Appendix 16

Marriott v Secretary of State for the Environment, Transport and the Regions [2000] EWHC (Admin) 652

BAILII Citation Number: [2000] EWHC 652 (Admin)

Case No. CO 1809/2000

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

(ADMINISTRATIVE COURT)

Royal Courts of Justice

The Strand

London WC2

Date: Tuesday, 10th October 2000

Before:

MR JUSTICE SULLIVAN

MARRIOTT

-v-

SECRETARY OF STATE FOR THE ENVIRONMENT,

TRANSPORT AND THE REGIONS

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Official Shorthand Writers to the Court)

MR G LAURENCE QC (Instructed by Wilson Solicitors, Steynings House, Fisherton Street, Salisbury, Wiltshire, SP2 7RJ) appeared on behalf of the Claimant.

MR M BEDFORD (Instructed by the Treasury Solicitors, Queen Anne's Chambers, 28 Broadway, London, SW1H 9JS) appeared on behalf of the Defendant.

JUDGMENT

1. MR JUSTICE SULLIVAN:

2. Introduction

3. This is an application under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 ("the 1981 Act") to quash the Hampshire (Basingstoke and Deane Borough No 13) (Parish of Candovers) Public Path Reclassification Order 1989, which was confirmed with modifications on behalf of the defendant by an Inspector, Mr Bryant, in a decision letter dated 1st March 2000. Notice of confirmation of the Order was published in accordance with paragraph 11 of Schedule 15 to the 1981 Act on 10th April 2000.

4. The year, 1989, in the title to the Order is not a misprint. The Order was made by Hampshire County Council ("the Council") nearly 11 years ago on 29th December 1989. It reclassified nine roads used as public paths ("RUPPS") shown on the definitive map, prepared under the National Parks and Access to the Countryside Act 1949, as Byways Open to All Traffic ("BOATS").

5. Section 54 of the 1981 Act imposed a duty on the Council to carry out a review of every RUPP shown on the definitive map, and to make an order reclassifying it as a BOAT, a bridleway or a footpath. The description RUPP was to be abolished. The reasons why Parliament considered that it was necessary to carry out this very substantial reclassification exercise are described in some detail in Stevens v Secretary of State for the Environment (1998) 76 P&CR 503, and for the purposes of this judgment it is unnecessary to repeat them here. Subsection 54(1) provides that:

> "... the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of orders under this subsection."

6. The delay of over 10 years between the making of this Order and its confirmation provides a vivid illustration of the magnitude of the task facing the Council and the complexity of the procedures prescribed by Schedule 15.

7. Schedule 15

8. By paragraph 2:

> "An order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7."

9. Paragraph 6 deals with unopposed orders and is not relevant for present purposes. Because of the number of ways that are classified as RUPPS on definitive maps, it is the practice of order making authorities, such as the Council, to group a number of RUPPS in a convenient geographical area into one reclassification order. This was the practice followed by the Council in the present case.

10. The reclassification of some of the RUPPS in such an order may not prove to be controversial and so

may not attract any representations or objections. In those circumstances, the Council may elect, under paragraph 5 of the Schedule, to have the Order treated as two separate orders: one order dealing with those RUPPS in respect of which there have been representations or objections, the other dealing with those RUPPS where reclassification is unopposed and which may then be confirmed under paragraph 6.

11. Paragraph 7 deals with opposed orders and is as follows:

> "(1) If any representation of objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.
>
> (2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either -
>
> (a) cause a local inquiry to be held; or
>
> (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.
>
> (3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications."

12. In the great majority of cases a local inquiry is held rather than a hearing. Paragraph 8 then imposes a "Restriction on power to confirm orders with modifications":

> "(1) The Secretary of State shall not confirm an order with modifications so as -
>
> (a) to affect land not affected by the order;
>
> (b) not to show any way shown in the order or to show any way not so shown; or
>
> (c) to show as a highway of one description a way which is shown in the order as a highway of another description,
>
> except after complying with the requirements of sub-paragraph (2).
>
> (2) The said requirements are that the Secretary of State shall -
>
> (a) give such notice as appears to him requisite of his proposal so to modify the order, specifying the time (which shall not be less than 28 days from the date of the first publication of the notice) within which, and the manner in which, representations or objections with respect to the proposal may be made;
>
> (b) hold a local inquiry or afford any person by whom any representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose; and
>
> (c) consider the report of the person appointed to hold the inquiry or to hear representations or objections."

13. Paragraph 10(1) provides as follows:

> "A decision of the Secretary of State under paragraph 6, 7 or 8 shall, expect in such classes of case as may for the time being be prescribed or as may be specified in directions given by the Secretary of State, be made by a person appointed by the Secretary of State for the purpose instead of by the Secretary of State; and a decision made by a person so appointed shall be treated as a decision of the Secretary of State."

14. In practice, reclassification decisions are almost invariably made by Inspectors acting on behalf of the Secretary of State, rather than by the Secretary of State himself. Because the decision-making process is so lengthy, an Inspector who has conducted a paragraph 7 inquiry and recommended modifications to an order, may have fallen ill, retired or died before the paragraph 8 inquiry can be held. So sub-paragraphs 10(3) and (4) provide:

> "(3) Where the Secretary of State has appointed a person to make a decision under paragraph 6, 7 or 8 the Secretary of State may, at any time before the making of the decision, appoint another person to make it instead of the person first appointed to make it.
>
> (4) Where by virtue of sub-paragraph (2) or (3) a particular decision falls to be made by the Secretary of State or any other person instead of the person first appointed to make it, anything done by or in relation to the latter shall be treated as having been done by or in relation to the former."

15. As will be seen, paragraph 10(3) was invoked in the present case.

16. Factual summary

17. Although the Order was made in December 1989, it was not until December 1995 that an Inspector, Mr Blomfield, held an inquiry into the Order under paragraph 7 of Schedule 15. In his decision letter, dated 27th February 1996 ("the 1996 decision"), he concluded that the Order should be confirmed, subject to modifications that two of the ways, RUPP 1 and RUPP 20, should be reclassified as bridleways rather than BOATS. Paragraph 173 of his decision letter said this:

> "Since the confirmed Orders would show as highways of one description ways that are shown in the Orders as highways of another description, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Orders and give the opportunity for representations or objections to be made to the proposed modifications. A further letter will be sent to you in connection with the advertisement of the notices and the deposit of associated documents."

18. The notice under paragraph 8(2) was dated 28th June 1996. It referred to the 1996 decision and said that "any representation or objection with respect to the proposed modifications" should be sent to the Secretary of State by 31st July 1996. There were representations and objections, so notice was given, both in local newspapers and on site, of an inquiry under paragraph 8(2)(b). The notices stated that Mr Blomfield, the Inspector appointed to determine the Order, would hold a local inquiry on 4th November 1997:

"... into the Inspector's proposed modifications to the Order as contained in his letter dated 27 February 1996.

"The effect of the modification, would be to - Reclassify RUPPS 1 and 20 as Bridleways and not as Byways Open to All Traffic."

19. It might have been thought that the scope of this 1997 Inquiry would have been clear from the terms of paragraph 8(2) of Schedule 15 and from this notice. The Inspector would enquire into the modifications that he had proposed to reclassify RUPPS 1 and 20 as bridleways, as contained in his 1996 decision. He would not be enquiring into the reclassification of the other RUPPS in the Order, in respect of which he had not proposed any modifications in his 1996 decision.

20. However, Mr Blomfield had been provided with internal guidance from the Inspectorate in the form or ROW note 5/97:

"Inquiries into proposed modifications to ROW Orders."

21. Paragraphs 3 to 10 of the guidance are as follows:

"3. The purpose of this ROW Note is to give guidance on the range of evidence which it is reasonable for the original Inspector (or his replacement) to hear at a second inquiry. The aim is to ensure that as consistent an approach as possible is taken by Inspectors at such inquiries.

"4. Objections received should relate to the advertised modifications. Therefore Inspectors should make it clear at the opening of the second inquiry that its purpose is to consider the proposed modifications and it should not be seen as an opportunity for a re-run of all the evidence heard at the first inquiry into the initial objections to the order. This is the case even if a long period has elapsed between the first and second inquiries.

"5. Attempts by any of the parties to repeat any of the original evidence for the sake of it should be stopped. Such attempts might be regarded as amounting to unreasonable behaviour justifying a costs application.

"6. That said, there may be occasions when the parties wish to give fresh evidence relating to the unmodified part of the order. In such cases it would be acceptable to hear the evidence, particularly if new issues are also raised. Fresh evidence can be taken to include updated facts of revised information. Submissions that the Inspector has misdirected himself in his 'interim' letter as to matters of fact or law may need to be heard but discussion of their merits should not be entered into by the Inspector.

"7. It is a matter for those present at the second inquiry to satisfy the Inspector that the evidence is fresh or that new issues are raised, or that the 'interim' letter is flawed. If in doubt, Inspectors should agree to hear the evidence and any submissions.

"8. Where the Inspector is satisfied as to the relevance of the fresh evidence or new issues it is important to bear in mind the interests of other parties who may not be attending the second inquiry in the belief that only objections and representations relating to the modification to the order would be heard. In such circumstances prejudice may occur if evidence relating to the unmodified part of the order was to be heard without those other paries being present. Inspectors should therefore consider carefully whether the inquiry should be adjourned, (after hearing anyone present who wishes to give evidence relating to

the proposed modifications), in order to give anyone not already present an opportunity to attend.

"9. Where a decision is made to adjourn the second inquiry, the Inspector should return the case file to the Rights of Way section so that they can notify the missing parties of the arrangements for the resumed inquiry. It is important, however, that the Inspector fixes a date for the resumption of the second inquiry. The date should be not less than 6 weeks after the adjournment to allow time for due process.

"10. As ever, no two inquiries are the same and this Note can only serve as a general guide. Inspectors will need to exercise judgement and discretion in these matters based on the arguments put to them. Inspectors must continue to treat each case on its merits and seek advice from ROW section where necessary."

22. These guidelines were not published. Their existence was belatedly acknowledged by the defendant and a copy was produced shortly before the hearing of this application. Although the guidelines were not published, it is clear that many of those who were familiar with Rights of Way inquiries had become aware of a policy, or practice, to this effect on the part of the Inspectorate.

23. On 22nd July 1996, the claimant had written in response to the notice under paragraph 8(2)(a), objecting to the Inspector's proposed modifications, saying, inter alia:

"1. The Inspectorate has explained (in other circumstances) that no part of an order is final until the Order as a whole has been confirmed with or without modification. For that reason the Secretary of State (through his Inspector) is empowered to reconsider any element of the Order, at any stage prior to confirmation, if it is appropriate so to do in the interests of justice and of reaching the correct conclusion. This objection therefore centres on the fact that the modifications as proposed are not as extensive as they should have been on the evidence and should be extended to include other RUPPS.

"2. In line with the Inspectorate's statement regarding the status of Orders as referred to above, the Inspectorate has also stated that 'the Inspector can consider fresh evidence regarding the unmodified parts of the Order'. The objectors wish to bring forward fresh evidence."

24. The letter then explained in outline what the fresh evidence would comprise. Mr Blomfield explained what happened during the course of the 1999 Inquiry in his second decision letter, dated 14th May 1998 ("the 1998 decision"):

"1.4 The Hampshire County Council (HCC) provided new evidence showing why RUPPS 13 and 14 should be reclassified as BOATS ...

"1.5 The Representative of the British Driving Society (BDS) presented detailed evidence as to why RUPPS 1, 6 and 20 should be BOATS. He also produced evidence to show why the other RUPPS should also be BOATS, but pointed out that this evidence was not as full as he would have wished as he had been given only short notice that these RUPPS were going to be considered at the inquiry ...

"1.6 The Representative of the Motoring Organisations Land Access and Recreation Association (LARA) presented new evidence to show why RUPP 20 should be reclassified as a BOAT and not a bridleway. He also produced new evidence to support the reclassification of other RUPPS as BOATS ...

> "1.7 Members of the BDS, the Trail Riders Fellowship (TRF) and other Supporters produced new evidence to add to that produced at the 1995 Inquiry ...
>
> "1.14 At the two inquiries four Organisations (HCC, BDS, LARA and TRF), the Objectors, and some 100 individuals produced well over 1000 pages of detailed written evidence as to why the ten RUPPS should or should not be BOATS ..."

25. The inquiry was concerned with another order dealing with a tenth RUPP, with which these proceedings are not concerned. It is clear that BDS produced a very considerable amount of evidence during the course of the 1997 Inquiry and the claimant (and other Objectors to the modifications) felt at a disadvantage, paragraph 2.22 of the decision letter records, under "Matters Raised by the Objectors":

> "BDS was not a Statutory Objector, and the Objectors had had no notice of their involvement and had only seen their evidence after this inquiry had started. They therefore had been unable to produce additional new evidence to show that drivers of carriages had been challenged."

26. It was accepted by Mr Bedford, on behalf of the defendant, that the 1998 decision letter does not distinguish between evidence relating to the proposed modifications and evidence relating to those RUPPS in respect of which no modifications had been proposed. On a fair reading of the 1998 decision, Mr Blomfield effectively treated the 1997 Inquiry as a opportunity to re-open the entirety of the 1995 Inquiry and to revisit all of the matters which had been dealt with in his 1996 decision.

27. In consequence of this wide ranging re-examination of the Order as a whole, he concluded that RUPPS 1 and 20 should not be reclassified as bridleways but as BOATS, but that RUPPS 16 and 21 should be reclassified as bridleways not BOATS and proposed a further modification to the Order accordingly.

28. Again, notice was given under paragraph 8(2) of Schedule 15. The notice, dated 5th June 1998, was "given pursuant to paragraph 8(2)" and stated that the Inspector proposed:

> "... to modify the Order by providing for the following: RUPPS 16 and 21 be reclassified as bridleways and not BOATS."

29. The notice referred to the 1998 decision and stated that:

> "... any representation or objection with respect to the proposed modification should be sent to the Inspectorate not later than 3rd July 1998."

30. The notice further stated that any such objection or representation:

> "... may be made available for viewing by interested parties at the Council offices on request."

31. Objections were made and so a third inquiry ("the 1999 Inquiry") was arranged, this time under a different Inspector, Mr Bryant, because Mr Blomfield had retired.

32. The press and site notices for the 1999 Inquiry differed from those used for the 1997 Inquiry in one

respect: having stated that the Inspector would hold a public local inquiry on 26th October 1999, into the modifications contained in the 1998 decision letter, and that:

> "The effect of the modifications would be to reclassify RUPPS Nos 16 & 21 as bridleways and not byways open to all traffic."

33. The notice continued:

> "The purpose of the above inquiry is to hear representations about the Inspector's proposed modifications, the Inspector may also consider new evidence and arguments relating to any unmodified parts of the Order."

34. The claimant, through her advocate, Mr Plumbe FRICS, wished to criticise both Mr Blomfield's conduct of the 1997 Inquiry and the reasonableness of some of his conclusions in the 1998 decision. In a prepared written opening submission, Mr Plumbe had been intending to say, inter alia, in part 4:

> "At the second inquiry, the objectors were taken completely by surprise, and their position was severely prejudiced, by the very lengthy evidence given by the representatives of the BDS, who had no statutory position (they were not objectors) and who had given no notice at all of their intent to produce evidence. It is recorded that this lack of notice resulted in the non-attendance of Mr Lalonde, who was an important witness as to historical matters at the first inquiry.
>
> "At that stage (well into the second day) it was not practicable to seek an adjournment, given the stage that had already been reached in the giving of evidence. It is recorded that the objectors had already considered the justification for an adjournment in the context of the eleventh hour delivery by HCC of its own evidence, and had agreed not to pursue the matter. That being so, the objectors register grievance at, and were deterred by, the comment by the Inspector towards the end of the inquiry (in the context of the BDS evidence) to the effect that 'many people have such evidence sprung on them at these inquiries and have to put up with it'. The objectors believe that they have not had a fair hearing, as it was quite impossible to digest and investigate the evidence given by the BDS and make a considered reply ...
>
> "The objectors' grievance has now widened because it has become apparent that the Inspector is paying insufficient regard to evidence given in 1995, and is prepared to accept the BDS evidence in total, without any reservation, notwithstanding the fact that the BDS representatives were not present at the first inquiry and their evidence did not reflect matters covered at that time. For these reasons, the objectors now take the opportunity of the objection procedures to exercise their right to provide a considered reply to the BDS.
>
> "That is the purpose of these submissions. It will necessarily involve reviewing evidence that has been given previously for the simple reason that it is in rebuttal of evidence now in front of the Inspector, which has not been tested or challenged in the context of evidence given two years earlier."

35. The prepared opening submission continued:

> "It is however the case that, not only is there new evidence, but also new points now derived from the earlier evidence. It is necessary to put that material into context. Whatever the procedural niceties, the objective must be to consider all the evidence fairly and to reach (if possible) the right answer.

> "The objectors wish to focus particularly on tracks 1, 9 and 13, but comment will also be made on RUPP 20 because of its alleged relationship with RUPP 9."

36. When dealing with Mr Blomfield's conclusions in respect of individual paths, in other parts of his prepared opening submission, Mr Plumbe had proposed to contend, for example, that Mr Blomfield's conclusions on RUPP 9 were "in comprehensible", and that the primary basis for his conclusion in respect of RUPP 9 was "totally at variance with the actual evidence".

37. In the event, Mr Plumbe struck out part 4 of the submissions, toned down his remaining criticisms of Mr Blomfield's conclusions on the evidence, and "avoided" other submissions critical of Mr Blomfield's conduct of, and conclusions reached following, the 1997 Inquiry. He did not do so voluntarily. He says in his witness statement that he felt constrained to do so by the terms and tenor of Mr Bryant's opening remarks to the inquiry.

38. Mr Bryant read from a prepared opening statement. Dealing with the scope of the inquiry he said this:

> "13. As the Planning Inspectorate has made clear to you, this inquiry is to hear objections to the modifications proposed by Mr Blomfield in his second Decision Letter. That is, his decision to modify his previous findings such that RUPPS 16 and 21 be reclassified as Bridleways, not as BOATS.
>
> 14. It is also Planning Inspectorate policy to allow the introduction of new evidence relating to unmodified parts of the Order. In my experience this laudable pursuit of natural justice is somewhat abused. Evidence previously considered is re-presented, albeit in disguise. I would be grateful if you would all scrupulously resist any such temptation. Quite simply, neither you nor I start with a clean sheet of paper. This inquiry is merely a continuation of the previous two. I do not wish evidence previously presented to Mr Blomfield to be repeated. Now it may be that, because of my recent involvement, I would not immediately recognise any such misguided repetition. But rest assured that it will become apparent in my post inquiry scrutiny. If I discover that the licence to introduce new evidence has been abused, I will discount entirely the related input. And in the event of any costs application against the perpetrator, it will be difficult to resist the conclusion that such behaviour was unreasonable."

39. Having dealt with a number of administrative matters he returned to "the statutory parameters" in the following terms:

> "The Orders were made under section 54 of the [1981 Act] WACA 81 by [the Council] the Hampshire County Council. At this juncture it is my normal practice to explain the statutory parameters of my empowerment and any others factors which will help you to confine your evidence to relevant matters. But given your previous involvement I intend to restrict myself to five observations."

40. Following those observations he said this:

> "I introduced the forgoing points with the phrase 'statutory parameters of my empowerment'. It is, perhaps as important that you also realise the 'no-go' areas. I am not competent to decide whether or not Mr Blomfield has misdirected himself in law. That is a

matter for the Courts. Nor am I competent to decide whether Mr Blomfield has been 'Wednesbury unreasonable'. That, also is a matter for the Courts. Therefore I do not intend to waste inquiry time by listening to any such assertions

"By now you should have realised that I have clearly laid out the parameters for the evidential aspects of this third inquiry. May I re-emphasise that, in the unusual circumstances of my appointment, it is your responsibility to exercise the requisite self-discipline. If during my subsequent deliberations I find you have not, and if there is a claim for costs entered against you, it will be no defence to say 'The Inspector allowed me to continue, therefore I thought it was OK'."

41. Despite the somewhat draconian nature of these opening remarks (two stern warnings as to costs before the parties had even begun to present their cases) it is plain that in the event, Mr Bryant was unable to distinguish between "old" and "new" evidence, or between evidence relating to the modifications proposed by Mr Blomfield and evidence relating to the Order as a whole. As he explained in his decision letter, dated 1st March 2000 ("the 2000 decision") in paragraph 3:

"Under current policy not only objections to the proposed modifications but also new evidence, if presented as a material consideration to the case, must be heard."

42. He then summarised the position of the parties to the inquiry and said this in paragraphs 5 to 7:

"5. It follows that the reclassification of RUPPS 1, 9, 13, 16, 20 and 21 are still live issues. A staggering volume of evidence was put before the third inquiry. My pre-inquiry review of the evidence previously considered by Mr Blomfield showed that old evidence was inextricably woven into this 'new and material' evidence. It would have been counter-productive to attempt to separate it at inquiry. Instead, agreed use of the 'as read' approach enabled the majority of inquiry time to be devoted to cross-examination.

6. Post-inquiry separation of old and new evidence remains a major problem. I have therefore decided to re-visit that evidence arising from the first two inquiries to which my attention was drawn during the third inquiry. The supporters may regard this as unfair, as it would suggest that they have to re-fight battles already won. However, this potential disadvantage is offset by the weight which will properly be accorded to Mr Blomfield's decisions.

7. Another unusual characteristic of the third inquiry is that relatively little time was devoted to its primary purpose ie to hear evidence on the proposed modification to RUPPS 16 and 21. Instead, debate centred mainly on RUPPS 1, 9 and 13. RUPP 20 featured less significantly; and on the final day appeared to be conceded by the objectors as a BOAT. That objectors to the modification are supporters of the original Order, and vice versa, introduces a presentational complication. The unusual structure of this Decision Letter seeks to accommodate the foregoing peculiarities."

43. The decision letter, which is 65 pages long, reviews in very considerable detail the entirety of the evidence in respect of the six RUPPS which were still in issue. I will refer to Mr Bryant's approach to RUPP 9 below. So far as the remaining matters are concerned, in summary, he agreed with Mr Blomfield's proposed modification to reclassify RUPP 16 as a bridleway, but disagreed with Mr Blomfield's proposed modification in respect of RUPP 21. As he explained in paragraph 140 of his decision:

"I hope to have demonstrated that all relevant evidence has received due consideration.

> That this review has, with one expectation, led to the same conclusions as those reached by Mr Blomfield should come as no surprise, for much of the 'new' evidence of objection was but repetition or elaboration. The exception is RUPP 21. Here genuinely new evidence persuades me that BOAT is the appropriate reclassification, although I found this to be the most difficult of all of my decisions."

44. So he confirmed the Order subject to the modification that RUPP 16 be reclassified as a bridleway.

45. The inquiry had been scheduled to run for three days. Shortly before, and during the first three days of the inquiry, BDS produced a considerable volume of evidence, some 450 pages. The claimant and her expert witness, Professor Kain, a distinguished geographer, had prepared their evidence in response to the additional material which had been adduced by BDS without warning at the 1997 Inquiry.

46. Mr Plumbe sought an adjournment, but indicated that if an agreed programme could be devised he would not have to press that application. The Inspector initially refused the application, but by the third day, 28th October 1999, he had come to the conclusion that "saturation point" had been reached and "that it was unreasonable to expect the objectors (including the claimant) to assimilate the new information without an adjournment." He therefore adjourned the inquiry to 2nd December. Professor Kain was not able to provide a supplementary report for that date.

47. On that day, the inquiry format was changed from an adversarial to a more inquisitorial procedure. The parties were asked to provide Mr Bryant with their written submissions in advance, which were taken as read. The Inspector, Mr Bryant, first asked all of his own questions on those submissions and then the parties were allowed to ask their questions on any outstanding issues.

48. The Council, which had hitherto played a minimal role in the 1999 Inquiry (see paragraph 29 of the 2000 decision) was given the final right of reply. Its advocate fairly described his 43 pages of closely typed submissions as:

> "More the opening of a book than a closing statement."

49. The Council's "book", contained extensive cross-references to the evidence given at the 1995, the 1997 and the 1999 Inquiries. All of this evidence was woven together into a coherent thread in the Council's closing submissions. There is a difference between Mr Bryant's and Mr Plumbe's recollection as to the extent to which the latter was permitted to comment upon or correct the Council's "book".

50. Following the close of the inquiry, the claimant wrote to the Inspector. Her letter, dated 17th December 1999, said inter alia:

> "Faced with a change of procedure without warning [on 2nd December], I found the style of questioning disturbing and hostile. I was deeply uncomfortable and unable to concentrate fully on what I was being asked. So disconcerting did I find it, that I allowed myself to be diverted from the point I was trying, and had intended, to make."

51. She then sought to explain the point. However, the letter concluded with these words:

> "I believe I speak for all participants at the inquiry when I say how grateful we were by the way you conducted it. Given that the supporters and objectors had quite different views on the evidence, the fact that a friendly atmosphere prevailed throughout the long hearings and the eventual trip along the RUPPS was due in no small measure to your skill."

52. In his witness statement, Mr Bryant explains why he felt that the change to a more inquisitorial procedure on 2nd December would be beneficial to his task of obtaining all the necessary information in order to make his decision. He says that no objection was raised to the change in procedure. He does not accept that his questioning of the claimant was aggressive or unfair. He felt that there were inconsistencies in her evidence at the three inquiries which needed to be explored. He says that:

> "The claimant appeared to have some difficulty in answering some of the questions. I also accept that the claimant did appear somewhat discomfited by my questions and as a result I decided to have a brief adjournment to provide the claimant with a break. What I cannot accept is that the claimant was subjected to unfair questioning or that she did not have an adequate opportunity to respond to matters put."

53. He accepted the final paragraph of the claimant's letter of 17th December at face value, since it tallied with his own perception of the 1999 inquiry.

54. The claimant's grounds of challenge

55. The grounds on which Mr Laurence QC, on behalf of the claimant, submits that the Order should be quashed can be conveniently grouped under three heads as follows:

(1) Jurisdiction: Mr Blomfield at the 1997 Inquiry did not have power to reconsider the Order as a whole. His powers at that inquiry were limited to considering representations or objections relating to the two modifications to the Order that he had proposed, to downgrade RUPPS 1 and 20 to bridleway status. It follows that the proposal in his 1998 decision to modify the Order to downgrade RUPPS 16 and 21 to bridleway status was outwith his powers under paragraph 8 of Schedule 15, and that the ensuing 1999 Inquiry, under Mr Bryant, was held without jurisdiction.

(2) Unfairness: Mr Blomfield's conduct at the 1997 Inquiry in permitting BDS to introduce lengthy evidence without prior warning was criticised. Mr Bryant's conduct for the 1999 Inquiry was criticised on a number of grounds, in particular, the extent to which he constrained criticism of Mr Blomfield's handling of the 1997 Inquiry and the conclusions reached in the 1998 decision; Mr Bryant's initial refusal of an adjournment; the change in inquiry format on the final day; his questioning of the claimant; and the fact that she had no effective opportunity to reply to the Council's closing submissions.

(3) RUPP 9: Mr Bryant erred in law in concluding that vehicular rights had been shown to exist over the whole length of RUPP 9.

56. The grounds of the application also alleged that Mr Bryant's decision in respect of RUPP 20 was erroneous in law, but this submission was not pursued before me in the light of the decision of the Court of Appeal in Masters v Secretary of State for the Environment, Transport and the Regions, reported in The Times on 12th September this year. Mr Laurence reserved his position under this head, lest either this case or the Masters case proceed further.

57. I will deal with the three heads of challenge that were argued before me in turn.

58. Jurisdiction

59. Mr Laurence pointed out that once an order has been submitted to the Secretary of State for confirmation under paragraph 7 of Schedule 15, is no power equivalent to that conferred upon the Council by paragraph 5 of the Schedule is thereafter available to the Secretary of State. It is common ground between the parties that an order submitted to the Secretary of State for confirmation is a single order which must be confirmed, or not, in a single decision, whether or not it relates to a number of RUPPS.

60. If, at the inquiry held under paragraph 7(2), the Inspector decides that modifications to the Order falling within sub-paragraph 8(1) should be made, the Order cannot be confirmed until the requirements of sub-paragraph 8(2) have been complied with.

61. Mr Laurence submits that any inquiry held under paragraph 8(2)(b) is an inquiry into "the proposal", that is to say the Inspector's proposal to modify the Order. It is not a re-opened inquiry into the remainder of the Order which the Inspector did not propose to modify.

62. He points to the terms of the notice under paragraph 8(2)(a) and to the notice given of the 1997 Inquiry, and submits that there are sound reasons for so limiting the scope of a paragraph 8 inquiry. Parties to a paragraph 7 inquiry, who have been wholly or partially successful in resisting modifications to the Order as made by the Council, may not attend the paragraph 8 inquiry at all, or if they do so, they may come prepared to deal simply with the Inspector's proposed modifications. It would be most unfair if, at the paragraph 8 inquiry, they could be confronted, without any prior notice, with a mass of evidence relating to those RUPPS in respect of which they thought they had been successful at the paragraph 7 stage. It is important for all parties to the order making process to know where they stand, both in terms of deciding whether to attend a paragraph 8 inquiry and if so, what case they should prepare, both to present and to meet.

63. Mr Laurence acknowledged that new evidence coming forward after the close of the paragraph 7 inquiry presented the Inspectorate with a practical problem. If the Inspector refused, at the paragraph 8 inquiry, to entertain new evidence in relation to those parts of the Order which were not proposed to be modified, there would be nothing to prevent the party wishing to adduce the new evidence from simply writing to the Inspector, inviting him to take account of the new material as a representation received after

the close of the paragraph 7 inquiry.

64. In his opening submissions, Mr Laurence suggested that subsections 53(2)(b) and (3)(c) of the 1981 Act provided a workable solution to this practical problem. Section 53(2)(b) imposes a duty on the Council to keep the definitive map and statement "under continuous review", and as soon as reasonably practicable after any of the events specified in subsection (3), to make any necessary modification order. The events specified in subsection (3) include, in paragraph (c):

> "the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows -
>
> (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates ...
>
> (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or
>
> (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification."

65. A modification order made by the Council as a result of the discovery of new evidence would be subject to the provisions of Schedule 15 (see subsection 53(6)). Thus, the solution, submitted Mr Laurence, was for the new evidence to be transmitted to the Council for it to consider under section 53.

66. On behalf of the Secretary of State, Mr Bedford submitted that where paragraph 8 applied, confirmation of the Order under paragraph 7 was prohibited until after compliance with the requirements of paragraph 8(2). Until confirmation, the decision as to whether or not to confirm the Order remained at large. It followed that the 1996 decision was merely an interim decision. It did not bind Mr Blomfield.

67. Before reaching his final decision under paragraph 7 to confirm or not to confirm, he was bound to take into consideration all relevant matters. In the absence of any express statutory power (such as that conferred by Regulation 17(4) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, or the Town and Country Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, "the Town and Country Planning Rules"), a decision taker must take account of all relevant considerations of which he is aware at the date of his decision.

68. Thus, he submitted, Mr Blomfield was obliged to take into account at the 1997 Inquiry any new evidence even though it related to the Order as a whole. The unpublished guidelines, ROW 5/97, merely reflected this duty. It would be most undesirable if an Inspector was prevented from considering relevant new evidence and was required to confirm an order on a knowingly incomplete or inaccurate basis. This would simply result in the local authority having to make another modification order, under section 53, with the provisions of Schedule 15 being invoked yet again. He submitted that there was nothing in paragraph 8 to prevent the Inspector from receiving new evidence in relation to those parts of the Order

which were not proposed to be modified.

69. The ambit of an inquiry, whether under paragraph 7 or paragraph 8, was not defined by the terms of the objections or representations received. Thus, where an order reclassifying ten RUPPS has been submitted to the Secretary of State for confirmation because there has been an objection to, say, one of the RUPPS, the Council not having exercised its power under paragraph 5, the Inspector at a paragraph 7 inquiry will hear objections to the Order as a whole, and such objections need not be confined to the particular RUPP which prompted the objection. Similarly, under paragraph 8, where an Inspector has proposed modifications to the status of a number of RUPPS, the objection to the Inspector's proposed modifications may have confined itself to one narrow point, or to one RUPP, but at the ensuing paragraph 8 inquiry, the Inspector will consider objections on different grounds and to the whole of his proposed modifications.

70. Against this background, Mr Bedford submits that there is no reason why an Inspector should not hear new evidence in relation to the Order as a whole at a paragraph 8 inquiry.

71. In the light of these submissions, my conclusions on jurisdiction are as follows. The starting point is the language of Schedule 15. There is no freestanding power to hold public local inquiries for the purpose of deciding whether or not to confirm reclassification orders under section 54. Any inquiry must be held in accordance with the provisions of Schedule 15: see subsection 54(1).

72. Parliament could have provided that an Inspector who wished to confirm an order with modifications of the kind described in paragraph 8(1) must re-open the inquiry held under paragraph 7(2)(a). It did not do so. The inquiry held under paragraph 8(2)(a) is a separate local inquiry, and it is clearly treated as such, not merely in paragraph 8, but also in paragraphs 9 and 10 of Schedule 15 (see above for the terms of paragraph 10). What then is the purpose of the separate inquiry under paragraph 8(2)(a)?

73. It is plain from the terms of sub-paragraphs 8(2)(a) and (b) that its purpose is to consider "representations or objections (hereinafter referred to simply as objections) with respect to the proposal", and that "the proposal" means the Inspector's proposal to modify the Order. Its purpose is not to hear objections with respect to those parts of the Order which are not proposed to be modified.

74. An inquiry or hearing will be required under paragraph 8(2)(b) only if an objection has been "duly made". Whilst an objection need not particularise the grounds on which it is based in order to be duly made (see the decision of Potts J. in Lasham Parish Meeting v Hampshire County Council and The Secretary of State for the Environment (1993) JPL 841 at page 848), it must be an objection "with respect to the proposal" [of the Inspector to modify the Order]. If it is an objection with respect to some other matter, including an objection in respect of those parts of the Order not proposed to be modified, it will not have been duly made under paragraph 8(2)(a) and there will be no need to hold an inquiry under paragraph 8(2)(b). That being the case, it would be surprising if, merely because an inquiry under paragraph 8(2) had

become necessary because a second objection had been duly made, the maker of the first objection with respect to the other matter could then insist on the Inspector hearing his objection at the paragraph 8 inquiry.

75. I accept Mr Bedford's submission that the scope of inquiries held under both paragraphs 7 and 8 is not defined by the terms of the objections which have been duly made. Once an objection has been duly made and an inquiry has to be held under paragraph 7, the Inspector is obliged to consider the merits of the Order as a whole - whether to confirm it with or without modifications - and must consider any evidence relating to the Order, unconstrained by the terms of the particular objection or objections which triggered the need for the paragraph 7 inquiry. But the evidence must relate to the subject-matter of that inquiry - the Order. In the same way, an Inspector holding an inquiry under paragraph 8 into his proposal to modify the Order, is not constrained by the terms of the objection or objections under paragraph 8(1) which triggered the need for an inquiry under paragraph 8(2), he must consider any evidence relating to the proposal. But the evidence must relate to the proposal, and not to those parts of the Order which do not form part of the proposal because they are not proposed to be modified.

76. In answer to Mr Bedford's submission that there is no reason why an Inspector at a paragraph 8 inquiry should not hear new evidence relating to the Order as a whole, I would say that elementary considerations of fairness require that those deciding whether to attend, and if so, how to prepare their cases for presentation at public inquiries, should know in advance what is to be the scope of the inquiry. Paragraph 9-004 of De Smith, Woolf and Jowells' Judicial Review of Administrative Law summarises the position thus, under the heading "Prior Notice of the Decision":

> "Procedural fairness generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position:
>
> (1) to make representations on their own behalf; or
>
> (2) to appear at a hearing or inquiry (if one is to be held); and
>
> (3) effectively to prepare their own case and to answer the case (if any) they have to meet."

77. There is a very considerable difference between, in effect, re-opening a paragraph 7 inquiry as a whole and confining a paragraph 8 inquiry to proposals to modify the Order. The notice under paragraph 8(2)(a) tells those who may be interested what it is that they may object to. They may object to the proposals to modify. They may not object, under paragraph 8(2)(a), to the Inspector's decision in so far as it does not relate to those modifications.

78. Although Schedule 15 does not expressly require notice to be given of the holding of a local inquiry under paragraph 8(2)(b), Parliament would have assumed that for such an inquiry (as opposed to a hearing), to serve its statutory purpose some form of public notice would be required. Notice is invariably

given to the public of the holding of such inquiries (see above for the forms of notice used for the 1997 and the 1999 Inquiries).

79. It would be inherently unfair for the public to be given notice of an inquiry under paragraph 8 into a particular proposal, and for the Inspector to be entitled or obliged to announce at the beginning of the inquiry, on the basis of unpublished, internal departmental advice, that he proposed to broaden the scope of the inquiry to consider matters other than that proposal.

80. In my judgment, the wording of paragraph 8 is plain - the scope of the inquiry is confined to the Inspector's proposal to modify. If I had thought that the language of Schedule 15 was in any way unclear, then I would have resolved the lack of clarity by starting from the proposition that it is most unlikely that Parliament would have enacted an inherently unfair procedure, which would frustrate the purpose of giving public notice both under paragraph 8(2)(a), and of the holding of an inquiry under paragraph 8(2)(b). It will be noted that any representations or objections made in response to a paragraph 8(2)(a) notice are made available for inspection by interested parties: see the terms of the notice dated 5th June 1998 above.

81. The change in the form of notice used for the 1997 and 1999 Inquiries is a tacit acknowledgment that fairness requires that the public must be told the purpose of a proposed public local inquiry in advance, so that they may decide whether to attend, and how to prepare their cases if they do decide to attend.

82. It is no answer for the defendant to say that a party who is taken by surprise at a paragraph 8 inquiry, by evidence which relates to the unmodified parts of an order, may request an adjournment. Persons interested in the unmodified parts of the Order may not have attended. For those who have attended, once an inquiry has commenced there is considerable pressure on the Inspector and on all parties to proceed: advocates and witnesses will have made themselves available, accommodation will have been booked, et cetera. Any adjournment will inevitably result in delay and wasted costs. If the underlying procedure of admitting, without prior public notice, evidence which does not relate to the proposal is inherently unfair, the defendant is not entitled to rely on the parties present at the inquiry to cure that unfairness by applying for an adjournment.

83. I acknowledge that the flow of new evidence after the close of paragraph 7 inquiries presents a real practical difficulty for the Inspectorate. This is particularly the case where an order deals with a number of RUPPS. The volume of evidence, and hence the time required to prepare a decision letter, may be very considerable. I accept Mr Bedford's submission that Mr Blomfield's 1996 decision was an interim decision and that, absent any provision such as those contained in the Town and Country Planning Rules, he was obliged to take account of all relevant considerations of which he became aware up to the time when he was able to make his final decision under paragraph 7.

84. I also accept the submission that section 53 does not, by itself, provide a very satisfactory practical

solution to the problem of late evidence. It would be most undesirable if an Inspector, having conducted an inquiry under paragraph 7, and having become aware of relevant new information, was obliged to reach his decision under paragraph 7 on a knowingly incomplete or inaccurate basis. That would simply result in the need for another order under section 53, to which Schedule 15 would apply. So the lengthy process would have to start rolling all over again.

85. But that does not mean that a paragraph 8 inquiry is the proper forum to consider such new evidence. During the course of submissions, both Mr Laurence and Mr Bedford accepted the proposition that an Inspector who has held a paragraph 7 inquiry has an inherent power to re-open that inquiry, prior to reaching a final decision, if he considers that re-opening is required in the interests of fairness. Take the case where the Inspector, having concluded a paragraph 7 inquiry, is not minded to propose any modifications to the Order but is still in the process of preparing his decision. Following the close of the inquiry, he receives new, cogent evidence relating to the Order. He may not, lawfully, disregard that evidence. He must consider how best to deal with it.

86. In some cases, the only fair course might be to re-open the paragraph 7 inquiry, having given the parties proper notice. In other cases it might be appropriate to deal with the new information by an exchange of written representations between the parties. Alternatively, the Inspector might feel that the new information was so insignificant that it would not affect his decision, so it was unnecessary to invite the parties' comments, either in writing or at a re-opened inquiry.

87. Although Schedule 15 does not contain an express power to re-open a paragraph 7 inquiry if new evidence is received after the close of the inquiry (compare the provisions of Regulations 16 and 18 in the Town and Country Planning Rules), such a power is necessarily to be implied in the interests of fairness. I also accept the parties' submission that re-opening of a paragraph 7 inquiry is expressly permitted by section 12 of the Interpretation Act 1978, which provides in subsection (1) that:

> "Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

88. If fairness requires it, the paragraph 7 inquiry may be reopened.

89. This being the case, there is no need to expand the scope of a paragraph 8 inquiry to enable the Inspector to consider evidence or objections which do not relate to his proposals to modify the Order. The proper response of an Inspector holding an inquiry under paragraph 8, if presented with such evidence or objections, would be to state that whilst he will not be able to consider them in the context of the paragraph 8 inquiry, which will be confined to considering his proposals to modify the Order, if they were set out in writing then he would be prepared to treat them as late representations received after the close of the paragraph 7 inquiry, and would, in due course, consider them with a view to deciding whether to re-open that inquiry, or to permit an exchange of written representations. If his decision is to re-open the

paragraph 7 inquiry then, naturally, proper notice will be given of that re-opened inquiry and its scope.

90. It has to be accepted that re-opening the paragraph 7 inquiry might in turn lead the Inspector to change his view about the modifications required to the Order, so a fresh paragraph 8 inquiry might be required. But this problem may arise whether or not there has been an inquiry under paragraph 8, so long as Inspectors are required to take all relevant evidence into consideration up to the date of their decisions under paragraph 7.

91. For these reasons, I conclude that the advice given to Mr Blomfield in ROW Note 5/97 was in error, and that he had no power at the paragraph 8 inquiry in 1997 to, effectively, re-open the paragraph 7 inquiry that he had held in 1995. Specifically, he had no jurisdiction to propose in his 1998 decision, modifications to the Order reclassifying RUPPS 16 and 21 as bridleways. It follows that Mr Bryant had no jurisdiction to conduct the paragraph 8 inquiry in 1999 into those purported modifications.

92. Unfairness

93. I have already remarked on the inherent unfairness of giving notice of an opportunity to make objections, or of an intention to hold a local inquiry, in relation to a particular (and narrowly defined) proposal; and then enlarging the scope of the inquiry on the basis of unpublished, internal guidance. I do not refer simply to unfairness to the parties who attend the inquiry, some of whom, such as the claimant in the present case, may have gained some prior understanding of the Inspectorate's practice, but to unfairness to the public at large. In ordinary civil litigation, the parties are free to define the ambit of their dispute, and may invite the judge to extend the scope of any hearing. But reclassification orders are public documents which affect public rights of way. The public has a right to expect that it will be given proper notice of the scope of an inquiry held under paragraph 7 or paragraph 8.

94. The lack of inquiry procedure rules for inquiries under Schedule 15 aggravated this underlying problem at the 1997 and 1999 Inquiries. At the 1997 Inquiry, the claimant, who did know of the Inspectorate's practice, was nevertheless surprised by a considerable volume of evidence which was introduced by the BDS. Mr Bedford submits that she should have sought an adjournment, and that having failed to do so she cannot now complain of Mr Blomfield's conduct at the 1997 Inquiry.

95. I do not accept that this is an adequate answer. In the absence of inquiry procedure rules, the defendant, through the Inspectors appointed under paragraph 10, has to devise administrative procedures which meet the basic requirements of fairness.

96. The right to attend a public inquiry and make objections to a proposal is of little assistance if one does not have even a general indication in advance of the case that one will have to meet. The Town and Country Planning Rules, which are intended to reflect the requirements of fairness in the context of planning inquiries (see Lake District Special Planning Board v Secretary of State for the Environment (1995)

JPL 220), contain elaborate provisions which are intended to ensure that, inter alia, the parties to a planning inquiry have proper notice of the cases that they will have to meet. I accept Mr Bedford's submission that it does not follow that fairness requires that such elaborate provisions should be made in the context of inquiries under Schedule 15.

97. I also accept that the requirements for advance disclosure have become increasingly stringent in the context of planning inquiries over the last 20 years: compare, for example, the requirements contained in the Town and Country Planning (Inquiries Procedure) Rules 1974 with the requirements contained in the most recent Town and Country Planning Rules. This comparison shows, in my view, that concepts of what is a fair procedure may change over time. There is now a greater recognition of the need for advance disclosure, and of the fact that "ambush" in the presentation of cases is more likely to lead to unfairness.

98. Moreover, no reason has been advanced as to why there are no procedural rules for inquiries held under Schedule 15. It is not suggested on behalf of the defendant, and in my judgment it could not sensibly be contended, that their particular characteristics make advance disclosure of the parties' cases any less important. It is clear from the decision letters in this case that Schedule 15 inquiries may have to deal with complex questions of fact and law. If one looks at the submissions recorded by Mr Blomfield and Mr Bryant in their lengthy decision letters, the need for some advance disclosure by the parties is only too evident. Whilst there may be problems in identifying in advance all those who may wish to give evidence at a Schedule 15 inquiry, the order making authority, those who have made objections or representations, and the list of those who must be served with notice of the making of an order under paragraph 3 of Schedule 15, and Schedule 6 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, may provide an useful starting point.

99. The complaints about Mr Blomfield's handling of the 1997 Inquiry in part 4 of Mr Plumbe's opening submissions (see above), raised matters of legitimate concern. Mr Bedford submits that since the claimant had a full opportunity to answer the 1997 BDS evidence at the 1999 Inquiry, there has, in the event, been no unfairness. Assuming that Mr Bryant had jurisdiction to embark on the 1999 Inquiry, it was particularly important, given the criticisms that had been made of the 1997 Inquiry, that the scope of the 1999 Inquiry should have been made clear from the outset. To what extent, for example, was Mr Plumbe, on behalf of the claimant, entitled to criticise both the substance of Mr Blomfield's conclusions and the manner in which he had reached those conclusions?

100. I have set out the terms of Mr Bryant's opening remarks above. Mr Bedford submits that the unusually forceful warnings about costs before the parties had even begun to present their cases were justified in the particular circumstances of this case since it was clear from documents before the Inspector that the "supporters" and "objectors" were not on particularly good terms.

101. Whatever Mr Bryant's intentions, the effect of his warnings was plain: Mr Plumbe deleted part 4 of

his submissions and "pulled his punches" when dealing with other criticisms of Mr Blomfield's conclusions. Some "re-presentation" of evidence previously considered was inevitable if the claimant was to be able to answer the evidence presented by the BDS in 1997. How far could Mr Plumbe go without exposing the claimant to the risk of costs as a result of Mr Bryant's post-inquiry scrutiny of the documentation?

102. Whilst it would have been entirely proper for Mr Bryant to mention the fact that he was not a lawyer, if the effect of the 1999 Inquiry was to re-open the 1997 Inquiry, there was no reason why the claimant should not have been able to submit that conclusions in the 1998 decision letter were erroneous in law. If the parties were to be allowed to present new evidence and question the correctness of Mr Blomfield's conclusions, it is difficult to see why they should not have been permitted to argue that a particular conclusion was not merely wrong but so unreasonable as to be perverse. An experienced advocate might think twice before making such a criticism of an Inspector's conclusion to another Inspector, but if the reclassification of RUPPS 1, 9, 13, 16, 20 and 21 were "still live issues", as explained by Mr Bryant, this should not have been a "no-go" area.

103. In practice, as Mr Bedford pointed out, it seems that it was not. Although paragraph 6 of the 2000 decision refers to "the weight which will properly be accorded to Mr Blomfield's decisions", when one looks at the matter in more detail, it appears that Mr Bryant, whilst noting Mr Blomfield's conclusions as his starting point, conducted his own assessment of all the relevant evidence, old and new, in relation to all of the "live issues" and reached his own conclusions; disagreeing with Mr Blomfield in the case of RUPP 21.

104. Mr Bedford submits that it does not, therefore, matter whether Mr Blomfield's conclusions were erroneous in law or perverse, and he says that there is, in any event, no evidence that they were. Mr Laurence submits, in summary, that Mr Bryant's ruling, in terms both of its content and tone, was far too draconian. The claimant felt inhibited in the presentation of her case. During the course of the inquiry the Inspector must have realised that his initial ruling was too draconian and, in effect, he embarked on a comprehensive re-opening of the 1997 Inquiry, but by then the damage had been done.

105. In my judgment, Mr Laurence's criticism is well-founded. Inquiry procedures must not merely be fair in terms of the end result, they must be seen to be fair. If there was to be a comprehensive re-evaluation of the conclusions reached in the 1998 decision on all of the "live issues", it was essential that the scope of the inquiry should be clearly defined by the Inspector at the outset. Mr Bryant's opening remarks failed to achieve this objective. It is understandable that they left the claimant and Mr Plumbe not merely confused as to the extent to which they were permitted to criticise the 1997 Inquiry and the 1998 decision, but also feeling constrained as to the manner in which they were able to present the claimant's case.

106. The blame should not be laid at Mr Bryant's door. He was placed in a very difficult position by the unpublished guidance in ROW Note 5/97, which he attempted to follow, at least in part. The end result was

confusion about a vital matter: the scope of the 1999 Inquiry. I should add that this confusion would not have been dispelled by the revised terms of the notice of the holding of the 1999 Inquiry. It will be remembered that the additional sentence in the notice was as follows:

> "The purpose of the above inquiry is to hear representations about the Inspector's proposed modifications, the Inspector may also consider new evidence and arguments relating to any unmodified parts of the Order."

107. If the purpose of the inquiry was to hear representations about the Inspector's proposed modifications, for what purpose "may" the Inspector be prepared to consider "new evidence and arguments relating to any unmodified parts of the Order"? The notice does not state that the Inspector will hear such evidence and arguments; he may hear them, but then presumably, he may not. The notice appears to leave the issue of new evidence and arguments relating to the unmodified parts of the Order entirely to the Inspector's discretion.

108. Mr Laurence's remaining criticisms of the procedures adopted by Mr Bryant would be of less force if considered individually, and outside the context set out above. I accept Mr Bedford's submissions that in principle, the decision whether to grant an adjournment was a matter for Mr Bryant's discretion; that he had a discretion to adopt a more inquisitorial format for the final day of the inquiry; that he was entitled to ask questions of the claimant to clarify what he perceived to be inconsistencies in her evidence; and that someone, in this case the Council, had to have the last word.

109. Whilst I am able to accept these submissions individually in principle, the fairness of an inquiry has to be looked at in the round, and questions of degree arise on the facts of the present case.

110. Mr Bryant himself says that a "staggering volume of evidence" was put before the 1999 Inquiry. Much of that evidence was produced very shortly before, or at the inquiry by the BDS. In effect, the problems experienced by the claimant at the 1997 Inquiry were being repeated in 1999. I find it surprising that in those circumstances the Inspector waited until "saturation point" was reached before announcing, after lunch on the third day, that the inquiry would be adjourned. Since the inquiry was originally set down for only three days, it seems likely that an adjournment of some kind was inevitable by that stage. The adjournment did not enable Professor Kain to address, on behalf of the claimant, the "staggering volume" of new evidence. That of itself might not have been of great consequence, but Professor Kain's contribution to the Inquiry was roundly criticised in the Council's final submissions, partly upon the basis that he had not considered all of the documentary evidence. Whilst someone has to have the final word at any Inquiry, I have grave reservations about the fairness of the Council being allowed to produce its "book" as the last word at the 1999 Inquiry, it having played virtually no part in the inquiry up to that stage.

111. Whilst the Inspector was entitled to adopt an inquisitorial format, it is most unfortunate that this change of procedure was introduced without prior notice, and that on his own account of the matter the claimant was "discomfited" by his questions to the extent that he decided that an adjournment was

necessary in order to give her a break.

112. Looked at cumulatively, and in the context of the Inspector's opening remarks which I have considered above, these matters do give me real cause for concern. It is plain that many of the difficulties stemmed from the lack of procedural rules for Schedule 15 inquiries. Such rules would have provided for, inter alia, a measure of advance disclosure by those intending to make objections or representations at the inquiry, so that the parties would not have been surprised by "staggering volumes" of evidence produced with little or no notice, or by "books" produced by order making authorities at the very end of the inquiry. However, the lack of inquiry procedure rules does not absolve the defendant and his Inspectors from responsibility for devising procedures which are, and are seen to be, fair. For the reasons set out above, I am satisfied that this duty was not discharged in the circumstances of the 1999 Inquiry that I have set out above.

113. RUPP 9

114. In both his 1996 and 1998 decision letters, Mr Blomfield concluded that RUPP 9 was correctly reclassified by the Council as a BOAT, but his justification for that conclusion changed, as explained by Mr Bryant, in paragraph 100 of the 2000 decision:

> "100 RUPP 9: Mr Blomfield appeared to base his first inquiry reclassification proposal (for BOAT status) mainly on user evidence. Thus the Robinson v Adair judgment necessitated reappraisal of the historic evidence. New BDS evidence at the second inquiry had persuaded him that RUPP 9 had probably been an historically important link in the ancient highway network. Its status as such had apparently been accepted by both Highway Authorities and landowners during the mid-20th century. BOAT status was therefore still appropriate, albeit for a different reason.
>
> "101 I have considered carefully Professor Kain's assessment of the somewhat limited documentary evidence presented to him for consideration. I have considered equally careful Mr Plumbe's response to the new BDS evidence; and also Mr Lalonde's re-submission. These responses do not persuade me that Mr Blomfield had erred in his conclusion. Again, I will begin at the beginning."

115. Mr Bryant then carried out, between paragraphs 102 and 111, a detailed examination of the historical evidence. That historical evidence included an 1890 map showing part of The Grange Estate, Alresford, across which RUPP 9 runs. This map has the following legend beside part of the northern half of RUPP 9:

> "80 chains of new road farm occupation 9 feet wide commencing at Chilton Woods new premises made 1873."

116. Mr Bryant dealt with the significance of this map as follows:

> "111 ... The construction of the new occupation road in 1873 casts doubt on the capability of the northern half of RUPP 9 to withstand continual use by wheeled traffic. The several gates suggest that this facility was primarily for traffic to and from the about to be created

farm. The timescale is wrong for it to have been an altruistic replacement for the inter-RUPP link. Recent arboreal evidence supports this theory in that trees appear to have encroached on the old track at about that time; hence the inference of probable disuse.

112 The objectors further argue that this new occupation road militates against the northern section of the RUPP having been a public carriageway because

112.1 The landowner would not have diverted a public carriageway ... my response is that the diversion is merely 'straightening' (RUPP 13 evidence is relevant). I accept that he would not have extinguished one.

112.2 There would be no public rights along an occupation road ... my response is that public rights are not necessarily excluded along occupation roads.

112.3 The 55 metre lateral extent of the diversion is defence against a de minimis transfer of existing rights (if they existed) ... my response is that the majority of the new route is immediately adjacent to the original line. Hence my 'straightening' comment.

112.4 If public carriageway rights did exist, why should an easement have been granted? I agree that this evidence militates against a perception of public carriage road status on the part of the owner.

113 Thus I am not wholly convinced that the advent of the new occupation road would automatically have precluded the possibility of public user. There also remains the question of the purpose of the original line of the northern section. That it physically existed (at least in part) is demonstrated by 'holloway' evidence seen on my site visit. There is also the interesting fact that Breach Farm is shown by name on small scale 18th century commercial maps. This could suggest that it had some importance in a highway network context. However, on a balance of probability, I conclude the evidence shows that the public had acquired vehicular rights along the southern half of the RUPP; but perhaps not along the northern half. Twentieth century evidence becomes of enhanced importance."

117. Pausing there, the reference to "55 metres" is probably an error. Mr Plumbe had argued that the new farm occupation road was displaced from the route of the track to which the pre-1873 evidence related by some 55 yards (51.3 metres): see paragraph 18.19.6 of the 2000 decision. The original route appears to follow old, curving, field boundaries, whereas the 1873 route is straight. Whether the maximum extent of the displacement is 55 metres or 55 yards does not matter for present purposes. Mr Laurence submits that if the pre-1873 way was a public highway, the landowner had no power to "straighten" it along what is the present alignment of part of the northern half of RUPP 9: see Dawes v Hawkins (1860) 8 CB (NS) at page 847. If the original way was founderous or obstructed, the public would have been entitled to deviate over the new occupation road, but such user would not have created a public right of way over the new road (ibid).

118. Thus, Mr Bryant should have concluded that the pre-1873 historical evidence was of no assistance in establishing the status of the new occupation road forming part of RUPP 9. One had to start afresh in 1873 to see what evidence there was, if any, of the creation of a public right of way thereafter over the new occupation road. This Mr Bryant had not done because he regarded the new road as a "straightening" of the old.

119. Mr Bedford accepted, indeed asserted, that Mr Bryant's overall conclusion on RUPP 9 was:

> "not dependent solely on twentieth century evidence relating to the post-1873 alignment, but was a conclusion reached in the light of all the evidence, both before and after 1873."

120. Mr Bryant was "not wholly convinced" that there were no public vehicular rights over the road constructed in 1873: see paragraph 113 of the decision letter above. He was entitled to approach the matter in that way because having inspected the route of RUPP 9 he was entitled to conclude, as a matter of fact and degree, that the alignment had not altered in substance and that the new road was merely a straightening of the old route. Mr Bedford submitted that it was unlikely that Mr Bryant erred in his approach to RUPP 9, because he had correctly concluded in respect of RUPP 16 that historic rights had not been "transferred" to a way that had been realigned in 1942: see paragraphs 132 to 133 of the 2000 decision.

121. I accept that Mr Bryant approached the realignment of RUPP 16 in a correct manner, but I am unable to accept Mr Bedford's submissions in respect of RUPP 9. I do accept that questions of fact will often arise as to the width of an alleged highway. Having inspected the way, the Inspector is in the best position to resolve such disputed questions of fact. But here the width of the way was not in issue. The 1890 map clearly shows the new occupation road on a different, straight alignment. Mr Bryant did not suggest that Mr Plumbe's evidence that the maximum extent of lateral diversion was 55 yards (or metres) was inaccurate. Nor did he conclude that the 1890 map was, in substance, inaccurate. Mr Bedford rightly accepts that a landowner is not, and was not in 1873, entitled to divert a public highway by straightening it without going through the appropriate procedures. He says that there was no diversion in the present case because it was for Mr Bryant to determine the precise alignment of the way, as a matter of fact.

122. Again, I would accept that, if there is a dispute as to precisely where a way ran in 1873, for example, because of conflicting information shown on a number of ancient maps, then the Inspector can resolve that kind of factual difference. But there was no dispute that the relevant part of the northern half of RUPP 9 had been constructed as a new occupation road in 1873 along a different alignment from that of the old route, as shown on the 1890 plan, the maximum lateral diversion being 55 yards or metres.

123. Since a landowner in 1873 had no power to divert a public highway by straightening it, there was no reasonable basis on which Mr Bryant could have concluded that in substance the route had not changed in 1873. Even if one assumed for the purposes of argument, although this would be disputed by Mr Laurence, that a landowner may lawfully "straighten" a right of way running across his land to a de minimis extent, no reasonable Inspector could possibly have concluded that a diversion of up to 55 yards (or metres) laterally, extending across the length of two fields and parts of two more fields, was de minimis. It follows that Mr Laurence is correct to submit that a fresh chapter opened in 1873. Mr Bryant did not suggest that the post-1873 evidence was sufficient to justify his conclusion that the public had acquired vehicular rights over the northern half of RUPP 9.

124. Looking at the twentieth century evidence, he relied on two factors: the 1929 Handover Map, showing which roads were thought to be publicly maintainable at that time, and correspondence from certain landowners. As Mr Bryant explained in paragraph 87.29, a Handover Map is:

> "... generally accorded modest evidential weight because its purpose was to record maintenance responsibilities, not rights; and because the contents of the map were not normally exposed in the public domain."

125. Paragraph 87.30 continued:

> "That said, a Highway Authority would not actively seek to take on unwarranted financial responsibilities. There is, therefore, a reasonable inference that a perceived maintenance liability embraces a perceived public right. Moreover, in the case of the 1929 map as it affects the Candovers, there is evidence that its contents had been known to the Parish Council. The 1946 map had been amended as a result of their reaction. It is not unreasonable to infer that their single objection reflects acceptance of the portrayed status of the remaining highways. Thus there is harmony with the Parish views expressed later in the preparation of the Definitive Map. Mr Plumbe's point, that Handover Map evidence would have influenced the compilation of the Definitive Map, is fairly made. But both documents appeared in the public domain."

126. Mr Laurence submits, correctly, that the 1929 map must have been wrong in so far as it related to the new road which had been constructed in 1873, since, as a post-1836 way, there was nothing to indicate that it had become publicly maintainable between 1873 and 1929, even if there had been some evidence of public user.

127. Dealing with the correspondence from the landowners, the Inspector said this in paragraph 114:

> "In 1935 General Hope had complained, amongst other things, that the cartway from Chilton Candover to Breach was very bad in places. An estate keeper had interfered with people using the road and had told them that the new owner had claimed the cartway as a private way. Warren Estate, the new owners, had published an open reply in a local newspaper. Amongst other things they denied stopping the use of the cartway and said that if it was impassable it was no concern of theirs. The foregoing paraphrasing adds a degree of clarity to the exchange which the objectors dispute, but I urge them to approach the issue with an open mind."

128. At paragraph 115, the Inspector continued:

> "Whatever 'spin' one may try to apply some 64 years later, there is an inescapable inference that the then owner had accepted that RUPP 9 was a public cartway. Not only that, they had publicly advertised this acceptance in a local newspaper. I suggest that it matters not if this perception had less than compelling historical justification. It seems to me that the newspaper article is tantamount to express dedication. Moreover, as I next explain, it appears to reflect the view of other landowners at the time."

129. In paragraph 116, the Inspector referred to correspondence from a Colonel Savill (the claimant's father) and Mr Kidson, accepting that RUPP 9 was part of a public road from Candover to Breach Farm. Paragraph 117 is as follows:

> "The objectors make a general point that Highway Authority Handover Records might have influenced landowners' perceptions of public rights along the RUPP network. In my inquiry experience landowners will not lightly accept any encroachment on their rights; and certainly not if that encroachment is based wholly upon an in-house administrative document."

130. In the light of all this evidence, Mr Bryant endorsed Mr Blomfield's decision that RUPP 9 should be reclassified as a BOAT.

131. Dealing first with the correspondence from the Warren Estate, on 24th November 1935, Colonel Hope had written as follows:

> "The state of the lanes East Stratton, Lone Barn Farm over Beckets Down to Woodmancot Holt and also the lane from Chilton Candover to Breach is very bad in places. Both are cartways but it is not possible now in places to get down them on a horse. Now that Breach Farm is being cultivated it is important to clear the old lanes out or to establish with the owners the right to go in the used way. Perhaps in places, particularly on Beckets Down this might be arranged.
>
> "A keeper has interfered with people using these roads and the new owner has claimed the Chilton-Breach Farm road as private. It is therefore time that they were made usable. I had a fall myself through an overhanging tree."

132. The reply from the Warren Estate, which was published in a local newspaper, was in these terms:

> "We write as owners of Breach in reference to Col. Hope's letter to the Basingstoke Rural District Council and the ensuing discussion, wherein it is suggested we proposed to interfere with authentic rights of way. This is incorrect. What we do object to and intend to stop are the proceedings of various riders, at times accompanied by ranging dogs, who have made a regular practice of riding over the whole property as though they owned it.
>
> "If, as is stated, the Right of Way is impassable, it is no concern of ours and is no justification for going beyond it."

133. Whilst I accept that it was for Mr Bryant to assess the weight of the evidence, both oral and documentary, and the inferences to be drawn from it, I find it difficult to understand how this exchange of correspondence gives rise to "an inescapable inference" that Warren Estate had accepted that RUPP 9 was a public cartway. Whilst Colonel Hope's letter had referred to cartways, both his letter and Warren Estate's reply appeared to be principally concerned with horse riders, and the responsibility, or lack of it, for maintenance of some of the ways.

134. Mr Kidson's letter, dated 26th August 1958, stated in terms that he had been told by the Deputy Surveyor that the way was classified as an unmetalled highway. This was clearly a reference to the description of the way on the 1929 Handover Map. In so far as Mr Bryant's observations in paragraph 117 of his decision above are based on the proposition that the 1929 Handover Map was "an in-house administrative document", they appear to conflict with his conclusion in paragraph 87.30 above, that this particular Handover Map was "in the public domain".

135. Taken in isolation, these detailed criticisms of the manner in which Mr Bryant dealt with the twentieth century evidence might not have been fatal to his conclusions in respect of RUPP 9. I mention them more for the sake of completeness, since he relied on both the pre and post-1873 evidence in coming to his conclusion. In my judgment, he erred in both of those respects for the reasons set out above.

136. Mr Bedford conceded that if I reached this conclusion in respect of the northern half of RUPP 9, Mr Bryant's conclusion in respect of the southern half of RUPP 9 could not be sustained. If the errors in respect of RUPP 9 had been the only ground of challenge to the making of the Order, I would have felt able to quash it in part under paragraph 12(2) of Schedule 15. Since I have concluded that all three heads of challenge have bean made out, I propose to quash the Order generally.

137. I do not propose to extend this lengthy judgment with a discussion of whether confirmation of the Order was outside the powers conferred by section 54, or the interests of the claimant have been substantially prejudiced by a failure to comply with the requirements of Schedule 15. Even if Mr Laurence's grounds of challenge fall within the latter category, I am satisfied that the interests of the claimant have been substantially prejudiced for the reasons set out under the heading of "Unfairness" above.

138. I quash the Order with considerable regret, since it has taken nearly 11 years and three inquiries to get this far. But I do so without hesitation because I am satisfied that the defendant's approach to the scope of inquiries under paragraph 8 of Schedule 15 is erroneous, whether that issue is looked at in terms of jurisdiction or in terms of fairness. This case points up the urgent need for inquiry procedure rules for Schedule 15 Inquiries, of which I was told there are about 150 a year. It also suggests that an amendment to Schedule 15, conferring a power equivalent to that conferred on order making authorities by paragraph 5, upon the Secretary of State when confirming an order, would be of considerable value, given the delays inherent in the paragraph 8 modifications procedure.

139. MR LAURENCE QC:My Lord, in the circumstances I invite your Lordship to quash the Order, as you have indicated you have done and are reminded to do, and to order the Secretary of State to pay Mrs Marriott's costs. Such costs should be the subject of a detailed assessment if not agreed.

140. MR JUSTICE SULLIVAN: Any opposition to that, Mr Bedford?

141. MR BEDFORD:My Lord, not on those matters. My Lord, can I just mention two very small matters in terms of the judgment.

142. MR JUSTICE SULLIVAN: Please do. Anything you notice that should be corrected.

143. MR BEDFORD: My Lord, the first point is a matter which your Lordship gave a date, for the publication of the notice by the County Council of the confirmation of the Order of 30th April.

144. MR JUSTICE SULLIVAN: Yes.

145. MR BEDFORD: Which your Lordship, I anticipate, took from the bundle, because there is indeed a date set out in the claim form.

146. MR JUSTICE SULLIVAN: Right, yes.

147. MR BEDFORD:It was not a matter which I needed to raise in the hearing but the date was actually wrong. I understand that, in fact the notice was given on 10th April.

148. MR JUSTICE SULLIVAN: Right.

149. MR BEDFORD: Which meant that this challenge was actually lodged on the very last day of the 42 days, but it was still in time, so therefore I did not consider there was any point in mentioning it. But since your Lordship has referred to it, it may be that others, particularly the County Council, may look at the judgment and query that.

150. MR JUSTICE SULLIVAN:Of course. For the shorthand writer's note, it is absolutely at the start of the judgment, first paragraph really, it is "notice of confirmation of the Order was published in accordance with paragraph 11 of Schedule 15 to the 1981 Act on 10th April."

151. MR BEDFORD:Of April.

152. MR JUSTICE SULLIVAN: Right, thank you for that correction.

153. MR BEDFORD:The second point. My Lord, this arose when your Lordship was setting out the factual summary.

154. MR JUSTICE SULLIVAN: Yes.

155. MR BEDFORD:Your Lordship referred to the notice that was given, first of all the notice given of the proposed modification under paragraph 8(2)(b), but then your Lordship referred to the notice of the inquiry. Your Lordship said that there was a local advert and that the notice was published on site.

156. MR JUSTICE SULLIVAN: Yes.

157. MR BEDFORD:Being the site of RUPPS 1 and 20.

158. MR JUSTICE SULLIVAN: Yes. That was my understanding, was that wrong?

159. MR BEDFORD:My Lord, the position was that the Court did not, in the end, hear specific evidence about --

160. MR JUSTICE SULLIVAN: As to where.

161. MR BEDFORD: Your Lordship will recall that the matter was raised in argument.

162. MR JUSTICE SULLIVAN: Yes.

163. MR BEDFORD:I had indicated that it was my understanding that the position was that the order making authorities put the notices at the end of all of the effective RUPPS.

164. MR JUSTICE SULLIVAN: Yes, I took that to be 1 and 20, but if that is wrong.

165. MR BEDFORD:My Lord, my learned friend and I did not feel that it was necessary to take the matter further, in terms of the evidence to the Court. But my Lord, Mr Best, who is the County Council's solicitor, when there was an issue as to whether this was important or not, I was given a set of instructions from him. He, as it were, informed me as to what the practice was. My Lord, the Court was not actually told where the notices were put.

166. MR JUSTICE SULLIVAN: Right. Is it best then simply to say "both in local newspapers and on site", and if and in so far as it becomes important for the future I have no doubt you and Mr Laurence can sort something out, and if it is necessary to provide supplementary information that can be done. Is that the sensible thing, do you think that is sensible, Mr Laurence? That seems to flow. Right, so shorthand writer, where we are dealing with factual summary, again it is almost at the start, it is the second paragraph of the factual summary, "notice was given, both in local newspapers and on site". Delete "on RUPPS 1 and 20". Right, yes.

167. MR BEDFORD:My Lord, those were the matters. In relation to your Lordship's order, I make no submissions on the terms of the order and in relation to costs, clearly I cannot resist costs and it is appropriate for a detailed assessment in the circumstances of this case.

168. MR JUSTICE SULLIVAN: Very well. Thank you very much indeed. Then the formal order of the Court is that the Order be quashed generally and that the defendant pay the claimant's costs to go for detailed assessment if not agreed.

169. MR LAURENCE QC:My Lord, could I just mention one other matter, I am sure I speak for my learned friend and myself when I say that we very much appreciate the trouble your Lordship has taken with the judgment and the way in which you entertained our submissions in what turned out to be nearly double the original estimated length of the hearing.

170. MR JUSTICE SULLIVAN: That is very kind. Thank you very much. It is nice to know that one is sometimes appreciated anyway. Yes, do you have any other application, Mr Bedford?

171. MR BEDFORD: My Lord, I do in relation to permission to appeal.

172. MR JUSTICE SULLIVAN: Yes.

173. MR BEDFORD: My Lord, in terms of the appropriate test, as your Lordship knows it is page 761 of the White Book, ie the real prospect of success or some other compelling reason.

174. MR JUSTICE SULLIVAN: I do not need to trouble you. It does seem to me, at least on the first point and on the second to a degree there are wider issues, it seems to me, and Mr Laurence himself made the point that what I say in this judgment will affect the conduct of a number of inquiries, subject to what Mr Laurence may say. If it had been just RUPP 9, I think actually RUPP 9 is dead in the water, but ...

175. MR BEDFORD:My Lord, these matters need to be looked at, I would submit, in a comprehensive fashion.

176. MR JUSTICE SULLIVAN: Of course, there would not be any point, I think, in limiting you. Shall we see if Mr Laurence opposes leave to appeal to the Court of Appeal?

177. MR LAURENCE QC:My Lord, I suppose it depends really what view the individual tribunal takes. There are a lot of cases that raise matters which would profit from discussion by the Court of Appeal. It may be that this is one of those matters. That has to be weighed against the assessment of the judge, which is ex hypothesi invidious to ask for him to have to perform.

178. MR JUSTICE SULLIVAN: Yes.

179. MR LAURENCE QC:Whether there is any realistic prospect of a successful appeal. My Lord, it is plain to me, as I am sure it is to everybody in this courtroom, that your Lordship has given a very careful, cogent judgment which you, at any rate, think is going to survive scrutiny in any court, I would have thought.

180. MR JUSTICE SULLIVAN: The trouble is I would never give leave to appeal in those circumstances.

181. MR LAURENCE QC: I would respectfully submit the same. But my Lord, that is all I really want to say. If your Lordship feels there are minor matters that ought perhaps to be looked at at a higher level, then I confine my submissions to what I have just said and leave your Lordship to decide whether leave should be given.

182. MR JUSTICE SULLIVAN: That is very kind of you. I think it is appropriate for leave to be granted. This is the first time the ambit of paragraph 8 inquiries has been considered and it raises a matter of, in my judgment, broad general importance. Mr Bedford, I simply give leave generally, I do not constrain you to particular grounds. I am sure the Treasury Solicitor will use his judgment as to whether he thinks it is worth running the RUPP 9 point, for example, which as I say, I think on any basis is pretty much dead in the water.

183. Very well, so you have your leave, is there anything else? May I thank you both very much indeed

for your submissions. That is not mere politesse on my part. You had a great deal to put up with in terms of questioning from me and I am very very grateful for all the assistance you gave me, thank you. I shall just hand this file over to the shorthand writer and ask her to give me back my binder in due course. That done, we will rise.