Neutral Citation Number: [2002] EWHC 844 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/4762/2001

Royal Court of Justice
The Strand
London WC2A 2LL

Friday 12th April 2002

Before

MR JUSTICE TURNER

THE QUEEN

on the application of

THOMAS DAVID HAYWARD YOUNG

Respondent

v.

THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

(Computer Aided Transcription of the Stenograph Notes of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG Tel: 020 7404 1400
Official Shorthand Writers to the Court)

MR ROBIN GREEN (instructed by Messrs Glanvilles, Isle of Wight) appeared on behalf of the Claimant.

MR MICHAEL BEDFORD (instructed by The Treasury Solicitor) appeared on behalf of the Defendant.

JUDGMENT
(As approved by the Court)

1. MR JUSTICE TURNER: This matter came before me as a paper application for permission to bring proceedings for judicial review of the decision of an inspector appointed by the Secretary of State, which was dated 30th July of last year. I adjourned the application for permission to open court, observing that the claimant's principal difficulty at the permission stage is the issue of delay; apart from that, I said, the claimant had shown an arguable case.

2. As to the second part of those brief observations, it is plain that the claimant did have an arguable case, and it has been cogently argued by Mr Green (on the claimant's behalf) and equally cogently argued by Mr Bedford (on behalf of the Secretary of State) that there was in truth no error of approach by the inspector.

3. The subject matter of the dispute concerns a proposed order for the diversion of a major part of footpath S10 on to a different line within the Isle of Wight and the Hampstead Estate Diversion Order (No.1) 2000. The path as it currently exists describes a sinuous line from points A to B on the plan annexed to the decision letter. At the commencement of the line, as it currently exists, it passes through a plantation. It then enters a field belonging to a person other than the claimant, before re-entering another parcel of plantation, and disgorges on to what is described as an access road, which is public footpath S27, some 70 metres or so to the north of the point at which the proposed diversion joins the access road. The effect of the diversion which was proposed was to route the footpath along the outside of the various parcels of land, which I have already described, and thus it would be described as three dog leg corners.

4. The route of the footpath as diverted did not cross or enter any afforested enclosure. It was because the footpath in its current form crossed afforested enclosures that the claimant approached the Isle of Wight Council with a view to re-routing or diverting the footpath in the manner I have described. In paragraph 5 of a statement made on 28th March this year, the claimant states:

> "Following lengthy negotiations and discussions with the Isle of Wight Council, to which the Ramblers Association were involved, it was ultimately agreed with the Isle of Wight Council that the footpath be diverted along the [described diversion route]. I was ultimately notified by the Isle of Wight Council (letter 8th November 1990) that that would be put forward as a Public Path Diversion Order. Having been negotiating this matter for over 10 years I was prepared to accept that route and assumed that the Council would put in place the necessary procedures to confirm the formal Diversion Order."

5. How ill-advised the claimant was to have made any such assumption is evidenced by what subsequently happened.

6. On 4th April 2000 the claimant was notified by the Isle of Wight Council that it proposed to make a footpath diversion order. The Council made an order which required the confirmation of the Secretary of State. In the body of the letter dated 4th April the Council wrote:

> "I enclose a copy of the Notice and Order in relation to the above.
>
> I will advise you in due course whether the Order has been confirmed."

7. As a matter of history, the inspector visited and inspected the relevant area of land on 17th

July last year and reported, as I have already noted, on 30th of the same month. Contrary to the requirements of paragraph 4 of Part II of Schedule 6 of the Highways Act 1980, however, the Council did not notify the claimant "as soon as may be" of the fact that the Secretary of State had not confirmed the draft order which had been made by the Council.

8. In the enclosures with the letter of 4th April 2000 was the draft Public Path Extinguishment Order and Diversion Order which had been proposed by the Council. That was addressed to Mr Young. It will be recalled that Mr Young had initiated the process which had led to the stage, now reached, of the Council publishing its draft order. It is unnecessary to refer to the body of that draft order save to the last two paragraphs, which state:

> "Any representations about, or objections to, the Order may be sent in writing to Committee Services, Isle of Wight Council [and they give the address] not later than Friday, 5 May 2000. Please state the grounds on which they are made.
>
> If no representations or objections are duly made, or if any so made are withdrawn, the Isle of Wight Council may confirm the Order as an unopposed Order. If the Order is sent to the Secretary of State for the Environment for confirmation any representations and objections which have not been withdrawn will be sent with the Order."

9. The claimant did nothing on the receipt of that document and he did nothing until, by letter dated 17th September 2001, he was belatedly notified of the fact that the Secretary of State had not confirmed the Order, as he had hoped.

10. Had the claimant made representations in respect of the draft Order, the history of these events might (I do not say would) have been markedly different. First, the claimant would have received notification of the proposed site visit of 17th July; in the event he knew nothing about it at all. Secondly, he would have received notification of the decision of the Secretary of State on or shortly after 30th July, the date of the decision letter in this case. Moreover, had he done so, that is to say made representations, he would have been provided with copies of the objections made inferentially on behalf of the Ramblers Association, to which he would have had the opportunity of making reply. Again, because of the claimant's lack of familiarity with and/or his failure to seek legal advice in relation to this matter, he knew, and therefore did, nothing further.

11. It is necessary to set out the statutory framework of this matter. It is to be found in the Highways Act 1980 as amended by the Wildlife and Countryside Act 1981. So far as relevant to the present case the court is concerned only with the provisions of section 119 of the Act as amended. That provides by subsection (1):

> "Where it appears to a council as respects a footpath ... in their area ... that, in the interests of the owner ... of land crossed by the path ... it is expedient that the line of the path... should be diverted... 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... any such new footpath... as appears to the council requisite for affecting the diversion, and
>
> (b) extinguish... the public right of way over so much of the path... as appears to the council requisite as aforesaid...

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

(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... unless he... [is] satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path... 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."

12. I turn to the decision letter, and say at once that I do not propose to read it in full but merely quote what may be regarded as the relevant parts of it. Under the cross-heading "Procedural matters" appears the passage:

> "4. The definitive path is not visible on the ground and is obstructed in places by trees, undergrowth and fences. In comparing it with the proposed diversion, I have considered it as if it were not obstructed."

13. Under the cross-heading "The main issues":

> "6. The main issues are the requirements of section 119 of the Highways Act 1980, namely:
>
> a.That the terminal point of the proposed diversion at F is substantially as convenient to the public as the terminal point of the existing path at B.
>
> b.that the Order is in the interest of the owners of the land crossed by the path.
>
> c.That the proposed diversion will not be substantially less convenient to the public, taking into account how it will affect:
>
> (i) the public's enjoyment of the path
>
> (ii) the land next to the existing path

(iii) the land through which it is diverted."

14. Under the cross-heading "Reasons":

> "8. The terminal point of the proposed diversion at F is some 80 metres to the southeast of B [I interpolate that B is the termination point of the path in its present state]. Both join Footpath S27 that runs along Hampstead Drive, a metalled estate road. I have seen no arguments to suggest that the terminal at F would not be substantially as convenient to the public; I believe it would be."

15. Under the cross- heading, "Is the Order in the interest of the owners of the land crossed by the path?":

> "11. I agree that this is in the interest of the owners of the land crossed by the path."

16. Under the cross-heading "The public's enjoyment of the path between A and D", what might be described as the first dog leg section, the inspector says:

> "16. In my view the definitive path, running through the comparatively open plantation land, initially with views down to the lake, would provide a considerably more enjoyable and direct walk than the proposed diversion, sandwiched, as it would be, between the rabbit fence and the oak trees A-C. The forest track is a mixed blessing; it is fairly rough at present and liable to become more so at times. It seems to me that the clearest and maintenance requirements of both routes are much the same. I believe that most walkers would enjoy the definitive route much more than the proposed diversion."

17. Under the heading "The public's enjoyment of the path between D-G", the inspector states his conclusion:

> "20. In my view, what would be a rather oppressive path between D-E is a poor substitute for walking across a pleasant and open area of pasture on the definitive route. I believe that most walkers would enjoy the definitive route much more than the proposed diversion."

18. Under the cross-heading "The public's enjoyment of the path between G-B and G-F", the inspector states his conclusion:

> "24. In my view, there is a more even balance between the definitive path and proposed diversion in this section. However, I note that many of the paths in the area pass along estate roads and, therefore, the possibility of walking through woodland provides a pleasant alternative. I believe the definitive route is marginally more enjoyable for the public."

19. Under the cross-heading "The public's enjoyment of the path as a whole":

> "26. In my view, the definitive line of the path is a more varied, natural and enjoyable route for a path in the country, rather than the four right angle bends through which the proposed diversion would pass."

20. Under the cross-heading "The land next to the existing path and the land through which it is diverted", the inspector wrote:

"27. In my view, the proposed diversion will not affect the land next to the existing path and the land through which it is diverted."

21. Under the cross-heading "Will the proposed diversion be substantially less convenient to the public?":

"28. Taking into account the above consideration, I am in no doubt that the proposed diversion will be substantially less convenient to the public, particularly between A-G."

22. Going back to the text of the letter, paragraph 6a ("That the terminal point of the proposed diversion at F is substantially as convenient to the public as the terminal point of the existing path at B") is a clear reference back to the provisions of section 119(2)(b). Paragraph (b) ("That the Order is in the interest of the owners of the land crossed by the path") is likewise a plain reference back to the provisions of section 119, subsections (1) and (6). The sticking point comes with the next subparagraph:

"(c) That the proposed diversion will not be substantially less convenient to the public taking into account how it will affect

(i)the public's enjoyment of the path

(ii) the land next to the existing path

(iii) the land through which it is diverted."

23. That represents the apparent understanding of the inspector of the relevant requirements embodied in section 119(6). It is around that understanding, or misunderstanding as the claimant contends, that the substantive issue in this case revolves.

24. The submission for the claimant on this issue is as follows. The provisions of section 119(6) have to be properly understood as to their context and meaning. Thus it was submitted that the provisions of the subsection from the words "the Secretary of State shall not confirm" down to and including the words "in subsection (1) above," are, as already indicated, a plain reference back to the requirements of subsection (1) and must be satisfied if the section is to be invoked at all. Correctly, in my judgment, both counsel referred to it as the trigger condition for the operation of the section.

25. The submission for the claimant was that the words which follow ("and further that the path will not be substantially less convenient to the public in consequence of the diversion") constitute one dependent clause followed by another and separate dependent clause, that is to say "that it is expedient to confirm the order having regard to" the provisions of subparagraphs (a) to (c) below. In a nutshell the submission for the Secretary of State is that there are not two dependent subclauses in that part of the subsection, as contended for by the claimant, but only one, as witnessed by the inclusion of the words after "subsection (1) above," "and further that..."

26. The submission for the Secretary of State was that the words "and further that" indicate that everything which follows is subject to the qualifications embodied within the concluding subparagraphs (a), (b) and (c) of the subsection. Thus, it was submitted by the Secretary of State that the contents of subparagraphs (a) to (c) of the subsection are as apt in defining the extent of the phrase "substantially less convenient" as they are to "it is expedient to confirm the order having regard to the effect which..."

27. It is clear, in my judgment, that the construction contended for on behalf of the Secretary of State involves an element of complication and disregard of the language and purpose of the subsection. In my judgment the expression "substantially less convenient to the public" is eminently capable of finding a satisfactory meaning by reference to consideration of such matters as the length, difficulty of walking and purpose of the path. Those are features which readily fall within the presumed contemplation of the draftsman of this section as falling within the natural and ordinary meaning of the word "convenient".

28. I find it not to have been within the contemplation of the draftsman that the considerations contained within subparagraphs (a) to (c) of subsection (6) should have been intended to qualify the word "convenient" as well as the expression "expedient to confirm the order having regard to the effect which ... the diversion would have on public enjoyment of the path as a whole".

29. The way in which the claimant put this matter in his skeleton argument was that the subsection contemplates the possibility that a proposed diversion would be as easy to use as the existing path; that is to say as convenient but would not be as enjoyable to the public perhaps because the route was less scenic. In that event the decision-maker would have to balance the interests of the applicant against those of the public to determine whether it was expedient to make the diversion order. Conversely, a proposed diversion might give greater public enjoyment but be less accessible or longer than the existing path and so be substantially less convenient.

30. The principal contention on behalf of the Secretary of State was that the suggested reading of subsection (6) put forward by the claimant was erroneous Having referred to the legislative history of the now section 119 as compared with its original language when first enacted in 1980 and its predecessor Act, the Highways Act of 1959, it was submitted that there was an inevitable duplication or overlap in the requirements contained within section 119(6) which assists on the proper construction of the now section 119(6) in the context of the substituted section 119(1). But it was submitted on behalf of the Secretary of State that, if the legislative history is put aside, there is nothing in the language or punctuation used in section 119(6) to suggest that the subclauses, to which I have referred, are confined to the expediency test. There was, it was submitted, no punctuation which split the convenience test from the expediency test, or from subclauses (a), (b) and (c). Contrast the punctuation which separates both of the tests from the expedient as mentioned in subsection (1) above. Then the point to which I have already adverted, the words "and further" naturally govern everything that follows. If it had been intended that the convenience test was self-contained and distinct from subclauses (a), (b) and (c) then some break of wording would be needed to limit the effect of "and further".

31. Furthermore, it was submitted, if regard was had to the purpose to be achieved, there was no sound reason why the convenience test should not include the factors specified in subclauses (a) to (c). This, it was submitted, was obviously so in the case of public enjoyment and there was no warrant for limiting the convenience test to ease of use and excluding enjoyment. Both factors, it was submitted, may be relevant to a way substantially less convenient to the public in consequence of the diversion. I have already averted to paragraph 6 of the decision letter.

32. In the light of the conclusion which I have heralded, it is plain that I accept the submission made on the claimant's behalf: that the inspector did indeed conflate the concept of convenience with the concept of expediency as contained within the subsection. That that is so is confirmed by the terms of paragraph 28 of the decision letter in which, as it will be recalled, the inspector said that he was "in no doubt that the proposed diversion will be

substantially less convenient to the public, particularly between A-G"; and I add the implicit qualification, having regard to the public's enjoyment of the path - a matter which is, as I have already indicated, absent from the requirement of the consideration of the convenience of the path.

33. Thus I hold that not merely is the claimant's approach to the construction of section 119 (6) arguable, I hold it to be correct.

34. I turn to the issue of delay. It was not until the receipt of the letter of 17th September 2001 that the claimant became aware that the inspector had not confirmed the diversion order. For reasons which appear to be statutorily incorrect, the writer of that letter assumed that the planning inspectorate would have sent a copy of the report to the claimant. As already indicated by the short history, that was something which was not done until by letter dated 28th September the claimant was sent a copy of that report. At a date between 17th and 28th September which, subject to correction, was not clearly identified, the claimant had in fact asked the county council to provide him with a copy of the decision letter.

35. Following receipt of the letter, which was sent by facsimile transmission on 28th September, the claimant set about seeing what he could or should do. He approached his local county councillor. He approached the representative of the County Landowners Association, both of whom were away on holiday until mid-October. The claimant stated in paragraph 8 of his recent statement:

> "I had been verbally assured by Mr Slade [of the council] that the IW Council would not in fact commence any works on site pursuant to the Inspector's decision until I had had the opportunity to seek advice."

36. To an extent the claimant was misled by that statement into thinking that the enemy which he had to confront was the prospect of work being done to his land to reinstate the footpath, whereas the true enemy was the non-confirmation of the diversion order made so long ago as April 2000, and a challenge to the decision of 30th July. So it was that the claimant did not seek legal advice until three weeks and a bit had elapsed since he had received a copy of the decision letter. The solicitors took a week to send instructions to counsel, who responded within the week, but a further week elapsed until the proceedings were commenced.

37. It is submitted on behalf of the defendant that the claimant did not act promptly as the rules required. It is manifest from the timetable that he did not commence proceedings within the three months allowed, subject to the qualification of acting promptly within the civil procedural rules for the commencement of proceedings such as these; and in any event there is no good reason why time should be extended.

38. Of course it is the position so far as the Secretary of State is concerned that, because of the claimant's failure to make representations in favour of the confirmation of the draft order, he was not a person notified of objections, notified of the appointment of the inspector, notified of the inspection of the land, let alone notified of the result of the inspector's decision. It was submitted on behalf of the Secretary of State that it was not just a case of non-notification but that, having started out on 4th April 2000 by having initiated the process which had led to the making of the draft order, the claimant had in reality sat back and done nothing. In terms of the statutory regime that submission is entirely correct.

39. To an extent the claimant was led into his state of torpor by his not having been alerted to the fact that, notwithstanding that he had initiated the process which had led to the making of the draft order, he still needed to make representations if he was to be notified of

objections so that he could in his turn respond to the objections, and be notified of the site visit and of the result of the inquiry by the Secretary of State.

40. Two questions arise. Did the claimant act promptly? That he could have acted more promptly, and no doubt would have acted more promptly had he been fully apprised and cognisant of the requirements and, as I would think, deficiencies of the statutory regime, he would have acted sooner. The question of promptitude however is not an absolute, but a relative, concept. Given the circumstances I have already outlined, given also that to an extent he was misled by the county council, which had assured him that it would take no steps to reinstate the existing footpath until he had time to take advice, I am satisfied that the claimant did, in relative terms, act promptly in doing as he did once he had obtained a copy of the decision letter. The fact is that within six weeks or so of its receipt these proceedings had been commenced.

41. As to whether or not the court should, in the exercise of its discretion, extend time, I am entitled to take into consideration that, unlike many such cases, administrative inconvenience will not have been caused by such delay as has taken place. On the assumption that the council has not yet started to embark on reinstating the footpath, the council is not disadvantaged. So far as the Secretary of State is concerned no disadvantage has been suggested to have been caused to her as a result of any delay which has occurred.

42. In these circumstances, I am satisfied that I am justified in the exercise of my discretion in extending the time for this application to have been made.

43. Is there anything else you would require?

MR GREEN: I would ask for an order formally quashing the decision given by the inspector.

MR JUSTICE TURNER: Yes.

MR GREEN: Also I would seek the claimant's costs. My learned friend has a copy of the statement of costs.

MR JUSTICE TURNER: He does. I do not.

MR GREEN: He does. Your Lordship does not. I do not think there will be a dispute as to the quantum.

MR JUSTICE TURNER: Is there any dispute, Mr Bedford?

MR BEDFORD: My Lord, no.

MR GREEN: The total claim on the second page of the schedule, including VAT, is £8321.54.

MR JUSTICE TURNER: Very well.

MR GREEN: I am obliged.

MR BEDFORD: My Lord, if I could raise two separate matters. The first point is, when your Lordship is perfecting the judgment, there are three matters which if I could raise for your Lordship to consider. First, when your Lordship was setting out the provisions of section 119(6), your Lordship, as I heard it, omitted from paragraph (a) the words "or way" and omitted the words that finished the clause after (c): "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 ..."

MR JUSTICE TURNER: You are certainly right about the second matter and I am sure you are right about the first.

MR BEDFORD: My Lord, secondly when your Lordship was referring to my submissions as to legislative issue, I may have misheard but I understood your Lordship to say section 116 whereas clearly it was section 119. It may have been mishearing on my part.

MR JUSTICE TURNER: It was probably a misstatement by me because I was confusing it with subsection (6). It is the sort of verbal inelegance which one commits when giving judgment ex tempore.

MR BEDFORD: My Lord, the third matter: when your Lordship was dealing with the history of the matter in relation to land and with the date of receipt of the decision letter, your Lordship said that your Lordship was not aware of it in the papers. My Lord, it is page 25 in the bundle. There was a faxed copy ---

MR JUSTICE TURNER: That is the date when it was sent.

MR BEDFORD: My Lord, it was a fax sent on 28th.

MR JUSTICE TURNER: So when I said the 29th or the 30th, I ought not to have done so.

MR GREEN: My Lord, I think it was the 28th.

MR JUSTICE TURNER: The fax was undoubtedly dated the 28th

MR GREEN: It was received by me on the 28th as well.

MR JUSTICE TURNER: I am grateful to you. I am sure the shorthandwriter will correct my judgment to the extent to which you have indicated.

MR BEDFORD: My Lord, the second matter is a question of permission to appeal. This is a point of statutory construction. It potentially has implications for the approach to other similar orders under section 119. Your Lordship has held on your Lordship's construction in clear terms that the question of public enjoyment is simply not relevant to the test of convenience. My Lord, those who instruct me I am sure would wish to take that further as being a matter that requires more consideration. Clearly we have argued the matter here and, without repeating what I have argued, I say that there are reasonable prospects of success in such an argument. My Lord, that is my submission.

MR JUSTICE TURNER: I indicated I think at an early stage in the judgment that the case was arguable. I do not resile from that - unless Mr Green is going to persuade me that it was not arguable at all.

MR GREEN: I do not think I can that far. My learned friend has argued it and argued it well. I simply argued that the question of public enjoyment will be considered by an inspector under the heading of expediency if not under the heading of convenience. So in my submission as a matter of law it will make no difference. It did make a difference in this case because the inspector got it wrong. If he had gone on to consider expediency he would have been able to consider public enjoyment and would have come to the same or indeed a different conclusion. It is not a matter which was omitted completely from consideration in the subsection.

MR JUSTICE TURNER: But from the point of view of the decision in this case, I think you are entitled to rely upon that and say it is not a case in which permission should be granted.

MR GREEN: My Lord, in my submission yes.

MR JUSTICE TURNER: I agree.

MR BEDFORD: There is nothing I can add.

MR JUSTICE TURNER: I am most grateful to you.

MR BEDFORD: One separate matter. If those instructing me wish to appeal or apply for permission to appeal, could I ask you to extend time from 14 days from the publication of the transcript rather than 14 days from today. That will assist in focusing the grounds of appeal on the exposition which your Lordship has set out, rather than on my notes of your Lordship's judgment.

MR JUSTICE TURNER: Yes, I think that is entirely reasonable.