Neutral Citation Number: [2021] EWCA Civ 241

Case No: 2020/0836

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT (PLANNING COURT)
THE HONOURABLE MRS JUSTICE LIEVEN
[2020] EWHC 1085 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2021

Before :

LADY JUSTICE KING
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

THE OPEN SPACES SOCIETY	**Appellant**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Respondent**

- -
- -

Mr George Laurence Q.C. and Simon Adamyk (instructed by **Richard Buxton Solicitors**) for the **appellant**
Ned Westaway (instructed by **the Government Legal Department**) for the **respondent.**

Hearing date : 2 February 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 25 February 2021.

Lord Justice Lewis:

Introduction

1. This appeal concerns the proper interpretation of section 119(6) of the Highways Act 1980 ("the 1980 Act") which deals with the process for confirmation of an order diverting the line of a public footpath, bridleway or restricted byway.

2. In brief, the relevant local authority made an order diverting a 228 metre section of a footpath known as Rollright Footpath No. 7 ("FP7"). The appellant, The Open Spaces Society, objected to the order. An inspector was appointed by the Secretary of State to decide whether the order should be confirmed. The inspector considered that the diversion of the footpath was expedient in the interests of the owner of the land crossed by the footpath and would not render the footpath substantially less convenient to the public. The inspector then considered whether it was expedient to confirm the order having regard to the matters specifically referred to in section 119(6)(a) to (c) of the 1980 Act and balanced those considerations against the interests of the landowner.

3. The appellant submitted that the inspector had misinterpreted section 119(6) of the 1980 Act. It submitted that, at the third or last stage of the confirmation process, the inspector could only have regard to the specific matters referred to in section 119(6)(a) to (c) (and the matter referred to in section 119(6A) of the 1980 Act) and could not balance those considerations against the interests of the landowner. The respondent submitted that the question of whether it was expedient to confirm the order involved a broader judgment and required consideration of the specified matters and any other relevant considerations including, if appropriate, the interests of the landowner or the public in the making and confirmation of the order.

The Legal Framework

4. Section 119 of the 1980 Act, as amended, provides as 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.

(3) Where it appears to the council that work requires to be done to bring the new site of the footpath, bridleway or restricted byway 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 to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—

(a) any compensation which may become payable under section 28 above as applied by section 122(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 effected 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 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.
>
> (7) A public path diversion 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,—
>
> (a) showing the existing site of so much of the line of the path or way as is to be diverted by the order and the new site to which it is to be diverted,
>
> (b) indicating whether a new right of way is created by the order over the whole of the new site or whether some part of it is already comprised in a footpath, bridleway or restricted byway, and
>
> (c) where some part of the new site is already so comprised, defining that part.
>
> (8) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path diversion orders.
>
> (9) Section 27 above (making up of new footpaths, bridleways and restricted byways) applies to a footpath, bridleway or restricted byway created by a public path diversion order with the substitution, for references to a public path creation order, of references to a public path diversion order and, for references to section 26(2) above, of references to section 120(3) below."

The Factual Background

5. FP7 begins at Great Rollright in Oxfordshire and proceeds in a southerly direction through Little Rollright and beyond to connect with another footpath. The total length of FP7 is approximately 3225 metres. FP7 passed through the garden of a house known as Manor Farm which is in part a Grade II listed building said to date from 1633. The previous owners of Manor Farm sought a public path diversion order to divert a section of FP7 away from the garden (and on the other side of the garden wall) in order to protect their privacy.

6. On 28 May 2015, the local authority made the Oxfordshire County Rollright Footpath No. 7 (Part) (Public Path Diversion and Definitive Map and Statement Modification Order 2015 ("the Order"). The effect of the Order was to divert 228 metres of FP7 so that it ran to the east, and outside the garden, of Manor Farm. The Open Spaces Society objected to the order. An inspector was appointed by the Secretary of State for Environment, Food and Rural Affairs to determine whether to confirm the Order. The inspector held a hearing on 15 October 2019 and issued her decision on 31 October 2019.

The decision of the inspector

7. As appears from paragraph 10 of her decision, the inspector noted that the Order had been made in the interests of the owners and occupiers of land crossed by FP7. She considered that the main issues were as follows, namely, was she satisfied that:

> "(a) the diversion to be effected by the Order is expedient in those interests;
>
> (b) the new path will not be substantially less convenient to the public in consequence of the diversion;
>
> (c) it is expedient to confirm the Order having regard to:
>
> (i) the effect of the diversion on public enjoyment of the path as a whole; and
>
> (ii) the effect the coming into operation of the Order would have with respect to other land served by the existing paths and the land over which the new path would be created together with any land held with it."

8. The inspector noted that she would also have regard to any material provision in a rights of way improvement plan for the area when considering whether to confirm the Order.

9. The inspector found that the footpath passed through the garden of Manor Farm and gave views of an upper storey bedroom window and of a terrace and croquet lawn. She considered that the Order was expedient in the interests of the owners in order to safeguard the privacy of those living at Manor Farm.

10. Next the inspector found that the footpath would not be substantially less convenient to the public as a result of the diversion as the effect of the diversion was negligible. There is no appeal in relation to the findings of the inspector on those two issues.

11. This appeal concerns the approach taken to the third issue, namely whether it was expedient to confirm the order having regard to the matters specified in section 119(6)(a) to (c) of the 1980 Act. The inspector considered that the diverted footpath would be less enjoyable than the existing route for most people but the effect on enjoyment had to be considered in the context of the path as a whole. FP7 was approximately 3225 metres long and the diversion affected 228 metres, that is only about 7% of FP7. From that viewpoint, the inspector considered that the loss of enjoyment would not be significant. While the house and garden were unique and unlike anything else along FP7, the views of the house and garden did not constitute such a major attraction on the footpath for the loss of enjoyment to be regarded as more than relatively minor. There was no suggestion that the diversion would have any adverse effect on other land served by the existing route or on land on which the alternative route would be created. There was no suggestion that the Order would be contrary to any material provision in the relevant rights of way improvement plan. The inspector then set out her views on whether it was expedient to confirm the Order in the following terms:

> "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 *Young* is authority that in deciding whether to confirm an order, the criteria in section 119(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 section 119(6)(a), (b) and (c) under (iii) to determine whether it would be expedient to confirm the Order.
>
> "46. The [Open Spaces Society] 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 [Open Spaces Society] 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."

12. The inspector therefore confirmed the Order with modifications that are not material to this appeal.

The application to challenge the validity of the Order

13. The appellant applied as a person aggrieved to the High Court to challenge the validity of the Order pursuant to paragraph 2 of Schedule 2, and paragraphs 1 and 5 of Schedule 6, to the 1980 Act. The basis of the application was that the inspector erred as she was confined to considering the matters in paragraphs (a), (b) and (c) of sub-section 119(6) of the 1980 Act, and was not entitled to consider other matters, such as the interests of the owners or occupiers, when deciding whether it was expedient to confirm the Order at the final stage of the process.

14. Lieven J. ("the judge") rejected that submission. The judge considered that section 119(6) of the 1980 Act did not state that the factors in paragraphs (a) to (c) were the sole or exclusive factors to be considered. Rather, those factors were mandatory considerations that had to be taken into account but that did not exclude consideration of other relevant factors. The use of the word "expedient", although not conclusive, suggested that a broader balance or judgment was to be made by the decision-maker. Further, the judge considered that that conclusion was reinforced by the fact that matters that would, in her view, be obviously relevant factors would otherwise be made legally irrelevant.

15. In reaching her conclusion, the judge accepted that the decision in *Young* did not determine the issue in this case as *Young* was concerned with a different question. There, the High Court held the issue of whether the path was not substantially less convenient to the public in consequence of the diversion was a different and separate issue from the question of whether it was expedient to confirm a public path diversion order. The decision in *Young* did not therefore support the inspector's conclusion. Nevertheless, the inspector's conclusion was supported by the decision of Ouseley J. in *Rambler's Association v Secretary of State for Environment, Food and Rural Affairs, Weston and others* [2012] EWHC 3333 (Admin) ("*Weston"*). The reliance on the decision in *Young* did not, therefore, lead the inspector into any error of law.

The Issue and the Submissions

The Issue

16. The appeal raises one principal issue concerning the proper interpretation of section 119(6) of the 1980 Act. It concerns the question of whether a decision-maker deciding if it is expedient to confirm a public path diversion order is limited to considering the three factors referred to in section 119(6)(a) to (c) of the 1980 Act, together with any material provision of a rights of way improvement plan, or whether the decision-maker is entitled to have regard to other considerations including, if appropriate, the interests of the owner or occupier of the land crossed by the path.

17. The first seven grounds of appeal are, on analysis, aspects of the arguments relating to the proper interpretation of section 119 of the 1980 Act and can conveniently be considered together. An eighth ground of appeal contended that the judge erred in considering that the inspector would have reached the same decision if she had not erroneously relied upon the decision in *Young*.

The Submissions

18. Mr Laurence Q.C. and Mr Adamyk for the appellant submitted that section 119 of the 1980 Act operated in the following way. Before confirming a public path diversion order, the decision-maker has to consider three distinct, and separate, matters. First, the decision-maker had to be satisfied that the diversion was expedient in the interests of the owner or occupier of the land crossed by the path, or the interests of the public. Secondly, the decision-maker had to be satisfied that the path would not be substantially less convenient to the public in consequence of the diversion. Thirdly, the decision-maker had to determine if it were expedient to confirm the public path diversion order considering only the matters specified in sub-section 119(6)(a) to (c) of the 1980 Act (and any material provision of any rights of way improvement plan as required by section 119(6A) of the 1980 Act). The decision-maker could not, at that third stage, have regard to other considerations. In particular, the decision-maker could not have regard to the interests of the landowner or occupier, or the public, at that third stage. Those matters had already been dealt with at the first stage and could not be considered again at the later, third, stage, of deciding whether it was expedient to confirm a public path diversion order. Mr Laurence relied, in particular, on the decisions in *R v Secretary of State for the Environmen , ex p. Stewart* (1980) 39 P. & C.R. 534, and *Jenkins v The Welsh Assembly* [2010] EWCA Civ 1640 as supporting that interpretation.

19. Mr Laurence made a number of submissions supporting that interpretation. First, he referred to the fact that section 119(6)(b) of the 1980 Act expressly required the decision-maker to consider the effect of the order on other land served by the footpath (i.e. land other than that of the landowner in whose interests it was expedient to make the order). The express requirement to have regard to the effect on other land impliedly excluded consideration of the effect on the land of the landowner in whose interests it was expedient to make the order. Secondly, he submitted that it was improbable that the draftsman would have omitted any express reference to the interests of the landowner in whose interests it was expedient to make the order if was intended that those interests could be taken into account at the third stage.

20. Thirdly, Mr Laurence submitted that no significance should be attached to the use of the word "expedient" in section 119(6) of the 1980 Act and that word did not suggest that the third stage involved a broad discretion or judgment on the part of the decision-maker having regard to a wider range of consideration than referred to in that sub-section. Even if the decision-maker was confined to considering the factors in paragraphs (a) to (c), the decision-maker would still have a discretion as to whether to confirm based on the view formed of those factors. Fourthly, he submitted that there was nothing to indicate that the interests of the landowner or the public were sufficiently important that they had to be considered again at the third stage of the confirmation exercise after having been considered at the first stage. Fifthly, he submitted that the public interest in diversion was catered for at the second stage (whether the diversion would make the path substantially less convenient to the public) and within section 119(6)(a) of the 1980 Act which required consideration of the effect of the diversion on the public enjoyment of the path. There was no other relevant public interest in play and, therefore, nothing to suggest that the third stage envisaged by sub-section 119(6) of the 1980 Act should be seen as involving a balancing exercise weighing factors other than those specified in paragraphs (a) to (c). Sixthly, he indicated that there may be cases where the owner of land over which the path was to be diverted would be able to show that the effect on that land would be adverse (even taking into account the possibility of the payment of compensation). That landowner ought to be able to require the decision-maker to refuse to confirm the order and the decision-maker ought not be entitled to balance the effect on that landowner against the interests of the landowner whose land the path currently crosses. Finally, Mr Laurence and Mr Adamyk relied on provisions enacted after section 119 of the 1980 Act was enacted to assist in resolving what was said to be ambiguity in that subsection.

21. Mr Westaway, for the respondent, submitted that the judge was correct in her interpretation of section 119(6) of the 1980 Act. He submitted that the use of the word "expedient" did indicate that the decision-maker was exercising a broad discretion. The decision-maker had to have regard to the specific considerations mentioned in paragraphs (a) to (c) as they were mandatory considerations but that did not mean that they were the only considerations to which a decision-maker could have regard in deciding whether it was expedient to confirm an order. The structure of section 119 operated by requiring the decision-maker to be satisfied of certain matters, namely that the order was expedient in the interests of the landowner or the public, and that the path would not be substantially less convenient because of the diversion, as threshold matters. Thereafter, in deciding whether it was expedient to confirm the order the decision-maker was exercising a broad discretion. Furthermore, the interpretation favoured by the appellant would result in making matters which would otherwise obviously be factually relevant to the question of expediency legally irrelevant.

Discussion and Conclusion

22. The principal issue turns on the interpretation of section 119(6) of the 1980 Act. That involves consideration of the meaning of the words used having regard to the context and the purpose underlying the statutory provisions and any other permissible aids to statutory interpretation.

23. First, as a matter of language, the question at the third stage of the process of deciding whether to confirm a public path diversion order is whether the decision-maker is satisfied that "it is expedient to confirm the order" and, in considering that question,

"having regard to the effect" of the order on the three matters specified in paragraphs (a) to (c). That language indicates that the effect of the order on those matters must be taken into account in deciding the question of expediency. There is nothing in the language of the sub-section to indicate that other considerations, if relevant, cannot also be taken into account in deciding whether confirmation of the order "is expedient".

24. In particular, the wording of section 119(6) of the 1980 Act does not prescribe, or identify, or define a limited set of considerations governing what may or may not be relevant to expediency. The language used in section 119(6) is in stark contrast to the words in section 119(1) of the 1980 Act. There, it must appear to the relevant council that, in the interests of the owner, lessee or occupier of land crossed by the path or of the public, it is expedient to make a public path diversion order. Section 119(1), therefore, defines, or fixes, the circumstances in which it will be expedient to make a public path diversion order. The wording of section 119(6) of the1980 Act is different. It provides that it must be expedient to confirm the order "having regard to the effect" of the order on certain specified matters.

25. Secondly, the structure and purpose of section 119 of the 1980 Act viewed as a whole confirms that interpretation. Section 119(1) sets out the circumstances in which a public path diversion order may be made, that is where it is in the interests of the landowner, lessee or occupier, or the public, to make such an order. The order has to be confirmed. The relevant decision-maker cannot confirm the order if it would not be in the interests of the owner or occupier of the land or of the public. Put simply, if the diversion of the path would not, in fact, benefit the owner, or the public, the order should not be confirmed. Similarly, unless the decision-maker is satisfied that the path would not be substantially less convenient for the public as a result of the diversion, the order cannot be confirmed. Those two matters are necessary preconditions, or thresholds, to confirming the order.

26. Thereafter, the statute requires the decision-maker to form a judgment as to whether it is expedient to confirm the order. In considering that issue, the section ensures that the decision-maker must have regard to the effect of the order on certain matters, including the effect on public enjoyment of the path as a whole (not simply the length of the path that is to be diverted) and the effect on other land served by the existing path and on land which the newly diverted path would cross. The purpose underlying that stage of the confirmation process, therefore, is to ensure that those matters specifically set out in paragraphs (a) to (c), along with any other relevant matter (which could include the importance of the public interest, or the interests of the landowner or occupier in the diversion being made), are taken into account when reaching the decision on expediency.

27. Thirdly, as the judge below indicated, an interpretation of section 119(6) of the 1980 Act which limited the factors to be considered only to those mentioned in paragraphs (a) to (c) would have the result of excluding consideration of other factors that would potentially be factually relevant to the overall question of whether it is expedient to confirm the order diverting a path. The present case is a good example of such a situation. The footpath as a whole is approximately 3225 metres in length. The section of path proposed to be diverted is 228 metres. As the inspector found, that diversion did affect the public enjoyment of the path (the factor referred to in subsection (a)) but that effect was "relatively minor". There was no effect on other land (the factors referred to in paragraphs (b) and (c)). It would be odd if Parliament had intended that the question

of expediency would be determined solely by reference to the relatively minor effect on the public enjoyment of the path and could not take into account the interests of the owner of the property and the fact that the path crossed through the garden of a private residence, giving views into a bedroom, a terrace and a croquet lawn.

28. If, as Mr Laurence submitted, that was what Parliament did intend, then the interests of the landowner (or the public, if the order was made because it was in the interests of the public) would be legally irrelevant. But I consider that there is nothing to indicate that Parliament was intending to constrain the assessment of whether it was expedient to confirm an order in that way. A far more natural interpretation, which reflects the wording and structure of the section, is that Parliament intended to confer a broad discretion which required the decision-maker to take into account the effect of the order on certain specified matters, but also permitted the decision-maker to have regard to other factors that were considered relevant to the question of whether it was expedient to confirm the order.

29. I deal then with the specific points made by Mr Laurence and Mr Adamyk. First, the two authorities on which they rely do not support their interpretation of section 119 of the 1980 Act. *Ex p. Stewart* concerned a decision of the High Court, which is not binding on this Court, and dealt with a different statutory provision. Furthermore, properly analysed, that decision supports the interpretation I consider to be the correct interpretation of section 119 of the 1980 Act. The case dealt with the power conferred by section 110 of the Highway Act 1959 (now, section 118 of the 1980 Act) to make a public path extinguishment order, that is an order that a path be stopped up. Section 110(1) of the 1959 Act provided that such an order could be made where it appeared to the local authority to be expedient "on the ground that the path or way is not needed for public use". By virtue of section 110(2) of the 1959 Act, the order could only be confirmed if the Secretary of State considered it expedient to do so "having regard to the extent (if any)" that it appeared that the path would "be likely to be used by the public". Phillips J. held that the Secretary of State had erred when considering whether to confirm the order as he had applied the test of whether the path was needed, which applied at the stage of making the order under section 110(1) of the 1959 Act, not the test of having regard to the extent to which the path was used. However, two matters appear from the judgment of Phillips J. First, he considered that the power of confirmation conferred by section 110(2) of the 1959 Act, which involved deciding if confirmation of the order was expedient having regard to certain specified matters, did involve a discretion and did involve consideration of factors other than those specified. He said, obiter, that:

> "the only criterion that section 110(2) lays down is whether it is "expedient" to confirm the order having regard to the extent to which it appears to the Secretary of State that the path would be likely to be used. It thus concentrates on user as being, at all events, the prime consideration. I agree, however, with the submission being made on behalf of the applicant that the word "expedient" must mean that, to some extent at all events, other considerations can be brought into play because, if that were not so, there would be no room for a judgment, which is bound to be of a broad character, as to whether or not it is "expedient"."

Secondly, earlier in his judgment, Phillips J. expressed the view, obiter, that there would be cases where a Secretary of State could confirm an order even if the path would be

used to more than a minimal extent because it was not needed, for example, where an alternative path was available.

30. The reasoning in *ex p. Stewart*, even if applied to section 119 of the 1980 Act by analogy, would not assist the appellant. It is clear that Phillips J. considered that the power to confirm an order if expedient, having regard to certain specified matters, still permitted consideration of other matters including, if appropriate, the factors leading to the making of the order in the first place. Applying that reasoning to section 119(6) of the 1980 Act would result in an interpretation of section 119(6) which did not limit the considerations that may be taken into account in deciding if it is expedient to confirm the order and, moreover, could involve taking into account the factors leading to the making of the order in the first place (here, the interests of the landowner).

31. The second authority relied upon by Mr Laurence is a decision of the Court of Appeal in *Jenkins*. That concerned the power conferred by section 26 of the 1980 Act to make, and confirm, an order creating a footpath. The power may be exercised where it appears to the local authority that "there is a need for a footpath" and they are satisfied, having regard to specified matters (the extent to which the footpath would add to the convenience or enjoyment of the public and the effect the path would have on the rights of persons interested in the land), that it was expedient to create the path. That case turned upon the question of whether the decision-maker had, in fact, properly had regard to the adverse impact on the landowner. Richards LJ and Lord Neuberger M.R. held that, on a proper reading of the decision letter he had done so; see paragraphs 26, 29 to 31, and 34 to 41. As Mr Laurence accepts, the decision does not address the issue of whether the decision-maker could have had regard to considerations other than those specified in section 26 of the Act. For that reason, I do not consider that that decision assists in the interpretation of section 119 of the 1980 Act.

32. In my judgment, the most relevant, and helpful, decision on the interpretation of section 119 of the 1980 Act is that of Ouseley J. in *Weston*. As Ouseley J. held at paragraph 28 of his decision:

> "28. [Counsel for the claimant'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.

Although the decision is not binding upon us, I consider that Ouseley J. did correctly interpret section 119(6) of the Act.

33. I can deal with the specific grounds of appeal more briefly. First, the fact that section 119(6)(b) of the 1980 Act specifically requires consideration of the effect of the order on other land served by the path does not impliedly prohibit or exclude consideration of the interests of the landowner whose land would benefit from the making of the order. The purpose underlying section 119(6) is to ensure that, before an order is confirmed, the effect of the order on a number of specified considerations (including

the effect on other land) is taken into account. It is intended to ensure that certain considerations are included in the decision-making process; it is not to prohibit consideration of other relevant considerations. Secondly, I do not accept the suggestion that it would be improbable that the drafter of section 119 would not have mentioned the interests of the landowner if the drafter had considered that matter to be a relevant consideration. It is clear that the purpose of the legislation is to ensure that, before an order is confirmed, the decision-maker must take account of the effect of the diversion on the public enjoyment of the land, other land, and on the owner of land over which the new path is created. The aim is to ensure that those specific considerations are taken into account in deciding whether confirmation of the order is expedient. There is nothing improbable in the drafter also intending other relevant considerations to be taken into account. Thirdly, the use of the word "expedient" is, as the judge held, not conclusive but is an indication, read in context, that the decision to confirm involves a broad judgment which must include consideration of the specified matters but is not limited to them.

34. Fourthly, the question of whether the interests of the landowner are such as to be capable of being relevant to the question of whether it is expedient to confirm the order depends on the proper interpretation of the section. For the reasons given, those interests may in an appropriate case be a material consideration, along with the specified considerations and any other relevant consideration. It will be a matter for the decision-maker to weigh the different considerations and determine whether or not confirmation of the order is expedient. Fifthly, I do not agree that the public interest is limited to matters that are already taken into account in the order making and confirming process. It is easy to identify a wide range of situations where it may be expedient in the public interest to divert a section of path, for example, to protect a particular natural or man-made feature of the landscape. If that were the reason for making the order, those reasons could be a relevant consideration in considering whether it was expedient to confirm the order. In any event, even if the public interest were limited in the way submitted, that would not of itself provide a reason for departing from the clear meaning of the section and preventing other relevant considerations (here the interests of the landowner) being taken into account. Similarly, any potential difficulty in protecting the interests of another landowner who may be adversely affected if the third stage envisaged by section 119(6) of the 1980 Act is interpreted as involving, among other considerations, the interests of the landowner which prompted the making of the order, does not detract from what I consider to be the proper interpretation of that provision. The question is whether section 119, properly interpreted, was intended to permit the adverse effects contemplated by paragraphs (a) to (c) to be balanced against other considerations. There is no reason to assume that Parliament would have intended the interests of the other landowner to prevail in all circumstances, no matter now strong other competing considerations were. In the circumstances, this factor does not assist in the interpretation of section 119.

35. Next, Mr Laurence and Mr Adamyk relied upon subsequent legislation which, they submitted, assisted in resolving the ambiguities in section 119. First it is submitted that the amendment of section 119 by the insertion, in 2000, of section 119(6A), indicated that Parliament regarded the factors specified in paragraphs (a) to (c) to be exhaustive, hence the need to amend section 119 to provide for an additional factor to be taken into consideration. In my judgment, section 119(6A) was inserted to ensure that any material provision of a rights of way improvement plan was taken into account. In effect, it

provides that such material provisions are a mandatory consideration. That follows from the words used in section 119(6A). The Secretary of State "is to have regard" or the council "are to have regard" to that consideration when deciding whether or not to confirm an order. The sub-section was not inserted to enable an additional matter to be taken into consideration because it could not otherwise be taken into account. Rather, it was intended, as the wording demonstrates, to provide that it must be taken into account along with the other specified considerations and any other relevant matter.

36. Mr Adamyk relied on a series of provisions enacted after section 119 was enacted. He submitted that the appellant could rely upon the later statutory provisions as an aid to interpreting the earlier section 119 of the 1980 Act as that section was ambiguous. He relied, principally, upon a dictum of Lord Sterndale M.R. in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403 and dicta of judges in subsequent cases approving that dictum. Lord Sterndale M.R. said at pages 414-415 of his judgment in *Cape Brandy* that "subsequent legislation on the same subject may be looked at in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous". Mr Adamyk relied upon the dictum of Lord Buckmaster in *Ormond Investment Co. Ltd. v Betts* [1928] AC 143, at page 156, that "by 'any' ambiguity is meant a phrase fairly and equally open to divers meanings".

37. Against that background, Mr Adamyk relied on two sets of provisions, which provided for the making of stopping-up and diversion orders for paths crossing a railway where that was expedient in the interests of the safety of members of the public (sections 118A and 119A inserted in the 1980 Act by the Transport and Works Act 1992) and for the purpose of preventing or reducing crime or protecting pupils or staff of a school (sections 118B and 119B inserted in the 1980 Act by the Countryside and Rights of Way Act 2000). In each case, the power to confirm was expressed to be exercisable where it was expedient to do so "having regard to all the circumstances and in particular" certain specified matters. Mr Adamyk submitted that Parliament used that form of words to indicate that the decision-maker was entitled to have regard to all circumstances and, relied upon that as an indication that the earlier enacted provision, section 119, was not intended to enable the decision-maker to have regard to all the circumstances and was only intended to enable the decision-maker to have regard to the matters specified in paragraphs (a) to (c). Further, he submitted that when, also in 2000, the 1980 Act was amended to insert section 119D, dealing with the diversion of highways forming part of or adjacent to a site of special scientific interest, Parliament provided for the order to be confirmed where the decision-maker was satisfied it was expedient "having regard to the effect" of certain specified matters. That is, that the amendment in 2000 expressly did not use the phrase "having regard to all the circumstances" which, Mr Adamyk submitted, indicated that Parliament drew a distinction between that phrase and "having regard to" and that assisted in interpreting the meaning of that phrase in the 1980 Act.

38. First, I do not consider that it is necessary or legitimate to use the later enactment relied upon to interpret section 119 of the Act. The meaning of that section is clear, unambiguous and free from all reasonable doubt. In truth, the reference to later enactments seeks to introduce ambiguity where there is none, rather than resolving a genuine ambiguity.

39. Secondly, the circumstances surrounding the amendments made in 1992 and 2000 differ from the situation that arose in *Cape Brandy* and the other cases relied upon. Each

of the two sets of amendments were dealing with discrete issues where a stopping up or diversion order was made for one particular purpose – safety in one case, and crime prevention and reduction and protection of pupils and staff at a school in the other. They were not seeking to amend the provisions governing public path diversion orders provided for by section 119 of the 1980 Act. Equally, section 119D of the 1980 Act, inserted in 2000, was dealing with a discrete issue, namely the effect of a highway on a site of special scientific interest. I do not consider that the inclusion, or absence, of reference to "all the circumstances" in the amendments made in 1992 or 2000 is to be taken as an indication of what Parliament intended when enacting section 119 of the 1980 Act.

40. Thirdly, and in any event, I doubt that statutory provisions providing for the confirmation of orders where it is expedient to do so "having regard to all the circumstances, and in particular, the effect" or "having regard to the effect" of certain specified matters were intended to have a dramatically different scope. In each case, in my judgment, the form of words used indicate that the decision-maker must have regard to the matters specified but may have regard to other circumstances in so far as they are relevant.

41. Finally, I deal with ground 8 of the notice of appeal. Mr Laurence submitted that the inspector erred in relying on *Young* as authority for the proposition that the third stage of the confirmation process involved a balancing exercise. As the judge accepted, *Young* is not authority for that interpretation as it was dealing with a different issue and the inspector (and the Planning Inspectorate Advice Note) overstated the effect of *Young*. Mr Laurence submitted, however, that the judge erred in concluding that that did not lead the inspector to err in law. He submitted that the inspector might have reached a different conclusion if she had not, erroneously, relied upon *Young*. I agree with the reasoning of the judge on this issue. There is no prospect that the reliance on *Young* led the inspector to err in her consideration of whether it was expedient to confirm the Order. The interpretation that she adopted was one set out by Ouseley J. in *Weston* and is the interpretation that I consider is correct. The approach adopted by the inspector was, therefore, based on a correct understanding of section 119 of the 1980 Act.

Conclusion

42. In deciding whether it is expedient to confirm a public path diversion order in the exercise of the power conferred by section 119(6) of the 1980 Act, the decision-maker must have regard to the effect of the matters specified in paragraphs (a) to (c) (and any material provision of a rights of way improvement plan) and may have regard to any other relevant matter, including if appropriate the interests of the owner or occupier of the land over which the path currently passes, or the wider public interest. The judge was correct in holding that the inspector had not erred in her approach to deciding whether it was expedient to confirm the Order. I would, therefore, dismiss the appeal.

Lady Justice Elisabeth Laing

43. I agree.

Lady Justice King

44. I also agree.

Court of Appeal Ref: 2020/0836

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT (PLANNING COURT)
MRS JUSTICE LIEVEN
[2020] EWHC 1085 (Admin)

LADY JUSTICE KING
LORD JUSTICE LEWIS
LADY JUSTICE ELISABETH LAING

B E T W E E N:

THE OPEN SPACES SOCIETY

Appellant

and

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Respondent

ORDER

UPON HEARING Leading and Junior Counsel for the Appellant, and Counsel for the Respondent

IT IS ORDERED THAT:

1. The appeal is dismissed.
2. The Appellant is to pay the Respondent's costs of this appeal, summarily assessed at £10,000.00 (inclusive of any VAT).
3. Permission to appeal to the Supreme Court is refused.

25 February 2021.