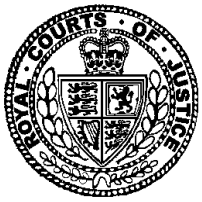

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Neutral Citation Number: [2020] EWHC 1085 (Admin)

Case No: CO/59/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE OPEN SPACES SOCIETY	**Claimant**
- and –	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Defendant**

- -
- -

Mr George Laurence QC and Mr Simon Adamyk (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: **7 April 2020**

- -

Approved Judgment

Mrs Justice Lieven :

1. This claim concerns a decision dated 31 October 2019 of an Inspector (Ms K.R. Saward) appointed by the Secretary of State for Environment, Food and Rural Affairs (order ref: ROW/3217703). The Inspector was appointed to decide whether or not to confirm a diversion order and definitive map modification order which had been made by Oxfordshire County Council (the "Council") as the relevant Order-Making Authority.

2. The relevant order (the "Order") is the Oxfordshire County Council Rollright Footpath No. 7 (Part) Public Path Diversion and Definitive Map and Statement Modification Order 2015 which was made by the Council on 28 May 2015. It was made by the Council on 28 May 2015 under section 119 of the Highways Act 1980 ("HA 1980") and section 53A(2) of the Wildlife and Countryside Act 1981. The effect of the Order as confirmed is to modify the definitive map and statement for Oxfordshire by diverting 228m of the public footpath known as Rollright Footpath No. 7 ("FP7") which lies to the east of Manor Farm, Little Rollright. The original line of FP7 is shown as running between points A-B-C-D on the order map (approx. 228m) and the new line as confirmed is shown as running between points A-E-F-G-D on the order map (approx. 240m).

3. By a decision letter dated 31 October 2019 (the "DL"), the Inspector, acting on behalf of the Secretary of State, confirmed the Order (with certain minor modifications which are irrelevant for present purposes). Notice of confirmation of the Order was published by the Council on 28 November 2019.

4. The Open Spaces Society, represented by Mr Laurence QC and Mr Adamyk, challenge the decision on the grounds that the Inspector misinterpreted s.119 of the HA 1980. The Secretary of State was represented by Mr Westaway.

5. The Claimant's case turns on the correct construction of s.119 of the HA 1980. I will set out the relevant parts of that section at the outset as it is central to all that follows:

> *(1) Where it appears to a council as respects a footpath , bridleway or restricted byway in their area (other than one that is a trunk road or a special road) 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, bridleway or restricted byway 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 council 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.

.....

(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 [Test 1] that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further [Test 2] that the path or way will not be substantially less convenient to the public in consequence of the diversion and [Test 3] that it is expedient to confirm the order having regard to the effect 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 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.

(6A)The considerations to which—

(a)the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order, and

(b)a council are to have regard in determining whether or not to confirm such an order as an unopposed order,

include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.

6. The Claimant's argument, in brief summary, is that the factors in s.119(6) (a), (b) and (c) are the only matters which can be taken into account when determining

expediency under that sub-section, referred to below as "Test 3". The Inspector therefore erred in law by taking into account the benefit to the landowner of the diversion when assessing expediency in s.119(6) as she should have considered only the matters in (a) to (c) at that stage of her analysis.

The facts

7. Rollright Footpath 7 (FP7) runs through the garden of Manor Farm, Little Rollright passing close to the main house. The landowners of Manor Farm sought to divert the footpath away from the house and its garden in order better to preserve both privacy and security. The landowners of Manor Farm have a high media profile and are named in some of the documentation. There is no relevance in my naming them here.

8. The diversion was opposed by the Open Spaces Society, which were represented at the Hearing before the Inspector. The detail of the facts is set out in the DL and referred to below.

The decision letter

9. The Inspector in the decision letter (DL) went through the requirements of s.119 in a structured manner. She recorded that the only outstanding objection to the order was from the Open Spaces Society, which made oral and written submissions at the hearing.

10. She set out the background of the matter, including that the property had ceased to be a working farm in 2007. The existing path ran inside the garden wall and a greenhouse and various structures had been built over the definitive line of the footpath.

11. At DL15-22 she addressed test 1 under s.119 HA 1980, namely whether it was expedient in the interests of the owners and occupiers of the land that the footpath should be diverted. She recorded that the present owners had bought the property in 2015 and they had particular concerns over their privacy given their high media profile. She found that there was a considerable impact on their privacy, both in terms of people on FP7 being able to look into certain windows of the property but also looking into the garden, including the terrace and croquet lawn.

12. She recorded the argument of the Open Spaces Society that the owners had bought the property in full knowledge of the existence of the footpath. She referred to the case of Ramblers Association v Secretary of State for Environment, Food and Rural Affairs, Weston and others [2012] EWHC 3333 (Admin), [2013] JPL 552 ("Weston") which made clear that owners could still make applications in those circumstances. The issue was simply whether it was expedient in the owners' interests to divert the path. She found at DL22 that it was in the interests of the owners for the path to be diverted.

13. At DL23-27 she addressed Test 2, namely whether the new footpath would be substantially less convenient to the public. She found at DL27 that there would be a negligible impact on convenience from the diversion and that there was consensus at the hearing that the new path would not be "substantially less convenient to the public" than the existing path. Therefore Test 2 was met.

14. She then addressed factors (a), (b) and (c) in s.119(6). At DL28-41 she considered the effect of the diversion on public enjoyment of the path as a whole. She referred to the fact that the owners had stated that if the diversion was not allowed they would build a second stone wall to enclose the path on both sides for 100m. If this happened it would create an oppressive tunnel-like effect for walkers, however she said she would attach little weight to this consideration, as it might not happen.

15. She considered the different views between the existing and diverted paths, the surfaces and the impact on some people of walking through the private area of the garden. She concluded that the diversion would be less enjoyable than the existing route for most people (DL40), but that she needed to consider the effect of enjoyment in the context of the path as a whole. In this context she noted that the diversion only affected some 7% of FP7 as a whole. She found at DL41 that the loss of enjoyment was only relatively minor when taking into account enjoyment of the path as a whole.

16. At DL42 she said that no issues were raised to suggest that the diversion would have any adverse effect on other land served by the existing path or the land over which the new path would be created.

17. At DL43 she said that there was no suggestion of any impact on the Rights of Way Improvement Plan, which is a mandatory factor to take into account under s.119(6A).

18. At DL44 she addressed the question of whether it was expedient to confirm the Order. She considered, following R (Young) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 844 (Admin) ("Young"), that this was an overarching balancing exercise. At DL44-47 she said:

> *44. I have concluded above that the Order is expedient in the interests of the landowners and occupiers on the grounds of privacy. The proposed route will not be substantially less convenient. There would be a diminution in public enjoyment, but this would not be significant in terms of the effect on the use of the path as a whole.*
>
> *45. The judgment in R (oao) Young v SSEFRA is authority that in deciding whether to confirm an order, the criteria in s119(6) should be considered as three separate tests, two of which may be the subject of a balancing exercise. Where, as in this case, the proposed diversion is considered expedient in terms of test (i), is not substantially less convenient in terms of (ii), but would not be as enjoyable to the public, the Inspector must balance the interests raised in the two expediency tests i.e. the interests of the applicant (i), and the criteria set out in s119(6)(a)(b) and (c) under (iii) to determine whether it would be expedient to confirm the order.*
>
> *46. The OSS invites me to take a contrary approach to the followed in Young. It submits that on a proper reading of section 119(6) if the diversion fails any one of tests comprised in section 119 then the diversion must fail. According to the OSS no balancing exercise should be undertaken.*

> *47. However, Young is settled law and I see no reason to depart from it. In this case, there is a relatively minor loss of public enjoyment of the path as a whole which must be weighed against the interests of the owners/occupiers. On balance, I consider that the benefits to the owners and occupiers outweigh the loss of public enjoyment. As such it would be expedient to confirm the Order.*

19. She therefore concluded that the Order should be confirmed.

The case law on s.119 HA 1980

20. The Inspector referred to Young. The principal issue in that case was that the inspector, when considering s.119 HA 1980, had elided Test 2, i.e. whether the proposed path was substantially less convenient to the public, with the expediency question in Test 3. This conclusion can be seen in [27-29] of the judgment and then at [32]: "the inspector did indeed conflate the concept of convenience with the concept of expediency as contained within the subsection."

21. The Inspector in the present case took Young to be authority for the proposition that Test 3 in s.119(6) involved an unfettered balance of all relevant factors. Mr Westaway argued that she was correct in this regard, whereas Mr Laurence argued that that was not the ratio of Young and in fact was no part of Turner J's findings in Young.

22. The issue in Young was fairly clear cut, and I agree with Mr Laurence that the Judge was not considering an argument about the breadth of considerations in Test 3. The argument before him was narrower, namely whether convenience in Test 2 was separate from expediency in Test 3, see [30]. I therefore accept that the ratio of Young does not expressly support the Inspector's approach in the current case of Test 3 involving an unfettered balance. To the degree Turner J considered the matter he does appear to have considered that Test 3 did involve a wider balance, however that was not part of the ratio of the judgment.

23. The more directly relevant case is Weston. In that case the issue before Ouseley J is neatly summarised at [3-5]:

> *3. The Inspector reached his decision following an inquiry at which a number of individual objectors and, in particular, the Bodicote Parish Council (though at one point a supporter) had expressed their opposition to the order. The Inspector said in his conclusions, in relation to the order being confirmed, this:*
>
> *"Confirmation of the Order would lead to a significant decrease in public enjoyment of the path between Bodicote and Bloxham, although not greatly so (paragraph 59). It would lead to a very significant increase in the privacy and a significant increase to the security of the applicants. It seems to me that I should take into account that the effect on public enjoyment might be lasting whereas the applicants will benefit only for as long as they occupy the Mill although, as I noted above, future owners would probably benefit too. I should also take into account, I consider, that the enjoyment of a greater number of people would be affected while only those resident at the Mill would*

> *immediately benefit from confirmation of the Order. On the other hand people's enjoyment of the path would be affected principally only when they were walking the diverted path, while the benefit to the applicants would be felt continually. It is a difficult balance to make, but overall I conclude that the interests of the applicants prevail, and that it is expedient to confirm the Order."*
>
> *4. In paragraph 70, under the heading "Other matters", the Inspector said:*
>
> *"I mention here two arguments which were each raised in a number of objections. The first is that because the applicants knew of the existence of the footpath when they bought the Mill it is not legitimate for them to expect that it should be diverted. The second argument is that if this diversion is allowed it might set a precedent for the diversion of other paths which pass close to nearby mills. Understandable though these arguments might be, they are not relevant to the tests for confirmation set out in s119 of the 1980 Act."*
>
> *5. It is conceded by the Secretary of State and by the two individual defendants and asserted by the claimant that the Inspector erred in law in treating those two matters as irrelevant. The Secretary of State was indifferent initially as to whether the decision should be quashed, but accepted in the end that he could not say that without those errors the Inspector's decision would inevitably have been the same. The Westons contend that the decision would plainly and inevitably have been the same.*

24. Therefore, the legal issue for the Judge was whether the accepted error would have made any difference to the ultimate outcome, and therefore whether he should quash the decision. At [7] the Judge records that the Ramblers' Association, represented by Mr Laurence, had raised a wider point about the interpretation of s.119. Mr Laurence was arguing that although Test 3, the second expediency question, could raise the same issues as at the earlier stage, the background to those issues and the weight that could be attached to them could differ, see [21]. Ouseley J rejected this argument as being untenable and unnecessarily complicated, see [23].

25. The Judge then said at [28-31]:

> *28. Mr Laurence's submissions accepted, at least at some stage as I understood them, that the expediency issue in section 119(6) was not confined to the specific factors in sub-paragraphs (a) to (c), nor to the effect of compensation on the land onto which the path might be diverted. It could encompass the factors said to be unlawfully omitted in paragraph 70, and indeed the fact of historical integrity. In my judgment, that is the right approach to section 119(6) and expediency. It covers all considerations that are material. The fact that there is a focus given by the statute to specifying factors does not narrow down the scope of expediency in its application at that stage. That is by clear contrast with the scope of expediency in section 119(1) which is directed to what is expedient for the interests of the land owner.*

> *29. So far as the discretion which Mr Laurence contends arises is concerned, in my judgment it is clear that there is no further discretion. The Secretary of State has different powers where he, as Mr Buley points out, correctly, in his skeleton argument, is the recipient of a report from an Inspector. As he is the decision-maker, he may disagree with the conclusions of the Inspector, and that is why the Secretary of State "may" confirm or not confirm the order. That is because he is entitled to come to a different conclusion on the outcome of the statutory questions from that to which the Inspector has come.*
>
> *30. Where, however, the Inspector is the decision-maker, there is nothing to suggest that there is a residual discretion to come to a view other than that to which the answer to the questions of section 119(6) would otherwise point. I cannot conceive of circumstances in which, having properly answered the section 119(6) questions and concluded that it was expedient in relation to both questions that the diversion order be made, an Inspector (or Secretary of State) rationally could say that nonetheless the order should not be confirmed. It is difficult to see what factors could animate such a decision which were not relevant to the expediency issues under section 119(6). The fact that such a discretion could only lead, if exercised adversely to the decision which would otherwise be arrived at, to an irrational basis, strongly supports my view that the discretion does not exist at all. A discretion only to act unlawfully is a discretion scarcely worth having.*
>
> *31. The Inspector, therefore, made no error in the structure of his approach. But even if his structure had been wrong, I cannot see that such an error in structure could conceivably have affected the outcome of his decision-making. I found it difficult to follow how considering the same factor at different stages with a different background could lead to a different conclusion unless it was the result of utter confusion caused by the statutory structure for which Mr Laurence contends.*

The submissions

26. The parties agreed that s.119(6) involved three separate tests, as described in the case law set out above. The first test was whether it was in the interests of the landowner for the path to be diverted. This was described by Mr M Supperstone QC (sitting as a Deputy High Court Judge) in R (Hargrave) v Stroud District Council [2001] EWHC Admin 1128, [2002] JPL 1081 at [34(i)] as being a low test. The second test is whether the proposed diversion is "substantially less convenient" to the public. Both of these tests could be described as gateway tests. Unless they are passed the decision-maker does not get to the third test, namely whether it is expedient to confirm the diversion.

27. Mr Laurence submitted that the Inspector erred in law in her application of the third test because she carried out a full balancing exercise taking into account the benefits to the landowner of the proposed diversion, as well as other material considerations. It was Mr Laurence's case that for the third test the benefits to the landowner and the convenience of the diverted path were irrelevant, the only factors that could be taken into account at that stage were those set out in s.119(6)(a), (b) and (c).

28. Mr Laurence based his submissions both on what he said was the purpose of s.119 and its structure. He argued that the purpose was to provide for a low gateway test to allow the landowner's application to be proceeded with so long as he could show that it was in his interests for the path to be diverted and the diversion was not substantially less convenient to the public. However, he said that when it came to the third test, there was a deliberate choice by the draughtsman that the decision-maker could only consider those matters which tended against confirmation. Therefore on s.119(6)(a) only negative impacts on public enjoyment could be taken into account. His skeleton argument on this point states:

> *"… if, in a given case, the Secretary of State is satisfied that the order should be confirmed (having had regard to the effect to the contrary which the matters mentioned in paragraphs (a), (b) and (c) may have), the order will be confirmed. Conversely (given the negative terms in which sub-section (6) is drafted ("shall not confirm unless")), if the "effect" of any of the matters to which the Secretary of State is to have regard is negative or adverse, the Secretary of State could and would not ordinarily be satisfied that it was expedient to confirm the order. A failure of the Secretary of State to be satisfied that it is expedient to confirm means that Constraint No. 3 is not overcome, and so the order will not be confirmed".*

29. He argued that s.119(6) (a), (b) and (c) are giving reasons why the order should not be confirmed and are there to assist the public in resisting confirmation, but that there are provisions to mitigate that effect, for example compensation to any third party landowner adversely affected.

30. On (b) it was Mr Laurence's argument that this was only concerned with land outside the ownership of the landowner. This was because "other land" meant land outside that in s.119(1), i.e. land not owned by the landowner who made the application. On (c) he said this was concerned with negative effects on the land over which the proposed diversion was to run.

31. Mr Laurence argued that the focus on the effects which were against confirmation can be seen from the words at the end of s.119(6) which allow the decision-maker to consider the mitigation given to the third party land owner(s) by compensation. This he says shows that the effects that the statute has in mind are negative effects, which are then capable of being mitigated.

32. He argued that the Inspector was wrong to rely on Young because the ratio of that case was limited to the issue of not conflating the convenience test in Test 2 with expediency in Test 3. To the degree the question of enjoyment was raised by the Claimant in Young at [29] that was not necessary to the case. In the alternative Young was wrong, if it was finding that Test 3 allowed an unfettered balance.

33. On Weston Mr Laurence said that Ouseley J was wrong to find that factors (a), (b) and (c) in s.119(6) were not exhaustive and that a balancing exercise could be undertaken at that stage.

34. Mr Laurence strongly argued that the third test cannot allow an unfettered balancing exercise because to do so would create unfairness. It would always be easier for the

landowner to articulate the effect on his interests, whereas public enjoyment would be more difficult to describe or quantify. In oral submissions he focused on the argument that the applicant landowner could engineer a situation where he benefited at the expense of a third party landowner. He posited the example of a landowner who bought a property with a footpath running close to the house much to its detriment. That landowner would then be able to propose a diversion away from his house and onto the land of a third party, potentially much to the detriment of their property but in a significantly more convenient and enjoyable location for the public. In this situation the Inspector would inevitably confirm the diversion and the landowner would have gained a significant benefit at the expense of adjoining owners. Mr Laurence acknowledged that the adjoining owner would be entitled to compensation, but he pointed out that financial compensation might well not mitigate the true impact on the adjoining owner's enjoyment of his property, albeit it would compensate for loss of value and "disturbance". He argued the applicant landowner will have bought the property at a lesser price because of the very existence of the footpath but may still desire to have the footpath moved. He argued that this ability to cause detriment to the neighbouring landowner showed that the Inspector's interpretation could create unfairness.

35. He argued that if Parliament had intended that the owner's interests could neutralise the effect of the factors in (a), (b) and (c) then the statute would have made that clear.

36. Mr Westaway argued that the third test in s.119(6) allowed a broad balancing exercise under the expediency limb and the Inspector had not erred in taking into account at that stage the scale of the benefit to the landowner. He described Test 3 as being a less "hard-edged" test than Tests 1 and 2. He said that the Claimant's construction of s.119 was unduly complex and did not reflect either the words of the section or the purpose or mischief of the statute. He argued that the factors in s.119(6)(a), (b) and (c) were mandatory material considerations but they did not exclude other factors being taken into consideration.

37. Mr Laurence's construction would distort the proper functioning of the section and would mean that plainly relevant factors such as the scale of the impact on the owner could not be taken into account.

38. It would also mean that other requirements that the decision-maker is bound to have regard to, such as agriculture, forestry and nature conservation, would be disregarded at the expediency stage in Test 3 even if the order had been made for those purposes. This, he said, made no sense.

39. Mr Westaway said the Claimant's arguments were contrary to authority. He relied on Young and Weston and argued that Turner J in Young had accepted the submission that Test 3 involved a balancing of interests. He also relied on caselaw concerning s.118 HA 1980 which is in similar terms to s.119. In R v Secretary of State for the Environment ex p Stewart (1980) 39 P&CR 534 Phillips J held that the word "expedient" in s.110(2) Highways Act 1959 must allow other considerations to be brought into play and involved a broad judgement. In R v Secretary of State for the Environment, ex parte Cheshire County Council [1991] JPL 537 Auld J followed Ex p Stewart and referred to the expediency test in s.110(2) as involving a "broader and discretionary question" in contrast to s.118(1).

40. Mr Westaway referred to the PINS Advice Note 9 which relied on Young for the approach of taking a balance of interests to determine expediency.

41. Mr Westaway said there was no support for the argument that subparagraphs (a) to (c) were only concerned with "adverse effect" and that this simply did not follow from the words of the statute.

Conclusions

42. In my view the Secretary of State's interpretation of s.119 is plainly to be preferred and the Inspector did not err in law. Mr Laurence's construction is overly and unnecessarily complicated, involves writing words into the statute that are not there, and makes little sense in terms of the working of the provision.

43. The starting point is that s.119(6) does not state that sub-paragraphs (a) to (c) are exclusive factors. Although this is not conclusive, the use of the word "expedient" suggests that a broad balance or judgement is to be made by the decision-maker. If it had been intended that the expressly stated factors in (a) to (c) were an exclusionary list then it might be expected that the draughtsman would have made this clear. Just taking the words at face value it seems more likely that (a) to (c) are mandatory factors to be taken into account, but that they are not intended to exclude all other factors. This would explain why those factors are listed but others such as the scale of the owner's interest in the diversion is not. This does not in any way contradict Mr Justice Ouseley's point at [30] in Weston that once the expediency question is answered in Test 3 there is no residual discretion for the Secretary of State to then reach a different decision. If the Secretary of State concludes that it is expedient to make the Order, then there is no further residual discretion.

44. There is nothing in the words of the provision that supports Mr Laurence's argument that (a) to (c) are limited to matters which tend against confirmation of the order. This does not appear from the words and is not necessary to make the provision make sense or be capable of being operated effectively. The fact that (a) to (c) are matters which go against confirmation merely requires the Secretary of State to ensure that those negative factors are taken into consideration. To that degree they support non-confirmation, but that does not mean that no other factors pointing the other way can be considered.

45. The strongest argument against Mr Laurence's construction is that it would involve what, in my view, are obviously relevant factors being made legally irrelevant. On his argument, as he accepted, the scale of the benefit to the landowner of the diversion would be irrelevant. Once the owner had met Test 1, which was described in R (Hargrave) v Stroud District Council 2001 EWHC Admin 1128, [2002] JPL 1081 at [34(i)] as a low threshold, the scale of benefit becomes irrelevant. This is simply nonsensical. If the reason for the diversion is the benefit to the owner then the decision-maker must be able to consider what weight is to be given to that benefit, depending on how great the benefit is judged to be. Equally, on Mr Laurence's construction, the degree to which there is a benefit to the enjoyment of the public by the diversion of the path is irrelevant. Again, that makes no sense, particularly when it is borne in mind that under s.119(1) the application for the diversion could be made by the local authority on the grounds that it is in the interests of the public for the path to be diverted. So again, the very raison d'être of the diversion becomes irrelevant

once the threshold in Test 1 is passed. Mr Laurence focused on the scenario by which the landowner applies for the diversion, and that is the facts of the present case. But the statutory scheme specifically allows the local authority to apply on the ground of expediency to the public. Therefore, the scale of any benefit to the public must in my view be a relevant consideration.

46. Mr Westaway pointed to the other public interests that would be taken out of the expediency balance, such as the interests of agriculture, forestry or biodiversity. Mr Laurence's answer is that these are taken into consideration at the order-making stage, but in my judgement that is no answer. The biodiversity impacts may be such as to be an important element of the decision whether or not to confirm the order. It again makes no sense for the decision-maker not to be able to take them into account in deciding expediency at the Test 3 stage.

47. Mr Laurence is correct that the effect of this construction is that a landowner could purchase land at a discount because of the existence of a path across the land. He could then apply for a diversion of that path onto third party land, thus potentially devaluing that land and reducing the third party owner's enjoyment of his land. The third party owner would be entitled to compensation but the applicant landowner might still well end up increasing the value of his property by more than the compensation he had to pay. However, I do not take this scenario to mean that the Secretary of State's construction of the section is wrong. It is unlikely, though not impossible, that the diversion in this scenario would be approved if there was not a clear public benefit. But in any event, that there is provision for compensation makes it quite clear that the applicant owner can benefit by the diversion at the potential expense of the third party owner. There is nothing unlikely about Parliament accepting a scenario whereby the applicant landowner does gain a benefit and the third party a disbenefit in circumstances where there is a benefit in the public interest in the diversion.

48. I also do not accept the Claimant's argument that the "effects" in subsection (6) must be adverse effects. This is simply not reflected in the words of the statute and involves a reading in which in my view would be wholly illegitimate. I do not accept Mr Laurence's argument that the draughtsman has created Test 3 in this manner in order to prevent the landowner from gaining an advantage. The section is not structured in that manner and the argument ignores the fact that it could be the local authority which makes the original application on the grounds of public interest. The end result would be an interpretation which was both unduly complicated and would not achieve any clear cut statutory purpose.

49. As I have explained above, I accept that the ratio of Young does not include a finding that Test 3 had a balancing exercise. The PINS Advice Note, and the Decision Letter, therefore overstate the reliance on Young. However, Turner J did accept the argument being put, so he does appear to have considered that the argument that there should be a balance was correct. In any event, Ouseley J in Weston did accept that (a)–(c) were not exhaustive factors in Test 3. The fact that he did so on the basis of concessions by both parties does not mean it is not a central part of his judgment. In my view both Young and Weston support the analysis I have set out above.

50. Mr Laurence argued in his note of Reply that the Inspector had erred by considering that the ratio of Young was that there had to be a balance made at the Test 3 stage.

This error alone was sufficient he said to quash the decision. I do not accept the submission. I agree with Mr Laurence that the appropriateness of carrying out a balancing exercise was not part of the ratio of Young. But the Inspector's reliance on Young did not lead her into any error of law. Her conclusion as to the approach under s.119(6) was, in my view, entirely correct and her understanding that the requirement for a balancing was part of the ratio of Young was not itself an error of law which had any possible impact on the decision.

51. For these reasons I dismiss the application and uphold the decision.