordance with regulations made under paragraph 3 of the said schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order …". The relevant regulation is regulation 4(2) of the Public Path Orders Regulation 1993 which provides:

> "Any proceedings preliminary to the confirmation of a public path extinguishment order … may be taken concurrently with any proceedings preliminary to the confirmation of a public path creation order …"

88. What purpose is this serving? If the extinguishment order is being considered separately from any confirmation of a creation order, then what facts would be before the Secretary of State to enable him to consider future use of the path that the Council have ordered to be extinguished? The Council's order may be put before him, but what is its effect? It seems to me it has none. It does not come into operation unless and until it has been confirmed. How can the Secretary of State decide in the extinguishment proceedings whether he will make an order in other proceedings which are not before him? He is left with no option but to disregard the inchoate creation order. Ss. (5) therefore serves a wholly pragmatic purpose. It is not otiose. It makes obvious good sense to consolidate the confirmation of the extinguishment order and the confirmation of the creation order and to deal with matters concurrently so that the impact of the one upon the other can be judged, the same person then and there taking both decisions.

89. I very much regret that I simply do not understand why such a simple and sensible provision drives the conclusion that no creation agreement of any kind can ever be taken into account in deciding whether to stop up a particular path. The creation agreement, unlike the creation order, does have an independent existence and is, therefore, a fact in existence at the time the stopping up has to be judged. For my part I simply cannot see how the wide words of s. 118(2) can be limited by as obscure an implication as is said to arise from s. 118(5) as the respondent contends and as Sullivan J. found. Being a child in these matters, the logic is beyond me. Why does it follow that because provision has to be made in certain circumstances for creation orders to be taken into consideration when, without special provision, they could not be taken into consideration, therefore creation agreements which can be taken into account by virtue of the wide words of s.118(2) must suddenly now be excluded? If the intention had

been to exclude creation agreements from consideration of what is expedient and what use will be made of the path proposed to be extinguished, then the natural and proper place to have said so would be in s. 118(2), e.g. "apart from the order and apart from the use of any path dedicated or to be dedicated under a public path creation agreement, be likely to be used ..."

90. The Inspector's view is that if the legislation had intended agreements to be taken into account, it would have clearly said so. My judgment to the contrary is that agreements are included by the breadth of s.118(2) and it would be silly to have a checklist in s.118(2) of what can or what cannot be taken into account for the purposes of s.118((2). I retort that if agreements otherwise admissible are to be excluded, then one would expect the legislation clearly to say so, and not to exclude them from s.118(2) simply because they are not included in s. 118(5).

91. Furthermore I cannot see how this upsets the statutory scheme. I can understand why the public should have a say in the extinguishment of a public path but I cannot see what worthwhile objection the public could have to the local authority and a landowner agreeing to create a new path. If the legislature intended the public to be given the chance to object to that, then surely all new creations should be by order and that would make s. 25 otiose. S. 25 has its place in the statutory scheme and agreements made pursuant to it cannot be airbrushed out of the overall picture for the Secretary of State's consideration. I prefer to construe s. 118 at its face value and give effect to the ordinary natural meaning of its language.

92. That leaves the third point of construction arising out of s. 118(2) – the words "apart from this order". They are ordinary enough words. "Apart from this or that" means that one ignores this or that and removes it from one's consideration. So the Secretary of State asks himself what use are the public likely to make of this path ignoring completely the fact that the Council have ordered that it should be closed.

93. If, however, one ignores the order, then one must also ignore the effect of the order and the question then arises what is the impact in this case where pursuant to clause 2.1 of the agreement the owners

> " dedicate each of the Schedule 2 paths for public use such dedications to become effective immediately before the extinguishment by means of an extinguishment order or orders of the related length or length of the path set out in column B of Schedule 2."

94. One knows what the purpose the agreement was intended to serve. The owners were agreeable to the dedication of the new paths as part and parcel of an overall rationalisation of the paths in the area which envisaged that other paths would be extinguished. Unfortunately the agreement just does not work. Apart from the order, i.e. ignoring the effect an order would have, no new paths are created because no extinguishment will, apart from the order, occur.

95. Thus I conclude that whilst the Inspector was wrong as a matter of law to exclude, as I understand she has excluded, *any* creation agreement from ever being taken into a consideration when the Secretary of State has to judge the extent to which it appears to him that a path is likely to be used, she was right to exclude *this* agreement because, apart from the order, no new paths are created and the public are therefore bound to continue to use the paths which the Council had ordered to be extinguished. For that reason I too would dismiss the appeal.