Appendix 18

Elveden Farms Ltd v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 644 (Admin)

The Queen on the Application of Elveden Farms Limited v Secretary of State for Environment Food and Rural Affairs


No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
25 January 2012

CO/6766/2011

High Court of Justice Queen's Bench Division the Administrative Court

[2012] EWHC 644 (Admin), 2012 WL 14898

Before: Mr Justice Charles

Wednesday, 25 January 2012

Representation

Mr W Upton appeared on behalf of the Claimant.
Mr R Palmer appeared on behalf of the Defendant.

Judgment

Mr Justice Charles:

1. These proceedings raise a challenge to an order made by the Secretary of State, pursuant to section 53 of the Wildlife and Countryside Act 1981 . It is brought under paragraph 12 of schedule 15 of that Act, which provides:

> "(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.
>
> (2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.
>
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever."

2. I pause to mention a preliminary point. That paragraph sets out the grounds for the challenge that can be made in this case. Having regard to the terms of that paragraph, to my mind it is clear that the reliance that the claimant sought to place on the decision of the Court of Appeal in Roland v Environment Agency [2005] Chancery , at page 1, was misplaced. The claimant sought to rely on that decision of the Court of Appeal to found an approach that this court could examine the facts before the relevant inspector and substitute its own decision from that analysis of the facts, if, of course, the court disagreed with the earlier factual analysis. As the decision in Roland shows, such an approach is one that is open to the Court of Appeal when it is dealing with an appeal from a judge, but that approach is not apposite when Parliament has directed that the court is not the initial decision maker and the initial decision maker is the Secretary of State or an inspector appointed by the Secretary of State.

3. The correct approach to a challenge under paragraph 12 is, for example, set out by Mr Justice Langstaff in Whitworth v Secretary of State for Environment Food and Rural Affairs [2010] EWHC 738 Admin , where he discusses and applies the earlier cases. I adopt that analysis and his conclusion, which shows that the nature of the challenge is the one taken on judicial review. Therefore, it can be said that the Secretary of State, through an inspector, was not lawfully exercising the statutory powers, and the public law arguments for review or challenge to a decision made by a statutory decision maker would be available. In summary, those are well known and they are: was there an error of law; did the decision maker fail to apply the correct test; did the decision maker take all and only relevant factors into account, the weight to be given to them being a matter for the decision maker; fairness, both procedural and substantive; and a failure to give proper reasons. Additionally, there is a Wednesbury challenge in the sense of perversity, namely, absent the other grounds, and in particular when a decision maker has applied the correct legal test and taken all and only relevant factors into account, is the decision nonetheless perverse?

4. To my mind, this error of approach, albeit in part recovered in the particulars relied on and the skeleton relied on by the claimant, in large measure focussed the arguments advanced by the claimant at an inappropriate target. This has, to my mind, caused difficulty to those representing the Secretary of State and, in my view, to the court.

5. I pause at this stage to comment that those representing the Secretary of State, in the helpful skeleton argument put in, did focus their attention on what to my mind are the relevant public law grounds in this case. They had and took the opportunity to consider developments in the attack advanced on behalf of the claimant and also arguments suggested to the claimant by the judge overnight, and told me that they were in a position to deal with them today. They have dealt with them and I am grateful to Mr Palmer, counsel for the Secretary of State, and no doubt those who have been instructing him, for dealing with this case in this way, recognising that they were dealing with what was to a large extent a moving target.

6. The relevant order was made pursuant to sections 53, subsection 2 and 3 :

> "(2) As regards every definitive map and statement, the surveying authority shall—
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> (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and.
>
> (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> (3) The events referred to in subsection (2) are as follows—

…

(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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A , a byway open to all traffic;

(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.

…

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).”

7. I also pause to record that I was referred to section 32 of the Highways Act of 1980 :

“Evidence of dedication of way as highway–

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

8. I should also record that, on the first day of the hearing, I raised a point, which I am now satisfied was a red herring in the context of subsection 3(c), as to whether or not in this case the most recent orders and inquiry were properly based on the discovery of new evidence and its consideration with all other relevant evidence. I am grateful to both sides for identifying the additional evidence that was put before the authority and I am satisfied that there was new evidence which was considered with earlier evidence, and the point I initially raised is a bad one.

9. The order relates to the addition of a byway open to all traffic, referred to as a "BOAT", to the Suffolk County Council's Definitive Map and Statement. A Definitive Map and Statement is defined in section 53 of the Act and is the map and statement prepared by the surveying authority in relation to its area showing public rights of way. Section 56 provides:

> "A Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein, as to the extent that:
>
> …
>
> (c) where the map shows a byway open to all traffic, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover at that date a right of way for vehicular and all other kinds of traffic;
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> …
>
> (e) where by virtue of the foregoing paragraphs the map is conclusive evidence, as at any date, as to a highway shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at that date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date."

10. The addition in this case relates to a way which has been, and as I understand it is, known as the Icknield Way. The addition is over a field owned by the claimant. That field is now, and has for many years, shown no signs of such a right of way and has been cultivated as arable land. The addition runs from the south west corner of that field, near a location referred to as Shelterhouse Corner, in a north easterly direction to a point near a point known as Barrow's Corner. These points are marked on a map attached to the order as points A and E. For the purposes of argument and decision making, other points have been marked on the relevant plan as points B, C, D and F. B, C and D are within the field. As I understand it, F is outside the field and is in fact on another byway.

11. Argument has focussed on two sections of that addition, namely between the points A and D and then between D and E; that is the point at the north eastern corner, at the Barrow Corner end. The point F is about ten metres to the east of point E.

12. I now turn to look at some history. I would also indicate that it would seem to me helpful, if and when this judgment is transcribed, that the plan that we have all been referring to showing the points I have just described was annexed to the transcript as a schedule.

13. The route had previously been the subject of consideration by an inspector in 1992 and a decision was made by that inspector in 1993. That inspector was dealing with a longer route. He confirmed the southern part of the route as a BOAT, that is the route up to the point A on our plan, and that was added to the Definitive Map and Statement. However, as that inspector's report shows, he did not include within the BOAT the land with which we are now concerned, because — and I cite from paragraph 28 of his report:

> "It was not possible to determine its exact location on the ground with any degree of certainty [that is the BOAT]."

14. That inspector placed considerable reliance on a closure order in 1802, and unsurprisingly, on the principle that once a highway always a highway applied, unless the way had been lawfully extinguished or diverted. The claimant was involved in that process and the result of it was that a BOAT was not entered on the plan over its field.

15. In, I think, 2004 a Mr Andrews who, as I understand it, has at least a connection with the Ramblers Association, asserted that he had found new evidence and, on that basis, invited the council to revisit its Definitive Plan. This the council refused to do but Mr Andrews then applied or appealed to the Secretary of State under schedule 14 of the Act and, as I understand the position, the Secretary of State instructed an inspector to look at the issue. A consequence of that inspector's report was that the council was directed to revisit the Definitive Map. This it did by way of an order. The effect of that order was that the council concluded that there was a BOAT between points A and F, and that that highway varied between one and two metres in width. As I understand it, the council gave no reasons for its conclusion.

16. Objections were raised to that order, pursuant to the provisions of schedule 15 , and this triggered the procedure set out in paragraph 7 of schedule 15 :

> (1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.
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> (2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall, subject to sub-paragraph (2A), either—
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> (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.
>
> (2A) The Secretary of State may, but need not, act as mentioned in sub-paragraph (2)(a) or (b) if, in his opinion, no representation or objection which has been duly made and not withdrawn relates to an issue which would be relevant in determining whether or not to confirm the order, either with or without modifications.
>
> (3) On considering any representations or objections duly made and the report of any person appointed to hold an inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications."

17. An inspector was instructed to carry out the relevant investigation. He carried out his investigation pursuant to the rules, and in this case that was a paper exercise.

18. At a late stage in that exercise the claimant submitted representations objecting to the confirmation of the order made by the council. That document was entitled "statement of case". In paragraph 3 thereof, the claimant objected to the confirmation of the order, that is the order made by the council, and in paragraph 4 went on to say:

> "This is a re-run of the previous decision not to include this route on the Definitive Map and Statement."

19. And referred to the decision of the inspector in November 1993.

20. Later in that document, at paragraphs 21 to 23, the claimant said this:

> "However, the important point remains that a right of way can only exist along a defined route. There is no defined and identifiable route for this alleged new route to the north of the B1106 road 22. The inspector in 1993 was correct (see paragraph D1128) when trying to identify the precise line of the way from old maps and in accepting that they showed significant variations. This is particularly the case at the northern end of the alleged route."

21. I pause to comment that that is between D and E.

22. The claimant's case goes on:

> "So it remains the case that 'it is not possible to determine its exact location on the ground with any degree of certainty'. It is not sufficient to identify its approximate location. Even if the prior existence of the highway is accepted, and that it had public rights over it, it cannot be confirmed as set out in the order."

23. Then, by reference to the council's position statement, it says at paragraph 23:

> "We agree with the FCC's conclusion (paragraph 40) that 'it is not considered appropriate to use the aerial photographs to determine the alignment, as they are relatively recent and may not show the same route as originally existed'. The County Council believes that the difficulties of determining the exact alignment still remain to the extent it is not sustainable to allege that the alignment is as shown on the order map."

24. To my mind, although I acknowledge that it could have been more clearly drafted, this statement of case is an objection to the order made, pursuant to the direction of the Secretary of State, by the council, recording the BOAT over the claimant's land between the points A to E. To my mind, this is made clearer if you stand back and ask yourself the question whether, if there was to be a recording of a BOAT over that parcel of land, the claimant would have been objecting to the width determined by the council of one to two metres? To my mind, the answer to that is plainly no. What it was, to my mind, making sufficiently clear was that it was objecting to this BOAT being shown on the Definitive Map over this area of land and was not confining or directing its comments to the width of one to two metres designated by the council. So, it was Mr Andrews and the other objector who were seeking a recording of a wider BOAT. The claimant was saying that there should be no such recording at all, because, as found earlier, its route, and thus its width, could not be identified with sufficient certainty.

25. To my mind, it is clear that Mr Andrews, in his earlier submission, recognised that these were the effective issues in dispute. For example, at paragraph 4 of his statement of case, he says:

> "Although the only points raised by the objectors concerned the width of the order route, it seems to me that I should not therefore assume that the order cannot be struck down in its entirety."

26. I completely agree with that point, which, to my mind, makes it clear that an issue before the inspector was whether or not the order should be struck down in its entirety.

27. Having regard to the history, I also agree with points made by Mr Andrews that central points in the dispute were arguments relating to the identification of the route, of whatever width, from point D northwards; and so whether from point D to point E or to some other point. At the heart of that dispute were issues gone into in some detail by reference to plans and other documents in the 1993 investigation, and thus by the first inspector. Included within the points so raised was (a) the lack of plans showing a highway path or route (and so any track) running as a direct extension of a track which was shown on the plans to approximately point D and so from that point in a straight north easterly direction to what is point E, and (b) the point that some of the plans did show a track or pathway running from approximately point D in an easterly direction to a point some distance to the east of points E and F, as I understand it on another byway. So, plans that were available show a track which ran north east from point A to a point approximately at point D and which then veered fairly sharply right, and therefore to the east, rather than going straight on to point E.

28. This, as Mr Andrews said in his submissions, was and is an alignment point. For example, in paragraph 8 of his submissions he says:

> "It is the larger scale maps which give a clearer idea of character of the route and there is a high degree of consistency in the way in which the route is shown on these. The only small area of doubt relates to a length of about 100 metres between point D on the order map and the Elveden byway number 1 at point E. However, because close examination of this documentation in comparison with more recent OS mapping has revealed that substantial changes in the physical feature of the area took place during the last century, it is necessary to examine the position in some detail so as to establish the correct alignment."

29. At the end of paragraph 10 he said this:

> "Even where this feature becomes so obscure between points D and E that land based surveyors have found it difficult to trace its course, two air photographs in 1946 demonstrate that it continued in the same generally straight direction, there being no doubt that the track visible there was within the confines of the original broad ancient way."

30. At paragraph 16, and this is an important paragraph which I will return to, he says this:

> "As already noted, the sketch map in the boundary of the Remarks Book shows that, north of point E, the track of the Icknield Way in existence in 1880 was in fact on the Elveden side; the note says the boundary stone is 'eight feet off top of bank' and it is shown in the line representing the base of the bank. The significance of this situation is that it establishes that the historically correct route of the Icknield Way crosses the east/west byway number one point, not at point F but at point E, and that discovery explains the apparent discrepancy between the modern OS and Definitive Maps and the two air photographs."

31. He goes on at paragraph 17 to say:

> "Any slight doubt raised by the mapping complexities about the position of the part of the order route between D and E is, I believe, entirely removed by a study of the very clear line shown on the air photographs. The first point to note is that it is still possible to make out the boundaries of the broad belt of land adjoining the track on both sides. These photographs predated Olive Cook's description, although we do not know when she walked the route."

32. And at paragraph 19 he says:

> "I suggest that the very clear line of the order route shown in the air photographs over its entire length both represents the position of the vehicle track visible on the earlier mapping and gives us clear evidence of its width at that date. In comparison, the appearance of the B1106, of the Elveden byway number one, leaves little doubt that even that carriageway width must have been substantially greater than two metres. I remain of the view, however, that the true boundaries of the highway are those on the strip of firs and pastures through which it ran until the whole was destroyed when the land was converted to arable production, and that even the less easily delineated section between points D and E must have been as wide as the narrowest part of the route south west of D."

33. In that submission or statement of case in respect of the land between the points A and D, Mr Andrews advanced an argument by reference to boundary features on the land which he interpreted as being two banks and, from that starting point, the proposition that the highway, as it existed many years ago, passed over the land between those two banks. That gave the width of the way between points A and B as a varying width up to 46 metres in places.

34. The statement of case by the claimant was in response to that and to the council's statement of case. Nobody in those statements of case, and nobody in the earlier investigation in 1993, raised the point that fences on the ground between the points A and B might represent the extent of the highway.

35. It seems to me important at this stage to pause, to remember and record that, in 1993, and again from the points raised by Mr Andrews, and thus as I understand it the Ramblers Association, in 2004, a number of people with relevant expertise of the law relating to highways did not raise, and it would seem, therefore, did not consider, that a sensible argument was that the fences, which are shown on some of the maps which were before the 1993 inspector and were well known to Mr Andrews, would have been likely to have been erected by the owner of the land to mark the extent of the highway. Mr Andrews' point was a different point in his more recent statement of case, namely that features on the ground, which he identified as banks, would naturally limit the extent of the highway and, so on any view, a highway which was a wide one between those banks. He was not saying they were man made for that purpose.

36. The presumption relating to fences or hedges is discussed and described in a case called Hale v Norfolk County Council . Reading a short passage from the head note, it is as follows:

> "Where a fence has been erected by a land owner in order to separate land enjoyed by him from land over which the public exercises rights of way, there was a rebuttable presumption that the land between the fence and the made up surface of the road had been dedicated to public use as a highway, and accepted by the public as such."

37. I was also referred to paragraph 33, which draws together the discussion on the law:

> "It seems to me much less clear that there is any foundation for a presumption of law that a fence or hedge which does, in fact, separate land over part of which there is an undoubted public highway from land enjoyed by the landowner has been erected or established for that purpose. It must, in my view, be a question of fact in each case. To take an obvious example: there could be no room for any such presumption unless the highway pre-dated (or was contemporary with) the fence or hedge. If it were unknown which came first, I can see no reason in principle for making an assumption — or adopting a presumption — that the landowner fenced against the highway rather than that the highway followed the line of the existing fence. Whether it is right to infer, as a matter of fact in any particular case, that the landowner has fenced against the highway must depend, as Lord Russell of Killowen, Chief Justice, observed in *Neeld v Hendon Urban District Council (1899) 81 LT 405* , on the nature of the district through which the road passes, the width of the margins, the regularity of the line of hedges, and the levels of the land adjoining the road; and (I would add) anything else known about the circumstances in which the fence was erected. If nothing is known as to the circumstances in which the fences were erected, the fact that the soil of a highway and the adjoining land on each side was once in common ownership and that the highway is separated from the adjoining land by continuous fence lines may well enable a court properly to infer that the landowner has fenced against the highway; that is to say, "that the fences may prima facie be taken to have been originally put up for the purpose of separating land dedicated as highway from land not so dedicated". But it is, I think, wrong to treat the remarks of Lord Justice Vaughan Williams in the Neeld case as authority for a presumption of law that, whenever it is found that a highway runs between fences, the fences were erected for that purpose."

38. What, to my mind, that paragraph shows is that the court or the decision maker has to carry out a factual exercise. Of course, the determination of the facts can be based on inference from what can be described as primary material and, if a finding is to be based on inference, then it has to be a reasoned inference from the primary evidential material.

39. As the comments I have just made foreshadow, this presumption was raised by the inspector in carrying out his paper exercise leading to his first report. That report is headed "order decision" concludes that there should be a modification to the order promulgated by the council. Essentially, under the heading "formal decision", he concludes that the route between points B and D was of a width which varies between ten metres and 46 metres. The width being that shown between boundaries on the Ordnance Survey 1.2500 plan of 2004. And that, as between D and E, the order should provide that the route has a width of three metres. He does not then, or indeed in his later decision, refer expressly to the position between points E and F, but at this stage it seems to me that nothing turns on that.

40. Schedule 15 provides, by paragraph 8, in broad terms, that if the inquiry pursuant to paragraph 7 leads an inspector to report, and so the Secretary of State to propose, modifications to the earlier order, which itself is proposing modifications to the Definitive Map, that objections can be raised to it, and thus to the proposal that such further modifications should be made. Paragraph 8 of schedule 15 provides as follows:

> (1) The Secretary of State shall not confirm an order with modifications so as—
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> (a) to affect land not affected by the order;
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> (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—
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> (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, which must include particulars of the grounds relied on, may be made;
>
> (b) if any representation or objection duly made is not withdrawn (but subject to sub-paragraph (3)), hold a local inquiry or afford any person by whom any such representation or objection has been made an opportunity of being heard by a person appointed by the Secretary of State for the purpose; and
>
> (c) consider the report of any person appointed to hold an inquiry or to hear representations or objections.
>
> (3) The Secretary of State may, but need not, act as mentioned in sub-paragraph (2)(b) if, in his opinion, no representation or objection which has been duly made and not withdrawn relates to an issue which would be relevant in determining whether or not to confirm the order in accordance with his proposal.
>
> (4) Sub-paragraph (2)(a) shall not be construed as limiting the grounds which may be relied on at any local inquiry or hearing held under this paragraph."

41. This was reflected in paragraph 31 of the order decision, dated 11 January 2010, where the inspector says:

> "Since the confirmed order would affect land not affected by the order as submitted, I am required, by virtue of paragraph 8.2 of schedule 15 , to give notice of the proposal to modify the order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure."

42. It seems to me, and it seemed to me on the earlier versions of paragraph 8 without the final paragraph, that the process under paragraph 8 did not limit objections that could be made, and does not limit them to the modifications proposed by the inspector.

43. I pause to make a general comment that I accept the submission made on behalf of the Secretary of State, that the statutory scheme essentially provides for a preliminary view or proposal through the paragraph 7 process, followed by a final order or process following objections raised pursuant to paragraph 8. I have not seen other decisions such as that of 11 January

2010 and, in this case, no point has been raised to the effect that the inspector cannot revisit his order decision of 11 January 2010 on the basis of apparent bias.

44. I can understand why, given the structure of the schedule and its language, the proposal for a further modification is described as the order decision, because it could, absent objection, become an order. But I have to say that it seems to me that thought should be given to the wording of such decisions, to seek to make it clear to all involved that, if a relevant person objects, the decision is a proposal or a preliminary decision to enable an inspector who has made it to approach the task of revisiting it against that backdrop.

45. In the paragraph 8 process the claimant's statement of case asserted in paragraph 2 as follows:

> "This, of course, is a slightly odd stage in the process, as we have to proceed on the basis that the order will be made and that the only remaining issue is with regard to the width that is now proposed by the inspector. We have limited our further submissions to this point."

46. Then paragraph 3 is as follows:

> "Please therefore note that, while we do not agree with the inspector's conclusions and our earlier objections to the order remain, we do not seek to repeat those points here."

47. It seems to me that that represents a misunderstanding of what was open to the claimant under paragraph 8, but it was the approach that the claimants took and I have seen nowhere where the point was raised concerning whether or not that was a correct approach or an incorrect approach. Certainly there is no indication on the papers that anything said by or on behalf of the Secretary of State induced the claimant to reach the view set out in paragraph 2.

48. I return to comment on what the issues under the paragraph 7 and paragraph 8 processes were. In the first decision letter, dated January 2010, the inspector records in paragraph 3 that there were no objections to the recording of the route as a BOAT by the council and that, at a late stage, the claimant had put in the statement of case I have identified. In paragraph 9 the inspector defines the main issue as:

> "Whether the width and position of the public vehicular right of way between Shelterhouse Corner and Barrow's Corner can be defined with sufficient precision to be recorded on SCC's Definitive Map of Rights of Way."

49. As I have already indicated, and in particular in the context of the issue of the route between points D and E, an alignment or route issue was raised in the exchanges between the parties. In that context, in paragraph 11 the inspector records that the council had given no reason for the position of the line it had drawn on the order plan. He follows that — and this is the third paragraph under the heading "reasons" — and it is essentially a paragraph which sets out a conclusion, which says:

> "There is no doubt that the Icknield Way is an ancient landscape feature, although its position has probably varied to some extent over the hundreds of years of its existence. It seems probable that in this area its line was fixed before the middle of the 18th century, when it was used as part of the road between London and Thetford, and that it ran between Shelterhouse Corner (A on the order plan) and Barrow's Corner (E/F on the order plan)."

50. So there he elides point E and F and states a conclusion as to the route and alignment of the way.

51. In paragraph 13 he refers to some old maps which show different routes and accepts that they show variations, but concludes that it is the large scale maps and plans to which reference should be made in an attempt at clear definition.

52. He then goes on in the ensuing paragraphs, paragraphs 14 through to 25, to deal with essentially the width of the way between points A and D. At paragraph 28 he says this — and it is this paragraph, which is the paragraph where, in addition to paragraph 12, which, as I have said, asserts a conclusion, he deals with the issue concerning the route between points D and E. He says:

> "The tithe map evidence suggests that the section of the Icknield Way between D and E may have fallen out of use as a vehicular track by 1840. From D the track is shown bearing away to the east on the tithe maps and later OS plans. Mr Andrews' conclusions from the map evidence that the Icknield Way continued north of E to the Elveden side of the parish boundary rather than on the present line of byway to Barnham, and that it crossed into Elveden at point E, seem well argued and are not challenged. There is, however, no clear evidence from which the width of the previous existing way between points D and E may be deduced".

53. He then goes on to conclude that three metres, being about the minimum over which vehicular rights could reasonably be exercised, should be the width that is identified. That part of the reasoning is not challenged.

54. Is the inspector right to say, as to the crucial point in that paragraph, based essentially on arguments advanced by Mr Andrews from plans, that the point that the way crossed into Elveden at point E was not challenged? That conclusion, as submitted by counsel for the Secretary of State, is primarily based on paragraph 16 of Mr Andrews' statement of case, which I have already cited. The Secretary of State argues that it is correct that that argument advanced by Mr Andrews was not challenged, because you seek in vain for any detailed riposte to it in the statement of case advanced on behalf of the claimant or anyone else. I agree that there was no such detailed riposte but it seems to me that it is not correct to assert that the claimant was not challenging that part of Mr Andrews' evidence and assertions. Indeed, it seems to me, for reasons I have explained by

reference to the background, the nature of the dispute, and its statement of case, that it is sufficiently clear that the claimant was putting in issue this very point. This conclusion flows inexorably from the dispute in 1993 and the conclusion of the inspector in 1993.

55. It is to my mind clear that the history and the introduction of the historical disputes meant that the lack of clarity from the plans was clearly being put in issue. I would not dispute that Mr Andrews' statement is well argued but I do not accept that it was not challenged. It follows, therefore, to my mind, that the inspector has effectively given no reasons, other than his acknowledgement that Mr Andrews' point is well argued, as to why, having regard to that well argued point, the inspector in 1993 was wrong, and therefore the adoption of the inspector's reasoning by the claimant was also wrong. Put another way, the inspector's conclusion, as asserted in paragraph 12 and supported by paragraph 28, is not supported by reasons as to why this inspector prefers the view of Mr Andrews, based on the old and the new evidence, to the arguments advanced essentially by reference to the old evidence by the claimant and the conclusion reached by the inspector in 1993.

56. Therefore it seems to me that the preliminary decision of the inspector contains insufficient reasoning to enable the claimant to know why it has won or lost, which is one of the generally asserted tests concerning the adequacy of reasoning.

57. The Secretary of State advanced an argument to me that the 1993 inspector reached his conclusion concerning the whole of the route between points A and E or A and F. I agree.

58. From that point it was argued that once, as has happened here in the decision letter of January 2010, a conclusion is reached that the route passed from point A to point D, and therefore you identify point D, a different issue arises: namely, how do you get from point D to point E? He says a natural inference is that you carry on in a straight line, and therefore essentially the finding as to the route between D and E flows from the finding as to the existence of point D, and that this logic separates the reasoning from the earlier reasoning and the inspector was right therefore to say, he having reached the conclusion as to point D, that there was no challenge as to the remainder of the route from point D to point E. I do not agree. There was always a challenge as to the route between points D and E. Simplistically put, one of the arguments was that the path depicted going off at right angles, or nearly at right angles, at point D, would or may have been the way that you got further north.

59. The elision in the inspector's reasoning of points E and F is also troubling but, to my mind, of itself that would not warrant a conclusion that the inspector has not sufficiently reasoned this aspect of his preliminary decision. Essentially I have reached that conclusion because, in my judgment, he was wrong to conclude that that part of Mr Andrews' statement of case, which is central to the conclusion on where point E is and the route between points D and E was not challenged.

60. Can this be saved by the paragraph 8 procedure, on the basis that it was open to the claimant to revisit this issue at that stage? As a matter of fact, it appears that this argument was not revisited and, on that approach, the claimant was effectively keeping its powder dry for a challenge under paragraph 12. As I have already mentioned, the point concerning whether or not it could or should be challenged at the paragraph 8 stage was not raised by anyone.

61. I have not been referred to a time limit for a challenge under paragraph 12. In any event, even if there was one, it seems to me that the right to challenge that conclusion on the basis of a lack of proper reasoning remains, because that reasoning simply remains and must have been adopted by the inspector at the paragraph 8 stage. So, in my judgment the two decisions are flawed for lack of reasoning in that respect.

62. I now turn to deal with the issues relating to the route between points A and D.

63. As I have already commented, it was the inspector who raised the fence to fence, or boundary feature to boundary feature, presumption. I have already commented that, on the face of it, this is a surprising new entry into a long running debate relating to this piece of land. It seems to me that, given that long background, fairness in this investigatory process required considerable caution being exercised when introducing this new approach. Basic to procedural fairness is the proposition that the relevant parties should be made aware of the case they have to meet. This the inspector did not do at this stage. On the basis I am approaching this aspect of the case, I am accepting that he was not required to do so as a matter of fairness pursuant to the statutory scheme, because the paragraph 8 process was available to any party or person who wished to object to his proposal made in the January order decision. I have already made some general comments as to the presentation of this conclusion, and they apply in particular to the introduction into the exercise of a new issue by the inspector, when writing his decision under paragraph 7.

64. It therefore seems to me important to see how the inspector reasons this issue. I acknowledge that, as submitted by the Secretary of State, it needs to be remembered that it was introduced against the background of Mr Andrews' contention, for different reasons by reference to banks, that the way had a width varying between 10 metres and 46 metres, as the inspector concluded. Further, it seems to me that when considering both decision letters it is necessary to remember, when examining their reasoning, how this issue was introduced, and in particular, therefore, how the inspector deals with evidence that is put in once the relevant parties had been alerted, through his first order decision of his introduction of the relevant presumption and his reasoning process based thereon.

65. His discussion begins essentially at paragraph 14. Indeed, that is where he identifies this point. In that discussion he refers, firstly, to large scale maps and, in particular, the OS plans of 1880 and 1904 and the markings on those maps. He then refers to a submission by the land owners (the claimant) that the right of way did not run between boundary features and, by inference therefore, Mr Andrews' contrary submission that it did, and comments that he accepted that until the mid 20th century a track passed along heathland but, unless all the large scale maps and plans are wrong, there is no doubt that on either side of the track there were boundary features. That goes up to point D and not from D onwards.

66. At paragraph 16 he says:

> "With regard to these features, the north western outer line follows the boundary bank between the parishes of Elveden and Barnham, which was noted by the compiler of the OS boundary Remarks Book. In 1880 the OS plan defines the position of the parish boundary by labelling it 'Tk.B' for 'Track of Bank' but, by 1904, a fence must have been erected on or next to the bank, as the letters 'F.F' for 'Face of Fence' are shown by the boundary. It is not clear whether the line to the south east of the track on the 1880 and 1904 plans represented a hedge, fence or bank. Mr Andrews asserted that the boundary Remarks Book showed banks either side, but it seems to me that he is mistaken; the book refers to a bank only on the north-west side."

67. Then at 17 he says:

> "The position of the inner track between the two outer boundaries varies between the two tithe maps, and between the tithe maps and the OS plans. The question is whether it is possible to make any presumptions regarding the extent of public highway rights within these two boundary features, or whether there is any other evidence from which it is possible to assign a width and position to the public highway between Shelterhouse Corner and Barrow's Corner."

68. He then refers to the presumption. It seems to me that a fair reading of his reasons shows that he has correctly identified the law relating to this presumption. At this stage I pause to record that I acknowledge that reasoning in decisions of this type must be read with appropriate generosity and against the background of the knowledge known to the parties to the decision making process. At this stage, it seems to me that the inspector has made reference to earlier plans and then to a fence that he has identified and located, and no doubt he can do little else from the scale of the plan, on or next to the bank, and that the inspector has also concluded that Mr Andrews' identification of the relevant marking on the other side of his alleged route as a bank, may well be wrong and the line may represent a hedge, fence or bank.

69. At paragraph 20 he says this:

> "It is possible that the bank on the parish boundary — and the parish boundary itself — were positioned with reference to the north western edge of the highway. It is also possible that the boundary bank pre-dates the existence of the highway and was not, therefore, made to define its edge.
>
> The fence erected on or next to the boundary bank between 1880 and 1904 (paragraph 16 above), however, could have been placed further to the south east if the highway did not extend as far as the bank, and its positioning on or by the bank supports the view, in the absence of any other explanation, that it, ie the fence, was perceived as the limit of the highway."

70. What he is referring to there is a fence, the exact position of which he does not identify other than it being on or next to the bank, and the absence of any other explanation for its erection, in circumstances in which he hasn't asked anybody to give an explanation as to its erection. He then goes on to refer to the feature on the south east of the track and when it was first shown.

71. The reference in paragraph 20 to the absence of other explanation needs to be linked with what he says in paragraph 23. Here he says:

> "The large scales maps and plans provided in evidence focus on the immediate area of the order route, but from this limited evidence, it does not appear that a long, narrow enclosure, such as that through which the order route ran between Shelterhouse Corner and Barrows Corner, was typical of the general landscape of the area, unless it consisted of trees forming a shelter belt. The OS Boundary Remarks Book records that within the boundaries, the vegetation on the north-western side of the track was furze and pasture and on the south-eastern side only furze. On the north-western side of

> the boundary bank the land was arable, while to the south-east of the south-eastern boundary it was furze, heath and rough pasture. There appears to be no evidence of the necessity of such an enclosure for any agricultural purpose."

72. So, there, at the beginning of that paragraph, the inspector is essentially identifying a point that he hasn't seen, on limited information, similar enclosures in the area. Then, again, in respect of a point which has not been raised by the parties, he asserts or concludes that there is no evidence of the creation of an enclosure for any agricultural purposes.

73. Criticism is made of the use of the word "necessity" in that sentence but, to my mind, that is not a free-standing point. The relevance of the point is that, at this part of his reasoning, the inspector is relying on the lack of other evidence in respect of an issue which was not raised by the parties and which he had not put to the parties.

74. At paragraph 24 he refers to evidence which would indicate that the route was approximately 40 feet wide. That is from a local historian and archaeologist. That is by way of introduction to paragraph 25, where he identifies that, if the width is between the two fences he has identified, it would vary between about 10 metres and 46 metres. He then says this:

> "I do not consider this to be inconceivably wide for an important ancient route."

75. He then refers to a discrepancy between the greater of the two widths and the 40 feet referred to by the historian, and comments on that, including a comment that the 40 feet was a generalisation of a width which varied considerably.

76. He then says, and this is the central concluding paragraph:

> "In my view, the evidence considered from paragraph 14 onwards supports an inference that the boundary features were erected to mark the limits of the highway rather than for an agricultural purpose or to mark a land ownership boundary. Although the reference to a width of 40 feet at Shelterhouse Corner in 1995 does not support this inference, I do not consider that it is enough to displace it. I conclude it is more likely than not that the boundary features either side of the Icknield Way north-east of Shelterhouse Corner were intended to mark its limits, and that therefore the extent of public highway between B and D is defined by the boundaries shown on either side of the track on the OS 1:2500 plans of 1880 and 1904."

77. That does not say why the evidence set out from paragraph 14 onwards supports such an inference. Again, acknowledging that this is to be read generously, I ask how can one reason that conclusion from those paragraphs? Counsel for the Secretary

of State helpfully sought to set such reasoning out in his written submissions. At the heart of that analysis, and I agree, is the point that the inspector noted that the land had been in common ownership.

78. Over and above that, what is there in this analysis by counsel of the unexpressed reasoning? One is an absence of any other explanation, or an absence of evidence that fencing could have been put up for an agricultural purpose, but that falls to be assessed against the backdrop I have described that nobody had been asked to advance any such explanation. The other is an expressed neutrality as to the relevance of the bank at or next to which one of the fences was erected. Finally, as I see it, the inspector's conclusion that the width he ascribes is not inconceivably wide. To my mind, that is effectively saying it's not inconceivably wide and there is no other explanation. To my mind, that is not sufficient or satisfactory reasoning in the context of an analysis introduced by the inspector himself, by reference to a backdrop that the many people who had considered this this highway in the past and had seen these boundary features on the maps had not sought to assert that they were erected, planted or constructed to mark the edges of the boundary.

79. However, this is, in the scheme of the procedure, a preliminary conclusion, so I turn to the second order decision. Again, in this decision there is, on the face of it, no recognition that the presumption was introduced by the inspector, and no express paragraphs referring to him re-examining the totality of the evidence in the context of what the parties said, after his approach had been put before them. Rather, he looks at certain points that had been put before him and maintains the same conclusion.

80. At paragraph 14 he addresses a point relating to tithe rent charge. He says:

> "I consider that, since tithe-rentcharge was payable on land that produced a crop, and that since a crop of, for example grass or hay for animal feed, might have been taken from land that was highway verge, there is no inherent inconsistency between the depiction and description of the relevant land in the tithe documentation as tithable heath and the existence of public highway rights over it."

81. There is common ground between the parties concerning the background law relating to this, namely that the reference to tithe rent charge, and the relevant maps concerning that, are no more than a factor. Certainly there is a point, as made by the inspector, that the land owner may not object to the omission of the highway if in fact he is cropping verges to a highway. Certainly that is a point recognised in the authorities but also the point made, and it is a point of common sense, is that if land was taxable, if not excluded as a highway on the relevant tithe maps, it is understandable and a factor that, a land owner who is said to have fenced a passage way through his land to de-mark the highway, would be more than interested to ensure that that was excluded from the land upon which he had to pay tax. The fact that he might be able to get over the fence and crop hay or some other crop doesn't, to my way of thinking, mean that the land owner might not wish to ensure that he doesn't pay the tax and can also have the benefit of the crop from the verge of the highway.

82. So the point can go both ways, but what the inspector fails to do, reading his decision letter generously, is to link this point back to his earlier reasoning.

83. The claimant put in evidence from a Dr Hodson who is an expert on maps and a local historian. The inspector comments on that evidence and says, in paragraph 23:

> "In paragraph 22 of her evidence, Dr Hodson asks the question 'Is it not more logical that the actual and practical limit of the highway would be the inner base of the bank, nearest to the carriageway?' (which she inferred would be the track shown between peck lines on the large-scale OS plans). It seems to me that the answer to that question is probably 'yes' and that rather than defining the parish boundary as the western limit to which public rights extended, those rights should be defined as starting from about ten feet, ie three metres, south-east of the parish boundary."

84. Now, as I understand it, that conclusion is reached by reference to an estimation of the width of the bank. So, Dr Hodson was arguing a delimitation of the highway by reference to the bank, which the inspector, in his earlier letter, had said was possible and equally that the opposite conclusion was possible, the inspector having hung his hat firmly on the fence, which he said, rightly, the map showed as having been erected on or next to the bank. At this point however, the inspector does not mention the fence at all but does narrow the width of the way. The Secretary of State submits, well, it is obvious that he is therefore concluding that the fence was, at that point, ie next to that side of the bank. I agree that that is a possible explanation. But, in the circumstances in which the relevant issue is where was the fence, and the earlier conclusion of the inspector was that it was on or erected next to the bank, the omission to give his reasons as to why it should now be assumed or found that the fence was erected next to the bank, and therefore where Dr Hodson says the natural limit of the highway might be, against a backdrop of the inspector's expressed view that the bank may well not have been made or developed to mark the highway is, to my mind, a significant omission which demonstrates a failure by the inspector to go back and look, in the context of all of the new evidence, at whether or not the conclusion he reached that that fence was erected for the purpose of delineating the highway, was correct.

85. It also seems to me that this change triggers the need, as a matter of reasoning by reference to his earlier conclusions, to ask the question, what about the boundary feature on the other side? That is not addressed in this letter at all. Because if there is doubt as to the purpose of erecting a fence on the top of the bank for the purpose of delimiting the extent of the highway, and/or any reason to doubt the position or purpose of that fence, there is a need to revisit the reasoning as to the boundary feature on the other side of the highway identified by the inspector in paragraph 1b of his first letter as a fence, hedge or bank. But no such re-examination is made, by reference to that alleged boundary feature or as to whether it was, and the consequences of it being a fence, a hedge or a bank.

86. Thirdly, in paragraph 26 the inspector refers to evidence and argument given by the estate manager of the claimant, to the effect that the route needed to be no more than about four metres wide, it did not make sense that it would belly out across valuable agricultural land, in the past, the land in this area was valued for breeding rabbits and it would not be used unnecessarily for a highway. Dr Hodson had also given evidence as to the land being used for breeding rabbits.

87. That is simply recorded, and it is said that the inspector did not doubt that the facts asserted were true. But that is evidence advanced in support of the proposition that fences might have been erected for a different purpose to that found by the inspector, namely an agricultural purpose. And it must be remembered that the earlier reasoning was that there simply was no evidence and no other explanation for fences being erected. However, the inspector does not revisit that reasoning at all. It is submitted, on behalf of the Secretary of State, essentially, well: so what, it is very interesting, and no doubt true, that the area was used for breeding rabbits, but it can't sensibly be suggested, in the absence of other evidence as to enclosure for such a purpose, that that was the reason for erecting fences. To this I would add there is also the point that if a highway was going down the middle of the fences and the fence did not go across the highway, it is not easy to see how that enclosure would keep the rabbits in.

88. There may be force in those points but counsel for the Secretary of State is not the decision maker here and neither am I. Given that the premise of the first reasoning was that there was no explanation and no evidence, it seems to me that, to be fair and to provide adequate reasons, the inspector should explain why that explanation, taken with other factors advanced as compelling factors against his conclusion that it should be inferred that on the balance of probabilities the boundary features he identified were erected, planted or established to de-mark the limit of the highway, did not cause him to change his view. But he does not do so. There is, therefore, no reasoning process from, or balancing by the inspector between (a) the arguments advanced as to why the boundary features he identified should not be taken to have been so erected, planted or established, which include the bellying out point, the width between the features, the possibility of an agricultural use, and I would add the fact that no one before had thought that his approach by reference to the presumption was relevant, and (b) the factors which the inspector took into account to reach his conclusion that it is more likely than not that the boundary features he identified were so erected, planted or established. Going back to the analysis put in by the Secretary of State of the inspector's reasoning, he had asked himself whether there was any other explanation and answered that on the basis that there was no evidence. But, if that is right, at the next stage the inspector does not explain why the new evidence is effectively immaterial or of little weight or does not outweigh the other factors. Essentially, one is left with an unexplained assertion from the earlier conclusions, which leaves alive at its centre the common ground that the evidence indicates that the land was in common ownership.

89. Standing back and reading the decisions in a generous way, and asking myself can the informed reader — informed in the sense of knowing what all the issues put before the inspector were — know with a sufficient degree of certainty why this inspector maintained, without further explanation, his earlier conclusion from that common ground of common ownership, and my answer is that you cannot.

90. I therefore conclude that the second report, when read with the first report, is flawed in public law terms, because it has failed to provide the reasoning of the inspector with sufficient clarity. Further, or alternatively, this lack of explanation in his reports founds the conclusion that he failed to take relevant factors into account, which would include the analysis of the new information and its impact on his original reasoning process. The lack of reasoning ground assumes that he did take all and only relevant factors into account but didn't tell us how. The alternative is if he didn't think about some of the relevant factors and so failed to take into account relevant factors in reaching his overall conclusion.

91. I therefore propose to quash the order or proposed order, whichever is the correct description of it.

92. I will hear counsel as to what relief should follow from that.

93. **MR UPTON:** I am grateful, my Lord. I think it is one of those situations where the power under the schedule is as straightforward as you have said, it is simply to quash, under paragraph 12 of schedule 15 , 12.2. It essentially is as straightforward as that.

94. It had reached the stage of, essentially, being confirmed by the Secretary of State, so to refer to it as the order would be correct, rather than the proposed order. I would say it is as simple as that, subject to anything my learned friend has to say.

95. **MR JUSTICE CHARLES:** What direction then follows?

96. **MR UPTON:** I regret to say there isn't a process, as there is in some of the other statutory regimes, for you to be able to remit it back to the inspector. It is as simple as quash.

97. **MR JUSTICE CHARLES:** Well how does Mr Andrews, for example, get the matter — does he have to go through the whole process again? That would seem rather odd. Can't I say that it should go back to a different inspector?

98. **MR PALMER:** My Lord, I was just taking instructions on the point raised. Our understanding is that it is perfectly open, in effect, for my Lord to quash the inspector's decision, leaving the underlying order yet to be confirmed, and therefore not in effect and having to be reconsidered. That must be the approach, by whatever route one takes. If one were to quash the order itself, one would then be left with the Secretary of State's antecedent direction to the County Council to make the order.

99. **MR JUSTICE CHARLES:** That is what I wondered. So you start all over again.

100. **MR PALMER:** So, either way, we are left with an order which is unconfirmed and will need to be reconsidered by the Secretary of State.

101. **MR JUSTICE CHARLES:** And that should be a paragraph 8 reconsideration, on the basis that everything is up for grabs?

102. **MR PALMER:** It should be a paragraph 7 reconsideration, all up for grabs.

103. **MR JUSTICE CHARLES:** Paragraph 7 reconsideration?

104. **MR PALMER:** Yes. It would be a new inspector, who may not share the view of this inspector that those modifications should be made. If he did then we would be on to paragraph 8 again, but it is only if.

105. **MR JUSTICE CHARLES:** I think that is right. You go back and you say quash the two order decisions, which leaves, therefore, the process to be gone through again under paragraphs 7 and 8. That would seem to me to make sense.

106. **MR PALMER:** I can't see any practical alternatives to that.

107. **MR JUSTICE CHARLES:** I think that must be right.

108. **MR UPTON:** I defer to the knowledge of those who deal with it all the time. Obviously the Secretary of State—

109. **MR JUSTICE CHARLES:** I very much doubt they do.

110. **MR UPTON:** I am not putting Mr Palmer in that category, but I imagine those instructing him certainly are familiar. I know, from having been involved on a previous case, that it was just a simple quash of the order.

111. **MR JUSTICE CHARLES:** Yes. I think it may not be the order — I don't know how it — I think what you need to have in place is that there then is in place an order by the County Council which has been challenged and therefore needs to be addressed by the Secretary of State through the schedule 15 procedure. Because I haven't gone back and nobody has challenged that direction of the Secretary of State for the council to make the order. So I think that—

112. **MR UPTON:** That logically must be correct.

113. **MR JUSTICE CHARLES:** I think that logically must be correct.

114. So if you could draw an order that has that effect. I don't perhaps need to say it but it is clear now that that should inevitably be done by a different inspector or inspectors, because this inspector would have an impossible task now of trying to revisit it all.

115. **MR UPTON:** My Lord, that then leaves the issue of the costs of these proceedings. I, at this stage, would make an application for our costs. I am conscious the Secretary of State may have some comments on the way in which it has been decided. Rather than me elaborating, I suspect I ought to respond to what he wishes to say.

116. **MR JUSTICE CHARLES:** Okay.

117. **MR PALMER:** Well, my Lord, at the very outset of my Lord's judgment, and the comment my Lord made about the approach in which this application was brought to this court, it is my submission, my Lord, that, although the claimant has ultimately succeeded in achieving an order to quash that decision, he has done so on grounds which could not fairly be discerned from those which were pleaded and on which this application was brought. The consequence of that, unusual as it may be, is that there be no order as to costs in the present case, or alternatively, if I am wrong about that, only a proportion; such proportion as my Lord assesses. This was a case brought on a entirely wrong legal basis.

118. **MR JUSTICE CHARLES:** Well, I think it is there somewhere in the middle of it. I agree with you it is quite difficult to get it.

119. **MR PALMER:** Even those points which I identified and addressed in my skeleton argument are, in effect, different to the ones which my Lord has identified, and that must have a consequence.

120. **MR JUSTICE CHARLES:** Yes. Thank you.

121. **MR UPTON:** My Lord, I can't resist the idea that it has a consequence. I would resist the ambitious idea of no order for costs. Clearly, the two grounds identified about the route and the width do lie at the heart of this decision and have always been raised and have been there as part of the challenge. I acknowledge that there was an invitation to this court to go further than the standard approach to judicial review, but it was always there that the inspector had failed to give proper reasons and failed to take into account proper considerations and we have succeeded on both of those grounds, regarding the alignment and the width. So I would say, in these circumstances, it should be considered as substantial success on behalf of the claimant. Whilst obviously we can only acknowledge there is a factor to be taken into account in the way it has developed before you.

122. I don't think I can assist you further on that.

123. **MR JUSTICE CHARLES:** Thank you.

124. I am going to take the unusual course in this case that, albeit the claimant has won, I am going to make no order as to costs. I do so for two reasons.

125. Essentially it seems to me that a major part of my reasoning has resulted from the approach that the claimant took before the inspector, and I have sympathy with the inspector in that matters were not identified to him with clarity as to the issues which the claimant was advancing to him. In particular, it seems to me that the claimant failed to take advantage of its ability, at the paragraph 8 stage, to bring home points relating to D and E, and also points relating to A to D and the reasoning process adopted by the inspector at that point, and to urge upon the inspector that he really should go back and look at it all afresh.

126. Next, and importantly, as I have indicated in my judgment, it seems to me that a significant part of the challenge was not focussed correctly. Albeit that the points that I have relied can be extracted from the grounds. As I indicated, it seemed to me that counsel for the Secretary of State, through his skeleton argument, identified the relevant public law points. Also, it seems to me that the very proper attitude of the Secretary of State of not seeking adjournments and arguing this case as it developed removes the force of an argument: Well, I am sure the Secretary of State would have fought this case anyway.

127. Therefore, those two factors in the approach taken by the claimant should be recognised by me making no order for costs.

128. Having said that, I would like to acknowledge the assistance I have been given by counsel in this case on both sides, but in particular I acknowledge the assistance I have been given by Mr Palmer who, it seems to me, advanced the Secretary of State's case against a moving target and, to some extent, a target being introduced to him by the judge for the first time, clearly and forcefully so far as his clients were concerned.

129. Thank you both very much.

130. **MR PALMER:** My Lord, I am grateful for that. It seems ungrateful now to ask for permission to appeal, which I do. I appreciate my Lord's reasoning is chiefly based on lack of reasons, which doesn't ordinarily yield success on such an application, but I make it.

131. **MR JUSTICE CHARLES:** You can make it. I think this is one of those cases in which, if the Court of Appeal want to enter into this exercise, the Court of Appeal should decide whether or not to do it. What I will do, though, is to extend your time for seeking permission to appeal until — is it a 21 day period in the rules, can anybody remember? Well, whatever the period in the rules is, to start on the date upon which you get an approved transcript of the judgment, because, until you get that, I think it is very difficult to formulate what you want to say.

132. **MR PALMER:** My Lord, I am very much obliged.

133. **MR JUSTICE CHARLES:** Thank you.

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