



Neutral Citation Number: [2026] EWHC 1884 (Admin)

Case No: AC-2025-LDS-000159

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

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG

Date: 23/07/2026

Before :

MR JUSTICE MOULD

Between :

Mark Turnbull	<u>Claimant</u>
- and -	
Secretary of State for Environment, Food and Rural Affairs	<u>Defendant</u>
- and -	
(1) South Tyneside Council	
(2) John White (on behalf of the Friends of Market Dock Pathway)	<u>Interested Parties</u>

George Laurence KC and Ross Crail (instructed by Mills & Reeve) for the Claimant
Piers Riley-Smith (instructed by Government Legal Department) for the Defendant
The Interested Parties did not appear and were not represented

Hearing date: 21 April 2026

Approved Judgment

This judgment was handed down remotely at 12pm on Thursday 23rd July 2026 by circulation to the parties or their representatives by e-mail.

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MR JUSTICE MOULD

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Factual background

1. On 25 July 2022, the Friends of the Market Dock Pathway [**“the Friends”**] applied to the First Interested Party as surveying authority to make an order modifying the definitive map and statement [**“the DMS”**], to add a footpath [**“the claimed path”**] along the east bank of the River Tyne adjacent to Long Row, South Shields. The application was made under section 53(5) of the Wildlife and Countryside Act 1981 [**“the 1981 Act”**]. The application was for a modification order to be made pursuant to section 53(2) and 53(3)(c)(i) of the 1981 Act, in consequence of evidence which, when considered with all other relevant evidence available to the surveying authority, showed that a public right of way on foot is reasonably alleged to subsist over the claimed path.
2. The Claimant is the registered leasehold proprietor and occupier of a residential apartment at 30 Long Row South Shields. The Claimant’s leasehold property includes an adjoining garden area extending to the east bank of the River Tyne. The Claimant is also the freehold owner of another parcel of land adjacent to the east bank of the river at Long Row. The claimed path runs over land owned by the Claimant.
3. The surveying authority consulted with affected landowners at Long Row, including the Claimant, before determining the Friends’ application. A number of those affected landowners, including the Claimant, lodged objections in writing to that application.
4. On 16 July 2024 the surveying authority refused the Friends’ application and communicated its decision not to make a modification order adding the claimed path to the DMS. The Friends exercised the right of appeal to the Defendant against the surveying authority’s decision given by paragraph 4(1) of schedule 14 to the 1981 Act. The Defendant appointed an inspector to determine the Friends’ appeal.
5. On 28 November 2024 the objectors’ solicitor wrote to the Planning Inspectorate setting out the objectors’ representations in response to the Friends’ appeal. In that letter, the solicitor identified and drew heavily on documentary material, some of which had been before and considered by the surveying authority at the time of its decision not to make the modification order; and some of which had been submitted to the Planning Inspectorate in relation to the appeal.

The decision

6. On 7 May 2025 the inspector issued her decision letter. In paragraph 2 of her decision [**“DL2”**], the inspector said that she had determined the appeal on the papers submitted. She had not visited the site of the claimed path. She was satisfied that a site visit had not been necessary for the purposes of reaching her decision.
7. Having directed herself in DL6 to DL12 on the basis of the relevant statutory framework and case law as to how she should approach her determination of the appeal, in DL13 the inspector said that in order to accede to the Friends’ appeal she need only be satisfied that the evidence met what she referred to as “Test B”, which she set out in DL7 –

“Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists”.

8. In DL14 to DL32, the inspector carried out a detailed analysis of the documentary evidence. In DL33 to DL41, she considered whether a right of way on foot was reasonably alleged to subsist over the claimed path on the basis of the statutory presumption of dedication under section 31 of the Highways Act 1980 [**“the 1980 Act”**]. In DL41, the inspector found it to be clear from the documentary evidence that it would not have been possible physically to use the claimed path prior to March 1999. The right of the public to use the claimed way had been brought into question in December 2016 by the erection of fencing along the appeal route to prevent public access. The public’s use of the claimed route had been interrupted between February 2007 and March 2008. The requisite full period of 20 years’ enjoyment by the public as of right and without interruption could not reasonably be asserted. The inspector concluded that there was insufficient evidence to show a presumption of dedication of the claimed way as a footpath under section 31 of the 1980 Act.
9. In DL42 to DL53, the inspector turned to consider whether Test B was satisfied on the basis of dedication of the claimed path as a footpath at common law. At DL53 the inspector concluded that there was a reasonable basis for drawing the inference of dedication of the claimed path on that basis. She referred to what she considered to be the high level of use of the claimed path by the public and the provision of a path which was made available to and used by the public. She maintained that view even allowing for the fact that the entire length of the claimed path had been used by the public only between 2008 and 2014, when the landowners went into receivership. She found there to be no evidence that the landowners took any action to make the public aware that they did not intend to dedicate a right of way over the claimed path until at least 2016. Moreover, the claimed path had since been designated as part of the English Coastal Path apparently without objection from the landowners.
10. Having found there to be a reasonable allegation of the subsistence of a right of way over the claimed path on the basis of an inference of dedication at common law, the inspector allowed the Friends’ appeal. In DL56 she made the following direction –

“In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act, South Tyneside Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within three months of the date of this decision to add the public footpath, as proposed in the application dated 25 July 2022 and shown on the plan appended to this decision”.

The plan shows the claimed path in a dashed line between points A and B along the east bank of the River Tyne adjacent to Long Row, South Shields.

The claim for judicial review

11. On 4 June 2025, in response to a request from the Claimant’s solicitor, the surveying authority confirmed that it intended to make a modification order adding the claimed

path to the DMS in accordance with the inspector's direction. The surveying authority did not propose to challenge the inspector's decision by way of judicial review. However, on being informed that the Claimant was considering bringing such a claim, the surveying authority confirmed that it would wait until early July 2025 before making the modification order. There followed further exchanges of correspondence during the course of which the Claimant confirmed that he intended to bring proceedings for judicial review of the inspector's decision. On 23 July 2025 the surveying authority informed the Claimant's solicitor that on the basis of the claim being issued by 7 August 2025, the authority undertook not to make the modification order directed by the inspector pending the final disposal of the Claimant's proposed judicial review proceedings (whether through the refusal of permission to apply or judgment on the substantive claim, including any appeal).

12. On 5 August 2025, the Claimant issued this claim seeking permission to apply for judicial review of the Defendant's decision made by his appointed inspector on 7 May 2025, to allow the Friends' appeal and to direct the making of a modification order adding the claimed path to the DMS. The Claimant seeks permission to apply for judicial review on 11 grounds of challenge.

The preliminary issue – alternative remedy

13. On 28 August 2025, the Defendant filed his Acknowledgment of Service stating his intention to contest the claim. In summary grounds of resistance, the Defendant contended that none of the proposed grounds of challenge was arguable. The Defendant also raised as a preliminary issue the question whether permission to proceed with the claim should, in any event, be refused on the basis that there was a suitable alternative remedy available to the Claimant. In short summary, the Defendant's contention was that once made by the surveying authority in accordance with the inspector's direction, the modification order adding the claimed path to the DMS would not take effect unless and until confirmed under paragraph 2 of schedule 15 to the 1981 Act and in accordance with the statutory procedure applicable to opposed orders enacted by that schedule. On the reasonable assumption that the Claimant would maintain his objection to the making of the modification order, paragraph 7 of schedule 15 required the surveying authority to submit the order to the Defendant for confirmation by him. Under paragraph 7, the Defendant must then either cause a local inquiry to be held or afford the Claimant (and any other objectors) an opportunity to be heard by a person appointed by the Defendant for that purpose. Prior to deciding whether to confirm the modification order, the Defendant must take into consideration both the remaining objections and the report of the person appointed to hold the local inquiry or hearing. The Defendant must give reasons for his decision. By virtue of paragraph 12 of schedule 15 to the 1981 Act, if the modification order is confirmed the Claimant will have the right to apply to the High Court questioning the validity of the order, essentially on public law grounds.
14. It was the Defendant's contention that the statutory procedure offers a suitable alternative remedy to the Claimant for the complaints that he seeks to advance in his proposed claim for judicial review. Through participating in that procedure, the Claimant will be able to raise the points of concern which are the foundation for his proposed grounds of challenge. He will be able to do so through the inquiry or hearing

procedure under paragraph 7 of schedule 15 to the 1981 Act. If, despite the objections, the Defendant decides to confirm the modification order, the Claimant will have the right under paragraph 12 of schedule 15 to invoke the jurisdiction of this court to quash the order either generally or in so far as it affects his interests. The Defendant argued that judicial review is a remedy of last resort. Applying that well established principle to the present case, it was clear that the Claimant should be required to follow the suitable alternative remedy provided by Parliament through its enactment of schedule 15 to the 1981 Act and refused permission to proceed with the current claim.

15. In the light of that preliminary issue raised by the Defendant, on 11 February 2026 I ordered that the Claimant's application for permission be adjourned to an oral hearing. I am very grateful indeed both to Mr George Laurence KC and Ms Ross Crail who appeared for the Claimant, and to Mr Piers Riley-Smith who appeared for the Defendant, for their most helpful and illuminating submissions.

The case law

16. It is beyond reasonable dispute that once a modification order has been made under section 53(2) of the 1981 Act, whether by a surveying authority in response to an application or on the direction of the Defendant following an appeal under section 53(5), there is no alternative open to an objector other than to participate in the procedure for confirmation of the order under schedule 15 to the 1981 Act; if necessary, including an application to the court to quash the order following confirmation, pursuant to paragraph 12 of schedule 15. That is the effect of the ouster clause enacted by paragraph 12(3) of schedule 15 which provides –

“Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever”.

See R v Cornwall County Council ex parte Huntington; R v Devon County Council ex parte Isaac [1994] 1 All ER 694 at pages 700-701.

17. However, in the present case, the surveying authority has yet to make the modification order and has undertaken not to do so pending the final determination of this proposed claim for judicial review. In these circumstances, the ouster clause in paragraph 12(3) of schedule 15 to the 1981 Act does not bite. In R v Wiltshire County Council ex parte Nettlecombe Limited and Pelham [1998] JPL 707 [*“Nettlecombe”*] the surveying authority had resolved to make an order pursuant to section 53(2) of the 1981 Act modifying the definitive map to show a byway open to all traffic passing the claimants' land. The surveying authority had, however, been restrained by order of the court from making the modification order. The claimants brought proceedings for judicial review of the surveying authority's decision to make the order. The surveying authority raised the issue as to whether the court had jurisdiction to entertain that claim, given the enactment of the schedule 15 confirmation procedure which would follow the making of the order.

18. Dyson J (as he then was) held that the court had jurisdiction to entertain a challenge by way of judicial review to the surveying authority's decision pursuant to section 53(2) of the 1981 Act to make the modification order. At page 713 he said –

“In my judgment, the court does have jurisdiction to entertain the application in the instant case. No good reason has been advanced against the existence of such jurisdiction. The existence of the statutory regime alone, in circumstances where it is accepted that the ouster clause does not bite, is not enough. It might be said that the fact that the ouster clause deals with certain situations gives rise to the inference that Parliament did not intend to exclude the availability of judicial review in other situations. I prefer, however, to rest my decision on wider considerations. There has to be a good reason to deny jurisdiction. Prima facie, a party is entitled to have recourse to the court. It seems to me that the existence of the statutory remedy of public inquiry by an inspector and statutory appeal thereafter is relevant to the question of whether I should refuse relief in the exercise of my discretion. I do not consider that it goes to jurisdiction....[Counsel for the Defendant's] argument involves the proposition that, where a Council is threatening to commit a plain error of law (as I have found to be the position in the present case), an aggrieved party cannot seek the intervention of the Court. Instead, he or she is obliged to embark on the often time consuming and costly procedure of a public inquiry, in which objectors can make representations, possibly involving detailed factual investigations, with the risk that the Inspector may repeat the Council's error of law. Counsel did not seek to justify this, save by reference to the existence of the statutory regime”.

19. At page 714 Dyson J added the following note of caution –

“It is important to add that, in my view, the discretion should be exercised cautiously, and only in clear cases where there has been a plain error of law. In any case where the position is uncertain, and especially where the issues raised involve questions of fact, it is most unlikely that it would be appropriate to exercise the court's discretion in favour of granting relief. That is not, however, this case”.

20. R (Roxlena Limited) v Cumbria County Council [2017] EWHC 2651 (Admin) [“*Roxlena*”] was another case in which the surveying authority had resolved to make a modification order to the definitive map which, if made and later confirmed, would have effect to add certain rights of way over the claimant's land. The claimant brought a claim for judicial review of the surveying authority resolution. At [59] and [60], Kerr J recorded submissions advanced on behalf of the claimant and the surveying authority respectively, as to whether the case raised a plain error of law of the kind which Dyson J in *Nettlecombe* considered might merit the intervention of the court on a claim for judicial review, at the stage prior to the making of the order and its subsequent consideration under the statutory conformation process. Both the parties and the court appear to have proceeded on the basis that Dyson J's approach was correct in principle.
21. There was an appeal. In R (Roxlena Limited) v Cumbria County Council [2019] EWCA Civ 1639 at [37] to [41] Lindblom LJ (giving the only substantive judgment) gave detailed consideration to the jurisprudence which explains the approach to be taken by a surveying authority for the purpose of deciding whether the making of a

modification order pursuant to section 53(2) was justified, on the basis of a reasonable allegation of the subsistence of a right of way over land under section 53(3)(c)(i) of the 1981 Act. Having summarised the established principles, Lindblom LJ went on to address the grounds of challenge to the surveying authority's resolution to make a modification order. He did not refer to *Nettlecombe*. Nor, however, did he suggest that Roxlena should in any event be denied relief on the basis that there existed a suitable alternative remedy available to Roxlena in the form of schedule 15 to the 1981 Act. At [39] and [40] of his judgment, Lindblom LJ provided the following succinct summary of the distinction between the order making and confirmation procedures, in a case where the asserted basis for the decision to make the order is section 53(3)(c)(i) of the 1981 Act –

“39. The submissions made by Mr Laurence seem to conflate the two stages of the statutory process: the making of the order and its confirmation. As the judge held, this is inappropriate. It is not the surveying authority's task, when considering whether an order should be made, to anticipate the outcome of an inspector's consideration of the evidence presented to him and tested before him at an inquiry, effectively forestalling that stage of the process. This would be the consequence of substituting the balance of probabilities standard of proof for the reasonable allegation test at the order-making stage. The crucial question for the surveying authority at that stage is whether it is at least reasonable to allege that the right of way subsists. Sometimes it will be clear that this is not a reasonable thing to allege – for example, where there is a conflict of evidence and it becomes obvious that the allegation of a right of way subsisting will be impossible to maintain. But if in the view of the authority the allegation is reasonable, it may make the order.

40. There are two alternatives under section 53(3)(c)(i): either that the right of way subsists or that it is reasonably alleged to subsist. If the surveying authority were obliged to apply the balance of probabilities test to the allegation of a right of way subsisting, that distinction would be eroded or removed. This cannot have been what Parliament intended by including the second alternative. The statutory purpose is not hard to discern: that orders may be made where the relevant allegation is reasonable, but not unless it is”.

22. R (Monckton and Somerford Home Farm Partnership Limited) v Staffordshire County Council [2022] EWHC 3049 (Admin) [**“Monckton”**] was another case in which the claimants brought a claim for judicial review of the resolution of the surveying authority to make a modification order adding a footpath which passed across their land to the definitive map. The basis for the surveying authority's resolution was again the discovery of evidence which the authority found sufficiently supported a reasonable allegation of the subsistence of a right of way under section 53(3)(c)(i) of the 1981 Act. Following a rolled-up hearing, Lang J refused permission to apply for judicial review for two alternative reasons: see [10] of *Monckton*. The first reason was the existence of the statutory scheme under schedule 15 to the 1981 Act for the determination of disputes over modification orders which have been made on the basis of section 53(3)(c)(i), which Lang J found to be a suitable alternative remedy to a claim for judicial review of the decision to make the order –

“The alternative procedure, which includes an Inquiry by a specialist Inspector, is more appropriate than judicial review, as it will include an independent examination

of the facts, followed by an expert judgment on the facts and the law. An aggrieved party may then apply for statutory review by the High Court on a point of law”.

23. Lang J stated her reasons for that finding in [19] to [37] of her judgment in *Monckton*. In [19] she referred to the general principle that the judicial review jurisdiction will not be exercised where alternative remedies are available and have not been exhausted, save in exceptional circumstances. At [20], for confirmation of that general principle Lang J referred extensively to the judgment of Sales LJ at [53] to [61] in *R (Glencore Energy UK Limited) v Revenue and Customs Commissioners* [2017] 4 WLR 213 [**“Glencore”**].
24. In *Glencore*, the question for the court was whether it should exercise its discretionary jurisdiction to grant judicial review in a tax case where the taxpayer had the right of appeal to the First-tier Tribunal against a disputed charging notice. On the basis that the applicable tax legislation provided the taxpayer with a suitable alternative remedy in the form of a right to review and appeal under a statutory procedure, the court declined to do so and dismissed the claim. At [54] to [56] in *Glencore*, Sales LJ explained the basis of the suitable alternative remedy principle –

“54. In order to evaluate these submissions, it is necessary to consider the basis for the suitable alternative remedy principle. The principle does not apply as the result of any statutory provision to oust the jurisdiction of the High Court on judicial review. In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the Designated Officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.

55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.

56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures

are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.”

25. At [23] and [24] in *Monckton*, Lang J referred to Dyson J’s decision in *Nettlecombe* that the court has jurisdiction to entertain a claim for judicial review of a decision under section 53(2) of the 1981 Act to make a modification order. At [25] and [26], Lang J said –

*“25. Applying these principles to this case, as no modification order has been made, I consider that the ouster clause in paragraph 12(3) of Schedule 15 to the 1981 Act does not exclude this Court’s jurisdiction. However, as Sales LJ confirmed in *Glencore*, at [54], the suitable alternative remedy principle does not apply as the result of any statutory provision to oust the jurisdiction of the Court on judicial review. It is applied in the exercise of the Court’s discretion, to give effect to the principle that judicial review is ordinarily a remedy of last resort (at [55]).*

*26. It is apparent from the judgment in *Nettlecombe* (at 395B) that Wiltshire County Council did not seek to argue that, if the jurisdiction existed, the court should not exercise its discretion to grant relief because of the existence of a suitable alternative remedy. The principle that the Court should not grant permission where there is a suitable alternative remedy does not appear to have been relied upon by Wiltshire County Council at permission stage either. Probably because of the way the case was presented to the court, Dyson J. dealt briefly with the issue, in a pragmatic manner. He did not address the principle that judicial review is a remedy of last resort and so the court should only intervene by way of judicial review in exceptional circumstances. He placed significant weight on the benefit for the claimant of bypassing “a time-consuming and costly procedure of a public inquiry” (at 394G), but gave little weight to the legislative intention of Parliament that the making of modification orders should be subject to the safeguards of an Inquiry and consideration by the Secretary of State. The principles have now been fully considered in *Glencore* by Sales LJ at [55] – [57]. Therefore, in my view, the recent judgment of the Court of Appeal in *Glencore* is a more authoritative guide to the suitable alternative remedy principle than the High Court judgment in *Nettlecombe*”.*

26. In [28] to [34] Lang J said that the suitable alternative remedy in *Monckton* was the schedule 15 procedure for confirmation of a modification order made under section 53(2) of the 1981 Act. Lang J identified what she saw as the comparative advantages of allowing that statutory procedure to take its course and the disadvantages of the judicial review court intervening in advance of the making of the order. Schedule 15 provided for objections to the order to be considered through a transparent inquiry or hearing process. Local people were able to attend the public inquiry or hearing. All the available evidence would be evaluated, including such further evidence that may emerge during the confirmation procedure. The appointed inspector was able to deploy their expertise not only to examine the facts but also to resolve any legal issues

raised for determination. It was plainly preferable that any such issues of law were determined by the inspector on the basis of his or her clear findings of fact, rather than upon assumptions and inferences without the benefit of such findings. A decision to confirm the order was able to be challenged under paragraph 12 of schedule 15.

27. At [35] and [36], Lang J drew matters together and explained how she would resolve the question whether she should exercise the judicial review court's discretionary jurisdiction in the circumstances of *Monckton* –

“35. So the question I have to consider is whether, despite the benefits of the statutory procedure, this is an exceptional case in which there has been some serious error of law by the Council which gives rise to a compelling need for the Court to intervene by way of judicial review, in the public interest, and which overrides the usual considerations in favour of pursuing the statutory procedure (per Sales LJ at [55] and [61]). Sales LJ gave as an example a case where it is clear that a public authority is acting in defiance of the rule of law (at [55]).

36. In Nettlecombe, Dyson J. considered, at 395B-C, that this Court's discretion to intervene "should be exercised cautiously, and only in clear cases where there has been a plain error of law. In any case where the position is uncertain, and especially where the issues raised involve questions of fact, it is most unlikely that it would be appropriate to exercise the court's discretion in favour of granting relief."

37. Applying these criteria, in the exercise of my discretion, I do not consider that this is an exceptional case in which the Court should intervene so as to allow a claim for judicial review to proceed part way through the statutory procedure laid down by Parliament. There are factual issues to be examined and determined. The parties are likely to obtain further evidence to address those factual issues in the course of preparation for an Inquiry. Further, I am not persuaded that there is any serious error of law in the Council's resolution which gives rise to a compelling need for the Court to intervene in the public interest at this stage. I consider the specific grounds of challenge below”.

28. I was helpfully referred to other cases in the appellate courts in which the issue was raised whether the judicial review claimant should be refused relief on the basis that a suitable alternative remedy was available. Having reflected on those cases, I have respectfully come to the view that they neither call into question nor add substantially to the authoritative analysis of the suitable alternative remedy principle undertaken by Sales LJ in *Glencore*.

Discussion and conclusions

29. In order to decide whether this is a case which justifies this court's intervention at this stage in the overall statutory process for the making and confirmation of a modification order under section 53 of and schedules 14 and 15 of the 1981 Act, it is necessary to begin with a clear understanding of the alleged error of law for which the court is now being asked to grant relief.

30. As developed in written and oral submissions, the core of the Claimant's complaint is to be found in grounds 2, 7 and 8 of his statement of facts and grounds.
31. That complaint may be summarised as follows. The inspector's direction to the surveying authority to make the modification order rests solely on her conclusion that there is a reasonable allegation of inferred dedication of the claimed path as a right of way at common law. However, the requisite inference of an intention to dedicate may be drawn only if there is evidence that the landowner at the material times had the capacity to dedicate the right of way over his or her land. In the case of land that is subject either to a mortgage or a lease during the material period of public use of the alleged footpath, the landowner will lack the capacity to dedicate unless he or she has the consent of the mortgagee or lessee, as the case may be.
32. In this case, there was evidence before the surveying authority and the inspector which established that between 2008 and 2016 the claimed way was in the freehold ownership of Ms Garland. On 12 September 2008 Ms Garland entered into a legal mortgage under which she charged the land in favour of Svenska Handelsbanken AB. On 29 September 2008 Ms Garland entered into a further legal mortgage [**"the Barclays mortgage"**] under which she charged the land in favour of Barclays Bank plc. The Barclays mortgage is shown on the charges register of Ms Garland's registered freehold title TY340736 as having been registered on 1 October 2008. The land was also subject to a lease granted on 29 September 2008 for a fixed term of 15 years from that date. In 2014, the mortgagee appointed a receiver under the Barclays mortgage to sell the land subject to the charge. The land was sold in 2016.
33. On the question of capacity to dedicate, it was the Claimant's submission that the evidence before both the surveying authority and the inspector was clear. Between 2008 and 2016, the land over which the claimed path runs was subject to mortgage and/or lease. There was no evidence that either the mortgagees or the lessees had consented to the dedication of the claimed path as a right of way. On all the available evidence, between 2008 and 2016 the landowner, Ms Garland, lacked the capacity to dedicate the claimed way to the public and, accordingly, no inference of her intention so to dedicate could reasonably be drawn.
34. Those contentions were advanced both to the surveying authority and the inspector in paragraphs 7.1 to 7.1.4 of the objectors' response to the Friends' application. They were also advanced in paragraph 29 of the Claimant's written submissions prepared by Mr Laurence KC on 25 October 2023. Copies of the mortgages and leases were included as appendices to the report of Mr Robin Carr, the surveying authority's rights of way consultant, dated 29 March 2023, which had been submitted to the Planning Inspectorate in response to the Friends' appeal. At paragraph 2.6 of his letter of 28 November 2024 to the inspector, the Claimant's solicitor said –

"The Objectors also adopt and endorse the conclusions summarised in the [Order Making Authority Report] as to dedication at common law at para 9.6.1. In particular the Objectors rely on the lack of capacity to dedicate during the period in which the Application Route was either tenanted and/or mortgaged/charged and/or owned by a company subject to receivership. No contrary evidence, supporting an intention to dedicate at common law has been adduced".

35. The inspector considered the question whether there was a landowner with capacity to dedicate in DL47 and DL48 –

“47. It has been suggested that there was no landowner with the capacity to dedicate due to mortgages or tenancy agreements but no copies of these have been provided. Landowners can still dedicate rights of way if they have the agreements of the lender or tenant. Furthermore, any tenants of Garlands are likely to have been aware of the appeal route when leasing the building due to its existence and use.

48. However, there appears to have been a period between 2014 and 2016 when the land was held by receivers meaning there were no land owners with the capacity to dedicate”.

36. Under grounds 2, 7 and 8, the Claimant contends that the inspector was plainly in error in DL47 in stating that no copies of the mortgages or tenancy agreements had been provided. It was not in dispute that those documents were in evidence before the inspector when she reached her decision. The inspector considered the question of capacity to dedicate on the basis of a material mistake of fact which went to the heart of the inspector’s decision to direct that the surveying authority should make the modification order. It was clear from her reasons in DL47 that, on the erroneous basis that the alleged mortgages and leases had not been provided, the inspector gave very little weight to the argument that the landowner lacked capacity and accordingly the intention to dedicate between 2008 and 2016. Had the inspector properly considered the significance of the existence of the Barclays mortgage, she would have been driven to accept that, in the absence of evidence of Barclays’ consent, there was no evidence reasonably to support the inference of dedication at common law. On a correct understanding of the objectively verifiable facts, the land had been subject to the Barclays mortgage from September 2008 onwards until its sale in 2016. There was no reasonable basis for inferring that in this case, Barclays as mortgagee had consented to the dedication of a public right of way over the claimed path. On the contrary, in 2014 Barclays had asserted and exercised its rights as mortgagee to put the land into the hands of a receiver for the purposes of sale. A landowner who lacks capacity to dedicate because his or her land is subject to mortgage cannot reasonably be found to possess the requisite intention to dedicate a public right of way over that land at common law.
37. In summary, it was submitted that on a correct analysis of the facts in this case as matters stood between 2008 and 2016, the existence of the Barclays mortgage had the clear potential to be dispositive of the Friends’ application.
38. The Defendant accepted that the inspector had been in error in stating in DL47 that no copies of the mortgages and tenancy agreements had been provided. Nevertheless, even taking the significance of that factual mistake at its highest, the existence of the Barclays mortgage (and the other mortgage and leases) could not reasonably be said to be dispositive of the case for the making of the modification order on the basis of section 53(3)(c)(i) of the 1981 Act. As the inspector correctly observed in DL47, land subject to a mortgage remains capable of being found to have been dedicated as a public right of way at common law. Although there was no actual evidence that Barclays did agree to the dedication of the claimed path as a public right of way, there

was no evidence to show that Barclays had withheld its consent. The question whether Barclays' consent might reasonably be inferred was a matter for the inspector on the basis of the evidence. It was a classic example of the kind of question which an inspector was much better placed than the judicial review court to determine, on the basis of all the evidence received through the inquiry or hearing process under the statutory arrangements provided by schedule 15 to the 1981 Act. Conversely, there was every reason to anticipate that in the event that the question of mortgagee's consent was remitted to an inspector to consider with sight of the Barclays mortgage, that inspector would maintain that there was a reasonable basis for inferring mortgagee's consent and thereby reaching the same overall conclusion as the inspector in DL53. Alternatively, upon redetermination an inspector might well conclude that the evidence of public use of the claimed way between 1998 and 2008 was sufficient in itself to sustain the reasonable allegation of the creation of a right of way through the inference of dedication at common law.

39. Overall, the Defendant contended that on analysis this case was essentially similar to *Monckton*, in that the grounds of challenge raised by the Claimant do not disclose a clear case where there has been a plain error of law on the part of the inspector. The underlying analysis in DL47 was that even allowing for the existence of the mortgages and leases of the land from 2008 onwards, there remained a sufficient evidential basis for inferred dedication of the right of way at common law; including, if necessary, the inference that the landowner's dedication of that right of way had been consented to by the mortgagees and lessees during the period between 2008 and 2014. Whether that inference was indeed justified was to be resolved following examination of the facts through the operation of the schedule 15 procedure.
40. In addressing these arguments, I propose to follow the cautious approach stated by Dyson J at page 714 of *Nettlecombe*, which I have quoted in paragraph 19 above. In my view, in that passage of his judgment Dyson J was seeking briefly to encapsulate and to apply the principles later formulated by Sales LJ at [54] to [56] in *Glencore*; and in turn applied by Lang J in *Monckton*.
41. The enactment of the statutory procedure for confirmation of a modification order under schedule 15 to the 1981 Act is a clear indication that Parliament intended that any interference by the judicial review court at the order making stage should be exercised sparingly. In my view, a proposed judicial review claim which essentially calls into question the rationality of the decision to direct the making of an order (or a decision by a surveying authority that an order should be made) on the grounds of the discovery of evidence showing that a public right of way can reasonably be alleged to subsist, is unlikely to be such a case. For the reasons given by Lang J in *Monckton*, the schedule 15 confirmation process is likely to provide a more suitable remedy at which the substance of such an argument may be examined on the basis of a better understanding of the evidence through the inquiry or hearing procedure. The rights of those objecting to the order are safeguarded by the opportunity to bring a statutory challenge in this court under paragraph 12 of schedule 15.
42. There is therefore much force in Mr Riley-Smith's submissions. The quashing of the inspector's decision on this claim would not necessarily achieve finality. However, the greater the prospect that the claim will enable the correction of a clear error of law which, once corrected, may avoid the need to pursue the schedule 15 procedure, the

more likely that the case for intervention now may be justified on *Glencore* grounds. That is the underlying logic of Dyson J's reasoning in *Nettlecombe*.

43. This is case where the Claimant has been able to raise a reasonable argument that the inspector's decision is clearly erroneous in law. The inspector's reasons for concluding that the subsistence of a right of way over the claimed path could not reasonably be alleged on the basis of deemed dedication under section 31 of the Highways Act 1980 are incontrovertible. The case for making a modification order on the Friends' application therefore rests solely on the inference of dedication at common law, applying the principles authoritatively stated in Folkestone Corporation v Brockman [1914] AC 338.
44. In DL47 and DL48, the inspector recognised that the question whether the landowner of the claimed path had capacity to dedicate a right of way over her land, during the period when there was evidence of the public using the claimed path, was a material factor. It is not in dispute that the inspector was correct to do so. In DL48, she found it to be apparent that between 2014 and 2016 there was no landowner with capacity to dedicate, that being a period of time during which the land was in the hands of receivers. It was the objectors' case to the inspector that there was a similar lack of capacity between September 2008 and 2014, particularly as a result of Ms Garland's land being subject to the Barclays' mortgage. It is pertinent to note that it was Barclays as mortgagee who in 2014 exercised the powers granted under that mortgage to place the land in the hands of the receivers with the intention that it be sold.
45. In my view, it is reasonably arguable that the inspector's analysis of that material factor in DL47 is vitiated by a clear error of law. It is obviously arguable that she based her consideration on a material mistake of fact. Arguably as a result of that legal error, she did not properly consider or evaluate the question whether there was a sustainable basis to infer that Barclays had consented to the dedication of a right of way over the claimed path. It is arguable that simply to refer to the general proposition that the freehold owner of mortgaged land can dedicate a right of way with the agreement of the lender is insufficient to support the reasonable allegation that the landowner in this case had Barclays' consent.
46. In Man O'War Station Limited v Auckland City Council (No.2) [2002] UKPC 32 at [49] the Privy Council said –

“The point was taken, on behalf of the appellant, that the consent of third parties with an interest in the land over which the road ran was necessary in order for there to be an effective dedication but was absent. Their Lordships accept the principle that a person with an interest in the land inconsistent with the public right of way must consent to the dedication if the dedication is to be effective. So, if the land is subject to a mortgage, the mortgagee must consent, and, if it is subject to a lease, the lessee cannot dedicate without the consent of the lessor (see Griffith CJ in Narracan at p 864)”.
47. It is clear from that passage that the question whether consent has been granted or is to be inferred is necessarily a case specific one, to be addressed on the basis of the available evidence. It is arguable that there was simply insufficient evidence to

support the drawing of that inference in this case. If that argument is accepted, then there is a real prospect that it may lead to the disposal of the Friends' application for a modification order, since the case for inferred dedication will essentially rest on the public's use of part only of the claimed path during the period between 1998 and 2008.

48. For these reasons, which reflect the Claimant's submissions which are summarised in paragraphs 36 and 37 above, I have decided that I should grant permission for this claim for judicial review to proceed to a full hearing. I have considered whether I should limit the grant of permission to grounds 2, 7 and 8 only. I have decided that I should not do so. There is a degree of overlap with other grounds of challenge. In any event, however, if the substantive claim on those principal grounds were to fail, the case for the grant of relief in the exercise of this court's discretion on the remaining grounds is likely to be far more difficult to sustain, in the light of the approach taken by Dyson J in *Nettlecombe* applying the principles later explained by the Court of Appeal in *Glencore*.
49. I shall now give directions for the substantive hearing of this claim.