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.