**PROPOSED STOPPING UP ORDER**

**SECTION 247 TOWN AND COUNTRY PLANNING ACT 1990**

**HIGHWAY AT QUEEN'S GROVE, NW8 6JD**

---

# LEGAL SUBMISSIONS ON BEHALF OF WEI-LYN LOH

---

## INTRODUCTION

1. These Legal Submissions are lodged on behalf of Wei-Lyn Loh, the Applicant for the proposed stopping up order, pursuant to the Inspector's direction communicated in PINS' e-mail dated 30 October 2024. They set out the legal principles and guidance which, in the Applicant's submission, should be applied in this case, before summarising the conclusions which (on the basis of the evidence as it is currently stands) the Inspector will be invited to reach when applying those principles.

2. The Applicant will update and amend its submissions on the application of the legal principles as appropriate, following the giving and cross-examination of evidence.

3. References in these submissions [x/y] are to [Tab/Page] of the Evidence Bundle.

## FRAMEWORK

### A. Legislation

4. The statutory power under which the Order is sought is s.247(2A) of the Town and Country Planning Act 1990 ("TCPA 1990") **[22/158]**, which provides that:

> "(2A) The council of a London borough may by order authorise the stopping up or diversion of any highway within the borough … if it is satisfied that it is necessary in order to enable development to be carried out –
>
> (a) in accordance with the planning permission granted under Part III"

5. The procedure for making an order under s.247 is contained in s.252 TCPA 1990. In particular (so far as is relevant to orders made by a London borough):

   a. Under s.252(1) and (3), there are obligations to advertise and display a notice stating the effect of the order and the right to object to it;

   b. Under s.252(4), where an objection is made to a proposed order within 28 days, there is a requirement to hold a public inquiry unless subsection (5A) applies;

   c. Under s.252(5A) the Mayor of London has the power to dispense with an inquiry if (s)he concludes that the holding of an inquiry is unnecessary "in the special circumstances of the case".

### B. Authorities and Guidance: Whether the order "is necessary in order to enable development to be carried out":

6. The leading authority on the use of s.247 is ***Ashby v. Secretary of State for the Environment*** **[1980] 1 WLR 673 [23/161-171]** which establishes that:

a. The use of s.247 is not precluded by the fact that the development which is the subject of the relevant permission has already commenced;[1]

b. The use of s.247 is not precluded by the fact that the development which has been carried out has already obstructed the highway;[2] but

c. (Eveleigh LJ dissenting) s.247 cannot be used where the development which is the subject of the relevant permission has been completed.[3]

7. Guidance on the point at which development should be taken to be complete for the purposes of s.247 is found in the judgments of Goff and Stephenson LJJ, as follows:

a. At p.680G, Goff LJ referred to the situation where (emphasis added)

> "(ignoring de minimis) … the work is nearly finished [but not] completed";

b. At p.681B-C Goff LJ said (emphasis added):

> "I do not see how the planning authority … can be satisfied that an order is necessary 'in order to enable development to be carried out' without ascertaining the factual situation to see whether there is in fact any part of the relevant permitted development left to be carried out or whether it has all been completed";

c. At p.681G, Goff LJ said (emphasis added):

> "I would say that any further building on the site of the highway, even though it is already stopped up by what has been done already, is itself a further obstruction which cannot be carried out without further order."

[1] See judgment of Goff LJ at p.678E; Stephenson @ p.683A-B
[2] Goff LJ @ p.681G; 682B-C.
[3] Goff LJ @ p. 681B-C; Stephenson @ p.682G-H

d. At p.683B Stephenson LJ agreed that (emphasis added):

> "On the inspector's findings of fact it was still then necessary to enable a by no means minimal part of the permitted development to be carried out"

e. At p.683C, Stephenson LJ referred to development consisting of building operations as (emphasis added):

> "a process with a beginning and an end; once it is begun, it continues to be carried out until it is completed or substantially completed".

8. Reading the two judgments together, both Goff and Stephenson LJ refer to development which is "de minimis" or "by no means minimal". In the Applicant's submission, that is the test which should be applied, and is how Stephenson LJ's reference to "substantial completion" should be understood. That conclusion is supported by:

a. the facts of ***Ashby***, where planning permission had been granted for 40 houses in circumstances where the drives of five (nos. 20, 21, 25, 34 and 36) covered the line of an existing footpath, which would become isolated once the plots were fenced.[4] Of these, no. 25 had been completed externally but had not been decorated inside because a 14' long floorboard had not been nailed down and some cupboards had not been completely installed; while nos. 20 and 21 had been completed from the outside, but radiators and sanitary fittings had still to be installed in No. 21, and floorboards had not been nailed down in the larder of No. 20.[5] It will be noted that the Court of Appeal considered these were "a by no means minimal part of the permitted development", even though the works which remained to be completed were all internal works which would not themselves have required planning permission,

[4] p. 677 B-D
[5] P.677 C

b. the approach which the Courts have taken to the concept of "substantial completion" elsewhere in planning law. For example, in ***Fidler v. Secretary of State for Communities and Local Government*** **[2010] EWHC 143 [24/172-181]** the High Court upheld the decision of a planning inspector that a dwelling constructed behind a row of straw bales was not "substantially complete" until the straw bales had been removed, even though no further works were required to the dwelling itself, and the removal of the bales would not itself have involved "development".

9. The Government has issued guidance on the use of s.247 in "Rights of Way Advice Note 9: General Guidance on Public Rights of Way Matters" (the "Guidance") **[25/182-184]**. In particular:

a. para 4.1.2 of the Guidance states:

> "Before an order can be confirmed, or indeed made, it must be apparent that there is a conflict between the development and the right of way, such as an obstruction. An outline permission might not give the degree of certainty necessary to evaluate the impact that the development will have upon the way. However, the development does not need to be in the form of a physical interference such as a building on the right of way. For example, a change of use may be sufficient."

b. Para 4.1.7 states:

> "The power contained in section [247] is only available if the development, insofar as it affects the path or way, is no tyet substantially complete (see Ashby and Dalby v. Secretary of State for the Environment [1980] 1 WLR 673 and Hall v. Secretary of State for the Environment [1998] JPL 1055. If the development has been substantially completed another type of order would have to be made (e.g. under sections 116, 118 or 119 of the HA 1980)."

10. It is clear that the references in para 4.1.7 to "substantial completion" are taken from, and are intended to reflect the decision in ***Ashby***.

**C. Authorities and Guidance: Revisiting the Planning Merits**

11. It is inherent in s.247 the planning permission will already have been granted, and that in granting planning permission the local planning authority will have had regard to the planning arguments concerning the merits (or demerits) of the development concerned.

12. The extent to which it is appropriate for a highway authority to revisit these same matters when considering whether to make an order under s.247 was considered in ***Vasiliou v. Secretary of State for Transport*** **(1991) 61 P&CR 507**, where the Court of Appeal quashed the Secretary of State's decision to confirm a stopping up order because the Secretary of State had misdirected himself when concluding that the financial loss which the stopping up would cause to a local restaurant (by way of loss of passing trade) was not a relevant consideration.

13. In particular, the Court of Appeal held that the Secretary of State had been wrong to conclude that the financial loss to Mr Vasiliou's restaurant would, as such, have been a matter which it was appropriate to take into account at the planning application stage. ***Vasiliou*** is thus clear authority for the proposition that, where a stopping up order would interfere with private interests in a manner which is "over and above that which will be sustained generally", and which are <u>not</u> a material planning consideration, the highway authority is entitled take these matters into account when deciding whether to make the order. However, Nicholls LJ also referred to circumstances in which there was an "overlap between matters which can properly be considered by the planning authority … and those which can properly be considered by the Secretary of State for Transport".

14. In that regard, Nicholls LJ held that, although the implications of the closure of the highway on pedestrian flows was a matter which the planning authority could properly take into account when deciding whether to grant permission, these were also a matter to be taken into account when considering the stopping up application, at which stage the Secretary of State was not bound by the local planning authority's

conclusions. However, Nicholls LJ also observed that Parliament could not have intended the s.247 procedure to enable an aggrieved objector to re-open the merits of a planning decision, and that there could not be "any question" of the Secretary of State going behind the planning authority's determination that there was no sound planning objection to the proposal.

15. The decision in ***Vasiliou*** is reflected in paras 4.1.4 and 4.1.5 of the Guidance **[25/183]**, which state that:

> "4.1.4 When Inspectors consider an order made under [section 247] they should be mindful that the planning merits of the development itself are not at issue in the RoW case and Inspectors should not allow that matter to be re-opened. The weighing up of the planning merits and demerits will have been determined in favour of the development (where planning permission has already been granted), see ***Vasiliou v Secretary of State for Transport*** **[1991] 2 All ER 77 (appended to these submissions).**
>
> 4.1.5. However, the Inspector does have latitude to consider wider issues. He should consider the overall public interest in diverting or stopping up a right of way and how it will affect those concerned. Considerations could include, for example, matters such as how the confirmation of the order would result in the loss of passing trade (which might be particularly relevant in view of the fact that there is no provision for compensation in relation to this type of order). Such issues may not be a material consideration at the planning stage. Furthermore, there are bound to be some matters which are overlapping – i.e. relevant to both the planning merits and the merit of whether or not an order should be confirmed."

**APPLICATION**

**A. The Stopping Up Order is Necessary in Order for the Development to be Carried Out**

16. The drawings approved under the relevant planning permission clearly show that the wall for which permission was given is to be located within land which is currently public highway **[2/7]**. Applying para 4.1.2 of the Guidance, it is therefore readily apparent that there is conflict between the development and the right of way. In particular, the construction of the wall across the right of way not only constructs the right of way, but isolates a part of the right of way in such a manner as to render it inaccessible to the public.

17. Consequently, the stopping up order is necessary for the development to be carried out.

**B. The power to use section 247 remains because the wall has not been completed**

18. Construction of the wall commenced in 2021.[6] However, commencement does not preclude reliance on s. 247: see para 5(a) above. Nor does the fact that the highway has already been obstructed result in the loss of the ability to use s.247: see para 5(b) above. Mr Westwick's observations[7] in this regard are directly contrary to the decision in ***Ashby***.

19. Having regard to ***Ashby***, the only question is whether the works which remain to be completed are *de minimis*. The highway authority is clearly of the view that they are not, and in the Applicant's submission that conclusion is obviously correct:

    a. The 3m long stretch of wall which remains to be constructed is not only part of the overall development for which permission was granted but, if constructed in isolation, would undoubtedly amount to "development" in its own right. The stopping up order is necessary for that "development" to be carried out.

[6] Proof of Colin Morris, para 2.11
[7] See para 4.14 of Mr Neil Westwick's proof

b. Completion of the wall would also comprise a "further obstruction [of the highway] which cannot be carried out without an order" (per Goff LJ @ p.681G).

c. The steps required to complete the wall are considerably more significant than the works which were outstanding in either ***Ashby*** or ***Fidler***. If the outstanding works in those cases were regarded as more than *de minimis*, the present cases is even stronger.

d. Whatever the mathematical quantification of the unfinished length of as a percentage of the overall wall, a 3m gap which is wide enough to drive a vehicles through is fundamental to the extent to which, until it has been completed, the wall is able to serve its intended purpose, i.e. to secure the property.

**C. It is not the role of the Inquiry to revisit matters relating to the planning merits which do not flow from the Stopping Up Order**

20. In the present case, the only reason why the GLA concluded that it was necessary to hold an Inquiry was because of that part of the objection by Town Legal which alleged that the wall had been completed **[5/45-46] and [12/117-118]**. In all other respects, the GLA was satisfied that the objections raised related to matters which had already been addressed at the planning stage: see paras 11-15 of the GLA Report dated 3 August 2023 **[19/142]**.

21. In applying the judgment in ***Vasiliou***, it is important to separate arguments about merits and disadvantages which flow from <u>both</u> the carrying out of the development and the stopping up order, from those which flow only from the development itself and have nothing to do with the stopping up. Hence (for example) although both the wall and the stopping up order affect the ability of members of the public to use the PRoW, the detailed design of the wall and its impact on public and private views are purely a consequence of the planning permission. It is not the function of this Inquiry to consider matters of the latter kind.

22. On this basis, arguments which have been raised relating to views of the wall from public and private viewpoints, its alleged impact on the character or appearance of the area, and the possibility of protecting the TPO trees by other means are irrelevant. In the words of the Circular, the Inspector "should not allow" these matters to be reopened.

**D. The Public Interest Supports the Making of the Order**

23. Although (applying ***Vasiliou***) concerns relating to the impact of the stopping up on the amenity of users of the highway are relevant notwithstanding the fact that they were addressed at the planning stage, and although the highway authority/Inspector is entitled to disagree with the planning authority's conclusions in this regard, it is important to recognise that:

    a. these concerns were all addressed when the decision to grant permission was taken **[4/12-18]**. Officers were satisfied that the stopping up was consistent with development plan policies and standards which have been written specifically in order to protect the amenity of users of the PRoW; and

    b. the planning authority's conclusions were supported in full by the highway authority, which is the body now responsible for making the stopping up order, whose view has not changed.

24. Consistency of approach is important. Critically, the objections which have been raised under this heading do not give rise to any new concern which has not already been taken into account by both the planning and highway authority. In the Applicant's submission, there is no good reason to disagree with the conclusions they reached when planning permission was granted.

**E. Miscellaneous: Other Legal Issues Arising from Points Raised by Objectors**

25. The Applicant notes that paras 5.1-5.18 of Mr Westwick's Proof raises various concerns about the validity of the application for planning permission, which Mr Westwick argues rendered the grant of permission "legally defective" and "would

have been sufficient for the lawfulness of the consent to be challenged through the judicial review process".[8]

26. The Applicant's witnesses will respond to the detail of these matters in their evidence. However (and irrespective of those responses) the Applicant's primary response as that Mr Westwick's complaints are an inappropriate and impermissible attempt to challenge the validity of the permission, which is beyond the lawful powers of this Inquiry.

27. In particular, it is a firmly established principle of planning law that a planning permission is valid unless and until set aside by the Courts. The normal procedure for seeking to quash a planning permission is an application for judicial review, and there are stringent rules governing the time limits for the making of such an application. In the present case, no such application has been made and the objectors are now more than three and half years outside time.[9] It would be entirely wrong if the objectors were able to circumvent those procedural safeguards by using the present stopping up process as a means of undermining the permission by the back door. For that reason alone, Mr Westwick's arguments under this heading should be disregarded.

## CONCLUSIONS

28. For the above reasons, the Applicant submits that there is no legal impediment to the making of the Order, and the Inspector is invited to recommend that it should be made.

**PAUL BROWN K.C.**
**12 November 2024**
**Landmark Chambers**
**180 Fleet Street**
**London EC4A 2HG**

[8] Westwick paras 5.13, 5.17

[9] Even if (which is not the case) they were now to make an application for judicial review, it is inconceivable that they would be granted an extension of time in circumstances, given that they have been aware of the application for a stopping up order, and therefore the fact that the permission involved the relocation of the boundary wall, for more than two years.

# VASILIOU v. SECRETARY OF STATE FOR TRANSPORT AND ANOTHER

COURT OF APPEAL (Mustill and Nicholls L.JJ. and Sir Roualeyn Cumming-Bruce): July 12, 1990

*Town and country planning—Planning permission subject to grant of street closure order—Closure would seriously affect appellant's restaurant business—Inspector recommended order should not be made—Secretary of State for Transport granted order—Whether minister had misdirected himself—Whether minister should have taken into account extinguishment of appellant's rights—Whether minister would be usurping functions of planning authority—Material considerations*

The appellant carried on a restaurant business—Giggi's Taverna—at Temple Street in the heart of the Blackpool tourist centre. Temple Street connected with Church Street and Victoria Street. Blackpool Borough Council granted planning permission for the development of a two-storey shop across the southern end of Temple Street, closing off Victoria Street and so making Temple street a cul-de-sac. The permission was subject to the grant of the necessary street closing order. The inspector, holding a local inquiry in August 1988, recommended that the order should not be made because, although an alternative route was available to pedestrians, the closure would have a serious effect on the appellant's restaurant, 60–70 per cent. of his business being passing trade. The Secretary of State for Transport rejected the inspector's recommendation on the basis that section 209 of the 1971 Act, under which the stopping up order would be made, related solely to highway matters and was not concerned with the merits of the planning permission. If the Secretary of State were to take this into account, he would be usurping the planning function. An application by the appellant to the court under section 244 of the 1971 Act as a person aggrieved by the order was dismissed by Hodgson J. On appeal to the Court of Appeal:

**Held,** allowing the appeal, that the Secretary of State had misdirected himself when exercising his discretion under section 209(1). The Minister could and, indeed, ought to to have taken into account the adverse effect an order would have on those whose rights would be extinguished—the more especially because the statute made no provision for the payment of compensation. The financial loss to the appellant was not *as such* a matter properly to be taken into account at the planning stage. Although the personal circumstances of an occupier could be a material consideration when dealing with an application for planning permission under section 29(1) of the Act, they fell to be considered not as a general rule but as exceptions to be met in special cases. No case had been advanced for the appellant's financial loss being exceptional, so that the council was not obliged to consider it when determining the planning application and the Minister of Transport would not be usurping the functions of the planning authority if he considered such loss when deciding whether to grant the street closing order.

**Cases cited:**

(1) *Benjamin* v. *Storr* (1874) L.R. 9 C.P. 400.

(2) *Fritz* v. *Hobson* (1880) 14 Ch.D. 542.

(3) *Gravesham Borough Council* v. *British Railways Board* [1978] Ch. 379; [1978] 3 W.L.R. 494; [1978] 3 All E.R. 853.

(4) *Westminster City Council* v. *Great Portland Estates plc* [1985] A.C. 661; [1984] 3 W.L.R. 1035; [1984] 3 All E.R. 744; 50 P. & C.R. 34, H.L.

**Legislation construed:**

Town and Country Planning Act 1971 (c. 78) s.209(1). This provision is set out at pages 511–512 *post.*

**Appeal** by Mr. K. Vasiliou, against a decision of Hodgson J. dated December 14, 1989 whereby he refused an application under section 244 of the Town and Country Planning Act 1971 in which the appellant claimed to be a person aggrieved by the making of a street closing order by the first respondent, the Secretary of State for Transport, in favour of the second respondent, Ladbroke City and Country Land Company Ltd. The facts are stated in the judgment of Nicholls L.J.

*John Barrett* for the appellant.
*Thomas Hill* for the first respondent.
*David Friedman, Q.C.* for the second respondent.

**NICHOLLS L.J.** This appeal raises a question concerning the matters which the Secretary of State for Transport may properly take into account in considering whether to make an order, under section 209 of the Town and Country Planning Act 1971, authorising the stopping up of a highway. The appellant, Mr. Vasiliou, carries on a restaurant business, known as Giggi's Taverna, at Temple Street, Blackpool. Temple Street is a little side-street situated at the heart of the tourist centre of Blackpool. It is about 150 yards from Blackpool Tower, and about the same distance from the sea-front promenade. It is some 16 feet or so wide and about 70 yards long. It runs north-south and lies between and connects two other roads, which are roughly parallel to each other: Church Street to the north, and Victoria Street to the south. Victoria Street is now a pedestrian precinct.

In 1986 Ladbroke City and County Land Co. Ltd. applied to Blackpool Borough Council, as the local planning authority, for permission to carry out two developments, The first, and major, development involved the construction of a two-storey building of seven shops fronting onto Victoria Street, and abutting, at one side, onto Temple Street. Permission was granted, and that development has now been completed. The second proposed development was the construction of one two-storey shop, to front onto Victoria Street, and to be built on the southern end of Temple Street itself. The new building would be erected across the whole width of Temple Street, as it now is. The building would fit between the Victoria Street buildings situated on either side of the end of Temple Street, and it would wholly close off Temple Street from Victoria Street. The length of Temple Street on which the new building would be constructed would have to be stopped up. Temple Street would become a cul-de-sac, which could be entered only from Church Street. In this way the southern one-third of Temple Street would be built over and cease to exist.

On January 6, 1987, the local planning authority granted permission for this second development, but subject to the condition that work should not commence until the necessary street closing order had been obtained. Ladbroke duly applied to the Secretary of State for Transport for the appropriate order. A local inquiry was held in August 1988. The inspector recommended that the order should not be made. His reason was this. If the southern end of Temple Street were stopped up, pedestrians who at present pass along Temple Street from Victoria Street to Church Street, or vice versa, would be able to go by an alternative route, along Corporation Street. The additional walk, of some 90 yards, would not be significant. Corporation Street could accommodate the over-flow from Temple Street without intolerable problems. But the closure of the southern end of

Temple Street would have a serious effect on Mr. Vasiliou's restaurant. In the summer between 360 and 1,000 people an hour walk along Temple Street past Mr. Vasiliou's restaurant. He is heavily dependent upon these passers-by for his custom. Between 60 per cent. and 70 per cent. of his business is passing trade. If Temple Street were stopped up as proposed, Mr. Vasiliou's business would be likely to fail. The inspector was impressed by this hardship which the closure order would cause for Mr. Vasiliou. He considered that it would be unjust in the circumstances for Mr. Vasiliou to suffer significant financial loss without the possibility of compensation.

The Secretary of State rejected the inspector's recommendation. He agreed with the inspector's findings and conclusions except for the conclusion relating to Mr. Vasiliou's objection. In paragraph 5 of his decision letter dated the February 24, 1989, the Minister said:

> Section 209 of the Town and Country Planning Act 1971, under which the stopping up Order would be made, is solely related to highway matters; it is not concerned as to the merits of the planning permission which has already been granted. For that reason the Secretary of State cannot agree with the Inspector's conclusion . . . that the effect of the stopping up on trade must be a relevant material consideration. In his view the question of any potential loss of trade is a matter for the planning authority to take into account when considering the application for planning consent. If the Secretary of State were to take this matter into account in deciding whether or not to authorise the stopping up of the highway in question under section 209(1) then he would be usurping the planning function and acting beyond his powers.

The Secretary of State stated his conclusion in paragraph 7:

> Following consideration of the Inspector's Report the Secretary of State is satisfied that the proposed closure of Temple Street is necessary to allow the approved development to be carried out. He is also satisfied that alternative routes for users of the highway to be stopped up are available and adequate. While there may be some adverse effect on local businesses caused by the closure of Temple Street, the Secretary of State does not consider that it would be appropriate to reject the proposed closure order on those grounds alone. For the reasons given above the Secretary of State does not consider that the objection raised by Mr. Vasiliou justified the Inspector's recommendation that the order should not be made. The Secretary of State has, therefore, decided to make the order without modification and has done so.

So the Secretary of State made the stopping up order.

Mr. Vasiliou applied to the court, under section 244 of the 1971 Act, as a person aggrieved by the making of the order. On December 14, 1989 Hodgson J. dismissed Mr. Vasiliou's application. The judge held that the Secretary of State for Transport had directed himself correctly, and that if he had taken into account the effect that the stopping up would have on Mr. Vasiliou's business, he would have been interfering with the planning function under the aegis of his fellow Secretary of State. Mr. Vasiliou had his chance to object on planning grounds, and it would have been wrong to take that matter into account in deciding the matters which were the func-

tion of the Secretary of State for Transport. Mr. Vasiliou has appealed from that decision.

*Planning permission and stopping up orders*

I have two preliminary observations. First, when determining which matters may properly be taken into account on an application for planning permission or an application for an order stopping up a highway, it is important to have in mind the different functions of a planning permission and of a stopping up order. It is axiomatic that a planning permission does not of itself affect or override any existing rights of property. A grant of planning permission sanctions the carrying out of a development which otherwise would be in contravention of the statutory inhibition against, in general, the carrying out of any development of land without planning permission (s.23). But if carrying out a development for which permission is granted would, for instance, be in breach of a restrictive covenant affecting the freehold, or in breach of a covenant in a lease, or infringe rights of way or rights of light of adjoining owners, the existing legal rights of those entitled to enforce the covenant or entitled to the benefit of the easement are not overridden by the grant of planning permission. This is so whether the development comprises the carrying out of building or other operations on land or the making of a material change in the use of land.

The position is otherwise with an order stopping up or diverting a highway. In the absence of such an order obstruction of a highway is a criminal offence. It is also a public nuisance. The Attorney-General, acting *ex officio* or at the relation of a third party, can bring proceedings for the removal of the obstruction. So may a local authority, acting in the interests of the local inhabitants, by virtue of the enabling powers in section 222 of the Local Government Act 1972. So also may an individual who sustains particular damage other than beyond the inconvenience suffered by him in common with the public at large. Such an individual may also recover damages for the loss caused to him by the wrongful obstruction. But once a stopping up order has been made those existing legal rights are lost. To the extent to which the highway is stopped up, the rights of the public over the highway are extinguished under the authority of a statute. Thereafter neither the Attorney-General, nor a local authority, nor a person suffering particular damage, can bring forward any complaint or seek any relief from the court in respect of the existence of the building or fence or other works which, but for the stopping up order, would constitute obstruction of a highway.

*Particular damage*

My second observation concerns the existence and nature of the claim which Mr. Vasiliou would have in the present case if the proposed building works proceeded without a stopping up order having been made in respect of the southern end of Temple Street. The better view seems to be that, whatever might have been the position in the past, today a person has a right of action if the highway is obstructed and as a result prospective customers are diverted from his place of business and in consequence he suffers loss. The authorities are summarised conveniently and succinctly by Slade J. in *Gravesham Borough Council* v. *British Railways Board*.[1]

[1] [1978] Ch. 379 at pp. 397–398.

In the instant case the closing off of Temple Street from Victoria Street would not prevent any members of the public who wished to eat at Mr. Vasiliou's restaurant from doing so, nor would any would-be diners be subjected to a significantly less convenient access route. Mr. Vasiliou's concern is that, by turning Temple Street into a cul-de-sac, members of the public who would have used Temple Street and thereby become aware of Giggi's Taverna will not do so in future. He will lose the trade of passers-by. It seems to me that, in principle, loss so arising could properly be recovered by Mr. Vasiliou from a person who wrongfully obstructed the southern end of Temple Street. The contrary was not contended before us.

What would be the nature of such a claim by Mr. Vasiliou? His loss stems from the fact that he operates a restaurant adjacent to the highway in question. In *Fritz* v. *Hobson* the plaintiff was a dealer in antiques. He had a shop in a passageway off Fetter Lane, in London, over which there was a public right of way. The defendant's building operations blocked this passageway for some months. The consequence was to drive away persons who might have become customers of the plaintiff. Fry J. held that the plaintiff was entitled to recover damages for loss in his antiques' business, which was assessed at £50, on two grounds. First, on the ground of interference with the private right enjoyed by the plaintiff, as owner of a property adjoining a highway, to have access to the highway. Secondly, on the ground of public nuisance. The plaintiff was a person who had suffered a particular injury beyond that suffered by the rest of the public. In reaching that conclusion Fry J. applied the classic exposition of the law on this subject enunciated by Brett J. in *Benjamin* v. *Storr.*[2] I do not think that the distinction between these two causes of action is material for present purposes. It is sufficient to note that a person in the position of the plaintiff in *Fritz* v. *Hobson*, and of Mr. Vasiliou in the present case, has a well-recognised cause of action, on one or other or both of the grounds just mentioned, against anybody who obstructs a highway and thereby, as a direct consequence, causes financial loss to a business being carried on on land adjoining the highway.

*Section 209*

I turn to the statutory provisions. Section 209 is in Part X of the 1971 Act. Part X is entitled "Highways." It consists of a miscellaneous collection of sections concerned principally with the stopping up and diversion of highways, the conversion of highways into footpaths or bridleways, the extinguishment of rights of way over land held by a local authority for planning purposes, and the consequential compulsory acquisition of land for highway purposes. In some instances there is provision for the payment of compensation; for example, under section 212(5) compensation is payable to a person who has an interest in land having lawful access to a highway when the highway is "pedestrianised." In other instances, including section 209, there is no provision for the payment of compensation to those adversely affected by the making of the relevant order.

Section 209(1), as amended, reads:

> The Secretary of State may by order authorise the stopping up or diversion of any highway if he is satisfied that it is necessary to do so in

[2] (1873) L.R. 9 C.P. 400 at p. 406.

> order to enable development to be carried out in accordance with planning permission granted under Part III of this Act [or by virtue of Schedule 32 to the Local Government, Planning and Land Act 1980], or to be carried out by a government department.

This subsection is to be read with section 215, which enacts the procedure for making orders under section 209. In short, notices stating, amongst other matters, the general effect of the proposed order and that within 28 days persons may by written notice object to the making of the order, have to be suitably advertised and displayed (s.215(1), (2)). If objection is received from a local authority, or from a water, hydraulic power, gas or electricity undertaker having cables or pipes under the highway, or "from any other person appearing to him to be affected by the order," the Secretary of State is obliged normally to cause a local inquiry to be held (s.215(3)). After considering any objections, and the report of the person who held the inquiry, the Secretary of State may make the order either without modification or subject to such modification as he thinks fit (s.215(5)).

These sections confer a discretionary power on the Minister. He cannot make the order unless he is satisfied that this is necessary in order to enable the development in question to proceed. But even when he is satisfied that the order is necessary for this purpose he retains a discretion; he may still refuse to make an order. As a matter of first impression I would expect that when considering how to exercise this discretion the Minister could take into account, and, indeed, that he ought to take into account, the adverse effect his order would have on those entitled to the rights which would be extinquished by his order. The more especially is this so because the statute makes no provision for the payment of any compensation to those whose rights are being extinguished. I would not expect to find that such extinguishment, or expropriation, is to take place in the exercise of a discretionary power without the Minister in question so much as considering and taking into account the effect that such expropriation would have directly on those concerned.

Having read and re-read the sections I can see nothing in their language, or in the subject-matter, to displace my expectation. I can see nothing, on a fair reading of the sections, to suggest that, when considering the loss and inconvenience which will be suffered by members of the public as a direct consequence of closure of part of the highway, the Minister is not to be at liberty to take into account all such loss, including the loss, if any, which some members of the public such as occupiers of property adjoining the highway will sustain over and above that which will be sustained generally. The latter is as much a direct consequence of the closure order as the former. The loss flows directly from the extinguishment, by the order, of those occupiers' existing legal rights.

*The respondents' case: (1) the "overlap" point*

The respondents' case is that this interpretation of section 209 is inconsistent with the scheme of the Act. Their case is that, although not stated expressly in section 209, it is implicit that the Secretary of State for Transport cannot have regard to any loss of trade which the occupier of land adjacent to a highway may suffer by reason of closure of part of the highway. This is implicit because such loss is a matter to be taken into account

at the planning application stage. Part III of the Act contains a detailed code concerning planning control, with machinery for appeals and so forth. This code is distinct from the procedure set out in Part X with regard to stopping up orders. If a loss such as Mr. Vasiliou's in the present case could be taken into account by the Secretary of State for Transport under section 209, that would result in the Part X procedure relating to highways subverting the Part III procedure relating to planning control. It would result in the merits of the planning decision being re-opened and considered again.

I am unable to accept this argument. In the first place, I cannot accept that the financial loss of which Mr. Vasiliou complains, is, *as such*, a matter properly to be taken into account at the planning application stage. I emphasise "as such." The proposed development will necessitate turning Temple Street into a cul-de-sac with no access, even for pedestrians, from Victoria Street. The local planning authority was concerned with all the planning ramifications of this. If one of the likely consequences would be the closure of Giggi's Taverna because of loss of trade, the planning authority would be concerned with the impact of that on the locality. The planning authority might also need to take into account matters such as any significant resulting loss of employment opportunities. But I do not think that Mr. Vasiliou's financial loss flowing from the failure of his restaurant was, as such, relevant to the planning authority's decision. Had the planning authority rejected Ladbroke's application regarding the second development and stated as the reason, or one of the reasons, "the proposed development is likely to cause severe financial loss to Mr. Vasiliou," in my view the decision, to that extent, would have been impeachable.

We were referred to the much-quoted observations of Lord Scarman in *Westminster City Council* v. *Great Portland Estates plc.* Under section 29(1) a planning authority, in dealing with an application for planning permission, is to have regard to the provisions of the development plan, so far as material, and to "any other material consideration." Lord Scarman observed that the test of what is a material "consideration" is whether it serves a planning purpose, and that a planning purpose is one which relates to the character of the use of the land. But he added[3]:

> Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it.

The respondents sought to rely on the references to personal circumstances of an occupier and personal hardship.

I do not think that these observations assist the respondents on this appeal. No case has been advanced, or made out, for Mr. Vasiliou's per-

[3] [1985] A.C. 661 at p. 670; 50 P. & C.R. 34 at p. 41.

sonal financial loss being an exceptional or special circumstance which, by way of exception to the general rule, the Blackpool Borough Council should have considered when deciding Ladbroke's application for planning permission. The case advanced to this court was that the impact which the development will have on trade being carried on at nearby properties was a matter to be considered at the planning state. I agree. So it was. But this does not embrace the whole subject-matter of Mr. Vasiliou's complaint, for it does not include the consequential financial loss he will suffer.

I pause to observe that, if I am right in thinking that Mr. Vasiliou's financial loss as such was not a material consideration for planning purposes, the consequence, on the respondents' construction of section 209, is that a stopping up order, extinguishing Mr. Vasiliou's existing legal rights as described above, will be made without anybody, either the planning authority or the Secretary of State for Transport or anyone else, ever taking into account the loss this will cause for Mr. Vasiliou. That is not a conclusion I would readily embrace.

There is a further reason why I cannot accept the argument that for the Secretary of State for Transport to take into account Mr. Vasiliou's financial loss would "subvert" the planning procedures or "usurp" the functions of the local planning authority or the Secretary of State for the Environment. Thus far I have concluded that Mr. Vasiliou's financial loss was not, as such, a material consideration for planning purposes. But even if this were not so, the "subversion" argument would still be unsound. The argument is founded on there being no overlap between matters which can properly be considered by the planning authority on the one hand and those which can properly be considered by the Secretary of State for Transport on the other hand. But this is not so. At the planning stage in the present case the planning authority could properly take into account, and presumably did take into account, whether the closure of the southern end of Temple Street was desirable or not. In this regard the council would have considered, amongst other matters, the repercussions such closure would have on pedestrian traffic flows in and around Victoria Street and Corporation Street. Indeed, the Department for the Environment has drawn attention to the need for local planning authorities to take into account the effect of proposed developments on public rights of way: *see* paras. 12 to 14 of Circular 1/83. But, however narrowly section 209 is construed, matters such as pedestrian traffic flows were a matter to be taken into account by the Secretary of State for Transport when considering the closure order application. It would be open to him to form a wholly different view on such matters from the view taken of them by the planning authority. Thus, as I see it, given the existence of areas of overlap, there is in any event inherent in the existence of the two separate procedures the feature that, in respect of "overlapping" matters, the persons making the two decisions will be considering the same items and may form a different view regarding them.

*The respondents' case: (2) re-opening the planning permission decision*

More serious is the respondents' further argument that, if Mr. Vasiliou's financial loss has to be taken into account on the closure order application, the Secretary of State for Transport will find himself having to investigate anew the overall merits of the development for which planning permission has been given. We were urged that, if Mr. Vasiliou's contentions on this

appeal are correct, then, in deciding whether or not to make the closure order despite the financial loss this would cause for Mr. Vasiliou, the Secretary of State for Transport would have to evaluate the desirability, from the planning point of view, of permitting the new shop to be built at all on the site of Temple Street. To carry out such an evaluation the Secretary of State for Transport would have to consider afresh the case put forward by the developer, and the supporters of the scheme. He would also have to consider afresh the case put forward by the objectors. He would need to consider the views of the local planning authority. In short, an inquiry held under section 215(3) on the closure order application would involve evidence and representations on all the matters already investigated and considered by the local planning authority, or at a planning inquiry. A closure order application would become in effect an appeal, not authorised by the statutory code relating to planning control, against the grant of planning permission.

If the consequence of what seems to me to be the natural construction of section 209 were to enable an aggrieved objector to re-open the merits of a planning decision in this way, I would see much force in this argument. Parliament cannot have intended such a result. But in my view these fears are ill-founded. A pre-requisite to an order being made under the limb of section 209 relevant for present purposes is the existence of a planning permission for the development in question. Thus the Secretary of State for Transport's power to make a closure order arises only where the local planning authority, or the Secretary of State for the Environment, has determined that there is no sound planning objection to the proposed development. I do not think that there can be any question of the Secretary of State for Transport going behind that determination. He must approach the exercise of his discretion under section 209 on the footing that that issue has been resolved, in favour of the development being allowed to proceed. It is on that basis that he must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order. In some instances there will be no significant disadvantages or losses, either (a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up or are sufficiently near to it that, in the absence of a closure order, they could bring proceedings in respect of the proposed obstruction. In such instances the task of the Secretary of State for Transport will be comparatively straightforward. In other cases there will be significant disadvantages or losses under head (a) or under head (b) or under both heads. In those cases, the Secretary of State for Transport must decide whether, having regard to the nature of the proposed development, the disadvantages and losses are sufficiently serious for him to refuse to make the closure order sought. That is a matter for his judgment. In reaching his decision he will, of course, also take into account any advantages under heads (a) or (b) flowing directly from a closure order: for example, the new road layout may have highway safety advantages.

Of course, some proposed developments are of greater importance, from the planning point of view, than others. When making his road closure decision the Secretary of State for Transport will also need to take this factor into account. But here again, I do not think that this presents an insuperable difficulty. In the same way as it is not for the Secretary of State

for Transport to question the merits, from the planning point of view, of the proposed development, so also it is not for him to question the degree of importance attached to the proposed development by those who granted the planning permission. The planning objective of the proposed development and the degree of importance attached to that objective by the local planning authority will normally be clear. If necessary, the planning authority can state its views on these points quite shortly. Likewise, if the permission was granted by the Secretary of State for the Environment on appeal, his decision letter will normally give adequate guidance on both those points. Either way, the Secretary of State for Transport can be apprised of the views on these points of the planning authority or of the Minister who granted the planning permission. The Secretary of State for Transport will then make his decision on the road closure application on that footing. In this way there will be no question of objectors being able to go behind the views and decision of the local planning authority, or of the Secretary of State for the Environment, on matters which were entrusted to them alone for decision, *viz.*, the planning merits of the development.

I add a footnote. I have referred above to the Secretary of State for Transport carrying out an exercise of judgment: weighing the disadvantages, if any, of the road closure against the advantages of not thwarting the proposed development. It should be appreciated that the need for the Secretary of State for Transport to carry out this exercise is not avoided by the respondents' arguments. Even on the respondents' construction of section 209 there will be cases where this exercise is called for. Even on the respondents' construction, there will be cases where there are significant disadvantages to members of the public generally if the road is closed (head (a) above). In such cases it must be open to the Secretary of State for Transport to make the closure order, despite these disadvantages. It must be open to him to take the view that the development should proceed, despite the disadvantages. Conversely, it must be open to him to reach the contrary conclusion. Thus, even on the narrower interpretation of the matters which the Secretary of State for Transport may consider, the judgmental exercise to which I have referred will need to be carried out from time to time. Any difficulties there may be in the Secretary of State for Transport having to carry out this exercise exist and have to be faced on either construction of section 209.

*Conclusion on section 209*

My overall conclusion on section 209 is that I can see nothing in the scheme of the Act which requires, as a matter of implication, that the Secretary of State for Transport shall not be entitled, when making a road closure order, to have regard to and take into account the directly adverse effect his order would have on all those presently entitled to the rights being extinguished by the order. In my view, he is entitled to, and should, take into account those matters when exercising his discretion on a road closure application under section 209.

*Paragraph 7 of the decision letter*

In one respect the Secretary of State's decision letter is puzzling. In paragraph 5 he expressed the view that loss of trade was a matter for the planning authority and not for him. But, certainly on one reading of the letter, in paragraph 7 he did consider and take into account the impact the road

closure order would have on local business. This led to an attack being advanced before the judge on the ground that the two paragraphs were inconsistent and that, to that extent, the letter was unintelligible. Hodgson J. observed that the material sentence in paragraph 7 was infelicitously expressed. But he decided that in paragraph 7 the Minister was not going back on what he had said earlier in the letter. So the judge rejected that inconsistency argument.

Before us this argument was abandoned. Further, and more importantly for present purposes, the respondents did not suggest that if their argument based on the construction of section 209 were wrong, the Minister's decision could still stand. Counsel, in my view rightly, did not contend that in paragraph 7 the Secretary of State for Transport was expressing his view on the alternative basis of what would be the position if, contrary to his view expressed in paragraph 5, objections based on the adverse consequences of loss of trade were a material matter for him to take into account on the road closure application.

In these circumstances it must follow that the Secretary of State for Transport erred in his approach to this matter. He misdirected himself when exercising his discretion. He should have taken into account, as one of the relevant factors, the financial loss Mr. Vasiliou would be likely to suffer if the order sought were made. That he did not do. I would allow the appeal and quash the stopping up order in respect of Temple Street mentioned by the Secretary of State in his letter of February 24, 1989.

**SIR ROUALEYN CUMMING-BRUCE.** I agree.

**MUSTILL L.J.** I also agree.

*Appeal allowed. First respondent to pay costs of applicant in Court of Appeal and below. No order in respect of costs of second respondent. Leave to appeal to House of Lords refused.*

*Solicitors*—Walker Morris Scott Turnbull; the Treasury Solicitor; Saunders Sobell Leigh & Dobbin.