REP 1-035 PARK BARN FARM ("PBF") – ALDERSON

SUBMISSIONS FOR DEADLINE 11 (3/7/20)

The objector's submissions for Deadline 11 comprise the following items, as attached:

1. Written summary of oral submissions made at CAH 1 (Session 2, Part 3) on 17th June 2020;

2. Note on the *Greenwich* case, together with a copy of the court judgment;

3. Note on the "bottom-up" approach to the application of the statutory test for compulsory acquisition of replacement land: s.122, Planning Act 2008.

KEYSTONE LAW

(ON BEHALF OF MR ALDERSON)

REP 1-035 PARK BARN FARM (“PBF”) – ALDERSON

SUBMISSION FOR DEADLINE 11 (3/7/20)

WRITTEN SUMMARY OF OBJECTOR’S ORAL CASE: CAH 1, SESSION 2, PART 3 (17TH JUNE 2020)

Agenda Item no. 4: The objection to the proposed CA of land at Park Barn Farm (‘PBF’) – 17th June 2020

This summary is made up of two parts:

1. Comments made during the opening presentation of the objector’s case (pp.1-4);
2. Overview of objection / discussion points raised during hearing (pp.5-6).

OPENING PRESENTATION

Content:

[A] Description of PBF, its value and importance to the objector
[B] Summary of the reasons why the Order (for CA of RL) should not be confirmed
[C] Comments on previous M25/ A3 road schemes
[D] Compulsory Acquisition of replacement land: how should the statutory test (s.122 PA 2008) apply in practice?

[A] Overview / site context

1. These matters are already set out in evidence [see Mr Alderson’s two statutory declarations: REP1-035, REP5a-013].

2. Anyone visiting PBF (reached by a winding drive down through ancient and mature woodland until one arrives at the three dwellings where Mr Alderson and his family all live) will be impressed by its quiet seclusion: the natural contours of the land, and surrounding tree belt, providing an effective shield from the sight and sound of road traffic.

3. Confirmation of the Order (for RL) would have a significant impact on what is an attractive and well-used part of the domestic curtilage, land which contributes in a meaningful way to the amenity and valuable enjoyment of all three properties.

4. The Order Land ('OL')[1] forms part of the domestic curtilage of PBF. It would cut this almost in half - taking away roughly 50 acres of the most highly prized land in fields PBF2 and PBF3.

5. The OL has very special qualities in terms of its visual character, its natural beauty, and wildlife, as well as containing other [man-made] features such as two ponds overlooked by a summerhouse, and also a pole barn.

6. The objector and his family have used the summerhouse and pole barn for hosting various private parties and events over many years.

7. The blight is causing added a distress at a time Mr Alderson has been seriously unwell and has been trying to sell the property.

[B] A summary of the reasons why the Order (for CA of RL) should not be confirmed

8. The Secretary of State ('SoS') cannot be satisfied that it would be lawful to confirm the draft Order (for compulsory acquisition of RL), which is for a number of reasons.

9. On the basis of any fair and objective assessment of the evidence it is only sensible and rational conclude that the part of the OL to be acquired does not offer much by way of current "advantage"[2] that would be lost [see SoR, Appx C, Common Land and Open Space Report @ para. 2.7.11]. That is because (whilst those parts of the OL may be visually attractive in places):

   - The OL is not particularly usable due to undergrowth and the presence of other man-made physical impediments to access around the road junctions;
   - The OL is not well-used in fact; and
   - That user experience, such as it is, is also badly impaired by the sight and sound of road traffic.

10. There would also be no serious loss or disadvantage caused by the acquisition of permanent rights over other parts of the OL which justifies RL on a 1:1 swap basis [as the applicant seeks to provide]. Note also that the previous schemes did not give any additional EL for compensation in relation to the taking of those rights.

11. On the other side of the coin the RL has been selected because it would provide, what would, on a scheme-wide basis, be much of a 'like for like' replacement in visual and

[1] For the purposes of this note this refers only to the part of the OL comprising PBF land interests.
[2] Advantage measured in terms of its value for recreational use by members of the public, and other persons entitled to use it.

landscape character terms [SoR, 7.2.7; Appx C, 2.7.4], whilst the additional planting which the applicant has proposed will improve its recreational amenity value still further.

12. The selected RL parcels share many of the same general characteristics and advantages as the OL in terms of their suitability for public recreational use, in that they are:

   - located close to the affected OL;
   - available for use and will be generally 'accessible';
   - (mostly) contiguous with other existing blocks of SCL, and so will help to create larger usable areas of access land;
   - already well-connected to the existing public rights of way network (and will benefit from further scheme enhancements in that regard); [Appx C, 3.4.17]
   - generally much quieter than the OL, being further away from road traffic; [Appx C, 2.7.11]; and
   - less visually impacted by road traffic and assorted road infrastructure.

13. Balancing out these relative advantages sensibly it can really only be concluded that the RL is more advantageous as a whole; and that at any rate, a ratio of almost 3x the amount of OL (comprising special category land) that would be lost[3] is totally disproportionate, being far more than is actually necessary to achieve 'equality of advantage' vis a vis the statutory test.

14. The applicant has <u>not</u> carried out a proper human rights balance in relation to the factors involved with the acquisition of RL. This analysis does not appear anywhere in the application documents. In particular, the applicant's Statement of Reasons sets out a full explanation of why there is a strong public need case for the road scheme to proceed, without a corresponding assessment of the impacts on private property rights and interests, such as PBF[4]. Decisions in relation to PBF are also undermined by the fact the applicant has treated that site as agricultural land only [Soil resources, APP-126, para. 13.1.1.1; Appx C, 6.1.4].

15. CA on this scale proposed would constitute a wholly unjustified interference with the objector's human rights[5] (and those of his family); and it also fails to satisfy the basic PA 2008 requirement for a <u>compelling</u> case in the public interest ('CCIPI')[6].

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[3] See para. 6.4.6 of SoR, Appendix C, Common land and Opens Space Report (Rep 8-015)

[4] See sections 5.4 (page 21) and 6.2 (page 26) of the SoR, and similarly para. 6.4.21 of the applicant's Planning Statement.

[5] i.e. those rights given protection by section 6 of the Human Rights Act 1998: Art 1 of the First Protocol & Art.8 of the ECHR

[6] Section 122(3) PA 2008

16. These are quintessentially matters of judgment, but in our view, it would be relatively simple and straightforward for the SoS to conclude that the two statutory definitions[7] [of RL] are satisfied even if the overall amount of RL is reduced by nearly two-thirds.

17. In our submission the sheer weight of evidence indicates that, in fact, whichever RL parcels are actually chosen, the appropriate ratio should be 1:1 equivalence for the loss of land, with perhaps just a small incremental addition to compensate for the acquisition of permanent rights. It follows that the SoS is left with having to make some hard choices about which RL areas should now be selected to make up this reduced total.

18. Any CA of PBF land will require special human rights justification (of a kind which is currently lacking) because it would affect the ordinary use and enjoyment of the three dwellinghouses. By comparison, the other RL parcels are all in agricultural use, and none of those owners has objected to the CA, a factor which is also important to the overall human rights balance.

19. The objector is prepared to accept that if it is absolutely critical to include land from PBF then it should be limited to the 'Cowfield' (PBF1) only, since that part of the land is less intimately associated with the curtilage uses described in evidence. PBF1 does though offer substantial advantages in terms of public recreational use being contiguous with existing blocks of common land & open space. It is also well connected by the RoW network.

[C] Previous road schemes (M25 / A3)

20. The exchange land ratios which have been applied to previous road schemes in this vicinity are simply not a material consideration.

21. The fact that the applicant has been so closely wedded to these 'target ratios'[8] (and in the final reckoning has exceeded them by a distance) discloses a serious error of approach which will now be hard to rectify given the sheer chasm between what it should have done and what it has done.

[D] Compulsory Acquisition of replacement land: how should the statutory test (s.122 PA 2008) apply in practice?

22. It is implicit within these criticisms that the applicant has not devised a RL package in a manner which is capable of satisfying the statutory test (for CA of RL) under s.122 PA 2008.

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[7] Sections 131(12) & 132(12) PA 2008

[8] The appropriate target ratio is 1:1 equivalence (in terms of overall area) unless the balance of public use advantages demands that a higher ratio should be applied.

23. The objector has produced a separate note setting out how the statutory test (s.122 PA 2008) should apply in practice.

OVERVIEW OF OBJECTION / DISCUSSION POINTS

1. The objector considers that it would easily be possible to satisfy the two statutory definitions of RL [s.131(12) & s.132(12) Planning Act 2008] in other ways all of which involve taking far less RL; and that it is necessary to scale back the RL in order to satisfy the second statutory condition (s.122(3) Planning Act 2008) of "*a compelling case in the public interest for the land to be acquired compulsorily*", particularly to appease the objection in respect of PBF.

2. As it is, the public access advantages of the RL, on a scheme-wide basis, exceed the advantages of the OL[9] by a very appreciable margin when all the relevant factors are considered, which includes: likely beneficial use and usability; linkages with the public RoW network / direction of travel[10]; lack of additional severance; deficit of provision elsewhere (in the NE & NW quadrants); merger with other common land and open space; overall quality of provision; capacity for improvements; noise environment.

3. This is particularly so when, at the hearing, witnesses were unable to identify any significant valuable advantages served by the OL for the important purposes for public recreation, focussing instead on its strategic role as a 'buffer' to the road carriageway. The objector acknowledges that some loss of access land at the fringes would cause the remainder of the existing common land to shrink by a small percentage factor – but not so that it would diminish the overall user experience to any significant degree.

4. The witnesses who spoke at the hearings also offered no cogent reasons to justify the taking of land at a 1:1 ratio for the acquisition of permanent order rights[11], whilst the objector referred to other positive benefits which would need to be considered, e.g. improved condition of the ground surface is a benefit to those who are disabled or infirm.

5. Accordingly, it is considered that on the basis of any rational assessment, the overall RL ratio needed to satisfy the statutory test is close to 1:1.

[9] i.e. that which also comprises special category land.
[10] See SoR, Appendix C, para. 6.1.1 which indicates that many users come from a northerly direction in the NW quadrant.
[11] See also SoR Appx C, @ paras. 2.7.16, 2.7.17, & 6.3.15.

6. The objector contends that the applicant took completely the wrong path when it used the M25 and A3 road schemes as its fundamental guide for setting 'target ratios'. A number of reasons have been given as to why these target ratios are inappropriate, e.g. a markedly quieter noise environment which previously existed in this vicinity; freedom of access across a larger block of land unaffected by the M25/A3 roads etc..

7. In any event, the applicant's current blended ratio for common land and open space combined (compared to permanent loss of land*) is almost 3:1[12] – and so contrary to the assertion made by Counsel for the applicant, the ratio is actually much greater now than it was for the historic road schemes when land under the second definition of RL is removed from the equation. Land affected by order rights did not form any component of the calculation in relation to the 1970's and 1980's road schemes. And so it must be recognised that the current level of RL provision is not even a like-for-like comparison with those schemes.

   ***Nb**. The figure discussed at the hearing for loss of special category land was 13.77 ha, but the figures quoted at SoR, Appx C para. 6.4.6 make a total of 13.71 ha.

8. The objector considers that the *Greenwich* case offers a useful guide as to the appropriate level of RL in this case. It is a strong indicator that the replacement ratio should be 1:1.

9. The focus of this particular objection is PBF, though it might be said that many of the same criticisms will apply to other parts of the RL too. What sets PBF apart, however, is that it is the only RL site which involves a direct interference upon the use and enjoyment of private residential dwellings.

10. The adverse impacts on 3 dwellings at PBF are substantial (see evidence), and this constitutes an unnecessary and disproportionate interference with the objector's human rights as protected by section 6 of the Human Rights Act 1998, Art 1 of the First Protocol & Art.8 of the ECHR. In these circumstances, the scheme for RL fails to satisfy the legislative requirement for a CCIPI [s.122(3) PA 2008], and so the SoS cannot be satisfied that it would be lawful to confirm the Order for compulsory acquisition of RL.

11. PBF is up for sale, and a blight notice has been served. This matter has now been referred to the Tribunal for a hearing in December 2020, following service of a counter-notice by the applicant. At the hearing Counsel made the point that this undermines the objection in relation to the strength of the human rights grounds, but this point does not merit any serious attention and was not accepted. The evidence quite clearly shows that the objector is interested in selling either the whole of the

[12] See para. 6.4.6 of SoR, Appendix C, Common land and Open Space Report (Rep 8-015). The objector calculates the 'blended' ratio as 2.9:1 using these figures.

land, or none at all. The applicant's RL scheme does neither, and it is causing an ongoing interference with Mr Alderson's future plans.

12. Belatedly, the applicant has put forward a series of "lesser" options which are designed to reduce the area of RL. However, it has presented these options in a roundabout fashion which does not follow the 'bottom-up' approach that is actually required: see separate note.

13. The SoS will need to judge for itself whether there is adequate evidence to carry out a robust assessment of relative RL parcels which rows back sufficiently from the current position. One can also add, certainly, that wholesale deletion of PBF (option 3 in the applicant's Table of options, REP5a-012) would at least satisfy this particular objector's concerns fully; and if that option were to be chosen then the objector is ambivalent as to whether any other alternative RL packages might also meet the statutory test.

KEYSTONE LAW

*389 London Borough of Greenwich and Others v The Secretary of State for the Environment and the Secretary of State for Transport

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
19 February 1993

Report Citation
[1993] Env. L.R. 344

Queen's Bench Division

Hutchison J.

February 19, 1993

Applications under section 23 of the Acquisition of Land Act 1981 —challenge against the decision of the Secretary of State for the Environment to issue a certificate under section 19 of the Act—whether certain open space land was not less in area and was equally advantageous by comparison to other land—relief sought by quashing of the certificates—application dismissed on the basis that the Secretary of State did not act unreasonably in deciding to issue a certificate

The appellants applied to the High Court under section 23 of the Acquisition of Land Act 1981 to challenge the decision of the Secretary of State for the Environment certifying, pursuant to section 19 of the Act, that he was satisfied that there would be given in exchange for certain open space land other land which was not less in area and was equally advantageous to such persons as were entitled to rights of common or other rights over that open space land and to the public. The relief sought by the appellants was the quashing of the certificates.

The necessity to acquire the land in question arose from a proposal to construct part of the East London River Crossing (ELRC) through Eltham Park, Oxleas Wood and Falconwood Field open space. The ELRC is a major road construction scheme for a trunk road from the southern end of the A406 at South Woodford, across the Thames by a new bridge, to a junction, at Falconwood interchange with the A2 Rochester Way relief road. It being the last part of the proposed route, south of Shooters Hill, that involved the acquisition of part of Oxleas Wood.

The Secretary of State's decision to issue a certificate under section 19 followed a long history of controversy relating to whether the road should go through Oxleas Wood. Following publication of the draft orders relating to the route of the new road, an inspector appointed by the Secretaries of State held an inquiry to hear objections and representations in relation to the orders between September 10, 1985, and December 23, 1986. A major issue at the inquiry was the means by which the road should cross the Thames and, if it is was to be by bridge, as to the design of the bridge. Having received the Inspector's report concerning the “issue of a certificate in respect of Exchange Land for Oxleas Wood” and in the light of representations received on the question of the bridge the Secretaries of State decided to re-open the inquiry into that part of the draft order relating to the original bridge design and to hold concurrent inquiries into consequential draft orders which would be required to authorise a new design. By a letter dated September 6, 1991, the Secretaries of State intimated their decision in relation to the matters which had been deferred, including in particular the question of the issue of a certificate in respect of Exchange Land for Oxleas Wood. In that letter they gave their reasons for deciding to issue a certificate. That certificate was issued on November 20, 1991. The Secretaries of State also made, and on November 28, 1991, published notice of the making of, the relevant Compulsory Purchase Orders.

Oxleas Wood was described as "probably unique in being an SSSI which is both fully open to the public and in close proximity to urban development and is part of a GLC area of special character" and as ancient woodland, *i.e.* woodland which has not been clear-felled or otherwise similarly treated since the year 1600. There was an abundance of evidence called at the inquiry as to the particular features and advantages enjoyed by that type of woodland, including evidence about the flora and fauna. It provided special advantages and enjoyment to those members of the public ***345*** with access to it, both because of the scientific interest and also because of the special quality and atmosphere that it must have by reason of its very "oldness."

The Exchange Land consisted of a part of some open farmland called Woodlands Farm which lies to the north of and on the other side of Shooters Hill from Oxleas Wood. The farm was described as being probably the nearest working farm to the centre of London and as being metropolitan open land and part of the Green Chain. It was noted that the proposed exchange involved not merely the giving of open farmland for woodland, but elaborate arrangements for the modification of Woodlands Farm to make it as nearly as possible a real replacement for the woodland. Those proposals included an all-weather ground surface footpath through the area, ground modelling near the Shooters Hill interchange to reduce visual impact, enhancement of the watercourse, grassed areas suitable for "low key recreation," and woodland planting.

The 1987 Inspectors report evaluated the relative advantages and disadvantages arising from the exchange. The Inspector with his assessor decided that the balance was only just in favour of the DTp and the Secretaries of State in their letter of September 27,1991, agreeing with the Inspector's recommendations, decided to issue the certificate on the basis that (*inter alia*) the public will suffer *no loss* of advantage if their access to the Exchange Land is restricted to a network of paths and rides by fencing for up to 10 years.

The applicants' substantive challenges to the certificate were summarised under three headings:

(1) on the facts accepted by the Secretary of State, was it as a matter of law open to him to conclude that at the date when Woodlands Farm was to be given in exchange for the swath of Oxleas Wood required for the ELRC it will be equally advantageous for those who at present enjoy that portion of Oxleas Wood for public recreation and to the public at large?
(2) if, as a matter of law, it was open to the Secretary of State so to conclude, was his conclusion unreasonable in the *Wednesbury/Ashbridge* sense?
(3) (a) was there evidence supporting the Secretary of State's conclusion "that the fencing proposed on the Exchange Land should not, in practice, restrict public access over [it] to a significantly greater extent to that which Oxleas Wood is now restricted by undergrowth" ; and if not, (b) was that conclusion unreasonable in the *Wednesbury* sense?

Held, dismissing the appeal:

(1) [On points 3(a) and (b) above] The assessment and interpretation of the evidence was for the Secretary of State and there certainly was evidence upon which he could legitimately base the views which he did reach, and the answer to the question "Could the Secretary of State on the evidence conclude that the fences would not restrict public access over the Exchange Land to a significantly greater extent than does undergrowth on the Order Land?" was "Yes." Thus, the Secretary of State had not acted unreasonably in the Wednesbury sense in reaching his decision on this aspect of the case.

(2) [On point 1] There was sufficient information which the Secretary of State could accept as capable of counterbalancing the prima facie disadvantages inherent in the offer of open farmland for established woodland. Therefore, the stark challenge based on the assertion that the Secretary of State could not as a matter of law conclude, on the evidence available to him, that it was open to him to issue a certificate, must fail.

(3) [On point 2] The Secretary of State in making the crucial judgment did not leave out of account any vital consideration or significantly misconstrue the evidence. His decision that there was equality of advantage was one that was reasonably made and it was not unreasonable for the Secretary of State to issue the certificate in the *Wednesbury* sense. ***346***

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Cases cited:

(1) *Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147* .
(2) *Ashbridge Investments Ltd. v. Minister of Housing and Local Government [1965] 1 W.L.R. 1320; [1947] 2 All E.R. 680* .
(3) *Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680* .
(4) *Attorney-General v. Reynolds [1980] A.C. 637* .
(5) *Beck and Pollitzer, In Re [1948] 2 K.B. 339* .
(6) *Council of Civil Service Unions v. Minister of Civil Service [1985] A.C. 374* .
(7) *Gordondale Investments Ltd. v. Secretary of State for the Environment 23 P. & C.R. 334, C.A.*
(8) *Liversidge v. Anderson [1942] A.C. 206* .
(9) *Nakkuda Ali v. Jayaratne [1951] A.C. 66* .
(10) *O'Reilly v. Mackman [1983] 2 A.C. 237* .
(11) *Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694* .
(12) *Point of Ayr Collieries Ltd. v. Lloyd George [1943] 2 All E.R. 546* .
(13) *Pulhofer v. Hillingdon London Borough Council [1986] A.C. 484* .
(14) *R. v. Assessment Committee of the Metropolitan Borough of Shoreditch [1910] 2 K.B. 859* .
(15) *R. v. Independant Television Commission, Ex P. TSW Broadcasting Ltd. (unreported, March 26, 1992)* .
(16) *R. v. Secretary of State, Ex P. Ostler [1977] 1 Q.B. 122* .
(17) *R. v. Secretary of State for the Environment, Ex P. Powis [1981] 1 W.L.R. 584* .
(18) *R. v. Secretary of State for the Home Department, Ex P. Brind and Ors. [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720* .
(19) *Racal Communication Ltd., In Re [1981] A.C. 374* .
(20) *Robinson v. Minister of Town and Country Planning [1947] 1 K.B. 702; [1947] 1 All E.R. 851* .
(21) *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014* .
(22) *Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455; [1972] 2 W.L.R. 1370; [1972] 2 All E.R. 949* .
(23) *Smith v. East Elloe Rural District Council [1955] 1 W.L.R. 380* .
(24) *Webb v. Minister of Housing and Local Government [1965] 1 W.L.R. 755; [1965] 2 All E.R. 193* .

Representation

Mr. J. Morgan for the London Borough of Greenwich.
Mr. Nigel Pleming, Q.C. , for Yates and others.
Mr. J. Richards and Mr. J. Howell for the respondents.

HUTCHISON J.:

These are applications to the High Court under section 23 of the Acquisition of Land Act 1981 by the London Borough of Greenwich and a number of local people, all of whom challenge the decision of the Secretary of State for the Environment certifying, pursuant to section 19 of the Act, that he was satisfied that there would be given in exchange for certain open space land other land which was not less in area and was equally advantageous to such persons as were entitled to rights of common or other rights over that open space land and to the public. The relief sought is the quashing of the certificates.

Greenwich also seek to have related compulsory purchase orders quashed; and while the individual applicants do not in terms do so, this is an unimportant distinction, as will become clear when I examine the relevant statutory provisions.

The necessity to acquire the land in question arises from the proposal to construct part of the East London River Crossing (ELRC) through Eltham ***347*** Park, Oxleas Wood and Falconwood Field open space to which—since attention has concentrated on Oxleas Wood—I shall refer by that name. The ELRC is a major road construction

scheme for a trunk road from the southern end of A406 at South Woodford, across the Thames by a new bridge, to a junction, at Falconwood interchange, with the A2 Rochester Way relief road. It is the last part of the proposed route, south of Shooters Hill, that involves the acquisition of part of Oxleas Wood.

The wood is owned and managed by Greenwich, who hold it as a public open space. It is a large important area of what is described as ancient woodland and was in 1984 designed as a Site of Special Scientific Interest pursuant to section 28 of the Wildlife and Countryside Act 1981 .

The proposal to build the road has attracted much local opposition. It is clear that the individual objectors at least—and Greenwich also I believe—would wish to see the whole project frustrated. I mention that fact simply to make clear, at the beginning of this judgment, that it is not the propriety of building the road, nor even the propriety of building it through Oxleas Wood, with which I am concerned. What is in issue is the much more limited (although perhaps in practical terms equally vital) question of whether the certificate of the Secretary of State for the Environment was properly issued.

The relevant statutory provisions

Part III of the Acquisition of Land Act 1981 is headed “SPECIAL KINDS OF LAND.” Section 16 excludes—provided certain conditions are met—the land of statutory undertakers from compulsory purchase. Section 17 deals with local authority and statutory undertakers' land. Subsection (2) provides:

> “Subject to subsection (3) below, a compulsory purchase order shall, in so far as it authorises the compulsory purchase of land to which this section applies, be subject to special parliamentary procedure in any case where an objection to this order has been made by the local authority, or as the case may be the statutory undertakers, and has not been withdrawn.”

Section 18 applies to land inalienably held by the National Trust, and in subsection (2) makes a similar provision to that contained in subsection (2) of section 17 .

Section 19 , headed “Commons, open spaces, etc.” provides, as material, as follows:

> “(1) In so far as a compulsory purchase order authorises the purchase of any land forming part of a common, open space or fuel or field garden allotment, the order shall be subject to special parliamentary procedure unless the Secretary of State is satisfied—(*a*) that there has been or will be given in exchange for such land, other land, not being less in area and being equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public, and that the land given in exchange has been or will be vested in the persons in whom the land purchased was vested, and subject to the like rights, trusts and incidents as attached to the land purchased . . . and certifies accordingly.
> (2) Where it is proposed to give a certificate under this section, the Secretary of State shall [direct the acquiring authority to] give public notice of his intention so to do, and—(*a*) after affording opportunity to all persons interested to make representations and objections in ***348*** relation thereto, and (*b*) after causing a public local inquiry to be held in any case where it appears to him to be expedient so to do, having regard to any representations or objections made, the Secretary of State may, after considering any representations and objections made and, if

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an inquiry has been held, the report of the person who held the inquiry, give the certificate.

. . .

(4) In this section—

. . .

'open space' means any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground."

Part IV of the Act contains provisions of crucial importance in this case. They are as follows:

"23(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, he may make an application to the High Court.

(2) If any person aggrieved by—(*a*) a compulsory purchase order, or (*b*) a certificate under Part III of, or Schedule 3 to, this Act, desires to question the validity thereof on the ground that any relevant requirement has not been complied with in relation to the order or certificate he may make an application to the High Court.

(3) In subsection (2) above, 'relevant requirement' means—(*a*) any requirement of this Act, or of any regulation under section 7(2) above, or (*b*) any requirement of the Tribunals and Inquiries Act 1971 or of any rules made, or having effect as if made, under that Act.

. . .

24(1) On an application under section 23 above the court may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it effects any property of the applicant, until the final determination of the proceedings.

(2) If on the application the court is satisfied that—(*a*) the authorisation granted by the compulsory purchase order is not empowered to be granted under this Act or any such enactment as is mentioned in section 1(1) of this Act, or (*b*) the interests of the applicant have been substantially prejudiced by any relevant requirement (as defined in section 23(3) above) not having been complied with, the court may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant.

25. Subject to the preceding provisions of this Part of this Act, a compulsory purchase order, or a certificate under Part III of, or Schedule 3 to, this Act, shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever."

***349**

Relevant history

The proposal to build a road such as the ELRC is a long standing one: but I take the history up in 1984. In that and the following two years the two Secretaries of State published draft orders relating to the route of the new road and

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—of particular importance in this case—the intention to certify as to exchange land in relation to Oxleas Wood. Between September 10, 1985, and December 23, 1986, an Inspector appointed by the Secretaries of State held an inquiry to hear objections and representations in relation to these orders. It will be seen, therefore, that there were considered at one and the same time the question whether the road, should go through Oxleas Wood at all and the question whether, if it did, a certificate under section 19(1)(a) should be issued in respect of the exchange land.

A major issue at the inquiry was the means by which the road should cross the Thames and, if it was to be by bridge, as to the design of the bridge. In the light of the Inspector's report on these matters, the Secretaries of State decided to defer their decision on certain aspects of the scheme—it is unnecessary to go into details. It should, however, be mentioned that in the letter of July 28, 1988, in which they explained these matters, the Secretaries of State indicated, *inter alia* :

> (a) that they accepted the Inspector's findings of fact and, save where otherwise indicated, agreed with and accepted his conclusions and recommendations;
> (b) that among those conclusions was one on the exchange land for Oxleas Wood to the effect "that the balance is only just in favour of DTp, significant favourable issues being the remedying of local park deficiency and the welding together of E1 with E5, E6 and a bonus of 0.25 ha from the construction site" ;
> (c) that among the matters in respect of which the Secretary of State for the Environment deferred his decision was the question of the issue of a certificate in respect of exchange land for Oxleas Wood.

In the light of representations received on the question of the bridge, the Secretaries of State decided to re-open the inquiry into that part of the draft order relating to the original bridge design and to hold concurrent inquiries into consequential draft orders which would be required to authorise a new design. These resumed and supplemental inquiries were held between July 3, 1990, and January 8, 1991.

By a letter dated September 26, 1991, the Secretaries of State intimated their decision in relation to the matters which had been deferred, including in particular the question of the issue of a certificate in respect of exchange land for Oxleas Wood. In that letter they gave their reasons for deciding, as they had done, to issue a certificate. That certificate was issued on November 20, 1991. The Secretaries of State also made, and November 28, 1991 published notice of the making of, the relevant compulsory purchase orders.

Oxleas Wood and the exchange land

I must now embark, in a little detail, upon a description of the nature of Oxleas Wood and of the exchange land. In dwelling, as I must do, on those features of the wood which are said to make it particularly advantageous to the public, I again remined myself that I am doing so in the context of the section 19(1) comparison and that the issue whether it is appropriate that ***350*** such a road should go through such a wood is not for me to determine, nor indeed is it before me.

Oxleas Wood "is probably unique in being an SSSI which is both fully open to the public and in close proximity to urban development [and] is part of a GLC area of special character." It is also part of Shooters Hill Metropolitan park, it is some 72.7 ha in area and "contains a mixture of large and small open spaces and extensive woodland" [the quotations in this paragraph are taken from the first Inspector's report].

Ancient woodland is woodland which has not been clear-felled or otherwise similarly treated since the year 1600. At the inquiry an abundance of evidence was called as to the particular features and advantages enjoyed by such woodland, including evidence about the flora and fauna. However, it is not in my judgment necessary to say more

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than this: that it is common ground between the parties to this appeal that, as one would expect, Oxleas Wood contains many features which cannot be replicated on the exchange land, even if a programme of wood planting is undertaken there, as is proposed; that it has many large and ancient trees, interspersed with a network of paths and glades; and that the plant and animal life which flourishes in it enjoys a character attributable in part to its being ancient woodland. From all that it must, I think, follow that it provides special advantages and enjoyment to those members of the public who have access to it, both because of its scientific interest and also because of the special quality and atmosphere that it must have by reason of its very "oldness."

The exchange land

This consists of a part of some open farm land called Woodlands Farm which lies to the north of and on the other side of Shooters Hill from Oxleas Wood. Whereas 10.2 ha of the wood is to be taken, the exchange land is marginally greater in area. The farm is at present described as being probably the nearest working farm to the centre of London and is Metropolitan open land and part of the Green Chain. The Inspector described it as "a unique part of the Green Chain which would be halved in area by DTp's proposals." It will be apparent, therefore, that the public have access to it already—although their entitlement to do so was apparently open to some dispute.

It is, given some of the issues of law which I shall have to consider, of some significance to note that, from the outset, the proposed exchange involved not merely the giving of open farm land for woodland, but elaborate arrangements for the modification of Woodlands Farm to make it as nearly as possible a real replacement for the woodland. Those proposals included an all-weather ground surface footpath through the area (as a replacement of the Green Chain walk) ground modelling near the Shooters Hill interchange to reduce visual impact, enhancement of the water course, grassed areas (covering about 11 per cent. of the area) suitable for "low key recreation," and woodland planting. The intention is that the Green Chain walk will be kept open throughout the construction and adaptation period, that the grassed areas will be open some two years before the road itself is open, and that "after five years the woodland area should be sufficiently robust to withstand pressure from visitors" so that fencing can be removed. From this it will be apparent that it is envisaged that for a significant period (found by the Inspector to be at least 10 years rather than the postulated five) the bulk of the exchange land would be fenced off to enable the woodland to ***351*** become established. This means that 89 per cent. of the exchange land would be inaccessible for at least 10 years, and that access to the remaining 11 per cent. (through part of which the re-routed Green Chain walk would run) would be to an extent regimented by the presence of fences. I think I am entitled, moreover, to assume, even in the absence of specific evidence to this effect, that access to a 10-year-old woodland is access to something very different in nature from an established woodland—whether an ancient woodland or woodland 50 or 70 years old.

The 1987 Inspector's Report

I was shown a large part of the report, from which I shall quote selectively but at some length. It will be remembered that the Inspector was considering wider issues than the propriety of issuing a certificate, but I shall endeavour to confine my citations to matters relevant to the latter point.

> **"Recreated Woodland**
>
> DTp proposes to plant most of the . . . exchange land . . . so as to reproduce many of the valuable ecological features of old woods. The practicality of this operation is attacked by all the ecological objectors many of whom quote Peterken — 'Ancient semi-natural woodland cannot be recreated.' . . . Professor Mellanby [the Department's expert] accepts that research on the subject is limited but becomes more optimistic during the period of the Inquiries. He only claims to be able to reproduce 'many of the features of ancient woodland' and not 'the totality of ancient

woodland . . .' He calls it an 'experiment' because he cannot be entirely certain of the results . . .

. . . local park deficiency . . . arises from the provisions of the GLDP . . . that there should be a Local Park within a quarter mile of all homes . . . There is an area of Bexley . . . deficient in this respect and the Woodlands Farm Exchange Land would remedy that. DTp also argue that landscaping on that land would in time help to hide the skyline view of Westwood School North and adjacent housing. Neither of these points is contested . . .

The advantages claimed for DTp's proposals . . . are:

the visual quality would progressively emerge as an improvement over the uniformity of view experienced within Oxleas Wood;

local park deficiency would be corrected and the skyline improved (74.2.7);

recreational activities (listed) currently enjoyed in the lost public open space could be enjoyed near to the lost area;

a better footpath link is ensured over the Exchange Land, where it is now in dispute (1084 and 1291);

the recreation potential in the Poets Corner area is improved as is access to Oxleas Woods through public open space;

DTp's woodland development proposals will increase the range of plant and animal habitats, with a high proportion of woodland edge in close association with new water and water margin habitats. Ecological diversity would emerge early in the establishment period;

the educational opportunity of comparing ancient woodland with emerging woodland would be provided;

this Exchange Land would be developed with areas E5/1 and E6 to ***352** form a single new public open space from Poets Corner through to Shooters Hill, and in association with other ELRC landscape works it would give an improved ecological corridor of great significance;

the loss of some attractive farmland would be more than compensated by the public ownership of an attractive area with views over farmland to the golf course and beyond.”

The Inspector then set out disadvantages put forward on behalf of the objectors before proceeding to his findings of fact from which I quote the following:

“Woodlands Farm

. . . Woodlands Farm is a unique part of the Green Chain which would be halved in area by DTp's proposals . . .

> . . . The Woodlands Farm Exchange Land would remedy a deficiency in Local Park Provision in an area of Bexley . . . and in time its landscaping would help to hide the skyline view of Westwood School North and adjacent housing . . .
>
> . . . The area of Exchange Land E1 on Woodlands Farm is just greater than the public open space lost to ELRC south of there. The advantages claimed for DTp's proposals in paragraph 73.2.8. are not seriously disputed but important points of doubt remain . . .
>
> . . . Access to Exchange Land E1 from Oxleas Wood via the Shooters Hill interchange is not easy, although the interchange can be avoided by detouring via Oxleas Wood footbridge. This is nevertheless not a serious indictment of the E1 Exchange Land proposals.
>
> . . . It would be realistic to assume that the general public would not be allowed into the woodland planting, occupying 89 per cent. of the Exchange Land E1, for at least 10 years after ELRC is open.
>
> . . . Air pollution and odour should not be a problem in Exchange Land E1 nor should the visual impact of ELRC be significant once the woodland areas are established. However, in weighing equal advantage, an average increase in noise levels of 5–10dB(A) in Area E1 over that without ELRC in the areas lost should be taken into account."

The Inspector concluded with a recommendation that the certificates should be granted:

> **"Exchange Land**
>
> *75.3.1. Commentary.*
>
> The only Exchange Land with residual doubt is E1 on Woodlands Farm. The latter has unique value including its contribution to the Green Chain. However, ELRC plus the Exchange Land would only change it from a marginally viable farm to one of half the size for which special management measures would be needed. The CWS counter proposal does not meet the Exchange Land requirement and is not a reasonable alternative to the DTp proposal. In judging relative public advantage, the merits of Exchange Land E1 need to be assessed against the degree of severance from Oxleas Wood, the 89 per cent.limitation on public access for at least 10 years and the 5–10dB(A) noise increase over that in the land lost. [In this sentence he is summarising the objectors' points which I have mentioned on page 12]. The Assessor and I agree that the balance is only just in favour of DTp, ***353** significant favourable issues being the remedying of local park deficiency and the welding together of E1 with E5, E6 and a bonus 0.25 ha from the construction site. We would be happier if the landtake balance was not so exact and general access was improved with, say, a discreet car park.
>
> *75.3.2 Conclusions.*

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> Woodlands Farm could continue to be marginally viable under DTp's proposals for Exchange Land E1 . . . Exchange Land E1 only just achieves equal public advantage. The other Exchange Land proposals are certainly acceptable."

The Secretary of State's Decision

The Decision Letter of July 28, 1988, contained a lengthy appendix in which were summarised the evidence and the Inspector's findings, comments and recommendations on the issue of Exchange Land. However, all of this was merely noted because, as I have already explained, the Secretaries of State deferred making decisions in relation to the compulsory purchase orders and the applications for certificates. It is accordingly to the letter of September 27, 1991, and the enclosed appendix that one must turn.

In the letter the Secretaries of State reiterated their acceptance of the Inspector's findings of fact, and said that they accepted his conclusions, except where otherwise stated, and agreed with his recommendations. On the issue of the certificates, they said that for the reasons given in Part IV of the Annex to the letter the Secretary of State for the Environment had decided to issue certificates in respect, *inter alia* , of Oxleas Wood. The relevant passages in the Annex are set out below:

> The *Secretary of State for the Environment* has carefully considered the Inspector's findings and conclusion on the public advantage of Exchange Land E1, and in particular his concern about the limitation on public access to 89 per cent. of it for an extended period. He accepts that the area of Exchange Land E1 is only marginally larger than that taken for the new road, but is satisfied that the Acquisition of Land Act 1981 requires only that the Exchange Land be not less in area than the Public Open Space taken. The *Secretary of State for Transport* confirms that a discreet car park will be provided in the Exchange Land as suggested by the Inspector. The *Secretary of State for the Environment* has taken account of the fact that the Green Chain Walk through the Exchange Land will be kept open throughout and that an extensive system of subsidiary footpaths will be developed through the area of woodland planting. He has also taken account of the extensive evidence presented to the 1985-86 Inquiries by the Greater London Council, LB Greenwich and others, concerning the present characteristics and uses of Oxleas Wood.
>
> It is clear from the evidence presented to the Inquiries that the main recreational use of Oxleas Wood is for informal walking. It is also clear that the undergrowth in the woods is dense and, because of the predominance of brambles, is frequently impenetrable. The evidence presented on behalf of LB Greenwich, the body now responsible for management of the woods, shows that there has been a continuous management policy of utilising the undergrowth to keep visitors to the paths, thereby safeguarding the more sensitive areas. Indeed the *Secretary of State for the Environment* notes the evidence of the Greater ***354** London Council that when the woods were acquired for public access in 1934, the intention of the Council was to balance public access and preservation by creating fenced public paths; and that fencing was in fact carried out.
>
> The result is that access to the present woodlands has been restricted in practice to the network of paths and rides. *The Secretary of State for the Environment* notes that the proposal to re-create, so far as possible the characteristics of Oxleas Wood on the Exchange Land includes a proposal for the demarcation by fencing of a similar network of paths and rides there. He considers that the fencing proposed should not, in

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practice, restrict public access over the Exchange Land to a significantly greater extent than that to which the access over Oxleas Wood is now restricted by undergrowth.

The *Secretary of State for the Environment* concludes that the public will suffer *no less* of advantage if their access to the Exchange Land is restricted to a network of paths and rides by fencing for up to 10 years. The *Secretary of State* therefore accepts the Inspector's recommendation and has decided to issue the certificate."

Issues arising

(1) The first issues, arising out of a submission made on behalf of the Secretaries of State is the contention that the court has no jurisdiction to entertain these applications. The argument depends upon the proper construction of sections 23 and 24 of the Act, and involves the argument that whereas a compulsory purchase order may be challenged *either* on the ground that the authorisation of compulsory purchase thereby granted is not empowered to be granted under the Act (s.23(1)) or that any relevant requirement has not been complied with in relation to the order (s.23(2)), a certificate may be challenged only on the latter ground. It is said that, since no assertion is made of the omission of any proper procedural step, there is (see s.25) no jurisdiction in the court to entertain the challenge.
(2) If this issue is determined adversely to the Secretaries of State, then the following further issues arise:

(a) can the Secretary of State, as a matter of law, be satisfied under section 19(1) and certify accordingly, where the land which has been or will be given in exchange is not either at the date of the certificate or at the date when the land will be given in exchange, equally advantageous to the public? Although I have stated alternative dates, all parties agree that, in a case where the land is to be given, the date of exchange must as a matter of common sense be the correct date;
(b) what is meant by "the public" in section 19(1) ?
(c) what must be shown to establish that the Exchange Land is "equally advantageous" ? Does it mean like for like—woodland for woodland—or is it permissible to balance loss of one sort with advantage of another?
(d) in considering equal advantage, is the Secretary of State obliged to take into account overall loss to the public arising from the existing enjoyment of and access to the Exchange Land—in this case open farmland in an urban setting?
(e) could the Secretary of State, as a matter of fact and/or law, on the proper construction of section 19(1) be satisfied that the Exchange ***355** Land was equally advantageous to the public given that what is being taken is ancient woodland which is quiet and peaceful and an integral part of a large area of public open space, to be replaced by open farmland which is to be planted with new trees which need protection by fences, which will be noisier, which will be isolated from Oxleas Wood, and which will be bordered by a major trunk road?
(f) was the Secretary of State's conclusion that there was equal advantage unreasonable in the *Wednesbury* sense?
(g) was there any evidence on which the Secretary of State could conclude and/or could he have concluded (in the *Wednesbury Corporation* sense) that access to Oxleas Wood has in practice been restricted to a network of paths and rides; that the fencing proposed for the Exchange Land should not in practice restrict public access to a significantly greater extent; and that the public would suffer no loss of advantage if their access to the Exchange Land were restricted to a network of paths and rides for up to 10 years?

Jurisdiction

It is logical to begin with the arguments advanced by Mr. Richards on behalf of the Secretaries of State. The fundamental nature and importance of those arguments can be gathered from the fact that Mr. Richards did not shrink from contending that neither error of law nor unreasonableness on the part of the Secretary of State in

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granting a certificate furnished any ground for challenge; it was, he contended, open to the Secretary of State to consider an area of built up land in the middle of Greenwich and, provided he went through the right procedures, to certify that as being suitable Exchange Land within section 19 , and his decision was impregnable. Here, he said, the essential basis of the challenge was that the Secretary of State had acted outside his powers: that was a section 23(1) challenge and was not available in the case of the issue of a certificate. The starkness of this argument is mitigated, he suggests, by the fact that the Secretary of State is answerable to Parliament.

Mr. Richard's argument starts—indeed largely depends—on the rather difficult case of *Smith v. East Elloe Rural District Council [1955] 1 W.L.R. 380* . That was a case concerned with the corresponding provisions of the Acquisition of Land (Authorisation Procedure) Act 1946 . Mr. Richards argues that this case establishes that the 1981 Act permits only procedural, not substantive, grounds of challenge to be raised.

In that case the court was considering the effect of paragraphs 15 and 16 of Part IV of the First Schedule to the 1946 Act, which are in terms very similar to sections 23 to 25 of the 1981 Act.

It is unnecessary to rehearse the facts of the case, save to say that the plaintiff was challenging a compulsory purchase order on the grounds that it was wrongfully made and confirmed, and that she alleged bad faith. In the course of his judgment, Parker L.J. said this of paragraph 15:

> ". . . [it] lays down the procedure (and an analogous procedure has been laid down in a number of other Acts for some time) whereby provision is made for compulsory purchase orders being challenged and for their being quashed. That paragraph provides: 'If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation ***356*** of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in subsection (1) of section 1 of this Act,' —pausing there, that is dealing with a case where a compulsory purchase order is said not to have been authorised. The paragraph goes on: 'or if any person aggrieved by a compulsory purchase order or a certificate under Part III of this Schedule desired to question the validity thereof on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with,' he may take certain action within six weeks.
>
> That second part of paragraph 15 is dealing with the well known case where some requirement of the Act has not been complied with—such as that the owner has not been served, or some notice has not been published in the local newspaper, and matters of that sort. That applies to all compulsory purchase orders whether they are of land which forms the subject of the procedure in Part III or not. On the other hand, the certificate under Part III naturally comes in there because there is no question of challenging a certificate because authorisation is not empowered: the certificate can only be challenged because some procedure relating to a public local inquiry has not been complied with."

In considering this passage it is necessary to bear in mind that essentially two arguments had been advanced by the plaintiff in that case. The first was that the provisions of paragraph 16 of the Schedule (the material part of which is mirrored in s.25 of the 1981 Act) were limited to compulsory acquisition of land of the type dealt with in Part III of the Schedule (which is broadly equivalent to Part III of the 1981 Act). In the passage I have cited, it is clear that Parker L.J. was justifying his conclusion, stated earlier in the first paragraph from which I have taken the citation, that paragraph 16 applies to all compulsory purchase orders. The second argument—said to have been rather "faintly" pursued at that stage—was that by reason of the allegation of fraud the plaintiff could challenge the compulsory purchase order at any time. This argument was also, in reliance on paragraph 16, dismissed in

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summary terms. It follows, in my judgment, that the passage I have cited from the judgment of Parker L.J. was strictly speaking *obiter* , as I think Mr. Richards accepts.

The case went to the House of Lords, where what Lord Simonds described as “a more serious argument” was developed—namely that as the compulsory purchase order was challenged on the ground that it had been made and confirmed wrongfully and in bad faith, paragraph 16 had no application because, however general its language, it must be construed so as not to oust the jurisdiction of the court where the good faith of the local authority or of the Ministry was impugned and put in issue.

It was held unanimously that the action might proceed against the Clerk to the Council for damages. By a majority of three to two (Lord Reid and Lord Somervell of Harrow dissenting) it was held that the action against the council and the government department should not proceed by reason of the plain prohibition in paragraph 16 which, as the Court of Appeal had held, applied to compulsory purchase orders in general, against questioning the validity of the order, whereby the jurisdiction of the court was ousted. Lord Morton of Henryton, Lord Reid and Lord Somervell of Harrow (Lord Radcliffe dissenting) held that paragraph 15 gave no opportunity to a person ***357** aggrieved to question the validity of a compulsory purchase order on the ground that it was made or confirmed in bad faith.

I was referred in particular to certain passages in the speeches of Lord Morton and Lord Reid. Lord Morton, at the bottom of page 755, points to a significant difference between the 1946 Act and its predecessor, the Act of 1933. In the earlier Act the material words were (s.162(1)), “if any person aggrieved by a compulsory purchase order . . . desires to question its validity, he may, within two months after the publication of the notice of confirmation . . . make an application for the purpose to the High Court.” He contrasted these words with what he described as the strictly limited words of paragraph 15, and said:

> “It is, I think, inconceivable that, if the legislature had intended paragraph 15 to cover cases where bad faith was alleged, it would have made this striking alteration in the language of section 162 of the 1933 Act. I would add that if paragraph 15 had been intended to cover such cases, there would seem to be no good reason why the earlier part thereof should not have been applied to a certificate as well as to an order, since the later part applies to both. The reason for the difference was explained by Parker L.J. in the Court of Appeal, and I agree with his explanation; but the difference remains wholly unexplained if paragraph 15 covers cases where bad faith is alleged.”

Before turning to the speech of Lord Reid, I should point out that his analysis proceeded in two distinct parts. He first (which is what is material for present purposes) considered whether a challenge made within six weeks and based on bad faith fell *within* the grounds of challenge permitted by paragraph 15: and it will be remembered that he formed part of the majority who held that it did not. He then addressed the question whether the prohibition contained in paragraph 16 was sufficiently wide to prohibit an independent challenge based on bad faith: and he was part of the minority who held that it was not. Of course, in the present case, no question of bad faith arises, and it is on the first part of Lord Reid's analysis that attention was concentrated.

Lord Reid, at page 761, said this:

> “I must first examine paragraph 15 to see whether the present appellant could have questioned the order on any ground of bad faith, malice, corruption or conspiracy if she had raised her action within six weeks of the order being confirmed. It is not said that this could have been brought within the second of the grounds set out in paragraph 15 ['that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate'] but it is argued that

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> it could be brought within the first because an authorisation obtained in bad faith is not 'empowered to be granted.' ”

Lord Reid then proceeded to make a comparison between the 1933 and the 1946 Acts, pointing out that the former in no way restricted the grounds of challenge to the validity of an order, whereas the latter specified two grounds and said that he could see no possible reason for the change other than an intention to limit the grounds on which a person aggrieved could make an application to the court. He stated that in order to see how far the 1946 Act had limited jurisdiction it was necessary to consider what had ***358** previously been the grounds on which the court could give relief under the ordinary law or the 1933 Act, and continued:

> “I think that in the past there has been some confusion about this, and I fear that I must try as best I can to unravel the matter. It seems to me that there were four grounds. First, informality of procedure; where, for example, some essential step in procedure had been omitted. Secondly, *ultra vires* in the sense that what was authorised by the order went beyond what was authorised by the Act under which it was made. Thirdly, misuse of power in bona fide. And, fourthly, misuse of power in mala fide. In the last two classes the order is *intra vires* in the sense that what it authorises to be done is within the scope of the Act under which it is made, and every essential step in procedure may have been taken: what is challenged is something which lies behind the making of the order. I separate these two classes for this reason. There have been a few cases where actual bad faith has ever been alleged, but in the numerous cases where misuse of power has been alleged judges have been careful to point out that no question of bad faith was involved and that bad faith stands in a class by itself.”

Lord Reid then cited the well-known passage in the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223* as embodying an analysis of what amounted to misuse of power in bona fide and continued:

> “I can draw no other conclusion from the form in which paragraph 15 is now enacted than that Parliament intended to exclude from the scope of this paragraph the whole class of cases referred to in the passages which I have quoted. No doubt in one sense it might be said that in none of those cases is authority 'empowered to be granted,' but that would be a strained and unnatural reading of these words only to be accepted if there were in the Act some clear indication requiring it. But, to my mind, all the indications are the other way, and this part of the paragraph only refers to cases of *ultra vires* in the narrow sense in which I have used it.
>
> If other cases of misuse of power in bone fide are excluded, can a distinction be made where mala fides is in question? As I shall explain when I come to paragraph 16, I am of opinion that cases involving mala fides are in a special position, in that mere general words will not deprive the court of jurisdiction to deal with them, and, if that is so, then no question would arise under paragraph 15. But if I am wrong about cases of mala fides being in this special position, I do not see how there can be a distinction under paragraph 15 between cases of bona fide and mala fide misuse of power. I can see nothing to indicate any intention to that effect, and, if Parliament intended to treat bad

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> faith as a special case, it would be very strange to introduce the exception here. The time limit under paragraph 15 is six weeks, which is appropriate for grounds which appear from the terms of the order but not appropriate for grounds based on facts lying behind the order which may not be discoverable for some time after it is confirmed; and I find another strong indication that the first ground of challenge was not intended to apply to such cases in the fact that the ground is not available to a person aggrieved by the granting of a certificate; only the second ground is ***359*** available to him. This is intelligible if the first ground only applies to *ultra vires* , because I cannot see how a certificate would be *ultra vires* . But, if that ground was intended to apply where mala fides is alleged, I cannot imagine any reason why it was not also made available when a certificate is challenged."

Mr. Richards, while conceding that these passages cannot be said to be decisive of the issue in the present case, places great reliance on them. He argues (in terms of the provisions now found in s.23 of the 1981 Act) that Lord Reid is saying that only subsection (2) applies to a person aggrieved by the grant of a certificate and that the words "not empowered" in subsection (1) refer to questions of *vires* and have no application to certificates.

Accordingly, he contends, Lord Reid plainly regarded the second limb as relevant to procedural requirements only. In this connection he draws attention to the contrast between section 23 and section 288 of the Town and Country Planning Act 1990 , where both heads of challenge are made available without distinction. Mr. Richards also relies on the fact that section 24(2)(b) permits a section 23(2) challenge by a person aggrieved who has been "substantially prejudiced." This, he submits, emphasises that section 23(2)(b) is concerned only with procedural matters. Furthermore, he submits, that the requirement has to be shown not to have been "complied with" again points to subsection (2) being concerned only with procedural matters.

In support of these arguments, Mr. Richards drew attention to passages in the current (6th) edition of Sir William Wade's Administrative Law and to three authorities.

The passage from Sir William Wade is to be found at pages 739 to 742, and I shall not prolong this judgment by citing it all. In that passage, Professor Wade is considering the scope of judicial review within what he describes as the standard time-limited ouster clause where the action is duly brought within the six weeks or other prescribed period. It is clear from the context that he is, almost exclusively, concentrating on provisions which afford both section 23(1) and 23(2) remedies and where, therefore, the practical importance of the difference between them is that a person aggrieved whose claim can be advanced only under the latter head can obtain a remedy only if his interests have been substantially prejudiced by the failure to comply with the relevant requirement. Having summarised various cases bearing on the question whether a particular complaint fell under one or the other or both heads, Professor Wade, at page 740, continued:

> "Since judges have commented on the difficulty of distinguishing between ground (a) and ground (b), and have favoured a narrow construction of ground (a) in order to find some meaning for ground (b), it may be suggested that the difficulty would disappear if they were construed with reference to the well-known distinction between statutory requirements which are mandatory and those which are directory. Neglect of a mandatory requirement renders an order *ultra vires* and void, whereas neglect of a directory requirement has no invalidating effect at all. Neglect of a mandatory requirement therefore makes an order 'not within the powers of this Act,' just as much as does bad faith or a breach of natural justice. There is no need to confine such cases to ground (b) merely because they are cases of non-compliance with some requirement. Ground (b) may well be intended for the case ***360*** of neglect of merely directory requirements. Although such neglect does not affect the validity of the order, and therefore does not fall within ground (a), it would be reasonable to empower the court

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> to quash the order where an irregularity of this class has in fact caused substantial prejudice to the aggrieved person. The scope of judicial review under ground (b) would then go further than at common law, though always subject to proof of substantial prejudice and subject also the discretion of the court. The forms of words used in the standard clause suggest that precisely this may have been the legislative intention. If that were established, the distinction between grounds (a) and (b) would then be a familiar one, and their combined effect would be eminently reasonable."

This is, as it seems to me, a useful passage for Mr. Richards since it concentrates on widening the scope of subsection (1) and narrowing that of subsection (2): which is a welcome approach for aggrieved persons who can take advantage of either and wish to avoid the limitation imposed by the requirement that substantial prejudice should be shown but creates a difficulty for persons aggrieved whose only route is subsection (2).

However, Professor Wade then continues with a reference to the *East Elloe* case, though unfortunately not in terms which help to elucidate the problem presented by the present case. He concentrates on what he describes as the remarkable variety of opinions expressed on the meaning of the words "not within the powers of this Act," describing as extraordinary Lord Morton's conclusion that the Act allowed challenge only for violation of expressed statutory requirements so that many kinds of unlawful action would not be challengeable even within six weeks, *i.e.* another argument for a broader interpretation of subsection (1). He concludes this discussion with a paragraph on which Mr. Pleming, for the individual applicants, indicated that he placed reliance, but which seems to me, again, to provide support for Mr. Richards:

> "The key to the true interpretation of these statutory clauses must surely be to presume, following Lord Radcliffe and Lord Denning [in *Webb v. Minister of Housing and Local Government [1965] 1 W.L.R. 755*] that Parliament did not intend to authorise any of the abuses normally controlled by the courts of law, but intended only to set a short time limit within which proceedings must be initiated. 'Not within the powers of this Act' is simply a draftsman's translation of ' *ultra vires* ' comprising all its varieties such as bad faith, breach of natural justice, irrelevant considerations and, now, error of law. The other parts of the clause then fall easily into place if interpreted as suggested above. The draftsman may have been rash to attempt to express the whole subject of judicial review in a statutory formula; but he could scarcely have foreseen the fate that was in store for it."

Here, again, it seems to me that the emphasis is on the width of the subsection (1) ground of challenge as compared with the narrowness of the subsection (2) ground.

The three authorities to which Mr. Richards referred me on this topic were said by him to exemplify the fact that in the 1940s and 1950s it was commonplace to find that a statutory provision relating to the Minister's satisfaction on a particular issue was intended to confer on him a subjective ***361*** power—the right to determine a matter without being subject to review on *Wednesbury* grounds.

The first case was *Robinson v. Minister of Town and Country Planning [1947] 1 K.B. 702* . The statutory provision in question in that case was section 1(1) of the Town and Country Planning Act 1944 , which provided:

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> "Where the Minister . . . is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part of their area . . . should be laid out afresh and redeveloped as a whole . . . [a] compulsory purchase order . . . may be made by the Minister . . ."

The applicants sought to challenge an order declaring that some of their property should be so purchased on the grounds that the Minister could not be satisfied within the terms of the section because the council proposed to retain the existing fronts of the houses and to rebuild them. Reliance was placed on section 16 of the Act which provided that the validity of the order could be challenged on the ground that it was not within the powers of the Act. I need not cite from the judgments, two lengthy passages to which I was referred: it is clear that the Court of Appeal had no difficulty in accepting that Parliament could confer an unlimited discretion not only for war purposes but for other purposes and that they had done so in that case.

In *In re Beck and Pollitzer [1948] 2 K.B. 339* an attempt was made to quash an order which the Minister had made in relation to the stopping up of highways under a particular statutory instrument. The jurisdiction of the court was the conventional one—that the order was not within the powers of the relevant Act or that the interests of the applicant had been substantially prejudiced by any requirement of the Act not having been complied with. It was held that the court had no jurisdiction to consider whether the Minister was satisfied in the public interest that it was necessary to make the order. At page 345 Croom-Johnson J. said:

> "It has long since been held that when a statute provides for a Minister being satisfied on a particular issue that there is no jurisdiction in the King's Bench Divisional Court to examine into the question, which is a question of fact, whether the Minister is satisfied or not, and I cannot see that this court has any jurisdiction under Part III of the Act to say whether the Minister is satisfied that in the public interest it was necessary or expedient to stop up this highway. There may be cases in which, on the ground of want of bona fides, a court may have power to act. I do not know whether this court, operating under section 19, subsection (2), has any jurisdiction to do anything of the kind, but, as I have said, the court will not go behind the expression of the Minister's satisfaction."

The learned judge then proceeded to cite, in support of this view, the case of *Liversidge v. Anderson [1942] A.C. 206* and *Robinson v. Minister of Town and Country Planning* cited above.

The third case was *Point of Ayr Collieries Ltd. v. Lloyd George [1943] 2 All E.R. 546* . The question there was whether the decision of the Minister under the Defence (General) Regulations to take control of the appellants' undertaking on the grounds that it appeared to him that in the interests of the defence of the realm, etc., it was necessary to do so could be challenged. It was held that the courts had no jurisdiction to interfere with what was an ***362** admittedly bona fide decision of the Minister within his delegated authority, and that his actions could be questioned only in Parliament. It is clear from the report that the challenge was on what would today be described as general *Wednesbury* grounds. I was referred to the passage, which I need not cite, in the judgment of Lord Greene M.R. on page 547 between letters B and G. It came as no surprise that Mr. Richards conceded that the language was perhaps somewhat extreme in today's climate: but it was, he said, indicative of how provisions of

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this sort were then construed by the courts, and indicated what Parliament must have had in mind when enacting the provisions of the 1946 Act.

Mr Richards, concluding his argument on this part of the case, submitted that there were good reasons why Parliament should have been content that no challenge to the decision to give a certificate should be made provided that the relevant procedural requirements had been followed, or, if they had not, that no substantial prejudice had been suffered. This was because:

> (1) the certificate was in effect only a procedural ruling not in itself authorising compulsory purchase but merely determining the procedure by which authorisation might be given. Moreover, the issue of the certificate did not exclude consideration of the matters to which it relates when the issue whether an order should be confirmed arises for decision. Its only effect was to determine whether special Parliamentary procedure was required;
> (2) the restriction on challenges to a certificate does not exclude a challenge to the substantive decision that the land should be acquired if that decision itself is said to be unreasonable;
> (3) the prerequisite to a certificate is that the Secretary of State should be satisfied on certain matters, which are matters of pure judgment for him. Provided he satisfies himself in the terms of the section then he has complied with the requirements of the Act and Parliament did not intend his judgment to be impeached, in particular on *Wednesbury* principles. This approach excludes all the applicants' challenges, because the matter was simply left to the opinion of the Secretary of State. This is reflected in Lord Reid's speech in *East Elloe* where he says that he cannot conceive of a certificate being *ultra vires* : and reflects the prevailing philosophy in 1946. In this connection, Mr. Richards relied on a passage in the speech of Lord Wilberforce in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014* at page 1047, where he said, “Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment.”

However, Mr. Pleming urged me to have regard to the context of this observation, and I cite the relevant paragraph from the speech:

> “(2) The section is framed in 'subjective' form—if the Secretary of State 'is satisfied.' This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been ***363*** taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable

> of challenge: see *Secretary of State for Employment v. ASLEF (No. 2) [1972] 2 Q.B. 455* , *per* Lord Denning M.R. at page 493."

Taken in context, it seems to me that Lord Wilberforce's statement provides support for the applicants rather than the respondents. Moreover, as to the first argument mentioned above, of which the second is essentially a development, I am sceptical as to the contention that the certificate is only a procedural ruling. If regard is had to the purport of Part III of the Act, it is I think clear that its intention is to place severe restrictions on the compulsory acquisition of certain special categories of land, which in the main may not be acquired save after special Parliamentary procedure. In the case of section 19, there is a defined exception to the necessity for special Parliamentary procedure. While it is perfectly true that the granting of a certificate does not mean that a compulsory purchase order will necessarily be confirmed, it is the only means by which it can be made without special Parliamentary procedure being invoked. The decision of the Minister on the question of issuing a certificate is, accordingly, crucial and cannot in my view properly be belittled by being described as only procedural.

Mr Pleming, responding to the arguments on jurisdiction, began by pointing out that they were based essentially on *East Elloe* and three cases decided round about the time of the 1946 Act, said to support the submission that the judicial attitude in the 1940s to challenge to the expression of satisfaction by a Minister was very restricted and that the 1981 Act ought to be similarly interpreted. This approach, he argued, disregarded major developments in the law since the 1940s.

Mr. Pleming categorised these developments under three specific heads, for each of which he cited one of what he suggested were the three most important authorities in this field:

> (1) the decision-maker can no longer take refuge behind a provision which requires only that he should be satisfied of certain matters in order to escape judicial scrutiny, when the alleged satisfaction is said to be flawed on *Wednesbury* grounds. In this context he relies on *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* ;
> (2) words which purport to exclude the jurisdiction of the courts are to be interpreted restrictively, so as to preserve access if possible: see *Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147* ;
> (3) a discretion is vested in a decision-maker to further the intention of Parliament as expressed in the relevant statutory provisions, and should not be used to frustrate Parliament's intention by misconstruction: *Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997* . The policy of the Act, he argues, is that there should in such cases as this be special Parliamentary procedure unless there is equal advantage and the Minister is so satisfied.

Referring first to *Tameside* , Mr. Pleming cited and relied on the whole of ***364** the paragraph from Lord Wilberforce's speech which I have already cited. He also drew attention to a passage on the following page:

> "What the Secretary of State is entitled, by a direction if necessary, to ensure is that such disruptions are not 'unreasonable,' *i.e.* greater than a body, elected to carry out a new programme, with which the Secretary of State may disagree, ought to impose upon

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> those for whom it is responsible. After all, those who voted for the new programme, involving a change of course, must also be taken to have accepted some degree of disruption in implementing it.
>
> The ultimate question in this case, in my opinion, is whether the Secretary of State has given sufficient, or any, weight to the particular factor in the exercise of his judgment."

Next, Mr. Pleming cited the well-known passage in the speech of Lord Diplock at page 1064F:

> "The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. It has from beginning to end of those proceedings been properly conceded by counsel for the Secretary of State that his own strong preference and that of the government of which he is a member for non-selective entry to all secondary schools is not of itself a ground upon which he could be satisfied that the Tameside council would be acting unreasonably if they gave effect to their contrary preference for the retention of selective entry to the five grammar schools in their area. What he had to consider was whether the way in which they proposed to give effect to that preference would, in the light of the circumstances as they existed on June 11, 1976, involve such interference with the provision of efficient instruction and training in secondary schools in their area that no sensible authority acting with due appreciation of its responsibilities under the Act could have decided to adopt the course which the Tameside council were then proposing.
>
> It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223* , *per* Lord Greene *M. R. at page 229* . Or, put more compendiously the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

Mr. Pleming also relies on a passage in the judgment of Lord Denning M.R. in the same case in the Court of Appeal, to be found at page 1024G:

> "So far as 'satisfied' is concerned, it is suggested—and was suggested by the chief officers of the local authority on June 21, 1976—that once the Secretary of State said that he was 'satisfied' his decision could not ***365*** be challenged in the courts unless it was shown to have been made in bad faith. We were referred by Mr. Bingham to *Liversidge v. Anderson [1942] A.C. 206* , where Lord Atkin drew attention to cases where the Defence Regulations required the Secretary of State to be 'satisfied' of something or other. Lord Atkin said at page 233: 'In all these cases it is plain that

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> unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith,' to which I would add a similar passage by Somervell L.J. in *In re City of Plymouth (City Centre) Declaratory Order 1946: Robinson v. Minister of Town and Country Planning [1947] K.B. 702* , 721. Those statements were made, however, in relation to regulations in war time or immediately after the war when the decisions of the executive had to be implemented speedily and without question. That was pointed out by Lord Radcliffe in *Nakkuda Ali v. Jayaratne [1951] A.C. 66* , 73. Those statements do not apply today. Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another."

It is quite clear in my judgment that Mr. Pleming is correct when he says that in the light of this decision the three authorities on which Mr. Richards relies are of limited value. They may show what the attitude was in the 1940s: but *Tameside* shows that different notions are applicable today. They certainly give no indication of what Parliament's contention was in relation to an Act passed in 1981, even an Act passed in terms for practical purposes identical to the predecessor Act in 1946. I should say, in passing, however, that the concluding words in the judgment of Lord Denning M.R. do suggest that the courts will be less ready to be persuaded to interfere in cases where satisfaction depends solely on questions of opinion.

In support of this part of his argument, Mr. Pleming also made reference to Sir William Wade's work where, between pages 727 and 729, the author discusses the effect of *Anisminic* . I quote only a few sentences, which give the flavour of the passage:

> ". . . Farwell L.J. in the *Shoreditch Case [1910] 2 K.B. 859* at 880 . . . said that subjection to the jurisdictional control of the High Court was 'a necessary and inseparable incident to all tribunals of limited jurisdiction.' That passage was quoted with approval in the *Anisminic* case as correctly expressing the fundamental principle which maintains a coherent and orderly legal system.
>
> . . .
>
> Encouraged perhaps by these successes, the courts have now gone to the length of making ouster clauses meaningless, inconsistent though this is with the constitutional position of the judiciary. There can surely be no more striking illustration of the potentialities of judicial review."

It is interesting to note, and my attention was drawn to this, that in the succeeding passage, from page 729 to 731, Sir William Wade discusses the parallel statutory intervention effected by the Tribunals and Inquiries Act 1971, section 14 , of which provides that any provision in an Act passed before August 1, 1958, that an order or determination shall not be called into question in any court, or any provision in such an Act which by similar words ***366*** excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus. The author suggests, with citation of authority, that a clause in a post—1958 Act which substantially re-enacts a pre—1958 clause will be treated as pre—1958 within this section. He distinguishes total from partial ouster clauses, however, instancing in particular those under the Planning Act in relation to enforcement notices, which he says are enforced without judicial resistance since they do not purport to protect any excess or abuse of power. Mr. Pleming, while not I think going so far as to suggest that the terms of the Act overrode the restrictive

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provisions with which this case is concerned, relies on the provisions of the 1971 Act to re-enforce his submission as to the current approach to such restrictions.

Mr. Pleming, developing his submissions and emphasising that the words of Parker L. J. in the Court of Appeal in *East Elloe* were *obiter* and that the point on which the case was decided in the House of Lords does not touch the present case, pointed out that if the Secretary of State's construction of section 23 be correct, it ascribed to Parliament a somewhat bizarre intention. Why should it be, he asks, that Parliament should be content to entrust the substantive decision to the Secretary of State, but not trust the Secretary of State to follow the correct procedure? That cannot have been the intention of Parliament. In support of that contention, Mr. Pleming refers to the terms of the Local Government Act 1933 , the predecessor of the 1946 Act. In section 162(1) it is provided that any person aggrieved by a compulsory purchase order may, within a certain time, apply to the High Court and that:

> "if upon any such application the court are satisfied that the order is invalid, and, where the invalidity of the order arises from a failure to comply with any provision governing the procedure for the making or confirmation thereof, are further satisfied that the interests of the applicant have been substantially prejudiced by that failure, the court may quash the order . . ."

It is significant, Mr. Pleming suggests, that the 1946 Act and the 1981 Act, with their different wording, do not speak of "any provision governing . . . procedure" but of ". . . any relevant requirement of this Act." This, he argues, plainly shows that the intention was not to limit the 23(2)(*b*) challenge to procedural matters. He gives further examples, which I need not rehearse, of the suggested absurdity of attributing to Parliament the intention so to limit challenges to the issue of a certificate.

In considering all of these arguments, and those of Mr. Morgan on behalf of Greenwich, to which I am about to refer, it seems to me that it is essential never to lose sight of the fact that section 23 *does* differentiate between challenges to compulsory purchase orders and challenges to certificates, and that it must be that, since compulsory purchase orders figure in both subsection (1) and subsection (2), the ambit of challenge to such orders is wider than that available in the case of certificates. Moreover, the distinction must involve something more than the requirement to show substantial prejudice. The key to this case, resides in identifying why that distinction, carried into the 1981 Act from the 1946 Act, where it was introduced, was made.

Mr. Morgan, whose arguments not surprisingly broadly conformed with ****367*** those of Mr. Pleming, put the matter in a way which I found helpful and persuasive. He reminded me of the tremendous developments that there have been in administrative law since 1946, and in particular of the fact that *Anisminic* can be said to have abolished the distinction previously recognised between errors of law within and those outside jurisdiction—see *per* Lord Diplock in *In re Racal Communication Ltd. [1981] A.C. 374* at 383 and in *O'Reilly v. Mackman [1983] 2 A.C. 237* at 278. With this development in mind, Mr. Morgan submits, it becomes clear that the provisions in the 1946 Act equivalent to section 23(1) were intended to apply to decisions which were *ultra vires* in the meaning of that term in 1946— *ultra vires* in the old strict sense—and the provisions equivalent to section 23(2) were intended to apply to something less than *ultra vires* in that old sense, but plainly to something more than a mere procedural defect—that is to say to a failure to comply with the requirements of the Act.

Mr. Morgan and Mr. Pleming, consistently with this argument, interpret Lord Reid's observation in *East Elloe* that he could not see how a certificate could be *ultra vires* , not in the sense which Mr. Richards gives to those words —that mistakes by a Minister cannot be reviewed—but in the sense that, since the prerequisite of a certificate is the existence of a compulsory purchase order, and a certificate never would be made without there being such an order, a certificate would never be outside the powers of the Act in that strict sense. This explains why prejudice is not necessary to a challenge under section 23(1), because a decision *ultra vires* in the narrow sense was absolutely void with or without intervention by the court, and the court could never refuse to pronounce upon the invalidity of such a decision so the question of prejudice was irrelevant. On the other hand, a decision successfully challenged

under section 23(2) would have been regarded in 1946 as not void but voidable, and thus requiring the intervention of the court. Accordingly, it was perfectly logical to provide that the remedy of quashing the decision should not be available in the absence of some significant prejudice.

Mr. Morgan and Mr. Pleming recognise that Parker L.J., in his judgment in *East Elloe* in the Court of Appeal, appears to have accepted that section 23(2) was concerned with procedural defects only, but, as I have already pointed out, these observations are conceded to be *obiter* and both counsel submit that they should not be followed, since plainly section 23(2) has a wider ambit. They emphasise that the matters complained of by the applicants are all examples of failure to comply with relevant requirements of the Act, namely those in section 19(1)(*a*). Mr. Pleming disputes the suggestion made by Mr. Richards that it was merely as a matter of lip service that his clients' notice of motion asserts that the Secretary of State had not complied with the relevant requirements of this section: that is precisely what is contended.

Mr. Morgan next addresses the question of how *Wednesbury* (or, in a planning context, *Ashbridge*) challenges fit into this statutory scheme. He points out that they were probably not contemplated at the time of the passing of the 1946 Act and that, over the years, the courts have had difficulty in categorising them. As an example of the way in which the law has developed he refers to a passage in the judgment of Lord Denning M.R. in *Ex parte Ostler [1977] 1 Q.B. 122* at 133F. Lord Denning was there considering the provisions of Schedule 2 to the Highways Act 1959 where the ***368** two grounds of challenge available under the 1981 Act are also made available. He said this:

> “That is a familiar clause which appears in many statutes or schedules to them. Although the words appear to restrict the clause to cases of *ultra vires* or non-compliance with regulations, nevertheless the courts have interpreted them so as to cover cases of bad faith. On this point the view of Lord Radcliffe has been accepted (which he expressed in *Smith v. East Elloe Rural District Council [1956] A.C. 736* , 739). In addition, this court has held that under this clause a person aggrieved—who comes within six weeks—can upset a scheme or order if the Minister has taken into account considerations which he ought not to have done, or has failed to take into account considerations which he ought to have done, or has come to his decision without any evidence to support it, or has made a decision which no reasonable person could make. It was so held in *Ashbridge Investments Ltd. v. Minister of Housing and Local Government [1965] 1 W.L.R. 1320* , and the Minister did not dispute it. It has been repeatedly followed in this court ever since and never disputed by any Minister. So it is the accepted interpretation. But the person aggrieved must come within six weeks. That time limit has always been applied.”

Neither in that case, nor in *Ashbridge* , nor in *Fairmount [1976] 1 W.L.R. 1255* , which concerned a breach of the rules of natural justice, did the court find it necessary to distinguish between the two grounds: in this latter case it was accepted that a breach of natural justice was both not within the powers of the Act and a failure to comply with a requirement of the Act. In *Gordondale Investments Ltd. v. Secretary of State for the Environment [1972] 23 P. & C.R. 334* and 340, Lord Denning M.R., again dealing with the powers of the court under Schedule 4 to the Housing Act , restated the *Ashbridge* principle and continued:

> “The proposition thus stated does not distinguish between cases where the order is not within the powers of the Act, and those where a requirement of the Act has not been complied with. In nearly every case it is not necessary to distinguish between them because there nearly always is substantial prejudice to the applicant. But in this case it is material and for this reason: if the official representation was invalid it was only because a requirement of the Act (*viz.* the requirement of s.42) had not been complied

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> with. So the court will only set the order aside if the interests of the applicant have been materially prejudiced. It is quite plain that there is no prejudice whatever to these objectors by reason of any informality or any error in the official representation. The court therefore will not set the order aside."

In this case the applicants' challenges take three forms. They are based on construction of the statute, irrationality and irrelevance. These, it is submitted, all fall more naturally under the second ground than the first, since all amount to a failure to comply with a requirement of the Act. Thus, it is a requirement of the Act that the Secretary of State should be satisfied that there is equal advantage. If the Secretary of State reaches his conclusion on the basis of an error in construing the Act, this requirement of the Act has not been complied with. Similarly, if he reaches a conclusion irrationally, or ***369*** taking into account irrelevant matters, the requirements of the Act have not been complied with.

I find the applicants' arguments persuasive. I confess that I can see no good reason for construing the words "any relevant requirement . . . of this Act" as applying to procedural matters only. It would, I consider, be repugnant to common sense and all notions of fairness to attribute to Parliament an intention to preclude a challenge to the issue of a certificate in, for example, a case where the Secretary of State has mistakenly found that Exchange Land equal to only half the area of the Order Land is not less in area than the Order Land. Had Parliament wished to confine challenges to certificates to purely procedural challenges, it would, as it seems to me, have been a simple matter so to provide. There is no binding authority which compels me to hold that the construction advanced by the Secretary of State is correct and, persuaded as I am by the arguments of the applicants, I reject it. In my judgment, the court has jurisdiction to entertain these applications; and since it is not suggested that the applicants are unable to show substantial prejudice, I turn to consider the substantive issues.

The grounds of the applicants' challenge

The matter as to which the Secretary of State had to be satisifed before he granted a certificate was that there would be given in exchange for part of Oxleas Wood other land, not being less in area and being equally advantageous to the persons, if any, entitled to rights of common or other rights, and to the public, and the land given in exchange would be vested in the persons in whom Oxleas Wood was vested and subject to the like rights trusts and incidents as attached to Oxleas Wood.

It will be convenient, first, to mention those matters which are not in issue and to deal with some points of construction which are the subject of controversy.

It is accepted that the Exchange Land is of slightly greater area. It is accepted that Oxleas Wood is an open space —that is to say "land . . . used for the purposes of public recreation." No point has arisen in relation to the vesting of the Exchange Land, or as to the rights trusts and incidents which will be attached to it. By the end of the case it was common ground that the material date for purposes of satisfaction was the date of acquisition of the Order Land rather than the date of the certificate.

There was some argument about what was meant by "the public." Does it mean the public at large, or that section of the public which presently enjoys the land to be acquired? The applicants' submission is that it probably means both. The respondents suggest that there is no limitation in the Act and that it means the public at large; but contend that the point is of no significance in the present case. All sides seem to agree that there must be some sort of limitation, because it would be absurd to suggest that a piece of woodland a hundred miles away could qualify for a certificate.

It occurred to me after the conclusion of the argument that the words "equally advantageous to the persons, if any, entitled to rights of common or other rights," are in the context capable of applying, in an open space case, to the persons actually enjoying the open space for purposes of recreation. There is no reason, it seems to me, for construing "rights of common or other rights" as applying only to "a common . . . or fuel or field garden allotment." It can, I think, be said that persons enjoying a public open space for purposes of recreation have rights.

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If that be correct, then the reference **370* to the public must be to the public at large. However, whether or not this construction be correct, my conclusion is that equal advantage to the public must involve a consideration primarily of those members of the public who enjoy or might ordinarily be expected to enjoy the advantages of the open space, but may also include, as an ingredient in the equation, benefits to the public at large.

There is then an important dispute as to the proper construction of "equal advantage." The applicants contend that it is necessary to look at the way the public enjoy all aspects of the Order Land and to see whether, in those respects, the Exchange Land is equally advantageous to them. The Secretary of State says that this is too restrictive and that it is permissible to balance the loss of one type of benefit with the gain of another. The point can best be illustrated by an example that I put in the course of the argument: if, in an area well supplied with public open spaces consisting of woodland but very short of public open spaces being used as playing fields, it was proposed to acquire a piece of woodland and give in exchange a (perhaps larger) piece of ground suitable for use as playing field, could the Secretary of State properly certify? To this question the applicants gave an emphatic "No" and the respondents an equally emphatic "Yes."

In resolving this matter I must, of course, disregard the fact that in the present case the Secretary of State appears to have considered it incumbent on him to attempt to replicate as far as possible the features of ancient woodland to be found in Oxleas Wood. I must also, it seems to me, construe the phrase "equally advantageous" in the context of the section as a whole, and in the light of my conclusion as to the meaning of "the public." I must also remind myself that there is an important argument that is not available to the respondents—namely that the applicants' construction would preclude the making of a compulsory purchase order for special categories of land in any case where the Order and the Exchange Land did not afford identical advantages—because in such a case the Secretary of State would have recourse to Parliamentary procedure.

Giving, I hope, proper weight to all these considerations, I have reached the clear conclusion that the strict approach for which the applicants contend cannot be correct. I find nothing in the wording of the section to justify it. Moreover, it seems to me likely that Parliament would have intended to permit a degree of flexibility, leaving it to the Secretary of State to judge whether advantages of one sort could be offset against advantages of a different sort.

This is, as I have already implied, an important conclusion: but its importance must not be over-emphasised. In particular, while I have disregarded for the purpose of construing what the section means what the Secretary of State appears to have considered necessary in this case, the fact is that he did consider it necessary: so when it comes to the substantive attack on his decision, the propriety of his certifying must be judged with that in mind.

A related and in the context of this case even more important point on "equally advantageous" is whether the consideration is or is not limited to benefits which the public may derive from the Exchange Land at the moment of exchange. This goes to the heart of the applicants' case, because they submit that as a matter of law the Secretary of State cannot certify in a case where, at the date of exchange, the land is *not then* equally advantageous, on the basis that *it will become so* at some time in the future. **371* The Secretary of State, on the other hand, submits that future as well as present benefits may be taken into account although the weight to be given to future benefits is a matter for the judgment of the Secretary of State. The argument does not—in the light of the use in section 19(1) of the present tense could not—involve the simple proposition that the Secretary of State may issue a certificate even if satisfied that at the date of the exchange the land is not equally advantageous, on the basis that at some future time it will become so. What it involves is that the Secretary of State may be satisfied of equal advantage at the date of exchange on the basis that advantages which he is satisfied the Exchange Land will have in the future mean that it is equally advantageous to users of the Order Land and the public at large at the date of exchange.

An example will illustrate the point. Suppose the Order Land has two football pitches on it, in an area where such facilities are in short supply. There is offered in exchange a somewhat larger area on which there is presently one football pitch, and on which the acquiring authority undertakes within 12 months of the exchange to build three more. Is it open to the Secretary of State to certify that the exchange land is equally advantageous? It seems to me that it must be.

That example, however, involves balancing future enhancement against present detriment in advantage. Given the use of the present tense in subsection (1), it would not, I think, be open to the Secretary of State to certify that,

all other things being equal, the acquisition of two football pitches a year hence could balance in advantage the loss of two football pitches presently enjoyed.

I accept another submission made by Mr. Richards to the effect that the obligation of the Secretary of State when considering the problem of equal advantage to the public, which necessarily involves balancing the advantages of one parcel of land against those of the other, is to put into the scales on the side of the Order Land not every advantageous feature which it has, but only those features which bear on the use and enjoyment which the public derive from it. The Order Land may be advantageous for reasons unconnected with public recreation and such advantageous are irrelevant. The same considerations apply so far as the Exchange Land is concerned.

I should explain the limits of Mr. Richard's submission. He does not for a moment suggest that because the Secretary of State has found that the main recreational use of Oxleas Wood is for informal walking, all that need be considered is the advantage of having somewhere to walk. He expressly accepts that the characteristics of ancient woodland may enhance enjoyment for public recreation; that the features which have lead to its being declared as SSSI may do the same; but he rightly emphasises that it is important to distinguish between recreation on the one hand and ecological interests on the other, and to recognise that the assessment of equal advantage is not the assessment of equal ecological advantage but an assessment in terms of public recreation. Mr. Pleming and Mr. Morgan do not, I think, really quarrel with this contention.

On the other hand, I also accept the submission made by Mr. Pleming and Mr. Morgan already foreshadowed in my summary of the issues arising in this case, to the effect that in considering equal advantage the Secretary of State is obliged to take account in connection with the Exchange Land of detriment to the public in relation to the use of that land that will accrue by virtue of the proposals. This point could be put another way, by saying that ***372*** he is obliged to take into account the fact that rights of access for purposes of public recreation are already enjoyed over the Exchange Land. If the proposal were to take land already in public ownership and enjoyed for recreational purposes, and to substitute for it land in private ownership but over which the public already enjoyed extensive public rights of way affording roughly equivalent recreational access, it could not sensibly be contended that the requirements of the section were satisfied.

I think it may be helpful if I summarise in a single paragraph what, in the light of all the conclusions at which I have arrived on the issues of construction which I have had to determine, I conceive to be the correct interpretation of the requirements of section 19(1) as to the granting of certificates.

> In a case where the Exchange Land has not yet been given, the appropriate time for the comparison is the time when the exchange will take place. The Secretary of State must be satisfied that at that date the Exchange Land is equally advantageous to the users of the Order Land and the public at large. It is permissible when deciding whether at the date of exchange the Exchange Land will be equally advantageous to have regard to predicted future developments or occurrences which it is intended or anticipated will affect either or both parcels. It is not, however, permissible to approach the equation on the basis that such future developments will result in Exchange Land, not equally advantageous at the date of exchange, becoming equally advantageous at some future date. The frame within which equal advantage has to be assessed is that dictated by the nature of the public enjoyment of the Order Land: but, within that frame, there need not be precise correspondence between the advantages attaching to each parcel. The extent to which the public presently enjoy advantages over the Exchange Land is also material.

Before turning to the main ground of challenge, I must deal with a problem in relation to evidence. There are before me a large number of affidavits filed on behalf of the applicants. I have read them, although it is fair to say that they have in the main been little referred to during the hearing. For the most part they do not more than that

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which is conceded to be legitimate—to show what material was or was likely to have been before the Secretary of State when he made his decision. It is, however, conceded by the applicants that the evidence in the affidavit of Dr. Rackham was not before the Inspector or the Secretary of State, and that accordingly, if it is to be relied on, there must be some cogent justification for its introduction at this state. I was referred, in this connection, to a passage in the judgment of Dunn L.J. in *R. v. Secretary of State for the Environment, Ex P. Powis [1981] 1 W.L.R. 584* at 595G and 597F. The effect of that passage is that fresh evidence should be admitted on an application for judicial review in order to show what material was before the Secretary of State or tribunal, to decide a question of fact where jurisdiction depended on it, to enquire into a procedural error, or where proceedings were tainted by misconduct of the Secretary of State or inferior tribunal.

The basis on which Mr. Pleming contends that Dr. Rackham's evidence should be admitted is set out in paragraph 2 of the latter's affidavit, where he deposes to the fact that counsel for the Department of Transport defended the competence of the Department's ecological witness, Professor ***373*** Mellanby, by quoting in argument from a document written by Dr. Rackham in which he said: “I have the highest regard for Professor Mellanby's qualities as a scholar and for his services to conservation.” The concern felt by the applicants, and indeed by Dr. Rackham himself, was that this comment by counsel might have led the Inspector to believe that Dr. Rackham was endorsing Professor Mellanby's views on the practicability of re-creating ancient woodland on the Exchange Land: whereas in truth, as his affidavit shows, Dr. Rackham's regard for Professor Mellanby as a scholar is based on his achievements in areas other than the matter of ancient woodlands.

Mr. Pleming contends that the Secretaries of State have brought this application for the admission of evidence on their own heads, and should not resist it. They invited the Inspector to rely on Dr. Rackham's supposed endorsement of Professor Mellanby and if (which in what was plainly a very close run decision the Inspector may have done with decisive effect) he allowed himself to be influenced by this supposed endorsement, he should at least have given an opportunity for Dr. Rackham's true views to be presented.

I have concluded that the application to admit the evidence of Dr. Rackham falls within the categories adumbrated by Dunn L.J. and that I ought to admit it. Having said that, what it comes to is that Dr. Rackham does not support Professor Mellanby and has expressed the view that, whereas an attempt to re-create ancient woodland may be valuable as an experiment, it cannot succeed and the result would be no more than a pastiche or forgery. Given that the Secretary of State has made it clear that he does not and never has contended that all the features of ancient woodland can be replicated, this evidence is not likely to be decisive to the outcome of the present applications, unless the very point that the Inspector and/or the Secretary of State may have been misled upon a supposition as to what Dr. Rackham's views were is made out. I am not persuaded that it is.

In so far as the other voluminous evidence filed on behalf of the applications is concerned, I consider that in the main it does fulfil the purpose of showing what material was before the Inspector: and in so far as it goes beyond that I disregard it.

The applicants' substantive challenges to the certificate can be summarised under three heads:

(1) On the facts accepted by the Secretary of State, was it as a matter of law open to him to conclude that at the date when Woodlands Farm is to be given in exchange for the swathe of Oxleas Wood required for the ELRC it will be equally advantageous for those who at present enjoy that portion of Oxleas Wood for public recreation and to the public at large?
(2) If, as a matter of law, it was open to the Secretary of State so to conclude, was his conclusion unreasonable in the *Wednesbury/Ashbridge* sense?
(3) (a) Was there evidence supporting the Secretary of State's conclusion “that the fencing proposed on the Exchange Land should not, in practice, restrict public access over [it] to a significantly greater extent than that to which Oxleas Wood is now restricted by undergrowth” ; and if not, (b) was that conclusion unreasonable in the *Wednesbury* sense?

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There is a degree of overlap between these contentions, but they must nevertheless be considered separately. However, since plainly a finding on (3)(a) may be material to (1) and (2), it will be convenient to consider that ground first. Before doing so, however, I must refer to some submissions of law made by Mr. Richards as to the correct approach to challenges of this sort.

Mr. Richards submitted that where the power to act depends on whether the Secretary of State is satisfied of certain matters, and it is accepted (as I have accepted) that the provision conferring that power does not give him an absolute discretion, the court may intervene only if (a) no grounds exist which are capable of supporting his view or (b) he has misdirected himself in law. The decision cannot be impugned if he made "an unsustainable evaluation of the evidence" or if he made an "error of fact or inference from fact" (the quoted words are taken from Mr. Morgan's skeleton argument). Mr. Richards argues that the applicants are extending an impermissible invitation to the court to treat this as an appeal on the merits and substitute its own view for that of the Secretary of State on matters which Parliament entrusted to his judgment. In support of these propositions, Mr. Richards cited the well-known passages from the speech of Lord Brightman in *Puhlhofer v. Hillingdon London Borough Council [1986] A.C. 484* at 518 and from Lord Denning's judgment in *Ashbridge [1965] 1 W.L.R. 1320* , neither of which I need set out here. I do, however, cite a passage, also relied on by Mr. Richards, from *Attorney-General v. Reynolds [1980] A.C. 637* . The Privy Council there had to consider provisions in the Emergency Powers Regulations 1967 affecting the Leeward Islands preceded by the words "If the Governor is satisfied . . ." Lord Salmon, giving the judgment of the Board, said that sometimes such words did and sometimes they did not confer on the executive an absolute discretion, cited *Tameside* and the provisions of the Education Act 1944 that were considered in that case, and continued:

> "The House of Lords decided that that section's opening words 'If the [Secretary of State] is satisfied' did not confer an absolute discretion upon him, and that accordingly the court should exercise its judgment (a) as to whether grounds existed which were capable of supporting the Secretary of State's decision, and (b) as to whether he had misdirected himself on the law in arriving at his decision. The House of Lords held that if no such grounds existed or the Secretary of State had misdirected himself, his decision, however bona fide it was, should be overruled (see pp. 1047, 1064–1065, 1070 and 1074)."

I should mention that Mr. Richards also cited the following paragraph from Lord Salmon's judgment, as a useful epitome of the *Tameside* decision. He relied on these paragraphs as containing what he described as a succinct and accurate statement of the law relative to determining whether it is appropriate to overturn a decision involving ministerial discretion.

Mr. Richards then drew attention to a passage in the speech of Lord Templeman in *R. v. Independent Television Commission, Ex P. TSW Broadcasting Limited(unreported, March 26, 1992)* , of which I was provided with a transcript:

> "In the present case, Parliament has conferred powers and discretions and has imposed duties on the ITC. Parliament has not provided any ***375*** appeal machinery. Even if the ITC makes mistakes of fact or mistakes of law, there is no appeal from their decision. The courts have invented the remedies of judicial review not to provide an appeal machinery but to ensure that the decision-maker does not exceed or abuse his powers . . . [The] rules of natural justice do not render a decision invalid because the decision-maker or his advisers makes a mistake of fact or a mistake of law. Only if the reasons given by the ITC for the decision to reject the application of TSW disclosed illegality, irrationality or procedural impropriety, then, in accordance with the speech of Lord Diplock in *Council of Civil Service Unions v. the Minister of Civil Service [1985] A.C. 374* at page 410, and the judgment of Lord Greene M.R. in *Associated*

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> *Provincial Picturehouses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223* , 228–229, could the decision be open to judicial review."

In so far as these passages emphasise the important distinction between appellate and supervisory jurisdiction they are of course helpful, and although I hope I do not need the reminder, I take it to heart. They are not, however, authority for the proposition that a decision can never be impugned on the ground that the decision-maker in reaching it has placed reliance on a supposed fact or on a conclusion for which there was no evidence.

Having said that, I am alive to the fact that questions of evaluation and weight are for the decision-maker and (*Wednesbury* unreasonableness apart) it is not for the court to substitute its own view of the evidence or of the facts for his.

The inquiry under this third head must be whether there is any evidence for the following findings or conclusions at the end of the Secretary of State's reasons in the Annex to the letter of September 27, 1991, which I have already quoted but which I extract selectively below:

> "It is also clear that the undergrowth in the woods is dense and, because of the predominance of brambles, is frequently impenetrable. The evidence presented on behalf of LB Greenwich, the body now responsible for management of the woods, shows that there has been a continuous management policy of utilising the undergrowth to keep visitors to the paths, thereby safeguarding the more sensitive areas . . .
>
> The result is that access to the present woodlands has been restricted in practice to the network of paths and rides. The Secretary of State . . . considers that the fencing proposed should not, in practice, restrict public access over the Exchange Land to a significantly greater extent than that to which the access over Oxleas Wood is now restricted by undergrowth."

Mr. Richards relies on the affidavit of Mr. Attwater filed on behalf of the respondents where in paragraphs 14–19 he summarises the evidence that was available. I in turn summarise it:

First, there was the evidence of Mrs. J.K. Bellamy, the GLC's recreation witness, who said that when Oxleas Wood was first acquired by the GLC as an open space it was proposed that the layout should allow for the admission of the public to the greatest possible extent consistent with the preservation of the woodland, by means of fenced in paths and glades, and that there had initially been fenced areas. She is recorded as saying that care and ***376** management was affected by war time events but that it could be seen that path access was still fairly well canalised and that there had never been widespread destruction of the woodland fabric as a consequence of public access —people had tended to follow the established path network, which nowadays was very firmly established so that public access seemed to have reached a point of balance with wildlife.

Secondly, while the Secretary of State accepted that for practical purposes the original fences had disappeared, it appeared to him that there was a substantial body of evidence before the Inquiry to show that public access to the woodlands remained restricted by undergrowth. An Inquiry document submitted by the Nature Conservancy Council made repeated references to brambles, as did a document submitted by Dr. Goldsmith on the ecological value of Oxleas Wood, which contained reference to a well-developed ground flora with brambles; of particular importance was an Inquiry document by Joyce Pitt showing that brambles were present on all of the proposed line of the ELRC and a further document from the same source describing brambles as being dominant in many parts

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of the woodland; yet another document from the Nature Conservancy Council contained references to brambles throughout; and Appendix 1 to GLC Management Plan showed, as early as 1956–61 that undergrowth was dense in some areas with several references to brambles, very dense rhododendron, dense hazel thorn and bramble undergrowth, and dense bramble undergrowth; and a proof of evidence from Greenwich (Inquiry document 605) contained the statement that "The wood of mature oak has an extensive network of paths criss-crossing it. In parts a well-developed understorey . . . makes these informal walks quite contained and interesting, as lateral views are blocked."

Thirdly, there is an important passage at the end of Dr. Goldsmith's evidence—indeed, the applicants suggest, rather after the end of his evidence when there was what looks like an almost informal question addressed to him by the Inspector, more out of curiosity than for the purposes of elucidation, and when, the applicants argue, it would be unfair to attribute too much weight to his answer. The Inspector reminded him of the fact that the ground cover was, as he had pointed out, largely, although not exclusively, brambles and that while that might be a pity from the point of view of persons venturing into the woods it might in ecological terms be something that should be accepted. Dr. Goldsmith, who it seemed was alive to the fact that the Department's ecological witnesses had tended to belittle the importance of the woods because of the prevalence of brambles, seems to have seized on the opportunity to redress the balance in this regard, and said this:

> ". . . it has certain advantageous features. It is an important food plant for a lot of invertebrates for example. It does give cover to other more sensitive plants and one of the values of the brambles within Oxleas Wood is, quite simply, that it keeps people to the paths. What we are able to do with the management that is carried out is keep the bulk of the visitors to the paths where they do very little damage and we then have a natural fence almost, which is almost a barbed wire fence, of bramble which safeguards the more sensitive areas."

Fourthly, there was evidence from a Department of Transport witness, Dr. Gray, to the effect that although it had frequently been claimed that ***377*** there was freedom of movement through the existing woods a great deal of the movement was restricted by the understorey and coppice vegetation between many footpaths.

Fifthly, there was what the Inspector (who of course had himself visited the woods) had said in his report. In paragraph 73.2.13 he was discussing a conflict of evidence as to the length of time that would be required before the public could be admitted to the new woodlands on the Exchange Land and he said:

> "If as suggested by Professor Mellanby brambles would be encouraged to keep people out, that would be tantamount to keeping the fences; brambles in Oxleas Wood are generally low enough to walk through."

This last sentence is much relied on by the applicants; but it is rightly pointed out that it is not included in the Inspector's specific findings of fact and that it has to be considered in its context.

The applicants' case on this matter is summarised very persuasively in paragraphs 17–26 of the affidavit of Mr. David Higham, filed on behalf of Greenwich. He draws attention to the fact that it was common ground that the public had the right of access to all parts of Oxleas Wood and that there was a good deal of evidence that this right was exercised. In particular, Professor Mellanby agreed that "a good deal of the wood is fairly open" ; the

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evidence of the Ramblers Association was to the effect that one could strike out freely through the woodland at will and did not have to stick to the footpaths; and the evidence of the Department of Transport in rebuttal of this evidence was that "It is of course true that one can walk more or less anywhere off the marked tracks although from an ecological point of view this is hardly desirable."

Mr. Higham also points out that there was really no evidence of a *continuous* management policy of using the undergrowth to keep visitors to the paths—indeed the London Borough of Greenwich only took over the woods midway through the second Inquiry. He suggests, moreover, that it is significant that no such claim was put forward by the Department of Transport at the Inquiry and that really the only source of it is Dr. Goldsmith. The suggestion is, as I have indicated already, that it was quite unreasonable to treat this general statement as the foundation for the conclusions which the Secretary of State expresses; and in any event Dr. Goldsmith is talking only of safeguarding "the most sensitive areas." As to the GLC, Mr. Higham says that the only evidence that there was such a policy was of a statement of intention many, many years ago.

The relevant questions that I have to consider on this part of the case are (i) whether it can be said there was no evidence on which the Secretary of State could reach the conclusions he had reached about access to the Order Land; and if not, (ii) whether it can be said that his conclusion was nevertheless so unreasonable that no reasonable Secretary of State could, on the evidence that he did have, have reached it. It is not for me to say whether his conclusion was against the weight of the evidence, let alone to express my own views as to what the position is —views inevitably aided to some extent by the excellent photographs that I have seen. I have to take into account the submission that was made that the Secretary of State was differing from a factual finding of his Inspector, who had seen the position in the woods and described the brambles as being generally low enough to walk through. The assessment and interpretation of the evidence was for the ***378** Secretary of State, and I have concluded that there certainly was evidence upon which he could legitimately reach the views which he did reach. Nor do I think that in any true sense he was differing from a finding of fact by the Inspector, whose laconic observation on the subject of brambles did not in my judgment amount to a finding of fact that can be said to contradict the Secretary of State's conclusions. I accept, of course, that if a meticulous analysis is made of every word in the relevant part of the Secretary of State's reasons, one can point to matters of emphasis which are arguably unsupported by evidence: but looking at the matter in the round, and for the reasons I have given, I conclude that there was evidence to support the conclusions of the Secretary of State on this matter.

Given that there was some evidence, can it be said that the Secretary of State's conclusion was unreasonable in the *Wednesbury* sense? In addressing this question, in the present context and in connection with the first main ground of challenge, I shall be guided by Lord Lowry's exegesis of *Wednesbury* unreasonableness in *Ex parte Brind [1991] 1 A.C. 696* at 764H to 766C; and in particular by these words:

> "It also explains the emphatic language which judges have used in order to drive home the message and the necessity, as judges have seen it, for the act to be so unreasonable that no reasonable minister, etc., would have done it. In that strong, and necessary, emphasis lies the danger. The seductive voice of counsel will suggest (I am not thinking specifically of the present case) that, for example, ministers, who are far from irrational and indeed are reasonable people, may occasionally be guilty of an abuse of power by going too far. And then the court is in danger of turning its back not only on the vigorous language but on the principles which it was intended to support. A less emotive but, subject to one qualification, reliable test is to ask, ' *Could* a decision-maker acting reasonably have reached this decision?' The qualification is that the supervising court must bear in mind that it is not sitting on appeal, but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion."

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Could the Secretary of State on the evidence I have summarised conclude that the fences would not restrict public access over the Exchange Land to a significantly greater extent than does undergrowth on the Order Land? To that question I feel compelled to answer: Yes.

The first head of challenge—it was not open to the Secretary of State, as a matter of law, to certify

The argument advanced by Mr. Pleming, and adopted by Mr. Morgan, to the effect that the Secretary of State could not in this case be satisfied of equal advantage is put in this way. What the Secretary of State has done is to compare the Order Land with what the Exchange Land will become in 15 or so years. His approach implicitly recognises his acceptance of the fact that, without woodland, the Exchange Land cannot even begin to offer equal advantage. His error has been to treat future equality of advantage as though it were present equality. Implicit in what he says is his acceptance of the facts that there will not, and cannot, be equality at the date of exchange. The logic of his position is that the time lapse between exchange and the achievement of equal advantage is irrelevant—he could still lawfully be satisfied if the gap were 10, 20 or even 50 years. Mr. Pleming was of course ***379*** framing his submissions on the basis of a construction of section 19(1) more favourable than that which I have accepted as the correct construction. However, in the above summary my intention has been to adapt those submissions to that construction. Clearly, in my view, if what he asserts can be made good, then the Secretary of State was indeed approaching the task in the wrong way.

That the Secretary of State accepted that Oxleas Wood has unique properties which enhance the public's recreational enjoyment of it is clear. Apart from anything else, it is implicit in the decision to move soil from Oxleas Wood to Woodlands Farm, and to plant the latter with trees in a way designed to replicate as many as possible of the features of ancient woodland. It seems to me that I should accept that this view was correct: and the corollary of it is that the respondent must be able to point to other advantages which the Secretary of State could legitimately have regarded as counterbalancing the disadvantages of the delay of 10 to 15 years that will ensure during the established period and the fact that even at the end of that period what will be provided on the Exchange Land will be only an imperfect replication of Oxleas Wood.

Mr. Richards submits that there were identified and accepted by the Inspector and the Secretary of State advantages which it was legitimate to take into account. They are those listed in paragraph 73.2.8 of the Inspector's Report against which he weighed disadvantages identified by the objectors. There was thus material which the Secretary of State could regard as capable of counterbalancing the prima facie disadvantages inherent in the offer of open farmland for established woodland. While, as I shall show, the applicants seek to belittle these other advantages, the Inspector found that they were not seriously disputed, and the applicants accepted that some at least of them exist and are relevant. It seems to me, therefore, that the stark challenge based on the assertion that the Secretary of State could not as a matter of law conclude, on the evidence available to him, that it was open to him to issue a certificate must fail.

The second way in which the argument under this first head is put is that, even if there was evidence for consideration on the question of equality of advantage, it is apparent that the Secretary of State approached his task on the basis that it was legitimate to balance *present* advantages (to be lost with the acquisition of the Order Land) against *future* advantages to accrue after more than 10 years of the Exchange Land.

There is not, in the Inspector's Report or in the Secretary of State's reasons, any express recognition of the fact that the section requires a comparison at the date of exchange. It was suggested that the very fact that the Secretary of State was so concerned with the question of access during the first 10 years is indicative of his appreciation of this requirement, but I do not accept that this is so: his concern with what was a suggested disadvantage makes no less sense even if he was mistakenly proceeding on an incorrect basis. However, there is, equally, no express indication that he was proceeding on such a basis, and the language of both the Inspector and the Secretary of State is perfectly consistent with their having recognised that a judgment had to be made at the time of exchange. In the circumstances, I consider that I cannot uphold this second way of putting this challenge. ***380***

The second head of challenge—Wednesbury unreasonableness

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I begin by noting that, for obvious reasons, my finding in relation to restriction of access by undergrowth has deprived the applicants of an important plank of their argument under this head—both in relation to the simple challenge based on irrationality and in relation to the related argument, based on misapprehension of the evidence/taking into account an irrelevant consideration. However, there are other arguments on which the applicants rely, which include omission by the Secretary of State to take account of material matters.

It was submitted for the applicants that the balancing exercise could only sensibly be conducted if the Secretary of State identified, as at the date of exchange, (i) those features of the Order Land which constituted its advantages in terms of public recreation; (ii) those advantageous features, on a sensible and not over-pedantic approach, which would, and those which would not, exist on the Exchange Land; (iii) any positive disadvantage of the Exchange Land. Approaching the matter in that way, it is of course entirely possible that a serious deficit in advantage on the basis of a comparison of (i), (ii) and (iii) would be redressed by factors identified in (iv).

As I have already pointed out, the Secretary of State's implicit recognition that the Exchange Land is not in its present condition equally advantageous means that he must have found features under (iv) which in his view made good the deficiency. Did he have regard to the relevant features under the four heads I have identified, or did he, as the applicants suggest, not put all the right ingredients in the scales? If relevant features were omitted, or irrelevant features included, were they sufficiently important to make one conclude that the error may have led the Secretary of State to arrive at an erroneous result? Even if the Secretary of State took all relevant features into account, was his conclusion on balance of advantage irrational in *Wednesbury* terms? These are the questions which I must address.

The Inspector did evaluate Oxleas Wood, though I accept Mr. Morgan's submission that in doing so he did not clearly differentiate between an evaluation for the purpose of a highway decision (the main topic of his inquiry) and an evaluation for section 19 purposes. What the applicants say is that, in terms of evaluation for exchange purposes, there was a failure to appreciate the importance of the Order Land being ancient woodland, with all that that entailed in advantage and enjoyment to those resorting to it for purposes of recreation. Much attention was devoted to the issue of access during the initial period after planting the Exchange Land, but no recognition at all given to the fact that, even after 15 years, it will not provide recreational advantages comparable to those enjoyed in the Order Land: at best it will after that period, and for many years, be an immature woodland. Moreover, say the applicants, while the Secretary of State has accepted the findings of fact of the Inspector, he makes no reference to the facts that the Exchange Land is not likely to achieve any ecological importance, let alone SSSI status. The features which led the Nature Conservancy Council so to designate it in 1985 are of particular importance in terms of public recreation.

In considering the Secretary of State's decision it is necessary to remember that the passages from 2.3.4 to 2.3.7, which are concerned almost entirely with the question of access during the early years, have to be read in the light of the Secretary of State's acceptance of the Inspector's findings of fact and, save where the contrary is indicated, his conclusions. In those ***381*** paragraphs he was not, therefore, giving his only or main reasons for feeling able to certify, but was dealing with and giving his own conclusions on one aspect which had caused the Inspector particular concern. One needs, therefore, to turn to the Inspector's report for the full reasons on which the Secretary of State relied. Taking this document and the Secretary of State's letter together, has there been anything amounting to the sort of balancing process which it has been suggested must be undertaken?

As to (i), it does seem to me that it must be accepted that the Inspector and the Secretary of State were thoroughly alive to the peculiar recreational advantages of Oxleas Wood, and to the extent to which its age, character and flora and fauna enhance those recreational advantages. It is true that much of what is said about such matters is said in the context of the main topic of the Inquiry—whether the ELRC should go through Oxleas Wood at all—but it cannot in my view sensibly be suggested that, when approaching the question of equality of advantage, all these matters would have been disregarded or forgotten.

As to the second part of the Inquiry, beyond the fact that there would be public access over the Exchange Land (limited by fencing for at least 10 years) it is difficult to identify any advantages of the Order Land also enjoyed by the Exchange Land at the time of exchange.

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Turning then to positive disadvantages of the Exchange Land, these were the fact that it was not woodland but green fields; that even after 10 years or more it would still at best be only an immature plantation; that it required during this initial period to be extensively fenced; that it was separated from Oxleas Wood by a major road; and that there would be a 5–10 Db noise increase as compared with the Order Land—a "noticeably higher" level. Also to be included—for want of a better place—under this head, is that the exchange would result in the loss of some attractive open farm land over which the public already enjoyed a degree of access.

There thus had to be found significant advantages under the fourth head to redress this plainly adverse balance, and it is to the list in paragraph 73.2.8 that recourse is necessary. I have already set out that paragraph.

Mr. Richards submits that the Inspector and the Secretary of State took into account all the disadvantageous features I have mentioned, balanced against them these nine advantages, and concluded that there was, just, a balance of advantage in favour of the Exchange Land. He submits that while judgments on such matters might differ, it is plainly impossible to say that no reasonable Secretary of State could have reached such a conclusion.

The applicants make the following points about these advantages:

> (i) none—with the possible exception of the first—is an advantage over the Order Land: they are contrasted with the disadvantages of the Exchange Land, and are examples of the sort of thing that might arise from the acquisition of almost any addition to the reservoir of publicly-owned land. There has been no proper comparison of advantages and disadvantages of the two parcels;
> (ii) in the main they will not exist at the date of exchange;
> (iii) in truth, the only advantages which would be of any real significance are those mentioned by the Inspector in paragraph 7.3.1—the remedying of local park deficiency, the welding together of the Order Land with E5, E6 and a bonus of 0.25 ha. ***382*** over the Exchange Land. The rest, it is said, are so minor as to be of no real importance;
> (iv) the assertion that the loss of some attractive farm land would be more than compensated by the public ownership of an attractive area with views over farm land to the golf course and beyond leaves out of account that the farm land is already enjoyed by the public to an extent, even though subject to a dispute.

Some of these points are, in the light of my conclusions as to the construction of section 19(1), of limited force. Thus, the comment that most of the suggested advantages will not exist at the time of the exchange is not as telling a point as it would be had I accepted the applicants' argument that future development must be entirely disregarded. However, even on my construction, any advantage which is only going to exist in the future or develop over a period must, by reason of the delay, be of less account than it would be if it existed at the date of exchange.

In seeking to resolve these arguments, I reflect that, whenever a decision such as this is subjected to the analysis and scrutiny which the judicial process requires, or at least provokes, there is a danger that the court will allow itself to become so much influenced by the procedures which, as an aid to that analysis, it is suggested should have been adhered to; so trammelled by the progression of logical questions which, it is argued, the decision-maker maker ought to have posed and answered on his way to his conclusions; so enmeshed in the matters of detail which the scrutiny has revealed, as to lose sight of the essential issues. Section 19(1) is, after all, not particularly complicated, and I have endeavoured to show as much earlier in this judgment. So, while the sort of approach suggested in the second paragraph under this heading is of course helpful as a tool when one is trying to discover if the Secretary of State has complied with his obligations under the section, it seems to me to be fallacious to elevate it to the status of a formal process which he has to observe if his decision is to be valid. Nor do I think that, for example, such arguments as that he compared the perceived advantages of the Exchange Land not with the

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disadvantages of the Order Land but with those of the Exchange Land itself are of decisive importance—unless of course as a route to showing some error of approach to the essential question: will B, at the date of exchange, be at least as advantageous as A to those mentioned in the section? It seems to me that, in seeking to answer that question, it is quite permissible to use advantages of B to offset the disadvantages of B provided as the final step a comparison is made in terms of net advantage between A and B.

I also bear in mind, because I accept it, Mr. Richards' argument that judgments as between competing advantages and disadvantages are, because of the inevitable subjective element, very much matters of opinion with which the courts should be slow to interfere. Thus, opinions might differ as to the importance to be attached to the fact that the acquisition of the Exchange Land in this case will enable a local park deficiency to be corrected and on the weight to be given to the enhanced facilities that will be enjoyed by those whom the remedying of this deficiency will effect. Perhaps some people might regard this as a factor of major significance; others might be unimpressed by it. All this is very different from, for example, a challenge based on an alleged mistake about relative areas.

I refrain from commenting further on the weight of the advantages and ***383** disadvantages relied on, least in doing so I fall into the error of appearing to substitute my own view for that of the Secretary of State. I have, anxiously and I hope carefully, considered whether, reading the Report and the Decision Letter in the round and refraining, as I think I must, from adopting a "tooth comb approach," I can be satisfied that in making the crucial judgment the Secretary of State left out of account any vital consideration or significantly misconstrued the evidence, and I have concluded that he is not shown to have done so. Can it, nevertheless, be said that his decision that there was equality of advantage was one which no reasonable Secretary of State *could* have reached on the evidence before him? That, as I have endeavoured to show, involves in the last resort considering whether he *could* have been satisfied that the nine listed advantages compensated for the manifest disadvantages inherent in the exchange. I have found that a most difficult question to resolve; but in the end, reminding myself again of the emphatic language used in so many judgments and epitomised in the passage I have cited from Lord Lowry's speech in *Ex parte Brind* , I have concluded that I cannot hold that the Secretary of State's decision to issue a certificate was unreasonable in the *Wednesbury* sense. It follows that these applications must be dismissed.

MR. HOWELL:

My Lord, I would invite you to order that the applicants do pay the costs of the Secretaries of State resisting both the applications which your Lordship has just dismissed.

MR. GORDON for MR. PLEMING:

On behalf of the individual applicants, may I make four general submissions as to the balancing exercise that your Lordship might think it appropriate to make? My overall submission, certainly so far as the individual applicants are concerned, is that there should be no order as to costs.

The four areas that I invite your Lordship to consider are, first of all, the nature of these applicants, secondly, the nature of the particular proceedings with which this court is concerned on this application, thirdly, the fact that on what I will call the jurisdiction issue, the applicants were successful . . .

HUTCHINSON J.:

That was an issue which occupied at least as much time, if not more time, than anything else.

MR. GORDON:

It takes up a lot of pages in your Lordship's judgment. I will come back to that, because that was an issue taken very late in the day. Finally, the very difficult merits issue, the legal merits issue, as your Lordship's judgment reveals on page 76, engaged in this case.

Just dealing with those categories in slightly greater detail, first of all the applicants themselves, if there is any true public interest challenge, in my submission this case involves it. These applicants, as I am instructed, have absolutely no propriety interest in these proceedings, as is so often the case in public law litigation. They have incurred considerable time and considerable expense in maintaining this challenge, which is a challenge which, as I say, affects the wide public.

That brings me to the second point, really which is central to my submissions on costs. The often cited rule that costs follow the event is, in my submission, designed primarily for civil litigation, concerning the **384* vindication of private rights. The principle spills over into a lot of public law litigation as well, because a great many cases in the Crown Office lists, although they may not involve private rights, nonetheless are cases involving individual interests under the umbrella of a justiciable public law issue and one can cite by way of example a great many cases in the sphere of homelessness or even immigration, which are individual grievances, not private rights, but certainly the wider public is not affected in the same way as it is in certain types of cases. If ever there was a public interest challenge devoid of private rights, this is such a case. Statutory review often involves the wider public interest in the way that judicial review sometimes does. Statutory review is principally directed towards things like compulsory acquisition or compulsory purchase orders and the like, and this is a case where, on any view, in my submission, the applicants are a minute fraction of the public affected by the decision of the Secretary of State.

The Law Commission in its recent Consultation Paper makes this point, and I cite it to your Lordship, it is an observation which must be directed to judicial discretion: “Where an application is brought in good faith in the public interest unsuccessfully, the applicant should not be obliged to pay the other side's costs.” In my respectful submission, that is a factor which your Lordship is entitled to balance in this case in determining what order to make.

HUTCHINSON J.:

Mr. Gordon, I am not quite sure that I understand your submission that this reflects current law.

MR. GORDON:

My Lord, what I should have said at the outset, suggested to your Lordship is, the way in which costs are ordered to be paid is a matter of judicial discretion and, in my submission, the Law Commission in citing that passage is directing observation towards the exercise of discretion. It cannot be a reform proposal. It is an observation on the way the discretion should operate. All it does is underline my submission in this case that the nature of these proceedings ought not to reflect the rule in private rights litigation that costs generally follow the event. I do not cite the Law Commission as an authority. I simply say that it reflects quite succinctly the manner in which, in my submission, your Lordship's discretion should operate in this case. That is my second area, the nature of the proceedings themselves.

The third balancing factor is the fact that a great deal of time, as I am instructed, a great deal of time in this litigation has been taken up arguing over a jurisdiction issue. I am instructed that there was a preliminary hearing. Your Lordship will be familiar with that (I am not), at which, if this point was to be taken, it should have been taken there. It is an issue which apparently was raised in the respondents' skeleton argument delivered to the applicants on the day of the hearing and, certainly with the benefit of hindsight, a disproportionate amount of time was spent arguing over the effect of the words “reasonable requirements in the Act” or words to that effect. All I say is, the applicants were successful on that issue, it did take a substantial amount of time, and, even on all the costs principles in private litigation, that form of victory would be reflected in deduction of any costs award. In this area one often shrinks from saying “would,” because it is a discretion.

Finally, and it is only a balancing factor and I do not put it further than **385* that, on the last page of your Lordship's judgments reflected the difficulty, even on a *Wednesbury* argument, the final resolution. I appreciate the way in which the issue was ultimately decided, an extra factor in the overall balancing exercise.

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My Lord, a costs order against the individual applicants might well have very serious implications. One accepts that in a great deal of litigation one takes the risks in litigation, particularly in private litigation. But this is an exceptional kind of case, having regard to the factors of merits, the circumstances and the complexity of the judgment, it is my submission that the proper order here is one of no costs.

HUTCHINSON J.:

Mr. Pleming referred to them at one stage in a different context, as having put their heads over the parapet. It might be said that that can be turned against you, that if you put your head over the parapet, you must accept the full extent if they wing their way in your direction.

MR. GORDON:

I certainly would not want to find myself hooked as it were on a metaphor used by counsel in a very seductive way, but all that goes to the fact that, as I think I have accepted, in a great many areas of litigation, taking the risks involves risking consequences.

HUTCHINSON J.:

Perhaps we might change the metaphor slightly, by saying that it can be said that it was carrying the flag for a very large and very concerned part of the public who were interested, and a real interest and concern for this particular part of the country.

MR. GORDON:

Yes, and carrying that flag ought not, in my submission, result in execution as it were.

HUTCHINSON J.:

Can I put another matter to you before you sit down? Is it not really against Mr. Morgan's clients that your application is directed, or possibly? I do not know what he is going to say, but you cannot ask for more than no order for costs?

MR. GORDON:

I cannot.

HUTCHINSON J.:

I am conscious I have not heard Mr. Morgan. He may persuade me no order for costs should be made at all. Supposing the result were to order costs against one of the applicants only, and it is the council, the result of that is, the respondents will get their costs. The council instead of bearing half the costs will bear all the costs.

MR. GORDON:

Yes. But there is, as I have indicated, a public interest nature, and there is a difference between individuals litigating in the public interest and two public bodies in conflict in the public interest. There is a conceptual difference in my submission.

HUTCHINSON J.:

I know what Mr. Howell is looking at, I suspect what it is, which is to remind us that there are two separate applications here. I do not know what he is going to say. It occurs to me, the fact that there are two applications may be . . . ***386***

MR. GORDON:

Certainly it is no part of my task to make any application my learned friend Mr. Morgan may make easier or more difficult, but so far as individual applicants are concerned, the principles that I have submitted to your Lordship, the balancing factors, go to their application alone and are not in any way directed towards the other applicant.

HUTCHINSON J.:

It may be that I was wrong, the true position is where there are two applications, if there is no order for costs as to one, an order for costs against the other, they get in effect half their costs.

MR. GORDON:

I also ought to remind your Lordship, and remind myself, that there are two legally-aided clients amongst the nine individual applicants, and they are Black and Currie. They are legally aided, and in any event I will be asking for the usual legal aid taxation order so far as they are concerned.

HUTCHINSON J.:

I suppose it might be said to be rather to the credit of the others that they did not step down and leave it to the legally-aided applicants.

MR. GORDON:

That is another factor. They could have simply done that and it would have been in practice difficult. Those are my submissions.

MR. MORGAN:

If I may deal first with the point that your Lordship raised about the incidents of costs in the event of no order being made against the individual applicant, it would be my submission that the correct analysis is that the Government gets half its costs.

If I may turn to the other question, whether in the action between Greenwich and Government, there should be any order for costs, nothing that I say should be taken to detract from the courage and integrity of the individual applicants. But the situation of the Borough is equally to be taken into account. I adopt the second, third and fourth of the points which my learned friend made, which apply equally to the Borough and its case.

What I say about the Borough's individual position is this. Although it is very tempting to think that because local authorities have huge resources at their disposal, there is some bottomless pit. They have huge demands placed upon those resources. The Borough of Greenwich in the current year is imposing a cuts programme to the tune of £32 million, which has involved literally hundreds of redundancies, closure of two old people's homes, closure of a number of libraries and other consequences which I cannot spell out in detail. I simply invite you to bear those difficulties in mind when you determine the question of costs, and to make an order in accordance with the general principles my learned friend has put forward.

HUTCHINSON J.:

What do you suggest?

MR. MORGAN:

No order as to costs.

HUTCHINSON J.:

It is a very bold suggestion. It confronts me with a difficulty, which I am sure you are alive to. It would be a most unusual order that there should be no order for costs in a case where there are two applicants and the case has failed. ***387***

MR. MORGAN:

There are two limbs to the application. The first is, supposing you decide to make an order for costs, then it may be reduce the amount of costs by reference to the success of . . .

HUTCHINSON J.:

Affecting both applicants equally?

MR. MORGAN:

Yes, my Lord, the jurisdiction took up the time of the court and all the parties to it, it is one on which the applicants were successful, and in accordance with private law principles, we are entitled to ask you to use your discretion to make a disallowance.

HUTCHINSON J.:

I have got that point. Are you also saying that I really ought not to accede to the submission based on treating differently the individual applicants from your clients?

MR. MORGAN:

No, my Lord, I would not want to undermine anything my learned friend has said. What I do say is that the general principles which he laid before you as to the principles to be applied in determination of costs in genuine public law disputes where there is a genuine public interest, as opposed to a private interest, in the outcome. For that reason it would be perfectly proper to say it was a fair contest on a difficult issue which ultimately we lost, but in order not to discourage the council, a reasonable outcome is no order for costs. Those are my submissions.

MR. HOWELL:

My learned friend Mr. Gordon, in his submissions to your Lordship, put forward the suggestion at the outset of his submissions that your Lordship should perform a balancing exercise. In my respectful submission, that is not the correct approach for your Lordship to take. The correct approach for your Lordship to take is that normally costs follow the event, unless there is some reason why they should not. There is no authority to which my learned friend has been able to point to say why that rule does not apply in judicial review or in matters which he would describe as questions involving public interest. The Law Commission's recommendation may be a recommendation which in due course may be taken on board through a proper forum. It does not at present represent, in my respectful submission, the practice of the court. The Secretary of State has in the past recovered his costs against applicants

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who may well regard themselves as public-spirited. So my learned friend's approach is at least contrary to the normal approach.

Having said that, as his starting point my learned friend raised four matters. May I take the first two together, which refer to the nature of the application and the nature of the proceedings. Effectively, what my learned friend was seeking to impress upon your Lordship is the idea that public-spirited citizens bringing an application on a matter which may be of public concern should not face the burden of having to pay the costs if their application is unsuccessful.

What I say to that is this. The fact that some may view a decision as being of public concern or public importance, even if they have no individual interest in it, should not make them immune from costs which normally follow the event, if the litigation they are concerned with fails. It has to be borne in mind that if the Secretary of State does not obtain an order for costs, his costs will have to be met by the public taxpayer, including those ***388*** taxpayers who may not share the concern which the applicants in this case had. In my respectful submission, the mere fact that the applicants may consider themselves to be public-spirited and although they are individual applicants have no proprietary interest, is no reason why they should cause the costs occasioned by the litigation which eventually proved to be unfounded on other taxpayers.

Before I turn to the jurisdiction point, the other point which my learned friend describes as the legal merits point, appeared, with due respect to him, to be a submission that he ought to have the consolation of award in costs for the decision which he did not obtain on merits, as he suspects it was a close run thing. In my submission that is no basis for not awarding costs.

The other matter on the question of jurisdiction, I accept of course the Secretary of State's submissions did not bear fruit in your Lordship's judgment. The Secretary of State failed on the jurisdiction issue. But that does not mean that the normal rule should not necessarily be followed. It often happens that there are discreet issues.

HUTCHINSON J.:

This is familiar ground. It is an area of discretion, is it not? Judges are often discouraged from making partial orders to affect different issues. On the other hand there are abundant cases where such orders have been made, particularly where one can separate and clearly define an issue on which a successful party has failed which has taken up a substantial part of the hearing.

MR. HOWELL:

I accept it is a question of discretion. I do not say there is a hard and fast rule about it. What I would say is this. If your Lordship is minded to take the view that that ought to be reflected in the order for costs, it ought to be reflected not in no order for costs, but a proportion of amount. I certainly did not have a stop watch out during the course of the hearing. If one were to go by your Lordship's judgment, roughly a third of your Lordship's judgment is given to jurisdiction.

HUTCHINSON J.:

My impression is we took at least half a day on the jurisdiction issue.

MR. HOWELL:

Those sitting behind would not say that was unfair. What I would ask your Lordship to bear in mind is, there were two applications. Both were being run on exactly the same grounds, if I may respectfully say so, and there really was no reason why they should have been separately represented. I make no complaint about that, but it of course has the effect that more time has been spent as a result of that, which I will ask your Lordship to bear in mind when considering the protection of costs. As I say, your Lordship will of course form your own judgment on the apportionment of costs on the question of jurisdiction. I only wish to say, your Lordship does not treat this case in

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any different way from a normal case. On the question of the legally-aided applicants, I would not seek anything other than the normal costs order, not to be enforced without the leave of the court.

HUTCHINSON J.:

You do not want to inquire into their contribution?

MR. HOWELL:

The normal order is not to be enforced without leave of the court. As I say, there is simply no basis for making no order for costs. ***389***

HUTCHINSON J.:

The conclusion I have come to in the light of those helpful arguments is that first of all, much as I would like to be persuaded otherwise, no grounds exist for my making no order as to costs in this case. I feel that would be a wrong exercise of my discretion. Nor do I feel there really exists any good ground for differentiating between the two applicants merely because of the different nature of the individual applicants from the council. I do, however, consider, in the light of all the matters that have been argued before me, and in particular the issue of jurisdiction on which the applicants were successful, that some significant reflection of that ought to appear in the order for costs, and I propose to order that the Secretaries of State recover half their costs against both sets of applicants. So far as the legally-aided applicants are concerned, there will be an order that the order for costs against them be not enforced without leave of the court or the Court of Appeal.

MR. GORDON:

Would your Lordship grant legal aid taxation.

HUTCHINSON J.:

Yes.

Representation

Solicitors— The solicitor to the London Borough of Greenwich ; Messrs. Bindman and Partners for Yates and Others; the Treasury Solicitor for the respondent.

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REP 1-035 PARK BARN FARM ("PBF") – ALDERSON

SUBMISSION FOR DEADLINE 11 (3/7/20)

London Borough of Greenwich and Others v SoS for the Environment and the SoS for Transport [1993] Env. L.R 344.

Background

1. The brief background is that proposals for the construction of a trunk road required land to be given in exchange for the compulsory purchase of part of a woodland area known as Oxleas Wood ('OW'), being public access land.

2. Accepting an inspector's recommendation after an inquiry, the Secretaries of State for Environment and for Transport ('SoS') certified that the exchange land ('EL') was of equal value to the public under the provisions of s.19 Acquisition Land Act 1981.

3. The claimant subsequently brought a judicial review challenge to the lawfulness of that decision. The claim was dismissed.

Relevant findings of fact [as recorded by the judge]

4. The EL was only marginally greater in area than the 10.2ha of land which it was proposed to acquire from OW.

5. OW was considered to be a very valuable public recreational resource. The judge said that "*At the inquiry an abundance of evidence was called as to the particular features and advantages enjoyed by such woodland*". It provided "*…. special advantages and enjoyment to those members of the public who have access to it*". "*That the SoS accepted that OW has unique properties which enhance the public's recreational enjoyment of it is clear*". It was "*unique in being an SSSI which is both fully open to the public and in close proximity to urban development and is part of a GLC area of special character*".[1]

6. The EL comprised part of some open farmland. It was not contiguous with OW because it lay on the other side of Shooters Hill, and would be separated by a major road.

7. The applicant proposed (what the judge described as) "*elaborate arrangements or the modification of* [the EL] *to make it as nearly as possible as possible a real replacement for the woodland*". All this would be achieved by restricting public access to the EL to a

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[1] For this last quote the judge was quoting directly from the first inspector's report.

network of paths and rides by fencing, during which time it was hoped the new woodland would become established. The inspector found that these public access restrictions would last for at least 10 years, during which time the bulk of the EL (89%) would be unavailable, with the other 11% partly regimented by the presence of the fences. But the SoS had not made the mistake of believing that the features of ancient woodland could ever be replicated on the EL.

8. The judge himself took the view (even in the absence of specific evidence to that effect) that "*access to a 10-year old woodland is access to something very different in nature to an established woodland…*"

9. Members of the public using the EL would experience a 5-10dB(A) noise increase compared to the land taken from OW – this being described as a "*noticeably higher level*".

10. These were reasons to consider the EL was considerably less advantageous overall, however the inspector / SoS identified three specific advantages which balanced this out:
    a) The EL would remedy a deficiency in local park provision;
    b) The EL would weld together two existing areas of public access land;
    c) An overall bonus of 0.25ha.

11. The SoS also took the view (but not the inspector) that dense undergrowth in the woods, and brambles, meant that OW was frequently impenetrable, that access had been restricted in practice, and so fencing of the EL (for up to 10 years) would not restrict access to any greater extent.[2]

Key issues

12. Under "Issues arising"[3] the judge set out a list of disputed issues in the form of questions. The following matters are of particular importance in the context of what is the proper approach to be taken to the exercise of discretion in cases like the present one[4]:

    (i) can the Secretary of State, as a matter of law, be satisfied under section 19(1) and certify accordingly , where the land which has been or will be given in exchange is not either at the date of the certificate or at the date when the land will be given in exchange, equally advantageous to the public? Although I have stated alternative dates, all parties agree that, in a case where the land is to be given, the date of exchange must as a matter of common sense be the correct date;

[2] The claimant's separate challenge on the basis that the SoS did not have sufficient evidence to reach these conclusions also failed.

[3] See page 11 of the judgment

[4] Issues 2(b), 2(c), 2(e) and 2(f).

(ii) *what is meant by "the public" in section 19(1) ?*

(iii) *what must be shown to establish that the Exchange Land is "equally advantageous"? Does it mean like for like—woodland for woodland—or is it permissible to balance loss of one sort with advantage of another?*

(iv) *could the Secretary of State, as a matter of fact and/or law, on the proper construction of section 19(1) be satisfied that the Exchange Land was equally advantageous to the public given that what is being taken is ancient woodland which is quiet and peaceful and an integral part of a large area of public open space, to be replaced by open farmland which is to be planted with new trees which need protection by fences, which will be noisier, which will be isolated from Oxleas Wood, and which will be bordered by a major trunk road?*

(v) *was the Secretary of State's conclusion that there was equal advantage unreasonable in the Wednesbury sense?*

13. The judge reached the following key conclusions in relation to the first three 'matters of construction' set out above (words underlined for added emphasis):

- *"….. my conclusion is that equal advantage to the public must involve a consideration primarily of those members of the public who enjoy or might ordinarily be expected to enjoy the advantages of the* [common land / open space]*, but may also include, as an ingredient in the equation, benefits to the public at large.";*

- *"Moreover, it seems to me likely that Parliament would have intended to permit a degree of flexibility, leaving it to the Secretary of State to judge whether advantages of one sort could be offset against advantages of a different sort.";*

- *"The Secretary of State ……. submits that future as well as present benefits may be taken into account although the weight to be given to future benefits is a matter for the judgment of the Secretary of State………………………. What it involves is that the Secretary of State may be satisfied of equal advantage at the date of exchange on the basis that advantages which he is satisfied the Exchange Land will have in the future mean that it is equally advantageous to users of the Order Land and the public at large at the date of exchange.";*

- *"I accept another submission made by Mr. Richards to the effect that the obligation of the Secretary of State when considering the problem of equal advantage to the public, which necessarily involves balancing the advantages of one parcel of land against those of the other, is to put into the scales on the side of the Order Land not every advantageous feature which it has, but only those features which bear on the use and enjoyment which the public derive from it. The Order Land may be advantageous for reasons unconnected with public recreation*

and such advantageous are irrelevant. The same considerations apply so far as the Exchange Land is concerned.

I should explain the limits of Mr. Richard's submission. He does not for a moment suggest that because the Secretary of State has found that the main recreational use of Oxleas Wood is for informal walking, all that need be considered is the advantage of having somewhere to walk. He expressly accepts that the characteristics of ancient woodland may enhance enjoyment for public recreation; that the features which have lead to its being declared as SSSI may do the same; but he rightly emphasises that it is important to distinguish between recreation on the one hand and ecological interests on the other, and to recognise that the assessment of equal advantage is not the assessment of equal ecological advantage but an assessment in terms of public recreation."

14. The judge then helpfully summarised his various thoughts and conclusions in relation these matters in the following passage (on page 26 of the judgment):

    "In a case where the Exchange Land has not yet been given, the appropriate time for the comparison is the time when the exchange will take place. The Secretary of State must be satisfied that at that date the Exchange Land is equally advantageous to the users of the Order Land and the public at large."

15. He continued:

    "It is permissible when deciding whether at the date of exchange the Exchange Land will be equally advantageous to have regard to predicted future developments or occurrences which it is intended or anticipated will affect either or both parcels. It is not, however, permissible to approach the equation on the basis that such future developments will result in Exchange Land, not equally advantageous at the date of exchange, becoming equally advantageous at some future date. The frame within which equal advantage has to be assessed is that dictated by the nature of the public enjoyment of the Order Land: but, within that frame, there need not be precise correspondence between the advantages attaching to each parcel. The extent to which the public presently enjoy advantages over the Exchange Land is also material."

16. The judge then refined the two other questions ((iv) and (v) above) before deciding that the SoS had correctly gone about the task of evaluating the relevant considerations and weighing up the competing advantages in a manner that was not unreasonable in the *Wednesbury* sense. He had not left out of account any vital consideration or significantly misconstrued the evidence, the judge recognising that these were matters of opinion with which the court should be generally slow to interfere.

Final Comments / Observations

17. *Greenwich* does not depart from the well-established legal principle that discretionary judgments are within the exclusive province of the decision-maker to make, subject only to legal review by the courts on the usual grounds (irrationality, procedural impropriety etc..).

18. Further, on the particular facts of the *Greenwich* case the court did not conclude that the decision that there was equality of advantage was one which no reasonable SoS *could* have reached on the evidence before him.

19. What the case does provide, however, is a ruling on the specific legal parameters within which that decision must operate, as well as a useful guide to the sort of considerations which it is permissible to weigh up on the balance, by reference to the factors which the inspector / SoS specifically did take into account in that particular case.

20. Relevant factors which may be taken into account (and there may be others too) will include:-
    a) the relative noise environment;
    b) the degree to which the land is / or would be likely to be used by the public;
    c) the benefit of providing new public access where there is a local shortage;
    d) the merger of existing public access land to former a larger unified block;
    e) proposed improvements to the public amenity value of the RL;
    f) the value of future opportunities to use RL for public access which might not be currently available at the DoE;
    g) the amount of surplus of RL over existing Order Land.

21. *Greenwich* is an example of a case where the final ratio was settled at just above 1:1 even though it was clearly understood the EL could never replicate the quality of access provided by the Order Land, and that a large part of it would be unavailable for public use for many years. The noise environment on the EL would also be significantly worse.

22. Unlike in *Greenwich* these same factors weigh emphatically in favour of the RL in the present case.

23. Equally, the countervailing factors relied upon by the decision-maker to offset that loss in *Greenwich* are qualities which are present in the RL for the current scheme too (not least PBF). The RL would merge with blocks of existing special category land, and t would remedy a shortfall of public access provision where the applicant has already identified that a deficit currently exists in the NW and NE quadrants.

24. Taking these same factors on board, and considering the applicant's case as a whole, there is nothing within the evidence which warrants a RL ratio in excess of 1:1. The approach advocated by the applicant strays directly into *Wednesbury* irrationality.

25. Finally, it must be noted that whilst Queen's Counsel for the applicant stated to the Examination that the underlying principles of the legislative scheme have not changed vis a vis the EL/ RL tests, what notably has occurred is that s.122(3) of the Planning Act 2008 – the second statutory condition requiring the SoS to be satisfied "*that there is a compelling case in the public interest for the land to be acquired compulsorily*" - now puts on a firm statutory footing what was previously only case law and guidance.

26. It may be impossible to say now how much force such considerations would have carried in the mind of the SoS when decisions to confirm the earlier M25 / A3 road schemes were made. What is rather more apparent, however, is that this change does mean that any failure by the SoS to deal with this issue correctly would now constitute a breach of statutory duty, and that the court will be compelled to examine such matters with the utmost scrutiny.

27. In light of all this the applicant's invitation for the Examination Panel to follow other historic scheme precedents should be treated with extreme caution. Only by following what the objector has referred to as the "bottom-up" approach can satisfactory compliance with the statutory scheme now be guaranteed.

KEYSTONE LAW

REP 1-035 PARK BARN FARM ("PBF") – ALDERSON

SUBMISSION FOR DEADLINE 11 (3/7/20)

Application of the statutory test for the compulsory acquisition of replacement land under the PA 2008: the "bottom-up" approach

1. The objector contends that compliance with the statutory test for the compulsory acquisition of replacement land ('RL') under s.122 Planning Act 2008 ('PA 2008') essentially requires what might usefully be described as a 'bottom-up' approach.

2. This involves undergoing a sequence of steps, having regard to the legal principles in the *Greenwich*[1] case, by which the Secretary of State can be satisfied that he has identified sufficient land which meets the basic definition of RL under s.122(2)(c) PA 2008[2], but which is no more than is reasonably required to satisfy the added requirement of a "*compelling case in the public interest for the land to be acquired compulsorily*" (s.122(3) PA 2008).

3. But although this is presented as a sequence of steps below, these are not abstract questions which have to be followed through in mechanistic fashion. What is ultimately important is that there is an objective process of evaluation, based upon robust evidence, which measures up to the statutory test.

Step 1: Identify an equal area of RL (s.131(12) PA 2008)

4. To state the obvious, the first definition of RL (s.131(12) PA 2008) will never be satisfied if the RL area measures less than the order land ('OL') which is to be acquired[3]. The first task, therefore, is to identify an area of RL which is of equal size to the OL which may be said to offer some decent benefit in terms of public recreational use.

5. Given the steps which follow next, it is imperative that in the process of selecting a suitable area of RL one is careful to survey a range of possible land options which might potentially meet that need. One should be on the look-out particularly for land parcels which may seem to offer an equal advantage to the OL (in terms of public recreation),

[1] *London Borough of Greenwich and Others v SoS for the Environment and the SoS for Transport [1993] Env. L.R 344*.

[2] Section 122(2)(c) PA 2008 in turn refers to two separate definitions of RL depending on whether the order land is being permanently acquired (s.131(12)), or whether permanent rights are being acquired over it (s.132(12): See **Appendix.**

[3] For the purposes of this note this refers only to the part of the OL which comprises special category land (i.e. public open space and common land).

or perhaps something better than that, whilst causing least interference with private rights. These are quintessentially matters of fair and reasonable judgement.

Step 2: Assessment of relative advantage of OL / RL to be acquired (s.131(12) PA 2008)

6. Once an area[4] of RL has been identified which is of equal size to the OL (or which is at least no smaller than the OL) a sensible balancing exercise then needs to be carried out in order to determine whether the RL would be sufficient to compensate for the advantages that would be lost.

7. There is no requirement to replicate the advantages of the OL identically[5], and so the Secretary of State may approach this question with degree of flexibility. One may think of it as two opposite sides of a ledger:

    a. First, what are the features of the OL which are said to constitute its advantages in terms of public recreation? Here, one is chiefly concerned with the advantages of the OL, rather than the qualities of the other parts of the OL that are not being acquired[6];

    b. On the other side of the ledger, what are the features of the RL which are said to constitute its advantages (in terms of public recreation), which may be different advantages than those found on the OL?

8. In either case these competing advantages must be evaluated, and then weighed up against one other, in order to decide whether the RL area which has been selected would be any *less* advantageous than the OL.

9. At this point the Secretary of State may be satisfied that a higher ratio of RL would be required in order to make up for any perceived deficit of advantage of the RL over the OL. That was presumably the conclusion reached in relation to 'exchange land' under the earlier road schemes[7] where ratios well in excess of 1:1 were confirmed.

10. Equally, it is open for the Secretary of State to conclude that the chosen area of RL would be no less disadvantageous overall (compared to the OL). Indeed, a view might be reached that the RL would provide an abundance of public access advantages which far outweigh those of the OL. It would then be unnecessary to acquire any additional RL, because an appropriate amount which meets the s.131(12) definition would have already been identified (i.e. something close to the minimum 1:1 ratio). In those

[4] This may be made up of more than one land parcel.
[5] See *Greenwich*
[6] See *Greenwich*
[7] Schemes for the construction of the M25 motorway and A3 dual carriageway.

circumstances the acquisition of RL in a proportion above the 1:1 ratio could only ever be justified by the demonstration of a *compelling* case in the public interest.

<u>Step 3: Consider additional RL for permanent Order rights to be acquired (s.132(12) PA 2008)</u>

11. Once an area of RL has been identified (by following steps 1 & 2) which the Secretary of State is satisfied would be 'no less advantageous', he/she should go on to consider whether any additional land is required to compensate for any disadvantages arising under the second definition of RL: s.132(12) PA 2008.

12. There is no minimum level of land provision specified in the definition as being 'adequate', and so this could mean something well below a 1:1 ratio.

13. It would be open for the Secretary of State to be satisfied that no extra RL (or just a token amount) is required [to compensate for the acquisition of permanent rights over the OL] in either one of the circumstances described below:

    a. In circumstances where the resulting disadvantages of the order rights (after proper consideration of any beneficial impacts too) are considered to be negligible or minor;

    b. In the circumstances described at paragraph 10 above.

<u>Step 4: Is there a compelling case in the public interest? (s.122(3) PA 2008)</u>

14. As alluded to above, the second statutory condition[8] - the requirement for a "*compelling case in the public interest"* ('CCIPI') - acts as a notional "brake" in order to protect private property owners from any unjustified human rights unnecessary interference.

15. The Compulsory Acquisition ('CA') Guidance provides advice as to what may suffice in this regard:

    a. Paras 12 & 13: "*compelling evidence that the public benefits…. will outweigh the private loss*";

    b. Paras 8-10:

        - All reasonable alternatives (to CA) have been explored;
        - No more land is being taken than is reasonably necessary;
        - The CA is proportionate; and

[8] Section 122(3) PA 2008.

- The purposes are legitimate and sufficiently justify interfering with the human rights of those affected.

16. There are two obvious scenarios in which it might be said the requirement for a CCIPI would not be satisfied:-

    a. In circumstances where a smaller area of the same RL would also be 'no less advantageous' [to users & members of the public] than the OL;

    b. In circumstances where an alternative RL option would also confer no less advantage [to users & members of the public] than the OL, but which is likely to cause less substantial interference with private rights and interests.

KEYSTONE LAW

APPENDIX

DEFINITIONS OF REPLACEMENT LAND

There are two separate definitions of RL under the PA 2008 which are engaged by the first of two statutory conditions under section 122(2)(c) PA 2008:-

- Section 131(12): The land must be '*not less in area than the order land'* which is to be acquired, and '*no less advantageous'*;

- Section 132(12): The land must be '*adequate to compensate…. for the disadvantages which result from the compulsory acquisition of the order right*'.

These are **not** standalone tests.

The second statutory condition (s.122(3) PA 2008) also requires the Secretary of State to be satisfied that there is "*a compelling case in the public interest*" ('CCIPI').