Neutral Citation Number: **[2023] EWHC 2542 (KB)**

Case No: CO/944/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Bristol Civil Justice Centre
2 Redcliff Street
Redcliffe
Bristol BS1 6GR

Date: 12/10/2023

Before:

MR JUSTICE JAY

- -

Between:

GRACE BENNETT	**Claimant**
- and –	
SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS	**Defendant**
- and –	
GLOUCESTERSHIRE COUNTY COUNCIL	**Interested Party**

- -
- -

Killian Garvey (instructed by **Wright Hassall LLP**) for the **Claimant**
Ashley Bowes (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party was neither present nor represented

Hearing date: 6th October 2023

- -

Approved Judgment

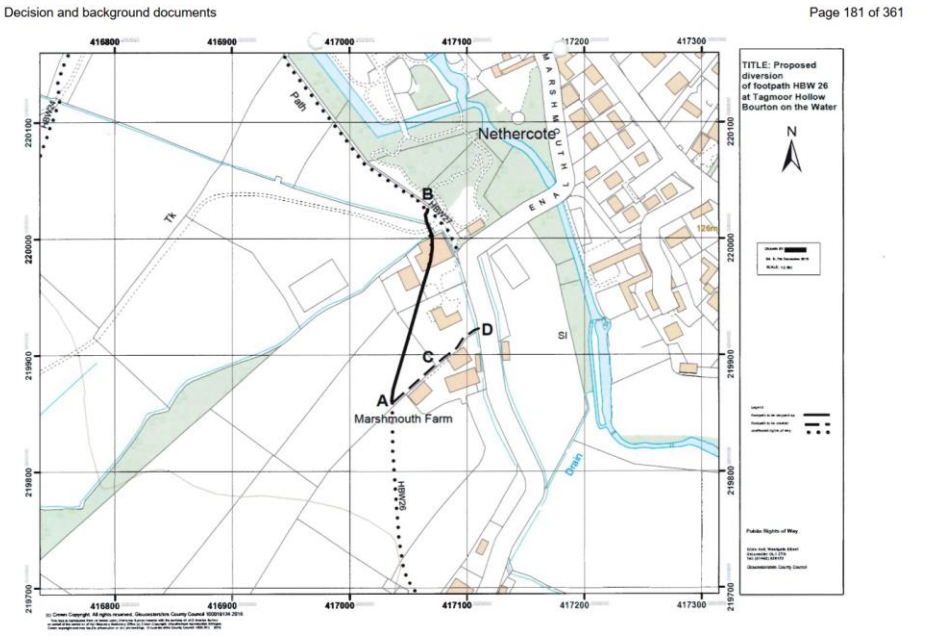
This judgment was handed down remotely at 10:30am on 12th October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE JAY:

INTRODUCTION

1. Mrs Grace Bennett ("the Claimant") has since the 1980s lived at Tagmoor Hollow, Marshmouth Lane, Bourton on the Water, Gloucestershire GL54 2EE ("the farm"). Since before living memory a footpath, known as HBW26, has run through the farm. Its original route is not clear. On 15th August 1994 the route of HBW26 was diverted by Order of the predecessor to the Gloucestershire County Council[1] ("the local authority") and at about that time, or maybe shortly thereafter, a barn was built across part of its route. Henceforth the footpath as diverted in 1994 will be referred to as the existing path.

2. A map showing the existing path, and more, appears below:



3. At this stage we are concerned with the section of HBW26, the existing path, between points B and A on this plan.

4. The Claimant says that the existing path had long been in disuse, explaining the construction of the barn. As I have said, the exact date that the barn was erected is unclear and nothing turns on it. Shortly after the barn was built, walkers were permitted by the Claimant and the co-owner of the farm, her then husband, to reach point A by travelling across a paddock. In order to do this, walkers had to walk south-eastwards along another footpath, HBW27, to approximately where the dotted line on the plan comes to an end. That point is approximately level with the barn that occupies the

[1] The Cotswold District Council's Order was made on 7th March 1991 but it was not confirmed for over three years.

northernmost point on the Claimant's land. Use of the permissive footpath (as I will be calling it henceforth) ceased during the pandemic.

5. On 3rd July 2017 the Claimant applied to the local authority to divert the footpath so that a walker wishing to proceed from point A to point B on the plan would take a slightly longer route. This is indicated on the plan by the dotted line taking in points C and D, the latter being on Marshmouth Lane. The walker would then proceed along the lane to point B. Henceforth, I will be referring to the Claimant's proposal as the diverted footpath.

6. The local authority made the Order under relevant statutory powers on 8th September 2020. Unless an individual objected within 28 days, the Order would take effect. On 1st October 2020 an individual operating under the aegis of the Open Spaces Society submitted an objection, primarily directed to the width of the diverted path between points C and D. On 7th October 2020 the local authority provided its Statement of Reasons in support of the diverted path. Given the objection, the case was referred to the Secretary of State for confirmation.

7. After what appears to have been an unacceptable delay (and the Claimant's application had been afflicted by prior similar delays), the Order and accompanying documents were sent to the Planning Inspectorate on 24th August 2021. On 10th January 2023 the Inspector carried out an unaccompanied site visit. In her decision letter dated 25th January she did not confirm the Order.

8. This case therefore comes before me as a judicial review challenge to the decision of the Secretary of State's Inspector not to confirm the Order.

THE FACTS IN MORE DETAIL

9. The Court has been bombarded with material, not all of it being relevant to the exercise at hand. This excessive generation of documentation and other evidence is a feature of litigation of this sort, not least because strong feelings are often present. I can well understand the latter but what follows will need to be a focussed overview of the available material applying well established judicial review principles. There are clear limitations on the use that may be put to material that was not before the decision maker.

10. The existing path was of undefined width. It is apparent from the plan that the route of the existing path from point B in an approximately south-easterly direction is not in the Claimant's ownership. On my reckoning, although the Claimant was imprecise about this when I asked her counsel, Mr Killian Garvey, the direct question, the distance between point B and the northern boundary of the Claimant's land is approximately 20 metres.

11. The Claimant's evidence to the Inspector was that the existing path over this 20 metre stretch crosses Tagmoor Brook and a watercourse. She stated that the existing path becomes waterlogged in the winter and, by implication, is virtually impassable. In any event, it is overgrown by brambles and other vegetation, and (on my understanding of the evidence) the route is bound by electric fencing. The Claimant's evidence to the Inspector was that the existing path had not been used for at least three generations. The Claimant has given further, post-decision evidence about the state of the existing path at this location but its relevance is limited.

12. The Inspector did not take a photograph of the existing path looking from point B towards the barn. The local authority did so, but the time of year the photograph was taken is unclear.

13. The Claimant's evidence to the Inspector was that the permissive path over the paddock also often became waterlogged in the winter.

14. The characteristics of the diverted footpath have generated considerable correspondence between the parties, including the objector. There was no issue with this footpath between points A and C: it would have a 3 metre width. The controversy over the 49 metre section between points C and D concerned (a) the width of the footpath, (b) its lack of amenity brought about by overhanging vegetation on one side and a fence on the other, and (c) the likely presence of floodwater.

15. As for (a), the objector was seeking a 3 metre width (i.e. the same width as between points A and C) whereas the Claimant was saying that 2 metres would be sufficient. The objector's argument, which also addressed points (b) and (c) above, was encapsulated as follows:

> "This section will be enclosed narrowly between the overhanging hedge and garden fencing described ambiguously as 'stock' fencing. My comment to the council that this will probably amount to a 2m high close boarded fence has not been refuted.
>
> This narrow length, over a water course and without benefit of sunlight or drying breeze will remain dank and wet and likely to remain a muddy trough for long periods.
>
> The council's photograph (Stmt p10) shows the surrounding ground slightly sloping to the infilled ditch. Surface water will filter down to the low point fulfilling the purpose for which the field drainage system was designed.
>
> …
>
> The 2m wide enclosed path will have a margin inaccessible to walkers feet thereby reducing the width still further and bringing passing walkers into close contact which is not particularly satisfactory with the resurgence of Covid cases throughout Europe and the UK."

16. The main hearing bundle does not contain a photograph showing the sloping ground between points C and D. In any event, the waterlogging issue has been addressed by the proposal to construct a culvert which has now on my understanding been installed.

17. I am not sure what is meant by "the 2m wide enclosed path will have a margin inaccessible to walkers feet", and the parties did not make a submission about it. The objector was seeking what he called "an undertaking for maintenance". Without being maintained, it was entirely obvious that the path would suffer encroachment from vegetation along one side.

18. Before the Order was made, the local authority had been in negotiation with the Claimant over the width of the path and a maintenance agreement. I infer that the objector had made his views known before 8th September. The local authority's position can be gathered from an email it sent to the objector on 1st October 2020:

> "We took your proposal for a full 3 metre width to the landowner/applicant and debated it with her long and hard. Eventually we succeeded in getting 3 metres for part of the route and 2 metres for a further section. We will be setting up a maintenance agreement but she did point out that 3 metres is wider than the path its runs off! The slightly narrower section is by her garden while the section by the field will be 3 metres wide.
>
> I hope that is acceptable to you. I am also expecting the landowner/applicant to pay for the culverting works."

19. It is clear from the local authority's correspondence and Statement of Reasons that it was proceeding on the basis of a 2 metre *available* width between points C and D. The latter was predicated on a maintenance agreement being in place inasmuch as the natural world is not static and vegetation has a propensity to burgeon.

20. The following parts of the Statement of Reasons are relevant in this regard:

> "The landowner has agreed to defray -
>
> (a) any compensation which may become payable under section 28 as applied by section 121 (2)
>
> (b) any expenses which they may incur in bringing the new site of the path into a fit condition for use for the public.
>
> The landowner has agreed to undertake at their expense work to culvert the ditch alongside the boundary hedge and to level the new path, providing a rolled stone surface between points A to D. The landowner intends to install a stock proof fence between points A to D to prevent dogs mixing with horses in the field or straying into the garden. The landowner has agreed to install a culvert across the ditch at the roadside at point D. The landowner will enter into a maintenance agreement with GCC to maintain vegetation along the new enclosed section of footpath A to D.
>
> …
>
> GCC's response to the objection is as follows:
>
> The proposed route has a 3 metre width for half of its length, and the 2 metre width applies only to a 49 metre section that runs alongside the applicant's rear garden. The path is on the outskirts of the town of Bourton on the Water and the landowner has concerns that providing a 3 metre width for the proposed path at

> its junction with Marshmouth Lane would attract antisocial behaviour. The applicant has agreed to install a stock fence between their garden and the path, and to maintain the hedge running along the southeast side of the path, allowing for a useable width of 2 metres between points C to D.
>
> The rolled stone surface of the proposed diversion will be equally as commodious to walkers as the surface of the existing path through the farmyard and provides a better surface than the existing section of path through the grassy field, which regularly becomes waterlogged at certain times of the year. It is therefore not considered that the diverted path is less convenient to the public than either the definitive path or the used path."

21. The Gloucestershire County Council Public Footpath HBW26 Parish of Bourton on the Water Diversion Order executed on 8th September 2020 described the diverted path between points C and D as being 2 metres wide. Under the rubric "Conditions and Limitations", there is no reference to any maintenance agreement, nor have I seen any evidence of a section 119 agreement referred to in the Statement of Reasons. The position is that both of these agreements do not yet exist.

THE INSPECTOR'S DECISION LETTER

22. The following parts of the Inspector's decision letter are relevant:

> "(Preamble) The Order is dated 8 September 2020 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
>
> 2. I undertook an unaccompanied site visit on the 10 January 2023. At the site visit I found the diversion route to be in place, with a wooden bridge over the highway ditch and a gate at point D on the attached map. When walking the existing route between Points B and A I found the path to be blocked at Point A by a fence so that I could not continue my walk along footpath HBW 26 at this point.
>
> …
>
> ***Whether the new path will not be substantially less convenient to the public***
>
> 15. It is necessary to consider whether, in terms of convenience, matters such as the length of the proposed path, the difficulty of walking it and its purpose will render the path substantially less convenient to the public.
>
> 16. The diversion would lead to an increased distance of approximately 17 metres if walkers chose to use HBW 27 and Marshmouth Lane to link points B and D, thus continuing their walk along HBW 26. Nevertheless, the evidence before me

suggests that the footpath is mainly used as part of a longer recreational route and, as such, I do not find that the extra distance would have a significant impact for users of the footpath. I also note from my site visit that there was no significant difference in the gradients of the existing and proposed routes.

17. One stile and two gates are recorded in connection with the present route. In contrast, the proposed route would have a pedestrian gate at point A, which would improve access, particularly for those people with limited mobility. In that respect, the proposed route would be more convenient. Moreover, during the site visit, I found the proposed route to be dry whereas a section of the existing route across the paddock was wet in places and at risk from additional damage due to the livestock. Therefore, the proposed route could provide an opportunity for the provision of an improved path for the public.

18. The width of the existing route is undefined, whereas the width of the proposed route would vary between 2 and 3 metres. Between points A and C the proposed footpath diversion would be 3 metres in width and separated from the paddock with stock proof fencing to the northwest and a hedge to the southeast. The section C to D would reduce in width to 2 metres bounded to the northwest by a stock proof fence and an approximately 2 metres high wooden hurdle type fence and to the southeast by a hedge, mature trees and the rear elevation of a stable block.

19. In respect of the C-D section, the Council has indicated that a width of 2 metres would be available between the hedge, and associated vegetation, and the boundary fence. However, it was apparent during the site visit that this section of the proposed route was reduced in part to approximately 1 metre due to overhanging vegetation and I note that this was in the winter and much of the vegetation was not in leaf.

20. I consider that, the boundary fencing, vegetation and narrow useable width of the path makes the route unwelcoming and intimidating. Furthermore, the limited width would not provide sufficient room for users to pass each other in relative comfort, particularly if they had dogs. I acknowledge that the length of section C-D is relatively short, being some 49 metres. However, the 'tunnel like' character of the section may dissuade users from leaving the metalled road at point D, particularly when there are other rights of way which are available further along Marshmouth Lane.

21. Although I do not doubt that it is possible that works could be undertaken to cut back the trees, no assurances were provided regarding this issue. In addition, no specific works are identified in the Order to tackle this particular matter. In any event, the

> narrowness of the path would make it extremely difficult to cut back the vegetation, particularly at height.
>
> 22. I note the five letters of support for the proposed diversion, many of which comment on the diversion of the path from the farmyard. One supporter commented that "*the 2m width seems a generous allowance for a footpath*". Nonetheless, as set out above, I have found that the actual useable width is substantially less.
>
> 23. Overall, I find that in some respects the diversion could offer an improved means of access. However, I consider that the limited width of section C to D currently poses a significant problem in relation to the convenience of the proposed route which outweighs the potential benefits of the diversion. Furthermore, in light of the details supplied, it is not possible for me to determine that this issue will be satisfactorily resolved if the Order were confirmed.
>
> 24. To my mind, the unresolved matter of the useable width of the path means that I am unable to conclude that the proposed route would not be substantially less convenient for the public. This view means that it would not be appropriate for me to confirm the Order."

23. The Claimant has taken issue with the Inspector's assertion that she walked the existing route between points B and A. Plainly she did not, if for no other reason that the barn was in the way. The Inspector's evidence filed for the purposes of these proceedings (which in my view is admissible in order to clarify what she did do) shows that she took what I am calling the permitted path and not the existing path, at least until the former joined the latter short of point A. According to paras 4 and 5 of her second witness statement:

> "4. At paragraph 4 of my First Witness Statement, I explained that my journey was blocked at Point B by a barn. That is true. At CB/88 [the local authority's photograph], the view looking south-west from Point B clearly illustrates that the barn prevents walking south. During my visit in the winter, there was limited vegetation in front of the barn. Whilst there may have been ditches and fencing before the barn, the main and obvious obstacle to continuing the journey along the current lawful route was the large barn.
>
> 5. I understand the Claimant says that prior to my site visit she had withdrawn permission to use the path through her farmyard, over her land. I was unaware of that when I undertook my site visit and understood that the permissive route was still available for the public. That aside, it makes no difference to what I did factually, which I describe at paragraph 5 of my First Witness Statement."

THE STATUTORY FRAMEWORK

24. Section 119 of the Highways Act 1980 provides, in material part:

> "**119 Diversion of footpaths, bridleways and restricted byways.**
>
> (1) Where it appears to a council as respects a footpath, bridleway or restricted byway in their area (other than one that is a trunk road or a special road) that, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or] of another owner, lessee or occupier), the council may, subject to subsection (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order,—
>
> (a) create, as from such date as may be specified in the order, any such new footpath, bridleway or restricted byway as appears to the council requisite for effecting the diversion, and
>
> (b) extinguish, as from such date as may be specified in the order or determined in accordance with the provisions of subsection (3) below, the public right of way over so much of the path or way as appears to the council requisite as aforesaid.
>
> An order under this section is referred to in this Act as a "public path diversion order".
>
> …
>
> (4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.
>
> (5) Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—
>
> (a) any compensation which may become payable under section 28 above as applied by section 121(2) below, or
>
> (b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing

> the new site of the path or way into fit condition for use for the public, or
>
> (c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.
>
> (6) The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—
>
> (a) the diversion would have on public enjoyment of the path or way as a whole,
>
> (b) the coming into operation of the order would have as respects other land served by the existing public right of way, and
>
> (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it, …"

25. Section 154(1) of the Highways Act 1980 provides in material part:

> "**154 Cutting or felling etc. trees etc. that overhang or are a danger to roads or footpaths.**
>
> (1) Where a hedge, tree or shrub overhangs a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians, or obstructs or interferes with the view of drivers of vehicles or the light from a public lamp, or overhangs a highway so as to endanger or obstruct the passage of horse-riders, a competent authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is growing, require him within 14 days from the date of service of the notice so to lop or cut it as to remove the cause of the danger, obstruction or interference."

26. Under section 106 of the Town and Country Planning Act 1990, a local authority is empowered to enter into the sort of maintenance agreement that this local authority had in mind in its Statement of Reasons.

RELEVANT POLICY

27. The Secretary of State's Rights of Way Advice Note No. 9, General Guidance on Public Rights of Way matters, provides in material part:

> "2.3.8. The decision in *Ramblers Association v SSEFRA, Weston and others* [2012] EWHC 3333 (Admin) acknowledges that section 119(6) involves three separate tests (as endorsed by the High Court in *The Open Spaces Society v Secretary of State for Environment, Food And Rural Affairs* [2020] EWHC 1085 (Admin)):
>
> **Test 1:** whether the diversion is expedient in the interests of the owner, lessee or occupier of land crossed by the path or of the public (as set out in section 119(1) and subject to section 119(2) – see paragraphs 2.31 and 2.32 above). This was described in *R (Hargrave) v Stroud District Council* [2001] EWHC Admin 1128, [2002] JPL 1081 as being a low test.
>
> **Test 2:** whether the proposed diversion is 'substantially less convenient to the public'. In order to meet this test, the path or way must not be substantially less convenient to the public in consequence of the diversion (as per the wording in section 119(6)).
>
> Both of these tests can be described as gateway tests - unless they are passed the decision-maker does not get to the third test.
>
> **Test 3:** whether it is expedient to confirm the Order having regard to the effect: (a) of the diversion on the public enjoyment of the path or way as a whole;
>
> (b) of the Order on other land served by the existing public right of way; and
>
> (c) of any new public right of way on the land over which it is to be created and any land held with it.
>
> Any material provisions of a rights of way improvement plan must also be taken into account.
>
> 2.3.9. Those specified factors in Test 3 must be taken into account by the decision-maker but the expediency test is not limited to those matters, as confirmed by the Court of Appeal in *The Open Spaces Society v SSEFRA* [2021] EWCA Civ 241. The decision-maker may have regard to any other relevant matter including, if appropriate, the interests of the owner over which the path currently passes, or the wider public interest. Use of the word "expedient" indicates that a broad judgement is to be made and it will be for the decision-maker to weigh the different considerations.

> 2.3.10. It is possible that a proposed diversion may be as convenient as the existing path but less enjoyable, perhaps because it was less scenic. In that scenario, it is correct for the decision-maker to take account of the degree of benefit to the owner and the extent of loss of public enjoyment together with any other factors both for and against the diversion to arrive at a finding on the expediency of confirming the Order under Test 3.
>
> 2.3.11. Conversely, a proposed diversion may give greater public enjoyment but be substantially less convenient (perhaps because the diverted route would be less accessible or longer than the existing path/way, for example). In such circumstances, the diversion order should not be confirmed, since a diversion order cannot be confirmed under section 119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion. The issue of convenience in Test 2 is separate from the question of expediency in Test 3 (see *R (on the application of Young) v SSEFRA* [2002] EWHC 844).
>
> 2.3.12. Whereas section 118(6) provides that, for the purposes of deciding whether a right of way should be stopped up, any temporary circumstances preventing or diminishing its use by the public shall be disregarded, section 119 contains no equivalent provision. However, [it is the Inspectorate's view that] when considering orders made under section 119(6), whether the right of way will be/ will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public. Therefore, in all cases where this test is to be applied, the convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it."

28. The Inspector considered that Tests 1 and 3 were satisfied but not Test 2.

THE GROUNDS OF CHALLENGE

29. Ground 1 is that the Inspector acted unfairly in determining that the available width of the diverted footpath between points C and D was 1 metre in places when it was common ground between the parties, including the Claimant, the local authority and the objector, that the available width was 2 metres. Had the Inspector reverted to the parties as she should have done, she would have been informed that the diverted path was regularly maintained and that the reason for its narrowing at one point was the presence of a fallen tree.

30. Ground 2(a) is that the Inspector erred in fact by saying that no assurances had been given in relation to the maintenance of the diverted path. The local authority had referred in terms to the Claimant's intention to enter into a maintenance agreement. I will deal subsequently with the question of whether Ground 2(a) goes any further.

31. Ground 2(b) is that the Inspector erred in fact when she stated that she walked between points B and A on the plan. Plainly she did not. My interpretation of this sub-ground is that it comprises two aspects. The first is that the Inspector simply misunderstood the line of the existing footpath and therefore fundamentally erred when carrying out the comparative exercise that Test 2 enjoined. The second aspect is that even if the Inspector understood that the existing footpath went between B and A, it is clear from the decision letter as a whole that she focussed on the characteristics of the permitted footpath, particularly over the paddock, and paid no attention to the amenity of the existing path between point B and the northern boundary of the Claimant's land. Paras 6.10 and 6.11 of the Claimant's Statement of Facts and Grounds advance what I am calling the second aspect, albeit with not quite the same clarity as the skeleton argument.

DISCUSSION AND CONCLUSIONS

32. I am grateful to both counsel for their written and oral submissions. They were of high quality and enabled me to cut through the metaphorical brambles to reach the true heart of this case. A synopsis of the parties' submissions is not required.

33. It is trite law that an Inspector's decision letter is to be read: (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case. It is also well-established that this Court must assume that an Inspector knows and understands relevant law and policy even if express reference may not be made to all of it. A clear contraindication is required in order to displace that assumption.

34. What fairness requires in an individual case is very much fact-specific. The general principles in a planning context have been set out in a number of cases, perhaps the most authoritative being the decision of the Court of Appeal in *Hopkins Developments Ltd v SSCLG* [2014] EWCA Civ 470. In the context of a case proceeding on written representations and an unaccompanied site visit, if an Inspector wishes to depart from what is common ground on the papers, she must give the party potentially adversely affected a reasonable opportunity to adduce further evidence and submission. This is the general principle. It may not apply, for example, if the Inspector takes a point that is so blindingly obvious that the parties ought to have addressed it. That may be a matter of fact and degree.

35. The Inspector's own observations were that the diverted footpath between points C and D had narrowed in places to 1 metre. The Inspector clearly understood that the width of the diverted path in the Order was 2 metres and that the local authority had been referring in correspondence to that being the *available* space. It is not arguable that the Inspector failed to apprehend this entirely basic point: indeed, her decision letter makes it clear that she did not. These judicial review proceedings are not the proper opportunity for the Inspector's findings and observations on site to be questioned or gainsaid, and I note that no one has provided contemporaneous evidence (i.e. evidence as to the position in January 2023) in the form of photographs and the like as to the physical state of the diverted footpath at about the time the Inspector saw it. In my judgment, it is not plausible that the Inspector mistook encroaching vegetation for a fallen tree. The obvious reason for the alteration in the state of the path between the autumn of 2020 and the winter of 2023 is that nature had taken its course.

36. Accordingly, I cannot accept the high watermark of the Claimant's case as advanced in Ground 1. This ground cannot succeed on a free-standing basis. The real issue, in my judgment, is how Ground 1 interacts with Ground 2(a): it is obvious to me that, in the absence of an enforceable maintenance agreement, the available width as required by the local authority's Order would diminish; as indeed has happened. Turning this point on its head, it is equally obvious that what was narrowed to 1 metre by natural processes could be restored to 2.

37. The local authority did not enter into any legally enforceable agreements before the Order was made. The only reasonable inference from all the available material is that the local authority had received an assurance or undertaking from the Claimant that she would enter into a section 119(5) agreement in relation to the works necessary to bring the diverted footpath to the requisite standard and a maintenance agreement that would ensure that this state of affairs endured.

38. Mr Bowes is right to submit that these informal arrangements were not legally enforceable. There is nothing to stop a local authority entering into binding agreements under section 119 of the Highways Act 1980 and/or section 106 of the Town and Country Planning Act 1990 after a diversion order was made, but the landowner could refuse or, alternatively, sell the land immediately after the 28 day period for objection had expired. An agreement to agree, or what used to be called – in a different era – a "gentleman's agreement", is writ on water.

39. Mr Bowes' overarching submission was that it was incumbent on the parties to ensure that legally binding agreements were in place. In such circumstances, the Inspector was not required to revert to the parties to enable the position to be improved.

40. I pressed Mr Garvey as to whether the absence of a legally binding agreement really mattered because statutory powers might fill in the lacuna. It was Mr Bowes who drew section 154(1) of the Highways Act 1980 to my attention. The issue here is whether the local authority could enforce the 2 metre available width requirement pursuant to its statutory powers, in the absence of legally-binding arrangements. The Claimant had not advanced a pleaded case in this respect. The section 154(1) power may be exercised if vegetation below human height obstructs the passage of pedestrians. I see the force of the argument that in considering the exercise of this power a local authority would need to bear in mind the available width of the footpath as specified in a relevant instrument, assuming that it has been defined. I also see the force of the argument that if the available width has reduced to 1 metre in a situation where the width as stipulated is 2 metres then a local authority acting reasonably, following a complaint, may well have to exercise this power by serving a notice on the landlord to relevant effect. However, it would not be right to decide this case on a point that has not been pleaded, has come from the judge and not the Claimant, and for equivalent reasons has arisen so late in the day. I have reached that conclusion because the correct approach to section 154(1) is not entirely obvious.

41. There is more force in the complaint that the Inspector ought to have reverted to the parties on the issue of maintenance. DL21 recognises that it is possible to cut the vegetation back (this is contradicted to some extent by the final sentence of DL21 which I will be addressing in due course). The reference to there being no "assurance" is troubling. There *were* assurances or undertakings but they were not legally binding.

The Inspector stated that this issue was "unresolved" but to my mind it could easily have been resolved by asking the parties whether there was a potential solution.

42. Mr Bowes submitted that it was not incumbent on the Inspector to revert to the parties on this issue. He drew my attention to two authorities. First, in *Top Deck Holdings v SoS* [1991] JPL 961, the Court of Appeal, Mann LJ giving the leading judgment, held that the Inspector was under no obligation to consider the imposition of a section 52 condition that had not been mentioned or offered by the parties. She was under no duty to "cast around" for conditions that had not been suggested by anyone. Secondly, in *West v SoS* [2005] EWHC 729 (Admin) Richards J, as he then was, identified the third issue for his determination as being whether the Inspector should have inquired whether there might be additional evidence or submissions which could support the Claimant's case. There was no such duty to inquire. In short:

> "… the general rule is that it is incumbent on the parties to a planning appeal to place before the inspector the material on which they rely … The inspector is entitled to reach his decision on the basis of the material put before [her]."

43. These cases are authority for the general proposition that an Inspector does not have to come up with something entirely new. But what we have here is not something entirely new but something incomplete and insufficient: in itself and without more inadequate, but ripe for a solution.

44. In the present case, the parties were content to proceed on the basis that the Claimant would honour her assurance or undertaking to enter into a section 119 agreement as well as a maintenance agreement, the latter presumably under section 106. The local authority assumed that this was good enough, and there is no reason to suppose that the Claimant would or might have reneged on her promise. At worst from the local authority's perspective, they overlooked the possibility that they could not compel the Claimant to enter into binding arrangements after the 28 period had expired and the Order could not be challenged.

45. The position of the objector is less clear, although he certainly was not contending, at least explicitly, that legally binding arrangements should be made before the Order was finalised.

46. In my judgment, the Inspector was wrong to say that no assurance had been given – or, at least, to have expressed herself in those terms. No legally binding arrangements had been made, but that is a significantly different point. If no assurances *at all* had been given, I would have concluded that the present case was indistinguishable from *Top Deck*. But the Claimant was acting without the benefit of legal advice, and if anyone was at fault it was the local authority in taking a fairly *laissez-faire* attitude to this process. It would been have the easiest thing in the world for the Inspector to have turned to the parties for comment; and – as the Claimant informs me in her evidence – the Inspector's concerns, whether express or implied, would have been speedily remedied.

47. Ultimately, my conclusion does not depend on the finding that the Inspector was wrong to say that no assurance had been given. Had she been more accurate with her phraseology, and had she said that assurances had been given but they were not legally

enforceable, all the more reason in my view to have reverted to the parties to ascertain if they could be made so.

48. Mr Bowes urged me to think long and hard before reaching that conclusion; it might have wider ramifications. I have thought long and hard before finalising my judgment and would have reached it even had the ramifications been more wide-ranging. In fact, they are not, because this case turns on its own particular facts.

49. Overall, given the local authority's attitude in particular, it was unfair to have erected a hurdle for the Claimant to surmount without giving her any prior warning, still less the opportunity to leap over it.

50. Mr Bowes suggested in his skeleton argument that Ground 2(a) is based solely on the "error of fact" principle and not on procedural unfairness. It is correct to point out that the Claimant has placed more emphasis on the former than the latter, but procedural unfairness is (just about) pleaded under para 6.6 of the Statement of Facts and Grounds, and it receives more prominence in Mr Garvey's skeleton argument. Mr Bowes' skeleton argument contains full and erudite submissions on the topic. There is no unfairness in my proceeding in this fashion.

51. Mr Bowes raised a further objection to Ground 2(a). He submitted that the Inspector concluded that the narrowness of the path would make it extremely difficult to cut back the vegetation. This was a free-standing conclusion that the Claimant has not challenged and should defeat Ground 2(a) regardless of any weaknesses elsewhere. I cannot accept this submission. The parties were proceeding on the basis that the diverted footpath *could* be maintained. If the Inspector was minded to rely on a point that is so obviously counter-intuitive, I consider that she should have drawn it to the parties' attention for comment. I cannot therefore accept Mr Bowes' contention that the outcome would highly likely have been the same absent errors elsewhere.

52. Mr Bowes' final argument is that all of this is moot. The Inspector at DL20 had referred to a "tunnel effect" which would have been the same even had the available width been 2 metres. I cannot accept that submission, not least because it cuts right across DL21.

53. As for Ground 2(b), it is not arguable that the Inspector did not understand the correct line of the existing footpath. It is also quite plain that the Inspector could not have walked the full length of the existing footpath, and that she did not. The Claimant has spent overlong focussing on these aspects.

54. Her much better point is that the Inspector did not conduct a proper comparison between the convenience of the existing path and the convenience of the diverted path. In particular, she paid no real attention to the 20 metre stetch between point B and the northern boundary, and paid inappropriate attention to the state of the paddock. These points are embedded in the Claimant's voluminous evidence and although could perhaps have been made in a more lapidary way were sufficiently clear to require consideration by the Inspector.

55. The penultimate sentence of DL17 does suggest that the Inspector had in mind the state of the paddock and was basing her comparison on the wrong footpath. However, nothing really turns on that matter, taken in isolation, because the erroneous comparison if anything availed rather than disserved the Claimant.

56. I see considerably more force in the argument that the Inspector did not take the 20 metre stetch into account. There is no reference to it in the decision letter, and para 4 of her second witness statement is very cautiously worded. Mr Bowes relied on para 2.3.12 of the Guidance Note (see §27) above. Although the presence of the barn and any other obstacles such as fences has to be ignored, the assumption that the existing footpath is maintained to a suitable standard requires further examination. This sentence is there to ensure that landowners under an obligation to maintain do not deliberately allow a footpath to go to rack and ruin before making an opportunistic application for a diversion. But that is not the position here at all. The Claimant does not own the 20 metre stretch to which I am referring, and her evidence to the Inspector was that the existing footpath had been in disuse. Moreover, her clear evidence was that this 20 metre stretch is often flooded in the winter and that a brook has to be traversed.

57. There was no evidence of any maintenance obligation in relation to this portion of the existing path. The local authority would have to resort to its powers under section 154(1), but there is no evidence that it has ever done so. We have seen that those powers are limited to obstructions. In my judgment it could not be deployed to improve non-existent bridges over the brook (itself of unspecified width) or to remove floodwater.

58. In my judgment, the clear inference is that the Inspector did not pay any regard to these matters. She did not factor into her comparative evaluation of convenience the Claimant's uncontradicted evidence to the effect that the path north of the barn is often waterlogged and had not been used by walkers for many years. She applied para 2.3.12 of the Guidance Note in a mechanistic fashion and failed to consider whether there was any obligation to maintain; and, if not, the extent to which section 154(1) might have impacted on the analysis.

59. It follows that Ground 2(b) succeeds.

DISPOSAL

60. Ground 1 fails. Grounds 2(a) and (b) succeed. It follows that the Secretary of State's decision not to confirm the local authority's diversion order must be quashed and the case remitted to the Defendant for reconsideration.

61. It is to be hoped that this long-standing saga may now be resolved speedily. The diverted path has now been brought into a proper state of repair, and it is being used. What is required is a legally binding maintenance agreement under section 106 of the Town and Country Planning Act 1990 obliging the Claimant to maintain the path so that its available width remains 2 metres. With goodwill on all sides, the height at which potentially encroaching vegetation needs to be cut back is also capable of agreement.