Town and Country Planning Act, s.247

Stopping up of part of footway at the side of 73-75 Avenue Road London NW8 6JD (on Queen's Grove)

LPA ref: ES/I&M/ED/1/22/S247

LEGAL SUBMISSIONS
ON BEHALF OF THE LONDON BOROUGH OF CAMDEN

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1. These are short legal submissions on behalf of the London Borough of Camden ("**the Council**") in relation to a proposed stopping up of part of the footway on Queen's Grove which is at the side of the property at 73-75 Avenue Road London NW8 6JD. They should be read alongside the Council's Statement of Case and Proof of Evidence and form part of the Council's case that will be presented at the stopping up inquiry which opens on 19 November 2024.

2. These submissions are prepared to assist the Inspector in addressing two matters of law which arise in this case. First, the correct approach to the issue of whether the development which has been granted permission is still being carried out. Second, the correct approach to the merits of the proposed stopping up in the light of the grant of planning permission for works which encroach on the footway.

Approach to whether development is still being carried out

3. Section 247 of the Town and Country Planning Act 1990 provides in relevant part:

(2A) The council of a London borough may by order authorise the stopping up or diversion of any highway within the borough, or within another London borough if the council of that borough consents, if it is satisfied that it is necessary to do so in order to enable development to be carried out—
(a) in accordance with planning permission granted under Part III or section 293A, or
(b) by a government department.

4. The meaning of the words "*necessary to do so in order to be enable development to be carried out*" were considered by the Court of Appeal in *Ashby v Secretary of State for the Environment* [1980] 1 WLR 673. That case discussed the predecessor provision to s.247 in the Town and Country Planning Act 1971, which was expressed in materially identical terms. It appears to be common ground that *Ashby* is the leading case on the interpretation of these words (see, for example, para.4.7 of Mr Westwick's Proof of Evidence).

5. In *Ashby* the majority found that there was no jurisdiction to confirm a stopping up order once the development in question was complete and was therefore no longer being carried out. The following principles can be derived from *Ashby* when determining whether development is still being carried out:

    a. First, it is lawful to apply for and make or confirm a stopping up order once development has commenced and where that development obstructs the highway (*Ashby* at 678D-E per Eveleigh LJ, 680G and 681E per Goff LJ and 683A-C per Stephenson LJ).

    b. Second, development is a process which, once begun, continues to be carried out until it is completed. As such, it is possible for an order to be necessary to enable development "*to be carried out*" if development has begun and has not yet been completed (*Ashby* at 683A-C per Stephenson LJ).

    c. Third, it is therefore lawful to apply for and make or confirm a stopping up order until the point that the development has been completed (*Ashby* at 681E-F per Goff LJ) and the power to make or confirm a stopping up order is available until only a minimal or *de minimis* part of the development remains to be carried out (*Ashby* at 680G per Goff LJ and 683B-C per Stephenson LJ). On a close reading of *Ashby*, it is clear that the test adopted by the majority is whether development is "*still being carried out*" other than to a minimal or *de minimis* extent. The reference by Stephenson LJ at 681C to development being "*completed or substantially completed*" must be read in that context.

d. Fourth, when considering whether development is still being carried out, one should have regard to that part of the development on or affecting the highway, rather than the development as a whole which is the subject of planning permission (*Ashby* at 681E and G per Goff LJ, see also *Hall v Secretary of State for the Environment, Transport and the Regions* [1998] JPL 1055, 1059).

Approach to the merits of the stopping up order

6. The leading case on the approach to the merits of the stopping up order is the decision of the Court of Appeal in *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507. Again, that concerned the relevant section of the 1971 Act, which as above was expressed in materially identical terms to s.247.

7. Nicholls LJ gave detailed guidance on the material considerations for decision-makers considering stopping up applications at 515. In particular:

a. As a prerequisite for the making of an order under s.247(2A) is the existence of a planning permission, there has already been a determination that there is no sound planning objection to the proposed development. The decision-maker on a stopping up application cannot go behind that determination.

b. On the basis that the planning issues have been resolved in favour of the development being allowed to proceed, a decision-maker for a stopping up application 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*". Those disadvantages or losses might be either to members of the public generally or to persons whose properties adjoin the highway being stopped up or are sufficiently near to it that they would, in the absence of the stopping up order, be able to bring proceedings in respect of the obstruction.

c. Correspondingly, the decision maker must take into account any advantages to members of the public or adjoining occupiers flowing directly from the stopping up order, for example in highway safety terms.

d. The decision maker must also take into account the planning benefits and importance of the development, as found by the planning authority which granted the planning permission.

8. These findings have been applied with approval by the High Court in *R (Network Rail Infrastructure Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin); [2017] PTSR 1662 at para.49. There Holgate J (as he then was) stated that once the disadvantages of making the order had been weighed against the planning benefits of, and the degree of importance attaching to, the development, the decision maker must decide whether any such disadvantages or losses are of such significance or seriousness that the order should not be made. He went on to emphasise that "*the confirmation procedure for the stopping up order does not provide an opportunity to reopen the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision*" (at para.49(iv)).

9. A further immaterial consideration was identified by Goff LJ in *Ashby* at 682B-C, namely that the decision maker should disregard the fact that the highway has already been obstructed when determining whether to confirm a stopping up order.

ESTHER DRABKIN-REITER
FRANCIS TAYLOR BUILDING
12 November 2024

A time and place for hearing the application. In *In re Marendez* the registrar refused to fix the time and place for hearing. The debtor appealed against that. The appeal was not heard until after the receiving order. At the time the receiving order was made therefore, the application to set aside the bankruptcy notice had never been heard at all. The refusal to fix a hearing was effected merely by the registrar indorsing the affidavit "No cause shown," or some similar words, and without a B hearing. Rule 179 prohibits the making of a receiving order until the application to set aside the bankruptcy notice has been heard. As I have said, when the receiving order was made in *In re Marendez*, the application had not been heard, the registrar having refused to fix a date and time for hearing. Thus the issue in *In re Marendez* was whether the application could be said to have been heard prior to the C determination of the appeal by the Divisional Court. That being said, and although we have only a very brief note of the judgment in *In re Marendez*, I think it is very probable that my observations were on any view too widely expressed, having regard in particular to *In re A Debtor (No. 10 of 1953), Ex parte the Debtor* v. *Ampthill Rural District Council* [1953] 1 W.L.R. 1050 which was not cited to the court in *In re Marendez*. I agree with Browne-Wilkinson J. that the latter case, *In re A Debtor* D *(No. 10 of 1953)*, is directly in point in the present case and covers the present point.

In the circumstances, I agree that the appeal must be dismissed.

Appeal dismissed with costs.

E Solicitors: *Adlers and Aberstones.*

[Reported by MISS HILARY PEARSON, Barrister-at-Law]

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[COURT OF APPEAL]

* ASHBY AND ANOTHER *v.* SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

G 1979 Oct. 31; Nov. 1; Dec. 11 Stephenson, Goff and Eveleigh L.JJ.

Highway — Public path — Diversion order — Housing development obstructing footpath begun before diversion order published— Whether Secretary of State empowered to confirm order—Town and Country Planning Act 1971 *(c.* 78), *ss.* 209 (1), 210 (1)

H

In 1962 outline planning permission was granted to a developer for a housing development of 40 houses on a plot through which a public footpath ran. When detailed approval was sought, consideration was given to diverting the footpath. Permission was given to the developer and work commenced in 1976. A diversion order was made in respect of the footpath under sections 209 (1) and 210 (1) of the Town and Country Planning Act 1971. That was confirmed by the Secretary of State after a public inquiry in 1977. The applicants applied to

the Queen's Bench Division for an order quashing the Secretary of State's decision on the ground that some of the houses were nearly complete and it was not within his powers under section 209 (1) to validate development that had begun. After finding that some permitted development remained to be completed, the deputy judge refused to quash the decision, holding that the diversion order was necessary to enable the remaining work to be completed and that the Secretary of State could confirm the diversion of a footpath under section 209 (1) if he were satisfied that it was necessary to enable the development to be carried out in accordance with planning permission.

On appeal by the applicants:—

Held, dismissing the appeal, that the confirmation of the diversion order was valid as (*per* Eveleigh L.J.) on the true construction of section 209 (1) of the Town and Country Planning Act 1971 the Secretary of State might confirm the order stopping up or diverting the footpath if he were satisfied that it was necessary in order to enable development which had been carried out on the ground to be legalised (post, pp. 678 D–F, 679H) or (*per* Stephenson and Goff L.JJ.) the development on the footpath not having been completed, what remained to be done showed that it was necessary for the purposes of section 209 (1) to make an order to enable the development to be carried out (post, pp. 681E–G, 683A–B).

Decision of Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division affirmed.

The following case is referred to in the judgment of Goff L.J.:

Wood v. *Secretary of State for the Environment* (unreported), June 27, 1975.

The following additional cases were cited in argument:

Jones v. *Bates* [1938] 2 All E.R. 237, C.A.

Lucas (F.) & Sons Ltd. v. *Dorking and Horley Rural District Council* (1964) 62 L.G.R. 491.

Reg. v. *Secretary of State for the Environment, Ex parte Hood* [1975] Q.B. 891; [1975] 3 W.L.R. 172; [1975] 3 All E.R. 243, C.A.

Thomas David (Porthcawl) Ltd. v. *Penybont Rural District Council* [1972] 1 W.L.R. 1526; [1972] 3 All E.R. 1092, C.A.

APPEAL from Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division.

The applicants, Kenneth Ashby and Andrew Dolby, suing on their own behalf and on behalf of the Ramblers' Association, by a notice of motion dated March 9, 1978, sought an order to quash and set aside the order of the Secretary of State for the Environment dated November 2, 1977, whereby he confirmed the order of the planning authority, the Kirklees Metropolitan District Council, made under section 210 of the Town and Country Planning Act 1971, known as the Kirklees (Broad Lane Estate, Upperthong) Public Path Diversion Order 1976. The grounds of the application were: (1) that the Secretary of State's decision was not within his powers under the Act of 1971; (2) that, the footpath being obstructed so as to be impassable, the Secretary of State and the planning authority could not be satisfied that it was necessary to divert the footpath in order to enable development to be carried out in accordance with planning permission under Part III of the Act; (3) that the Secretary of State and the planning authority were wrong in holding that they could be so satisfied if any development remained to be completed; (4) that they should have held that, once development had taken place to an extent that it

A obstructed the footpath, then they could not be so satisfied; (5) that, alternatively, the Secretary of State wrongly held that the permitted development had not been completed by reason of the internal works to some of the houses and the layout of land in curtilages; and (6) that there was no evidence on which the Secretary of State could reasonably conclude that the layout of the land in curtilages formed any part of the permitted development which remained to be completed.

B The deputy judge dismissed the application on July 13, 1978, holding, inter alia, that the Secretary of State could authorise the diversion of a footpath under section 209 (1) of the Act if he was satisfied that it was necessary to enable development to be carried out lawfully in accordance with planning permission and that the order had been properly confirmed by the Secretary of State. The applicants appealed against the deputy C judge's decision on the grounds that (1) on a proper construction of section 209 (1) of the Act of 1971, the power to authorise the diversion of a public footpath was to facilitate the proposed development and that the powers created under sections 209 and 210 of the Act could not be exercised so as to validate development already carried out; (2) the deputy judge was wrong in holding that he was entitled to consider another part of the development, not directly affected by the footpath, in deciding D whether the development had been carried out; and (3) the proper procedure should have been an application under section 111 of the Highways Act 1959, in which case objectors would have been entitled to invite the Secretary of State to consider other criteria; whereas the procedure adopted effectively encouraged developers to carry out unlawful development, thereby prejudicing the objectors' rights and the considera- E tion of the merits of their objections.

The facts are stated in the judgment of Eveleigh L.J.

Barry Payton for the applicants.
Jeremy Sullivan for the Secretary of State.
The planning authority was not represented.

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Cur. adv. vult.

December 11. The following judgments were read.

STEPHENSON L.J. I will read first the judgment of Eveleigh L.J. who G is not able to be here this morning.

EVELEIGH L.J. This is an appeal against the refusal of the deputy judge to quash a decision by the Secretary of State concerning a footpath diversion order made by the Kirklees Metropolitan District Council, the planning authority under section 210 of the Town and Country Planning Act 1971.

H In 1962 outline planning permission was granted for housing development on an area of land through which ran a public footpath. Approval of the details of residential development for 40 houses was given on September 5, 1975, to a Mr. Woodhead, a builder. The proposed development involved obstruction of the footpath at a number of points and so the question of diversion arose. On September 4, 1975, the advisory panel on footpaths of the planning accepted a proposed route for the diversion. In January 1976 the builder laid out an alternative

footpath and started work on a house, No. 25, which obstructed the footpath before the planning authority had published a diversion order and of course before any application was made to the Secretary of State. For that he was fined £80 and ordered to pay £100 costs.

On March 15, 1976, the planning authority made a diversion order in respect of a new route. After objections had been received and a public meeting had rejected this diversion, the planning authority devised another route for the footpath which became the subject of the Kirklees (Broad Lane Estate, Upperthong) Public Path Diversion Order 1976. After a local inquiry, the Secretary of State confirmed the order. It is this decision which is the subject of the present appeal.

Section 210 (1) of the Town and Country Planning Act 1971 reads:

> " Subject to section 217 of this Act, a competent authority may by order authorise the stopping up or diversion of any footpath or bridleway if they are satisfied as mentioned in section 209 (1) of this Act."

Section 217 (1) reads:

> " An order made under section 210 . . . of this Act shall not take effect unless confirmed by the Secretary of State, or unless confirmed, as an unopposed order, by the authority who made it."

As the order made under section 210 was opposed, confirmation by the Secretary of State was required. Section 217 (2) reads:

> " The Secretary of State shall not confirm any such order unless satisfied as to every matter of which the authority making the order are required under section 210 . . . to be satisfied."

Thus, the planning authority and the Secretary of State have to be satisfied of the matters referred to in section 209. Section 209 (1) 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 order to enable development to be carried out in accordance with planning permission granted under Part III of this Act, or to be carried out by a government department."

It is on the interpretation of this subsection that this appeal depends. For the applicants, Kenneth Ashby and Andrew Dolby, suing on their own behalf and on behalf of the Ramblers' Association, emphasis is placed upon the words " to be carried out." It is said that these words relate to the future and cannot apply where development has begun or, alternatively and a fortiori, where development has been completed. It is argued that there is no power to ratify past activities which would only encourage developers to " jump the gun." The whole of Part X of the Act in which the relevant sections are contained and provisions in Schedule 20 and section 215 of the Act for objectors to be heard and inquiries to be held indicate that the purpose of those provisions is to prevent premature unlawful development where a highway will be obstructed. In the present case, therefore, the order and the Secretary of State's decision were invalid and the developer's only course is to apply under section 111 of the Highways Act 1959 for an order for the diversion of the highway.

The Secretary of State (the planning authority does not appear) claims that section 209 of the Act of 1971 on its proper construction does give

power to the Secretary of State to act although development has been completed and although the highway has already been obstructed. Alternatively, it is claimed that all of the permitted development had not been completed, that development in accordance with planning permission remained to be done and that, consequently, there was a situation where the Secretary of State's decision could enable development to be carried out in the future.

The alternative submission makes it necessary to see what work had actually been done. Work on house, No. 25, was begun in January 1976 and part of the house went over the footpath. Two houses, Nos. 20 and 21, were about 18 feet apart and one was on the east of the footpath and the other on the west. The tarmac drives to the garages of these houses were linked or merged and between them covered the line of the footpath over the distance from the pavement to the garages. The footpath crossed the gardens of these houses and also the plots of two further houses, Nos. 34 and 36, which were to the north of Nos. 20 and 21. Although the public could still walk along the footpath line, save that No. 25 encroached over it, the path would be totally isolated from public use when the various plots were fenced.

The house numbered 25, appeared to have been completed externally but inside it had not been decorated. A floorboard 14 feet long was missing and some cupboards had not been completely installed in the kitchen. The houses numbered 20 and 21 also appear to have been completed from the outside but inside neither had been decorated. Radiators and sanitary fittings had not been installed in house, No. 21, and floorboards had not been nailed down in the larder of house, No. 20.

In his report to the Secretary of State the inspector remarked that the footpath had not yet been legally diverted and said:

> "For this reason Mr. Woodhead [the builder] is unable to sell the three plots and houses and to complete the development so far as he is concerned and so to enable the buildings to be occupied as dwelling-houses. So long as the public has a right to walk through these plots people are not likely to buy the houses. The development permitted on plan C, away from the line of the path, is also incomplete and cannot be completed until the alternative route is known along which the path will be diverted."

He went on to say that he considered that it would be unfair to the developer to require him to pull down house, No. 25, (and possibly another house).

An application to stop up or divert a highway may be made with the Secretary of State's consent to a magistrates' court under sections 110 and 111 of the Highways Act 1959.

Part X of the Town and Country Planning Act 1971 contains provisions for stopping up and diverting highways and provisions for safeguarding the public interest before a final order is made. The considerations governing the making of an order are not precisely the same as those under the Highways Act 1959, although in some situations the order might well be obtainable under the procedure of either Act. The effect of Part X of the Town and Country Planning Act 1971 is to provide a comprehensive scheme in that Act for the development of land and the consequential interference with highways under the supervision of the Secretary of State. It is tidy and logical and ensures a consistent approach in deciding the merits of conflicting interests.

I turn now to consider the construction of section 209. The Secretary of State is empowered to " authorise the stopping up or diversion of any highway." Stopping up or diversion may refer to the past or the future. The words are as applicable to a highway which has already been diverted as to one which it is intended to divert. I cannot accept the argument that the word " authorise " is inappropriate to something already done. The first meaning in the *Shorter Oxford Dictionary* 3rd ed. (1944) vol. 1, p. 125, for the verb " to authorise " is given as " To set up or acknowledge as authoritative. To give legal force to; to sanction, countenance." Where " authorise " embodies the idea of future conduct, it is defined in the second meaning in that dictionary. I read section 209 as saying that the Secretary of State may acknowledge as authoritative or give legal force to or sanction the stopping up and, consequently, he may deal with a highway that has been stopped up or one that will be stopped up. Indeed, the above meaning of the word is borne out by section 209 (4), which provides:

> " An order may be made under this section authorising the stopping up or diversion of any highway which is temporarily stopped up or diverted under any other enactment."

The Secretary of State has to be " satisfied that it is necessary to do so." This means that it is necessary to authorise the stopping up or the diversion. We then come to the words so strongly relied on by the applicants " in order to enable development to be carried out in accordance with planning permission granted under Part III of this Act," etc. Mr. Payton for the applicants would have us read this as though " carried out " were equivalent to " begun." I cannot so read it. For something to be carried out it must of course be begun, but bearing in mind the use of the past participle it must also contemplate completion. Section 209 of the Act is not concerned with the possibility of the works being carried out from a physical or practical point of view. It is an enabling section and is concerned to remove what would otherwise be a legal obstacle (not a physical obstacle) to development. In other words, the authorisation has to be necessary in order to enable development to be carried out lawfully. If it has not yet been carried out lawfully, the purpose for which the Secretary of State is given power to " authorise " is still there as the basis for the exercise of that power. Thus far, then, I see nothing in the words of the section themselves to prevent the Secretary of State from authorising an already existing obstruction of the highway caused by development already carried out to completion. Mr. Payton, however, says that Parliament must be taken to have intended to discourage unlawful development and furthermore to deny assistance in any way to a developer who, as he put it, " has jumped the gun."

The development covered by the section is " development . . . in accordance with planning permission granted under Part III " of the Act. It is relevant therefore to see what development may be permitted under Part III. Section 32 (1) reads:

> " An application for planning permission may relate to buildings or works constructed or carried out, or a use of land instituted, before the date of the application, whether—(*a*) the buildings or works were constructed or carried out, . . . or (*b*) the application is for permission to retain the buildings or works, or continue the use of the land, without complying with some condition subject to which a previous planning permission was granted."

A Clearly the legislature did envisage the possibility of legalising that which had already been done without permission. There is, however, no reference in section 32 to the obstruction of a highway. As the Act of 1971 envisages authorisation by the Secretary of State for development purposes and provides a comprehensive scheme (as I have already stated), it seems to me illogical that in a particular case where planning permission may be granted, namely under section 32, the Secretary of State should B have no power to authorise the stopping up. This would presumably be the case if " to be carried out " made authorisation impossible when the work had already obstructed the highway.

If the construction of section 209 is in any way ambiguous, I would resolve the ambiguity in favour of consistency in the operation of the scheme for every kind of permitted development envisaged by the Act. C Developers who act unlawfully would have to be dealt with by the penal provisions applicable to their conduct.

The matter does not stop there, however. Section 32 (2) reads:

> " Any power to grant planning permission to develop land under this Act shall include power to grant planning permission for the retention on land of buildings or works constructed or carried out, or for the continuance of a use of land instituted, as mentioned in D subsection (1) of this section; and references in this Act to planning permission to develop land or to carry out any development of land, and to applications for such permission, shall be construed accordingly."

The words " and references in this Act to planning permission to develop E land or to carry out any development of land," etc., are of importance. The references are not limited to the sections contained in Part III of the Act. It is true that " applications for such permission " will be made under Part III, but there are references to " planning permission to develop land " and to " the carrying out of any development of land " elsewhere than in Part III. Section 209 refers to " development to be carried out in accordance with planning permission granted under F Part III "; that is to say, " planning permission to develop land," the expression used in section 32. Putting it another way, " planning permission granted under Part III of this Act " (the words of section 209) *is* " planning permission to develop land." Consequently, by virtue of section 32 (2), the words in section 209 must be construed to include planning permission for the retention on land of buildings or works constructed or carried out, etc., as mentioned in subsection (1) of section G 32. This makes it quite clear to my mind that Parliament cannot be said to have intended that there should be no authorisation when a highway had already been obstructed or when the development had already been carried out. In other words, it emphasises that what is being applied for is an order to enable development to be carried out lawfully. This must be so because ex hypothesi in a case to which section 32 refers, H the development has already been carried out on the ground. It is perfectly permissible, consequently, to read section 209 as saying that the Secretary of State may authorise the stopping up of any highway if he is satisfied that it is necessary to do so in order to enable development which has been carried out on the ground to be legalised.

I appreciate that it can be argued that the power of the Secretary of State to authorise development ex post facto should be limited to a case where planning permission has been applied for by virtue of section 32

itself. However, once one recognises that section 209 can apply to an application under section 32, the future tense as contended for by Mr. Payton cannot be upheld. An argument seeking to limit retrospective authorisation to the section 32 case can only be based on the argument that the developer who " jumps the gun " must be denied the procedure under section 209 if it is conceivably possible to do so. Such an argument really rests on an inferred intention to penalise such a person by forcing upon him the procedure provided by the Highways Act 1959. While the conditions for the exercise of the power to make an order under the Highways Act 1959 are not the same as those contained in the Town and Country Planning Act 1971, there are many cases where an order could be made under either Act.

Mr. Payton has contended for the applicants that in this present case the application falls to be deal with under section 111 of the Highways Act 1959. I do not see that any worthwhile advantage is to be obtained in this way. It is surely better for the Secretary of State who may have to consider the merits of the development permission, to consider at the same time the highway question. Moreover, it does not always follow that the developer is blameworthy. Genuine mistakes can occur. A builder might be prepared to say that he will pull the house down and start again. Why should not the Secretary of State give his authority in such a case? I regard section 209 as saying that if development is of the kind which involves obstruction of a highway, then the Secretary of State can give his authority so that the development can be carried out legally. Until his authority is given development, although carried out on the ground, has not been carried out legally. The Secretary of State is concerned to give legal status to a development of which he approves. He is not concerned to inquire how far, if at all, the work has been done.

I would dismiss this appeal.

GOFF L.J. I much regret that I am unable to accept Eveleigh L.J.'s conclusion that section 209 of the Town and Country Planning Act 1971 includes power for the Secretary of State to make a completely retrospective order, although on a more restricted construction of the section which I am prepared to adopt, I agree that this appeal should be dismissed.

I feel the force of his argument and I would like to adopt it, or any other process of reasoning which would enable me to arrive at the conclusion that the Secretary of State's powers under section 209 are fully retrospective, since that would avoid the possible anomaly which will arise if (ignoring de minimis) an order may be made where the work is nearly finished, although not if it has been completed. It would also protect an innocent wrondoer, as in *Wood* v. *Secretary of State for the Environment* (unreported), June 27, 1975, where an order had actually been obtained before work started, but it was void for a technical irregularity and it was assumed that a further order could not be made under section 209 or 210.

However, I am driven to the conclusion that this is not possible in view of the words of futurity " to be carried out " which occur in section 209 (1), and I think this is emphasised by the sharp contrast with the expression in section 32 (1) " constructed or carried out, or a use of land instituted, before the date of the application."

Moreover, with all respect, I do not think that any anomaly is involved, in that if the work be started without planning permission, the

A developer will have to have recourse to section 32, and that contains no provision for authorising work upon the highway. The answer, to my mind, is that if the work has been finished sections 209 and 210 do not apply, whether or not planning permission was obtained before the work was done or started, and if it has not been finished the permission granted would have to be not only under section 32 to retain the work so far done, but also to authorise the rest, and that would bring in sections 209 B and 210. I do not see how the planning authority or the Secretary of State can be satisfied that an order is necessary " in order to enable development to be carried out " without ascertaining the factual situation in order 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.

Moreover, one cannot escape this difficulty by holding that in law C there has been no development until the work is completed, because development occurs as soon as any work is done, and to say otherwise for the purposes of sections 209 and 210 would be inconsistent with the definition of development in section 22 (1), and with section 23 (1). Any work is a development, even if contrary to planning control: see section 87 (2). It cannot be any the less a development because it is unlawful for D an entirely extraneous reason, namely, that it is built upon the highway. Nor, I think, can it be said that the planning authority or the Secretary of State has to perform a paper exercise, looking only at the plan and ignoring the facts. This is possibly what the legislature ought to have said, but it has not said it. It would be necessary to do unwarranted violence to the language. One would have to read the section as if it said " to be carried out or remain," or " it is or was necessary."

E So I turn to the more limited alternative. Can it be said that if development on the highway has not been completed, then what remains to be done does show that it is necessary to make an order to enable development to be carried out, none the less so because the order will as from its date validate the unlawful exercise?

In my judgment, the answer to that question should be in the affirma- F tive, on the simple ground that what remains to be done cannot be carried out so long as what has already been done remains unlawful and liable to be removed, at all events where the new cannot physically stand alone. It would be a very narrow distinction to draw between that kind of case, for example, building an upper storey or putting on a roof, and a case where what remains to be done can stand alone but is only an adjunct, for example, a garage, of what has to be removed, the house.

G If necessary, I would say that any further building on the site of the highway, even although it is physically stopped up by what has been done already, is itself a further obstruction which cannot be carried out without an order.

Much reliance was placed by the applicants on paragraph 1 (2) (*c*) of Schedule 20 to the Town and Country Planning Act 1971, but I do not H think that that presents any unsurmountable difficulty. The words " is to be stopped up, diverted or extinguished " clearly refer only to the effect of an order, because the paragraph reads on " by virtue of the order." So it is in no way inconsistent with an order being made to give validity to what remains to be done and indirectly to what has been done in fact but unlawfully. The positioning of the notice is a little more difficult, because the ends or an end of the relevant part of the highway may already have disappeared, but the notice can still be given on the face of whatever

obstruction has been constructed. The general sense of the paragraph is perhaps against my construction, but it is only an administrative provision and certainly does not, in my view, exclude it.

Section 90 (1), which draws a distinction between carrying out and continuing, has caused me some difficulty, but this distinction is not repeated in the final provision in subsection (5) and I do not feel driven by this section from the alternative construction which I have proposed, which is beneficial and which I would adopt.

When it comes to the exercise of discretion, in my view the planning authority or the Secretary of State should disregard the fact that the highway has already been obstructed, for he ought not on the one hand to make an order he otherwise would not have made because the loss to the developer if no order be made would be out of all proportion to the loss to the public occasioned by the making of the order, for that loss the developer has brought upon himself, nor on the other hand should the planning authority or the Secretary of State, in order to punish the developer, refuse to make an order which he otherwise would have made. Punishment for the encroachment, which must in any event be invalid for the period down to the making of the order, is for the criminal law.

I should add finally that Mr. Payton for the applicants made much of the public policy of preserving amenities for ramblers; but in many cases this is not the point, because even if no order be made the developer may well, either before or after development starts, be able to obtain planning consent for revised plans and develop the site, so making the highway no longer a place for a ramble. The relevant considerations will be the desirability (if any) of keeping any substituted way off the estate roads, and the convenience of the way as a short cut, whether or not to a place where one can ramble, and if a diversion is proposed the relative convenience of the old and the new way, whether any different diversion would be better and whether in suitable cases diversion is necessary or whether the way may simply be stopped up.

For these reasons, I agree that this appeal should be dismissed.

STEPHENSON L.J. I am attracted by the construction put by Eveleigh L.J. on section 209 of the Town and Country Planning Act 1971, but I agree with Goff L.J. that it does violence to the language of the section and, for the reasons he gives, I cannot accept it.

Sections 209 and 210 require the Secretary of State or the planning authority to be satisfied that to authorise a diversion order *is* necessary in order to enable development *to be carried out* in accordance with planning permission granted under Part III of the Act. They do not require, or permit, either to be satisfied that it *was* necessary to authorise a diversion order, or that it is necessary to authorise one ex post facto, in order to enable development *to have been carried out*. I cannot give what seem to me reasonably plain words that strained meaning unless it can be confidently inferred from their context or other provisions in the Act that that meaning would express Parliament's intention. And I do not find in any of the provisions of this Act to which we have been referred, including section 32, or in the provisions of the Highways Act 1959, any clear indication that what appears to be a requirement that the Secretary of State or a planning authority should be satisfied on the facts that something cannot be done in the future without a diversion order is

intended to be a requirement that the Secretary of State or a planning authority should be satisfied on paper that something done in the past unlawfully needs to be legalised by a diversion order.

I am, however, in agreement with the view that, on the facts of this case, development was still being carried out which necessitated the authorisation of a diversion order at the time when the diversion order was authorised and confirmed. I agree with the deputy judge that on the inspector's findings of fact it was then still necessary to enable a by no means minimal part of the permitted development to be carried out.

In my judgment, development which consists of building operations—and it may be development which consists of change of use, as to which I express no concluded opinion—is 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. That fact of life may produce the deplorable result that the earlier the developer "jumps the gun" the better his chance of completing the development before the Secretary of State or the planning authority comes to consider whether it is necessary to authorise a diversion order. But it may not save the developer from unpleasant consequences and it does not enable me to attribute to the legislature an intention which it has not expressed.

I agree that the appeal fails.

Appeal dismissed.
Secretary of State's costs to be paid by applicants.

Solicitors: *Franks, Charlesly & Co. for Pearlman Grazin & Co. Leeds: Treasury Solicitor.*

[Reported by MISS HENRIETTA STEINBERG, Barrister-at-Law]

[CHANCERY DIVISION]

* WESTMINSTER CITY COUNCIL *v.* HAYMARKET PUBLISHING LTD.

[1979 W. No. 1223]

1979 Oct. 17, 18 Dillon J.

Rating—Unoccupied hereditament—Surcharge—Commercial building unoccupied for more than six months—Legal charge in favour of mortgagee prior in time to rating authority's charge—Whether rating authority's charge on all interests in land—Whether binding on purchasers from mortgagee—General Rate Act 1967 (*c.* 9), *s.* 17*A* (*as amended by Local Government Act* 1974 (*c.* 7), *s.* 16)

On January 3, 1974, a company acquired certain commercial premises, which it charged by way of legal mortgage in favour of a bank, to secure all moneys and indebtedness present and future owing by the company to the bank. The premises remained empty and unused for a period extending beyond October 24, 1975, and a rating surcharge amounting to £16,940·93 became

Operational development - dwelling and garage - building across line of footpath

Case Comment

Journal of Planning & Environment Law

J.P.L. 1998, Nov, 1055-1062

Subject
Planning

Keywords
Development; Diversion of highways; Footpaths; Planning permission

Cases cited
Hall v Secretary of State for the Environment, Transport and the Regions [1998] J.P.L. 1055; [1998] 3 WLUK 344 (QBD)

Legislation cited
Town and Country Planning Act 1990 (c.8) s.257

J.P.L. 1055 Planning permission was granted in August 1996 for the construction of two dwellings and two garages on land that was traversed by a public footpath. The footpath cut across the corners of one house and garage. Work on the proposed development started in December 1996 and work on the relevant garage had begun by January 1997. The Council made an order diverting the footpath on February 3, 1997 under section 257 of the Town and Country Planning Act 1990 on the basis that the order was necessary to enable development to be carried out.

The applicant objected to the order and the Inspector held an inquiry on July 1, 1997. Before then the developer had substantially completed construction of the garage, but also before the inquiry, part of the garage over the footpath was demolished enabling a claim that the development was not substantially complete. The Inspector confirmed the order and the applicant applied to the High Court under section 287 of the 1990 Act to quash the confirmation. The application raised the question of whether the Inspector had power to confirm an order made under section 257 to enable development to be carried out in accordance with a planning permission when the development had already been carried out but then demolished.

Held, allowing the application:

1. It was important to consider the question of "substantial completion" according to its context.

2. When a discrete and a substantial part of a planning permission is completed in accordance with that permission, then that part of the permission has been completed and achieved, and is spent in so far as that aspect of the permission is concerned. This was not inconsistent with the accepted principle that a permission for operational work continues until completed. In the present case the development under the permission could have continued beyond the garage if it had not been completed as a whole. On the other hand, the principle of continuing operational development did not have as a corollary that the developer could keep going back to the start of his development and begin again for whatever reason that might be thought appropriate.

3. At the time of the inquiry, the planning permission was spent in so far as the highway was concerned. It was spent where the corner of the house and the garage were physically constructed, and additionally and consequentially, the rebuilding of the wall could not be carried out under the August 1996 planning permission at the date of the inquiry, so the requirements of section 257 could not be met.

The following judgment was given:

J.P.L. 1056 **The Deputy Judge:** This is an application under section 287 of the Town and Country Planning Act 1990 to quash a decision of the first respondent's Inspector. The Inspector had, following a local public inquiry, confirmed an order made under section 257 of the Town and Country Planning Act 1990, stopping up and diverting a footpath at Blackthorn. The order was entitled the Cherwell District Council Blackthorn Footpath No. 6 Diversion Order 1997.

Sections 257 and 259 of the Act, so far as relevant, provide as follows:

"257(1) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath or bridleway if they are satisfied that it is necessary to do so in order to enable development to be carried out--

(a) in accordance with planning permission granted under Part III, or

(b) by a government department.

(2) …

(3) …

(4) In this section "competent authority' means--

(a) in the case of development authorised by a planning permission, the local planning authority who granted the permission …

259. (1) An order made under section 257 or 258 shall not take effect unless confirmed by the Secretary of State, or unless confirmed, as an unopposed order, by the authority who made it.

(2) The Secretary of State shall not confirm any such order unless satisfied as to every matter of which the authority making the order are required under section 257 …"

The application raises the question of whether the Inspector had power to confirm an order made under section 257 to enable development to be carried out in accordance with a planning permission when the development had already been carried out but then demolished.

Planning permission had been granted in August 1996 for the construction of two dwellings and two garages on land which was, in part, traversed by the public foorpath in question. The history of the matter appears to indicate some error or misunderstanding as to the true line of the footpath which in fact cut across the corners of one house and one garage. Work on the proposed development started in December 1996, and work on the relevant garage had begun by January 1997. The Council made an order diverting the footpath on February 3, 1997. The applicant objected to the order, and the Inspector held the inquiry on July 1, 1997. Before then, the developer had substantially completed construction of the garage, but, also before the inquiry, part of the garage over the footpath was demolished enabling a claim that the development was not substantially complete.

The Inspector's conclusions at paragraphs 13.8 and 13.9 of his decision letter are relevant. Before I read those, I read first paragraph 13.2 in his conclusions. He says:

"13.2 To confirm the order I have to be satisfied, under section 257 of the 1990 Act, that the diversion is necessary to enable the development to be carried out in accordance with planning permission granted under Part III of the Act. I am satisfied this necessity exists."

At 13.8 and 13.9 he said:

"It is not disputed that the powers given by section 257 of the 1990 Act do not avail in a case where the development has been substantially completed. The objectors rightly draw attention to the provision in paragraph 24 of Annex C to Department of the Environment Circular 2/93 that development should be regarded as completed if the work remaining to be carried out is minimal. It is unsatisfactory that attempts have been made to alter the situation of the *J.P.L. 1057* development having been substantially completed which is admitted to have obtained until very recently.

13.9 It is not clear that those attempts having been successful. All they consist of is demolishing (but only up to a height of 2 metres) one corner of the garage. One wall of the garage continues to obstruct completely 1.8 metres of the footpath; another wall continues to obstruct completely 2 metres of the footpath. The demolition has achieved nothing except freeing from obstruction 2 metres of the footpath up to a height of two metres. A highway includes so much of the air space as is needed to enable the public to pass and repass and the highway authority to carry out its duty of maintenance (*Tunbridge Wells Corporation v. Baird* [1898] A.C. 434) and there are statutory restrictions on building over highways. It is arguable that the demolition has not resulted in any of the development being incomplete in relation to the use of the footpath. Having regard to *Ashby v. Secretary of State for the Environment* [1980] 1 All E.R. 508 there has at least to be, at the date of the authorisation, some development remaining to be carried out on the line of the highway. I find that on 2 metres of the line of the footpath some development at present remains to be carried out and that, by a narrow margin, the development is not substantially complete so as to deny the Council the use of the powers given by section 257 of the 1990 Act."

Accordingly, at paragraph 13.12, he reached his conclusion to confirm the order.

It is appropriate to set out the Inspector's description of the proposed footpath, and the surrounding area, and that he did in Part 7 of his decision letter. At 7.1 he said of the present footpath:

"7.1 *The present footpath.* Point C lies on a strip of land bounded on both sides by walls. Progress southwards from point C is prevented by a fuel tank. Northwards from point C the footpath is obstructed by a garage and then by a house. Part of the garage has been demolished so that a length of about 2 metres of the footpath which would be obstructed if the garage were actually completed is freed from obstruction up to a height of about two metres. The rest of the present footpath crosses rough ground some of which is to form the garden of the house and the rest of which is to form a paddock with a screen of trees. There is no beaten track. At point A the footpath is obstructed by overgrown vegetation."

At 7.2 and 7.3 he said of the proposed footpath and surrounding area:

"7.2 *The proposed footpath* Between points B and C the route of this footpath runs alongside the north-east boundary of a wall forming part of the building which used to be the Rose and Crown public house; it then runs alongside a wood post and rail fence for a distance of about 6 metres alongside the kitchen garden of Manor Cottage. Between points B and C there is a track about 2.5 metres wide made of crushed bricks. Between points B and A the route crosses rough ground which is intended to become a paddock.

7.3 *The surrounding area* The footpath leads to open countryside north of point A. The footpath itself is affected by houses which exist, or which are in the process of being built, on the north side of Thame Road. No public right of way is shown on the definitive map southwards from point C; there is no physical means of proceedings southwards from point C."

The Inspector reported the case for the order making authority as including the following matters: first, in paragraphs 9.2 and 9.3, that it was said by the order making authority:

"9.2 Although the order refers to building of two new houses in accordance with [the planning permission of August 1996] only one of those houses ("house 1') and its detached garage are relevant to the order. Two houses were referred to in the order only to achieve consistency with ***J.P.L. 1058*** the planning permission. To secure that consistency the order should be modified so as to refer to the garaging. That reference is crucial because the development is substantially complete except for the garage for house 1.

9.3 It is admitted that the garage for house 1 was substantially complete, but part of it has been pulled down so as to leave it in a state of not being substantially complete. The previous completion should be disregarded because the decision on whether or not to confirm the order should be taken in the circumstances which now exist. House 1 is substantially complete, but that should not prevent the confirmation of the order because for the purposes of the development the house and its garage are a single entity."

Then at 9.8 that the order making authority said:

"9.8 The Ramblers' Association (Oxfordshire Area) the Open Spaces Society and the Oxford FieldPaths Society claim that the order cannot be confirmed because the development has been substantially completed. That claim is not correct. The most significant element imposing on the footpath is the garage of house 1. That garage is not now substantially complete. The substantial completion of the rest of the development does not inhibit the confirmation of the order."

The applicant's argument was reported, so far as material, at paragraph 12.3 where the inspector reported:

"12.3 Section 257 of the 1990 Act provides that a competent authority may by order authorise the stopping up or diversion of a footpath or bridleway if they are satisfied that it is necessary to do so in order for development to be carried out. This power is not available where the development has been substantially completed. Paragraph 24 of Annex C to Department of the Environment Circular 2/93 provides that development should be regarded as completed if the work remaining to be carried out is minimal. The only remaining work in this development is minimal and results from recent demolition of part of the development. Thus the development has already been carried out. It follows that the order cannot be confirmed."

Mr George Laurence Q.C., for the applicant, makes his submissions in this way: the powers of section 257 ceased to be available to the Secretary of State for the Environment as a matter of law, once the relevant development had been substantially completed. *Ashby* is referred to as the authority for that proposition. The reasoning for this being because, on the wording of section 257's identical predecessor under the 1971 Act, it could not, as a matter of law, be necessary to divert the highway to enable a development to be carried out which had already been carried out by being substantially completed. On the date of completion, the power of the Secretary of State to confirm the order, having regard to section 259(2) of the Town and Country Planning Act 1990 was therefore no longer available to him.

He said that on the finding of the Inspector here, the completion had occurred in the present case sometime before the date of the inquiry on July 1, 1997. The developer then sought to undo the effects of what he had done by demolishing a certain part of what he had previously constructed. The consequence was that the Inspector had been prepared to conclude by a narrow margin, so as to be satisfied under sections 257(1)(a) and 259(2), that it was necessary to divert the footpath.

Mr Laurence posed the question as being whether, having completed the garage pursuant to the planning permission, it did remain open to the developer to rely on paragraph (a) of section 257(1) of the Act. He said that it was not open because once a relevant development had been completed or substantially completed then, based on the *Ashby* case, that is the end of the jurisdiction under sections 257 and 259 of the Act.

J.P.L. 1059 He put the same point in another way by saying that once the development in accordance with a particular planning permission granted under Part III of the 1990 Act has been completed, then the planning permission itself has been fully implemented and is accordingly spent. You cannot demolish a building for which you have been granted planning permission and then purport to re-erect that self same building pursuant to that same planning permission.

He argues that same planning permission cannot be implemented more than once. The carrying out of building operations is, he argues, as said in *Ashby* itself, a process with a beginning and an end. In relation to any questions under section 257, the relevant development is that which affects the public highway to be stopped up or diverted. Once that development has been completed, the planning permission has been fully implemented and is spent. Accordingly, argues Mr Laurence, the Inspector had no grounds upon which to be satisfied as required by section 257(2) of the Act. Therefore his confirmation does fall to be quashed.

Mr Laurence particularly referred to and relied on passages from the (majority) judgments in the *Ashby* case. I am referring here to *Ashby* as reported in [1980] 1 W.L.R. 673.

At page 681B, Goff L.J. said:

"I do not see how the planning authority or the Secretary of State can be satisfied that an order is necessary "in order to enable development to be carried out' without ascertaining the factual situation in order 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."

I draw attention to the word "relevant". Then at page 681E he goes on:

"So I turn to the more limited alternative. Can it be said that if development on the highway has not been completed, then what remains to be done does show that it is necessary to make an order to enable development to be carried out, none the less so because the order will as from its date validate the unlawful exercise?"

I draw attention to the indications of the words "on the highway".

The learned Lord Justice went on in his judgment to answer that question:

"In my judgment, the answer to that question should be in the affirmative, on the simple ground that what remains to be done cannot be carried out so long as what has already been done remains unlawful and liable to be removed, at all events where the new cannot physically stand alone. It would be a very narrow distinction to draw between that kind of case, for example, building an upper storey or putting on a roof, and a case where what remains to be done can stand alone but is only an adjunct, for example, a garage, of what has to be removed, the house.

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

Again, there is a reference to "the site of the highway" in that part of the judgment.

Then Stephenson L.J. said at page 683A to B:

"I am, however, in agreement with the view that, on the facts of this case, development was still being carried out which necessitated the authorisation of a diversion order at the time when the diversion order was authorised and confirmed. I agree with the deputy judge that on the inspector's findings of fact it was then still necessary to enable a by no means minimal part of the ***J.P.L. 1060*** permitted development to be carried out. In my judgment, development which consists of building operations--and it may be development which consists of change of use, as to which I express no concluded opinion--is 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."

Miss Alice Robinson, for the first respondent, argues that the position should be looked at in a different way. As a preliminary argument, she notes that the point raised in this Court was not argued before the Inspector and so in order to succeed, the applicant must demonstrate that if it had been raised, the Inspector could not have confirmed the order.

Then she argues that there should be a distinction in the approach to "substantial completion" according to the context in which the issue is being considered. If the context is a consideration of the section 257 issue as in the *Ashby* case, then it can be seen that the focus of such issue will relate only to the question of whether the development which affects the footpath is substantially complete.

In contrast, if the issue, and therefore the context, is the question now being raised by Mr Laurence, that is to say, of determining whether planning permission is spent, then this is a different question determined in a different way.

In looking at this second and different context of whether planning permission as a whole is spent, Miss Robinson referred to *Pioneer Aggregate UK Limited v. Secretary of State for the Environment* [1985] 1 A.C. 132 at 136F to 137A and pages 145H to 146E. This reference was made as authority for the proposition that until development as a whole is completed, the work provided within it may be authorised and carried out by the planning permission. It is all work which may be carried out before the planning permission is spent, apart from *de minimis* factors. Reference for the same purpose was also made to Neill L.J.'s judgment in *Durham County Council v. Secretary of State for the Environment* [1990] J.P.L. 280 at 283 to 284.

Miss Robinson then identified various items of evidence which showed that development within the planning permission, for example, post and rail enclosure had not been carried out. From this Miss Robinson says that it is plain that the Inspector was focusing his attention on the development affecting the footpath, in the context of the question raised by the *Ashby* case, namely whether development on the highway had been completed. He did not, because the point was not raised before him, consider the question of the whole development being substantially completed so that the permission was spent. Therefore, it is argued that if the new point had been put to the Inspector the Court cannot be satisfied that he could not have confirmed the order.

Miss Robinson's final point is that as the planning permission for the house and garage was not spent, this permission authorised work to walls of the garage which had been built and demolished. That building and demolition which had already taken place did not take away the authority given by the planning permission to construct a garage; rebuilding fell within the planning permission, and such works as were properly seen to be within the ambit of the planning permission were authorised by that permission, so the true position, Miss Robinson argued, was as follows:

-- first, planning permission existed for works of completion of the garage walls, the facts that such works were already carried out did not render the planning permissions spent for the purposes of section 257;

-- secondly, as a whole the planning permission was not spent as it was for operational works; and

-- thirdly, the work to the garage walls is authorised by the planning permission.

Consequently, she says, Mr Laurence's arguments cannot prevail.

J.P.L. 1061 In considering these various arguments, I do accept Miss Rorinson's point that it is important to consider the question of "substantial completion" according to its context. Although Mr Laurence has pointed out a number of instances where the order making authority argued that the development as a whole had been substantially completed and that that must be a matter of weight, this is not necessarily the same point as saying that the whole development was completed so that the planning permission was spent, in circumstances where such a question was not in issue. Given the development aspects which did appear to require completion, away from the garage area, I do not find that I am satisfied that if this aspect of the point had been taken before the Inspector he would not have confirmed the order.

Nevertheless, I do find that there is a difficulty in confirming the Inspector's decision. This difficulty relates to Mr Laurence's submission that the planning permission's authorisation for the building of the demolished wall was implemented when the wall was first built and to that extent the planning permission in its material aspects were spent.

Mr Laurence drew attention to sections 55(1) and 55(1A) of the 1990 Act. By section 55(1) development includes building operations and section 55(1A) states that "building operations" include, "demolition of buildings" and "rebuilding". So Mr Laurence says that three distinct species of building operations are involved in the current situation--first erection of the garage wall, then demolition of the garage wall, and last, rebuilding of the garage wall. The fact that demolition and rebuilding are identified in the Act as activities which count as building operations illustrates, says Mr Laurence, that demolition and rebuilding of the garage wall were neither of them activities caught by the planning permission relevant to this case. Because of section 257(4) of the Act, this was the August 1996 permission. On its proper construction, that planning permission authorised building operations consisting of the construction of two houses and their garages, and it did not authorise their partial demolition and subsequent rebuilding.

I do not find this an easy issue. I do not consider that Mr Laurence's analysis based on section 55(1A) necessarily and in principle leads to the conclusion which he claims. Nor do I find Miss Robinson's argument that the development permitted was operational and therefore may continue until wholly completed does, although acceptable in principle, provide an answer to the particular problem which I must resolve. I acknowledge also that there may be practical difficulties consequent upon Mr Laurence's arguments in the sense that there may need to be more frequent occasion to return to the planning authority for consents. I have not had identified to me any authority which directly answers the question with which I am faced, although I have found assistance in the judgment of Stephenson L.J. in the *Ashby* case to which I have referred. Nevertheless, it does seem to me that it is right that when a discrete and substantial part of a planning permission is completed in accordance with that permission, then that part of the permission has been completed and achieved, and is spent in so far as that aspect of the permission is concerned. To knock the garage down and rebuild it is not in my judgment authorised by this planning permission. I do not find that this is inconsistent with the accepted principle that a permission for operational work continues until completed. In the present case, the development under the permission could have continued beyond the garage if it had not been completed as a whole. On the other hand, I do not consider that the principle of continuing operational development has the necessary corollary that the developer can keep going back to the start of his development and begin again, for whatever reason that may be thought appropriate.

The consequence of my judgment is that at the time of the inquiry the planning permission was spent so far as the highway was concerned, it was spent where the corner of the house and the garage were physically constructed, and additionally and consequentially, the rebuilding of the wall could not be ***J.P.L. 1062*** carried out under the August 1996 planning permission at the date of the inquiry, so the requirements of section 257 could not be met.

The result is that this application succeeds and the decision is quashed.

Comment. The Court of Appeal decision in *Cynon Valley Borough Council v. Secretary of State for the Environment* (1987) 53 P. & C.R. 68 introduced the idea that a planning permission could be exhausted or spent. So far as the term "spent" suggests that the planning permission is lost, the concept goes against the principle established in *Pioneer Aggregates UK Ltd v. Secretary of State for the Environment* [1985] A.C. 132 that a planning permission once granted cannot be lost except by express statutory

words as when it has never been implemented. It is therefore better to understand the *Cynon* principle as laying down a rule of construction. Thus in the present case the crucial question was whether the grant of permission for the house and garage authorised both the erection of the buildings and their subsequent demolition and re-erection. The amendment of the definition of development expressly to include the demolition of buildings is strong evidence that the grant of planning permission only authorises the first erection of the building and that is that. On the other hand as the Deputy Judge recognised in most situations this would be a very technical argument and could lead to practical difficulties. For example, if in the course of building operations, the builder discovered that there had been mistakes in the way the foundations had been put down, it would be absurd if that builder had to seek further authorisations to pull down and re-erect what had already been built. The common-sense answer must be that the demolition and re-erection would be all part of the authorised building operations. In this regard counsel for the Department tried to argue that what was important was the final completion of the operations and it was only when the full permission had been completed, that it became impossible to knock down and start again. The Deputy Judge rejected this argument holding that once a discrete and substantial stage of a permission had been completed, there was no right to knock down that part and rebuild, even if all of the permission had not been completed.

This ruling is probably technically correct but it will need to be applied pragmatically. Indeed the problem will only arise in special cases like the present case where the right to stop up the footpath turned on whether this was necessary in order to carry out authorised development. The fact that development will obstruct a public right of way is a material consideration and permission could be refused on that basis. The grant of permission does not in itself entitle the developers to obstruct or interfere with a public right of way. Without an order stopping up the footpath the wilful obstruction of the right of way is a criminal offence under section 137 of the Highways Act 1980. In that regard, if neither the local planning authority nor the Secretary of State is prepared to make such an order, the existence of the footpath effectively undermines the grant of planning permission. On the other hand only the local highway authority has the power to prosecute under section 137; see *Westley v. Hertfordshire C.C.* [1998] J.P.L. 947. Further it seems that there is often a reluctance on highway authorities to prosecute; see Mark R. Williams, "Footpaths and Bridleways Affected by Development--Potential Problems and Possible Reforms" [1989] J.P.L. 651 at 658.

Nevertheless it could be argued on the lines of *R. v. Warwickshire County Council, ex p. Powergen plc* [1998] J.P.L. 131 that once planning permission has been granted, the grant should effectively remove any discretion as to whether the footpath should be stopped up. Indeed Williams has suggested the procedures should be streamlined so that the relevant local planning authority could make a concurrent decision on the right of way modification or extinguishment order at the same time that it approves planning permission.

The instant decision shows how important it is for developers not to jump the gun, since once the part of the development has been completed which obstructs the footpath, it will too late to use the powers under the town and country planning legislation. In such a case it will still be possible to have the footpath diverted or extinguished under the Highways Acts but in such a case this will only apply if it can be shown that the highway is no longer needed for public use. Even if that was done in the present case, the developer would still technically need a separate planning permission to re-erect the part of the building which had been demolished.

Queen' s Bench Division

Regina (Network Rail Infrastructure Ltd) *v* Secretary of State for Environment, Food and Rural Affairs

[2017] EWHC 2259 (Admin)

2017 July 25, 26; Sept 8

Holgate J

Planning — Planning permission — Conditions — Grant of planning permission for residential development — Condition restricting completion of balance of development until order for stopping up of footpath confirmed or not confirmed — Inspector declining to confirm order as condition not meeting statutory test of necessity — Whether statutory test properly applied — Whether planning condition properly construed — Whether stopping up order "necessary" to implementation of planning permission — Whether decision to be quashed — Town and Country Planning Act 1990 (c 8) (as amended by Planning and Compulsory Purchase Act 2004 (Commencement No 9 and Consequential Provisions) Order 2006 (SI 2006/1281), art 5(c), Restricted Byways (Application and Consequential Amendment of Provisions) Regulations 2006 (SI 2006/1177), reg 2, Sch 1(1), para 1, Growth and Infrastructure Act 2013 (c 27), s 12(2)(4)(5) and Planning (Wales) Act 2015 (anaw 4), s 38(2)(3)(a)), ss 257, 259

Planning — Practice — Case management — Observations on identifying and determining preliminary issues — Observations on efficient use of court resources including avoidance of excessively long skeleton arguments or court bundles

The local planning authority granted a developer planning permission for the development and construction of up to 142 houses and the provision of associated infrastructure. The claimant having raised safety concerns in relation to a footpath running close to the boundary of the development site and crossing both tracks of a railway line, the authority as the competent authority made an order under section 257 of the Town and Country Planning Act 1990[1] providing for the stopping up of the footpath and the provision of an alternative route crossing the railway line via a bridge. The planning permission contained a negative condition ("the *Grampian* condition") which provided that no more than 64 of the houses were permitted to be built unless (i) the stopping up order was confirmed by the Secretary of State or (ii) the Secretary of State did not confirm the order. Objections to the stopping up having been made, a public inquiry was convened. At the inquiry, the inspector invited submissions on the preliminary question whether in the light of the terms of the *Grampian* condition the stopping up order was legally capable of being confirmed. The inquiry closed without the inspector having taken any evidence on the merits of the order. The inspector concluded that the order was incapable of being confirmed since the effect of exception (ii) to the *Grampian* condition was that the order was not "necessary" within the meaning of section 257 of the 1990 Act. The claimant sought judicial review of that decision.

On the claim—

Held, allowing the claim, that for a stopping up order made under section 257 of the Town and Country Planning Act 1990 to be confirmed the Secretary of State had to be satisfied that a planning permission existed and that it was necessary to authorise the stopping up of the public right of way to enable the development to take place in accordance with that permission; that the test of necessity in section 257 of

[1] Town and Country Planning Act 1990, s 257, as amended: see post, para 40.
S 259, as amended: see post, para 41.

the 1990 Act did not mean "essential" or "indispensable", but instead meant "required in the circumstances of the case", which circumstances included the relevant terms of the planning permission and its conditions; that in the case of a *Grampian* condition relating to the stopping up of a highway, it was the terms of the particular condition rather than the mere existence of the permission which satisfied the necessity test, so that the proper construction of the condition, an objective question of law, was required in order properly to apply the test; but that, even where the necessity test was satisfied, the Secretary of State had a discretion to decline to confirm the order on its merits having considered the advantages and disadvantages of the making of the order; that the two exceptions in the *Grampian* condition had to be read consistently with each other, both conditions envisaging that the embargo on carrying out the residual part of the development necessitated the making and consideration of a stopping up order under section 257 to divert the footpath in the manner described; that the embargo or prohibition made the stopping up order necessary for the purposes of section 257; that both exceptions dealt with the effect of the Secretary of State's decision as to whether or not the order should be confirmed and required the application of the merits test, exception (i) addressing the situation where the merits test was satisfied and the section 257 order confirmed and exception (ii) addressing the situation where the merits test was not satisfied and the order not confirmed; that, in those circumstances, the inspector had clearly misconstrued the *Grampian* condition and had erred in law in concluding that the section 257 necessity test had not been met; and that, since that conclusion had been the sole basis on which the inspector had refused to confirm the order, the decision would be quashed and the issue remitted to be redetermined by a different inspector (post, paras 53–56, 66, 68–70, 73, 81).

Grampian Regional Council v City of Aberdeen District Council (1983) 47 P & CR 633, HL(Sc) and *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77, CA considered.

Per curiam (i) The determination of a preliminary issue without receiving all the evidence and submissions in the case is handled with particular care (see, for example, the Queen's Bench Guide, para 7.3.1). It is necessary to consider precisely what the preliminary issue should be and to draft the terms of that issue in advance of the hearing. The written arguments of the parties may then be focused on that issue and exchanged beforehand. The decision whether a preliminary issue should be heard will also address the need for an agreed statement of facts sufficient to enable the point to be determined. It would be advisable for the Planning Inspectorate to consider giving, or if it already exists reviewing, guidance to planning inspectors on (a) the circumstances in which it is truly appropriate for a preliminary issue to be determined and (b) the procedure to be followed, including inviting submissions on whether a preliminary issue should in fact be decided, and if so how the issue(s) should be defined and what directions should be made. The determination of a preliminary issue must be compatible with the statutory framework within which the subject matter before the Secretary of State is to be decided. This procedure is only likely to be appropriate in a limited range of cases (post, paras 37, 39).

Further observations on cases where the trial of preliminary issues may or may not be appropriate (post, paras 34–36).

(ii) For applications for statutory review or judicial review of decisions by planning inspectors or by the Secretary of State, including many of those cases designated as "significant" under CPR Practice Direction 54E, a core bundle of up to about 250 pages is generally sufficient to enable the parties' legal arguments to be made. In many cases the bundle might well be smaller. Even where the challenge relates to a decision by a local planning authority, the size of the bundle need not be substantially greater in most cases. Prolix or diffuse grounds and skeleton arguments, along with excessively long bundles, impede the efficient handling of business in the Planning Court and are therefore contrary to the rationale for its establishment. Whichever party is at fault, such practices are likely to result in the judge needing

more time to pre-read material so as to penetrate or decode the arguments being presented, the hearing may take longer, and the time needed to prepare a judgment may become extended. Consequently, a disproportionate amount of the court's finite resources may have to be given to a case prepared in this way and diverted from other litigants waiting for their matters to be dealt with. Such practices do not comply with the overriding objective and the duties of the parties under the Civil Procedure Rules and are unacceptable. The court has wide case management powers to deal with such problems, including for example CPR r 3.1. For example, the court may consider refusing to accept excessively long skeletons or bundles, or skeletons without proper cross-referencing. It may direct the production of a core bundle or limit the length of a skeleton, so that the arguments are set out incisively and without "forensic chaff". It is the responsibility of the parties to help the court to understand in an efficient manner those issues which truly need to be decided and the precise points upon which each such issue turns. The principles in the CPR for dealing with the costs of litigation provide further tools by which the court may deal with the inappropriate conduct of litigation, so that a party who incurs costs in that manner has to bear them (post, paras 10–12).

The following cases are referred to in the judgment:

Benjamin v Storr (1874) LR 9 CP 400
Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283
Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1994; [2003] JPL 1048, CA
Chesterfield Properties plc v Secretary of State for the Environment, Transport and the Regions (1997) 76 P & CR 117; [1998] JPL 568
E v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351; [2004] LGR 463, CA
Grampian Regional Council v City of Aberdeen District Council (1983) 47 P & CR 633; 1984 SC (HL) 58, HL(Sc)
K C Holdings (Rhyl) Ltd v Secretary of State for Wales [1990] JPL 353
Lenlyn Ltd v Secretary of State for the Environment (1984) 50 P & CR 129; [1985] JPL 482
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E)
R v Ashford Borough Council, Ex p Shepway District Council [1999] PLCR 12; [1998] JPL 1073
R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74; [2017] PTSR 1126
Rhymney Valley District Council v Secretary of State for Wales [1985] JPL 27
Sharkey v Secretary of State for the Environment (1991) 63 P & CR 332; [1992] 2 PLR 11, CA
Tilling v Whiteman [1980] AC 1; [1979] 2 WLR 401; [1979] 1 All ER 737, HL(E)
Vasiliou v Secretary of State for Transport [1991] 2 All ER 77; 61 P & CR 507, CA

The following additional cases were cited in argument or referred to in the skeleton arguments:

Lawson Builders Ltd v Secretary of State for Communities and Local Government [2015] EWCA Civ 122; [2015] PTSR 1324, CA
Pye v Secretary of State for the Environment, Transport and the Regions [1998] 3 PLR 72; [1999] PLCR 28
R v Coventry City Council, Ex p Arrowcroft Group plc [2001] PLCR 7
R (Hart Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840 (Admin); [2005] 2 P & CR 31; [2005] JPL 1602

A **CLAIM** for judicial review

By a claim form, and pursuant to permission granted by Dove J, the claimant, National Rail Infrastructure Ltd, sought judicial review of the decision dated 4 January 2017 of an inspector appointed by the defendant, the Secretary of State for Environment, Food and Rural Affairs, not to confirm a stopping up order, relating to a footpath situated within a proposed development site and crossing the Settle–Carlisle railway line, B made under section 257 of the Town and Country Planning Act 1990 by the first interested party, Eden District Council. The principal ground of challenge was that the inspector's sole basis for declining to conform the order, namely that the conditions of the planning consent granted to the developer, the second interested party, Story Homes Ltd, made it legally impossible for the order to be confirmed under section 259 of the 1990 Act.

C The facts are stated in the judgment, post, paras 1–33.

Juan Lopez (instructed by *Bond Dickinson llp*) for the claimant.
Tim Buley (instructed by *Treasury Solicitor*) for the Secretary of State.
Jonathan Easton (instructed by *Shoosmiths llp*) for the developer.

8 September 2017. **HOLGATE J** handed down the following judgment.

D

Introduction

1 The claimant, Network Rail Infrastructure Ltd ("NR"), applies for judicial review of the decision given by an inspector on behalf of the defendant, the Secretary of State for Environment, Food and Rural Affairs, by letter dated 4 January 2017. The inspector decided that the order made E under section 257 of the Town and Country Planning Act 1990 ("the TCPA 1990"), known as the Eden District Council Public Path Stopping Up Order (No 1) 2015 Cross Croft, Appleby ("the Order"), should not be confirmed. In summary, section 257 enables a local planning authority, in this case Eden District Council ("EDC"), to authorise by order the stopping up or diversion of any footpath, bridleway or restricted byway, if they are satisfied that it is necessary to do so in order to enable development to be carried out in F accordance with a planning permission.

2 The recital to the Order stated that it was made to enable development to be carried out under two planning permissions granted by Eden District Council, namely 11/0989 granted on 30 July 2013 and 14/0594 granted on 13 May 2015. Both permissions authorised the construction of up to 142 houses, and the provision of open spaces and associated infrastructure at land G off Cross Croft/Back Lane in Appleby. The site lies to the south west of the Settle-Carlisle railway line and just south of Appleby station. Both permissions were granted subject to a negative *Grampian* condition (see *Grampian Regional Council v City of Aberdeen District Council* (1983) 47 P & CR 633) which prevented more than 32 houses being constructed until a footpath diversion order had been made and confirmed. Currently the footpath runs close to the north-eastern boundary of the development site H and then crosses both tracks of the railway line. The condition stated that the Order should provide for (a) the stopping up of the footpath so as to prevent any access from the development site to the railway crossing, (b) the stopping up of a section of the existing footpath and (c) the provision of an alternative route which would run inside the north-eastern boundary of the development

site and connect with a highway crossing the railway line over a bridge further to the north west. The Order made by EDC gave effect to that requirement. The condition was imposed to address safety concerns which NR had said would result from the carrying out of the development.

3 The Order attracted objections from (inter alia) members of the public and associations representing the interests of footpath users. Consequently, by section 259 of the TCPA 1990 the Order could not take effect unless it was confirmed by the defendant. He decided to hold a public local inquiry under Schedule 14 to the TCPA 1990.

4 The inquiry was held on 29 November 2016. On the previous day, the inspector made an unaccompanied inspection of the footpath and the site of the development. By the time of the public inquiry, the developer, Story Homes Ltd ("SHL"), had applied under section 73 of the TCPA 1990 for the grant of a fresh planning permission for the same development but with amendments to the *Grampian* condition. The developer's planning application was made in the context of the Order under section 257 which had already been made by EDC. The developer proposed that (a) the restriction to 32 houses should be increased to 64 houses and (b) that restriction would be lifted if either of two exceptions were satisfied. The first exception continued to repeat the requirement that the stopping up order should be made and confirmed. But in the alternative, the second exception would allow the prohibition on the construction of more than 64 homes to be lifted in the event of the defendant deciding that the order should not be confirmed. On 9 March 2016 EDC approved the section 73 application and granted planning permission for the development of 142 homes subject to the revised condition proposed by the developer (Ref 15/1097). The council's decision resulted in the grant of a freestanding planning permission. It was open to SHL to decide which of these permissions to carry out and hence which version of the negative *Grampian* condition should be satisfied.

5 Shortly before the public inquiry opened, on 16 November 2016 Mr Alan Kind, an objector to the Order, wrote to the Planning Inspectorate, contending that in view of the terms in which planning permission 15/1097 had been granted it could no longer be said that the stopping up was "necessary" in order to enable the development to go ahead and therefore the Order should be treated as outwith the powers of the defendant. Another objector, Mr Geoff Wilson, wrote to the Planning Inspectorate to similar effect on 18 November.

6 The public inquiry had been set down for a hearing lasting some three days. However, when the inquiry opened the inspector announced that because objectors had submitted to him that the Order was legally incapable of being confirmed, that issue should be dealt with at the outset. The inspector then went on to hear submissions on this point from EDC and NR in support of the Order, and from objectors.

7 Towards the end of the morning of the first day of the inquiry, the inspector repeated his provisional view expressed earlier on during the hearing that, for the reasons advanced by the objectors, it was not legally possible for the Order to be confirmed. Counsel for NR submitted to the inspector that he should nevertheless proceed to hear all of the evidence which had been prepared for the three-day public inquiry dealing with the merits of the Order and the objections to it. It was suggested that the inspector could revisit the issue which he had raised that morning once he had heard and considered all of

A the evidence. However, the inspector rejected that suggestion and closed the inquiry. The hearing therefore lasted only a half day. His decision letter then followed just over a month later on 4 January 2017.

8 I regret the need to have to make some observations on the inappropriate manner in which the claim was put before the court. I do so in order to make it plain to litigants that practices which were followed in this case, and regrettably sometimes in others, are not acceptable. B Notwithstanding the clear statement by Sullivan J in *R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126, paras 5-9, this claim was accompanied by six volumes comprising over 2,000 pages of largely irrelevant material. The claimant's skeleton argument was long, diffuse and often confused. It also lacked proper cross-referencing to those pages in the bundles which were being C relied upon by the claimant. The skeleton gave little help to the court.

9 The court ordered the production of a core bundle for the hearing not exceeding 250 pages. During the hearing, it was necessary to refer to only five or six pages outside that core bundle. Ultimately, as will be seen below, the claim succeeds on one rather obvious point concerned with the effect of the *Grampian* condition in the 2016 permission. But this had merely been alluded to in para 76 and the first two lines of para 77 of the skeleton. Indeed, D the point was buried within the discussion of ground 3 of the claim, a part of the claimant' s argument to which it does not belong. Nevertheless, Mr Tim Buley, who appeared on behalf of the defendant, acknowledged that he had appreciated that this point could be raised. He was ready to respond to it.

10 Certainly, for applications for statutory review or judicial review of decisions by planning inspectors or by the Secretary of State, including many E of those cases designated as "significant" under Practice Direction 54E supplementing CPR Pt 54, a core bundle of up to about 250 pages is generally sufficient to enable the parties' legal arguments to be made. In many cases the bundle might well be smaller. Even where the challenge relates to a decision by a local planning authority, the size of the bundle need not be substantially greater in most cases.

11 Prolix or diffuse "grounds" and skeletons, along with excessively F long bundles, impede the efficient handling of business in the Planning Court and are therefore contrary to the rationale for its establishment. Where the fault lies at the door of a claimant, other parties may incur increased costs in having to deal with such a welter of material before they can respond to the court in a hopefully more incisive manner. Whichever party is at fault, such practices are likely to result in more time needing to be spent by the judge in G pre-reading material so as to penetrate or decode the arguments being presented, the hearing may take longer, and the time needed to prepare a judgment may become extended. Consequently, a disproportionate amount of the court's finite resources may have to be given to a case prepared in this way and diverted from other litigants waiting for their matters to be dealt with. Such practices do not comply with the overriding objective and the H duties of the parties: see CPR rr 1.1 to 1.3. They are unacceptable.

12 The court has wide case management powers to deal with such problems: see for example CPR r 3.1. For example, it may consider refusing to accept excessively long skeletons or bundles, or skeletons without proper cross-referencing. It may direct the production of a core bundle or limit the length of a skeleton, so that the arguments are set out incisively and without

"forensic chaff". It is the responsibility of the parties to help the court to understand in an efficient manner those issues which truly need to be decided and the precise points upon which each such issue turns. The principles in the Civil Procedure Rules for dealing with the costs of litigation provide further tools by which the court may deal with the inappropriate conduct of litigation, so that a party who incurs costs in that manner has to bear them.

13 This judgment is set out under the following headings: (i) planning history; (ii) a summary of the inspector's decision; (iii) the identification and determination of a preliminary issue; (iv) relevant legal principles; (v) the flaws in the decision letter; and (vi) other grounds of challenge.

Planning history

14 The first relevant planning permission (11/0989) was granted on 30 July 2013. It granted detailed planning approval for the proposed housing development. Because NR had raised safety concerns regarding potential additional usage of the pedestrian crossing of the railway lines, condition 14 of the permission provided:

> "No development hereby approved shall take place beyond plots 1–22 and 133–142 until a footpath diversion order has been made and confirmed. The order shall incorporate the diversion of the exiting [sic] footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle–Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane. The footpath shall be fully completed, including lighting, and made available prior to the occupancy of plots 23–132."

15 On 13 March 2014 EDC granted planning permission 13/0969, pursuant to an application made under section 73 of the TCPA 1990, by varying condition 2 of the 2013 permission so as to substitute a new layout altering the route of the proposed footpath diversion through the estate (Drawing SL054.90.9.SL.CPL.Rev P). The permission replicated condition 14 of the 2013 consent.

16 SHL then applied for a further variation of the consent they had obtained so as to delete altogether the negative *Grampian* condition. EDC did not accept that proposal. The further section 73 consent granted by the council on 13 May 2015 (14/0594) retained the same *Grampian* condition (now referred to as condition 13). Condition 1 also required the development to be carried out in accordance with a revised site layout, referred to as "Rev V", which showed the new, diverted footpath to be provided within the development site. The path was to run parallel to the north-eastern boundary of the site.

17 In November 2015 SHL made a further application under section 73 to vary condition 13 of the consent 14/0594. An accompanying planning statement explained that there had been a delay in resolving the issue whether the existing footpath should be diverted in accordance with the Order (which by this time had been made by EDC) and so, in order to maintain the rate of development on the site and the involvement of the workforce employed on the project, the developer asked that the cap on the amount of housing that could be built before satisfying the *Grampian* condition be raised from 32 to 64 units. SHL also asked for the terms of the condition to be varied so that the

A cap would be lifted, and the residue of the development (the remaining 78 units) could be carried out not only if the Order was confirmed and the footpath diverted, but also if the Secretary of State should refuse to confirm it. SHL envisaged that the Secretary of State might take the view that the Order was not justified on its merits; for example, following an inquiry he might consider that NR' s safety concerns were insufficient to justify the stopping up and diversion of the existing footpath. In that event, it was suggested that the B basis for the imposition of the cap in the *Grampian* condition would have been overcome. SHL expressly put forward the revised condition providing for these two alternative outcomes to a decision on whether the Order should be confirmed, so that if the Secretary of State should decide against confirmation on the merits, it would be unnecessary for SHL to make a further section 73 application for a fresh planning permission for the same C 142 house scheme but omitting the *Grampian* condition. They were seeking to avoid any further unnecessary delay to the carrying out of the remainder of the whole development (see also Mr McNally's witness statement referred to in para 62 below).

18 EDC agreed with the developer' s proposal and issued a fresh planning permission 15/1097 on 9 March 2016 with condition 13 expressed in the following terms:

D

> "No development hereby approved shall take place beyond plots 1–22, 49–53, 87–95, 73–74, 98–113 and 133–142 (64 units total) unless any of the following exceptions occur: (i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle–Settle public railway crossing fromt eh [sic] site (including the E erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane, as [sic] been made and confirmed by the [local planning authority] or the Secretary of State, or (ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point (i) does not confirm the order; upon any confirmed diversion and stopping up order coming into force, the new F footpath route shall be fully completed including lighting and made available prior to the occupation of units 39–48 and 126–132."

19 From the documentation before the court it does not appear that SHL asked for any other variation of the consent 14/0594. However, condition 1 of permission 15/1097 required the development to be carried out in accordance with a different layout to Rev V, referred to as "Rev U". G It is common ground that this version differed from Rev V in only one respect, namely it omitted a section of the route of the alternative footpath running towards the north-western corner of the site. It is also common ground that by the time of the public inquiry on 29 November 2016, the developer had only constructed that section of the alternative footpath corresponding to the length shown on Rev U.

H

A summary of the inspector's decision

20 In para 2 of his decision the inspector stated:

> "At the inquiry, the objectors submitted that the Order was incapable of confirmation as the wording of the relevant condition attached to the

planning permission was such that the statutory test found in section 257 of the 1990 Act could not be said to be satisfied." A

This argument was based upon exception (ii) in condition 13 of permission 15/1097: see para 24 below.

21 Paras 3–8 of the decision letter summarised the planning history. In para 4 the inspector recorded that the negative *Grampian* condition had been imposed by EDC "in the light of an objection to the development made by NR which contended that the housing estate would generate increased pedestrian traffic over the level crossing with a consequential increase in the risk of an accident occurring". B

22 In para 6 the inspector noted that EDC had rejected SHL's application in July 2014 (14/0594) to delete the *Grampian* condition altogether, on the basis of a study commissioned by the developer which concluded that the increased risk in the use of the crossing through the completion of the housing development was marginal. EDC decided to retain the *Grampian* condition in its original form. C

23 In para 7 of his decision the inspector noted that there had been no objection, not even from NR, to SHL's planning application which resulted in the permission 15/1097, with its revised *Grampian* condition.

24 In paras 9, 10 and 15 of the decision letter the inspector summarised the objectors' case as to why the Order no longer fell within the scope of section 257 of the TCPA 1990 by virtue of condition 13 of the permission 15/1097: D

"9. The objectors submit that the wording of the condition attached to the revised planning permission 15/1079 [sic] and the development which has already taken place on the site make the order incapable of confirmation. The effect of the 'exception' described in (ii) of condition 13 of 15/1097 being that the closure of the path across the railway is not necessary to enable the development to be carried out; consequently, the order does not meet the statutory criteria of section 257 of the 1990 Act and could not be confirmed. E

"10. In addition, it was submitted that it was not necessary to divert the path to allow development to take place as the houses were not being built on the footpath subject to the Order, the majority of which lay outside the development boundary. It was only because of the condition imposed by the council could the diversion be considered necessary. Whereas that would have been true of condition 13 attached to 14/0594, condition 13 of 15/1079 [sic] provided that development could take place without the footpath being diverted. Furthermore, the objectors submitted that the planning permission which was being implemented was 15/1079 [sic] which was not cited in the order and that the order was therefore no longer valid." F G

"15. The objectors' view was that permission 15/1097 and the terms of condition 13 attached to that permission could not be overlooked, either as a matter of course but particularly in the light of what had been built on the site. The condition attached to the planning permission which was being implemented demonstrated that the [local planning authority] did not consider that the closure of the path was necessary." H

25 In para 16 of his decision the inspector explained why he did not agree with the submissions made by objectors that the grant of the consent

15/1097 had "invalidated" the Order made under section 257 of the TCPA 1990. He said that it was not unusual for section 73 applications to be made to vary some aspect of a permission and it is unnecessary for a fresh section 257 order to be made each time a section 73 permission is granted. An order previously made:

> "remains valid so long as the development to which it relates remains the same. The planning permissions in 11/0989. 14/0594 or 15/1097 all relate to the construction of 142 houses on the site and the order is relevant to that development. Condition 13 attached to 15/1097 varies the phasing of the construction of those houses and the terms on which the full completion of the site can be achieved. I conclude that the order is validly made."

26 In paras 11–12 and 18–19 the inspector explained why he considered that, by the time of the inquiry, SHL was implementing permission 15/1097 rather than permission 14/0594. It is common ground that by that stage permission 11/0989 had lapsed. It is also common ground that when the developer began to build homes on the site it must then have been relying upon 14/0594. But by the time of the inquiry SHL had built at least 46 homes and its representative, Mr McNally, told the inquiry that the sale of 43 of these properties had been completed.

27 In para 14 of his decision the inspector recorded the submissions for NR, which was represented by Mr Juan Lopez, as in this court. He suggested that the inspector should consider whether to confirm the Order solely by reference to whether it was necessary to stop up the footpath to enable the development under 14/0945 to be carried out. He added that the consent 15/1097 was "by the by".

28 The inspector did not agree. Not surprisingly, he considered (para 18) that: "To consider the order against the merits of 11/0989 and 14/0594 to the exclusion of 15/1097 would be a wholly artificial approach to be taken to what is being built on the site which is in accordance with 15/1097."

29 The inspector took the view that, rather than treating all of the 46 homes built as being referable to permission 14/0594 and therefore in breach of planning control, the developer had been relying upon permission 15/1097, which allowed up to 64 homes to be built before condition 13 had to be discharged.

30 In paras 20–21 of the decision letter the inspector referred to the statutory test to be satisfied under section 257 of the TCPA 1990, and pointed out that this was not a case in which the development permitted would physically be constructed on the route of the existing footpath. He then went on to state that the question for him to determine was whether it was necessary to divert the footpath in order to satisfy condition 13 of permission 15/1097, focusing on the second exception of that condition. That was the sole issue which the inspector addressed when he decided that the Order was incapable of confirmation.

31 On this issue the inspector accepted the argument advanced by objectors:

> "21. If it is not necessary to allow physical construction to take place on site, the question arises therefore as to whether it is necessary to divert the path in order to satisfy condition 13 of 15/1097? Reading the

condition, it would appear not; the second part of the condition would permit the full development of the site if the order was not confirmed.

"22. In contrast to condition 13 attached to 14/0594 which would have prevented the development of more than 32 houses if the Order was not confirmed, condition 13 of 15/1097 permits the whole development of 142 houses to be carried out irrespective of whether the Order is or is not confirmed. If the full development of the site can be carried out without the Order being confirmed, it cannot be necessary to divert the footpath in order for the development to be carried out.

"23. I concur with the objectors that, in the light of the terms of the condition attached to the planning permission being implemented the Order fails the statutory test for confirmation.

"24. I conclude that as the diversion of the footpath is not necessary to allow development to take place, the Order should not be confirmed."

32 Thus, the inspector concluded that condition 13 of 15/1097 allowed the whole development of 142 homes to be carried out irrespective of whether the Order was or was not confirmed. However, it is to be noted that he did not address in his reasoning the range of considerations which are to be considered in order to be able to reach a conclusion on whether a section 257 order should or should not be confirmed. Furthermore, his construction of condition 13 in 15/1097 means that although the condition was expressed to be a *Grampian* condition limiting the development to 64 houses, that restriction was effectively a dead letter. True enough, it required that a section 257 order be made. But in the event of there being any objection (and in this case objections had been made to the Order before the grant of 15/1097), the effect of the inspector' s decision, as he recognised, was to render the restriction to 64 houses ineffective.

33 Although the developer's planning statement produced in November 2015 may not be used as an aid to the construction of condition 13 (see, for example *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12 and *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048)), it is plain that the inspector's interpretation arrives at an outcome which is wholly at odds with the declared purpose of SHL's application. No evidence was shown to the court to suggest that EDC took any other view when granting 15/1097. Accordingly, the correctness of the inspector's conclusion should be examined further. It does raise the questions whether he has properly construed condition 13 of 15/1097 taken as a whole (which is an objective question of law for the court to determine) and the relationship between that condition properly construed and the decision on whether to make and confirm the order under section 257 of the TCPA 1990.

The identification and determination of a preliminary issue

34 In granting permission to apply for judicial review Dove J observed that the case raises potentially significant issues about the correct procedure to be adopted in relation to preliminary issues. I agree. Counsel had not come across an ordinary planning appeal where an inspector or the Secretary of State has been willing to dispose of the entire process by reference to a preliminary issue. I am not referring here to the practice in some planning procedures where the evidence on separate issues is heard sequentially, but a decision on the whole matter is only made once all the evidence is received

A and considered in a decision letter. But a preliminary issue may arise, for example, where one party raises a *proper* argument that the Secretary of State has no jurisdiction to determine the subject matter of the proceedings at all. If the Secretary of State were to agree with that contention, then he would refuse to consider the merits of the matter. It would be outwith his power or ultra vires for him to do so.

B **35** For example, where a notice of appeal against an enforcement notice is served outside the absolute time limit in section 174(3) of the TCPA 1990, the Secretary of State is entitled to decide that he has no jurisdiction to entertain the appeal and will refuse to consider any grounds of appeal which have been put forward: see e g *Lenlyn Ltd v Secretary of State for the Environment* (1984) 50 P & CR 129. Similarly, where an appellant in an appeal against an enforcement notice successfully contends that the notice is
C a nullity, the Secretary of State will quash the notice, with the result that he has no further jurisdiction in the matter and will not address the statutory grounds of appeal relied upon in the alternative: see e g *Rhymney Valley District Council v Secretary of State for Wales* [1985] JPL 27. Issues of this kind may be suitable for consideration as a preliminary issue in an appropriate case.

D **36** On the other hand, there are many situations in which the issue whether the making or confirmation of an order lies within the relevant statutory power is inseparable from the merits of that order and therefore cannot in practice be determined until the decision-maker reaches conclusions on those merits. For example, under section 226(1)(b) of the TCPA 1990 a local planning authority may be authorised by the Secretary of State to acquire compulsorily any land in their area which "is required for a
E purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated". In *Sharkey v Secretary of State for the Environment* (1991) 63 P & CR 332 the Court of Appeal held that "required" meant "necessary in the circumstances of the case," and not merely "desirable" on the one hand or "indispensable" or "essential" on the other. In *Chesterfield Properties plc v Secretary of State for the Environment, Transport and the Regions* (1997) 76 P & CR 117 Laws J applied the
F same approach to the alternative power of compulsory acquisition in section 226(1)(a) where the local planning authority considers "that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". He also held that it is necessary to read the language of section 226(1)(a) as a whole, in order to appreciate that it expresses the purpose for which the discretionary power to make the order
G may be exercised (the principle in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997), rather than setting a condition precedent to the exercise of that power. Accordingly, the consideration of whether an order made under section 226 satisfies the statutory tests and is intra vires is generally dependent upon the Secretary of State's findings on such matters as the merits of the promoter's scheme. Issues of this kind are generally unsuited to the identification and determination of a preliminary issue.

H **37** In the courts the determination of a preliminary issue without receiving all the evidence and submissions in the case is handled with particular care (see, for example, paragraph 7.3.1 of the Queen's Bench Guide). It is necessary to consider precisely what the preliminary issue should be and to draft the terms of that issue in advance of the hearing.

The written arguments of the parties may then be focused on that issue and exchanged beforehand. The decision on whether a preliminary issue should be heard will also address the need for an agreed statement of facts sufficient to enable the point to be determined. It is worth recalling the comment by Lord Scarman in *Tilling v Whiteman* [1980] AC 1, 25: "preliminary points of law are too often treacherous short cuts."

38 It does not appear that anything resembling that approach occurred in the present case. Instead the point on which the inspector decided that the Order was incapable of confirmation was not raised until letters from two objectors were sent on 16 and 18 November 2016, less than two weeks before the start of the inquiry. They did not develop the point in any detail and it was not clarified before the inquiry. None the less the objectors suggested that the matter be dealt with at the beginning of the inquiry. Unfortunately, the inspector did not respond to their letters by notifying all parties in advance of the hearing on 29 November 2016 that he would deal with a preliminary issue at the outset. Nor indeed did he take any steps to invite written submissions to define and deal with the issue in advance of the hearing, or attempt to set down in writing what he considered the preliminary issue to be.

39 Plainly it would have been of assistance to the parties and, most importantly to the inspector, if he had taken such steps. To put the matter at its lowest, good practice was not followed in this case. It would be advisable for the Inspectorate to consider giving, or if it already exists reviewing, guidance to inspectors on (a) the circumstances in which it is truly appropriate for a preliminary issue to be determined and (b) where it may be, the procedure to be followed, including inviting submissions on whether a preliminary issue should in fact be decided, and if so how the issue(s) should be defined and what directions should be made. Of course, the determination of a preliminary issue must be compatible with the statutory framework within which the subject matter before the Secretary of State is to be decided. This procedure is only likely to be appropriate in a limited range of cases.

Relevant legal principles

The legislation

40 Section 257 of the TCPA 1990, as amended, provides (inter alia):

"(1) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that it is necessary to do so in order to enable development to be carried out— (a) in accordance with planning permission granted under Part 3 or section 293A; or (b) by a government department.

"(1A) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that— (a) an application for planning permission in respect of development has been made under Part 3, and (b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.

"(2) An order under this section may, if the competent authority are satisfied that it should do so, provide— (a) for the creation of an

A alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use; (b) for authorising or requiring works to be carried out in relation to any footpath, bridleway or restricted byway for whose stopping up or diversion, creation or improvement provision is made by the order; (c) for the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of B the order is under, in, on, over, along or across any such footpath, bridleway or restricted byway; (d) for requiring any person named in the order to pay, or make contributions in respect of, the cost of carrying out any such works."

The "competent authority" includes the local planning authority who granted the planning permission authorising the development upon which C the order is based, or who would have had the power to grant a permission if an application had fallen to be made to them.

41 Section 259, as amended, provides:

"(1) An order made under section 257 or 258 shall not take effect unless confirmed by the appropriate national authority or unless confirmed, as an unopposed order, by the authority who made it.

D "(1A) An order under section 257(1A) may not be confirmed unless the appropriate national authority or (as the case may be) the authority is satisfied— (a) that planning permission in respect of the development has been granted, and (b) it is necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission.

E "(2) The appropriate national authority shall not confirm any order under section 257(1) or 258 unless satisfied as to every matter as to which the authority making the order are required under section 257 or, as the case may be, section 258 to be satisfied."

The "appropriate national authority" is the Secretary of State in England and the Welsh Ministers in Wales: section 259(5). Section 259(4) and Schedule 14 set out the procedure for the confirmation of such orders, F including the holding of public inquiries in certain cases, such as the present one.

42 Section 247 confers a parallel power on the Secretary of State (and within Greater London upon London borough councils) to make a stopping up order in similar terms to the power conferred by section 257 on local planning authorities, save that it covers highways generally, including those G open to vehicular traffic. Here, the legislation does not provide for a confirmation stage. Instead it allows for the making of objections to a draft order and the holding of a public inquiry before that order is formally "made": section 252 of the TCPA 1990.

Vasiliou v Secretary for State for Transport

H **43** The leading case on the ambit of sections 247 and 257 of the TCPA 1990 is the decision of the Court of Appeal in *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77. In order to uphold the inspector's decision that the order in this case fell outwith section 257, Mr Buley placed great reliance upon a close reading of certain parts of *Vasiliou's* case and the legislation. He submitted that the inspector's conclusion was entirely in line

with, and indeed required by, these sources. But with respect his analysis was selective and incorrect. It is important to identify carefully what *Vasiliou's* case was about and what it did and did not decide, before revisiting the case law on *Grampian* conditions and section 257(1) itself.

44 Mr Vasiliou carried on a restaurant business 60–70% of which depended on passing trade. The local authority granted planning permission for a retail development across the whole width of the street on which the restaurant was located, subject to a condition that the development could not be commenced until the relevant section of the street had been stopped up. Because a vehicular highway was involved the developer asked the Secretary of State to make a stopping up order under what has since become section 247 of the TCPA 1990. The order would have made that part of the street where the restaurant was situated a cul de sac, with the consequence that the business was very likely to fail. The inspector found that there were no highway reasons against the confirmation of the order, but he recommended against confirmation because of the likely effect on the restaurant, for which there was no right to compensation. However, the Secretary of State disagreed with the inspector' s recommendation and confirmed the order. He did so on the basis that his decision was solely concerned with highway matters, and therefore the effect of the proposed stopping up on the restaurant was an irrelevant consideration.

45 The High Court rejected the legal challenge brought by Mr Vasiliou, holding that the Secretary of State had not erred in law. The correctness of that decision was the issue for the Court of Appeal to determine. It reversed the High Court, holding that the effect of the stopping up on the restaurant business had been a relevant consideration in deciding whether to confirm the order under section 247. The principles laid down by the court generally apply to orders made under both sections 247 and 257 of the TCPA 1990.

46 The leading judgment was given by Nicholls LJ, with whom the other members of the court agreed. He pointed out (at p 82) that, but for the stopping up order, Mr Vasiliou would have been entitled as against the developer to enforce rights of access to the highway without being obstructed by the development, on the grounds of both unlawful interference with his right to gain access to the highway as a frontager and also the damage he would sustain through the commission of a public nuisance: *Benjamin v Storr* (1874) LR 9 CP 400. It was in that context that Nicholls LJ went on to deal with stopping up under planning legislation and held, at [1991] 2 All ER 77, 83:

> "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 extinguished 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." (Emphasis added.)

The "expropriation" referred to there was the extinguishment by a stopping up order of the rights of a land owner in the position of Mr Vasiliou to bring a common law action to prevent interference with his access over the public highway.

47 The remaining parts of the judgment then went on to reject two arguments advanced by the Secretary of State against the construction of the legislation set out in para 46 above; namely, the effect on the trade of the restaurant business was irrelevant because (1) that was a matter to be dealt with in the application of planning control and there was no overlap between that regime and the stopping up code, and (2) it would involve re-opening the merits of the decision to grant planning permission for the development across the street. It was in the context of dealing with that second contention that Nicholls LJ stated, at p 86:

"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*. (Emphasis added.)

48 Finally, it is helpful to set out the conclusion of Nicholls LJ, at p 87:

"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*." (Emphasis added.)

49 In summary, it was decided in *Vasiliou's* case [1991] 2 All ER 77 that:

(1) The Secretary of State cannot make an order under section 247 or confirm an order under section 257 unless satisfied that a planning permission exists (or under sections 253 or 257(1A) will be granted) for development and that it is necessary to authorise the stopping up (or diversion) of the public right of way by the order so as to enable that development to take place in accordance with that permission (see also language to the same effect in section 259(1A)(b)).

A (2) But even if the Secretary of State is so satisfied, he is not obliged to confirm the order; he has a discretion as to whether to confirm the order and therefore may refuse to do so.

(3) In the exercise of that discretion the Secretary of State is obliged to take into account any significant disadvantages or losses flowing directly from the stopping up order which have been raised, either for the public generally or for those individuals whose actionable rights of access would be extinguished B by the order. In such a case the Secretary of State must also take into account any countervailing advantages to the public or those individuals, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such disadvantages or losses are of such significance or seriousness that he should refuse to make the order.

(4) The confirmation procedure for the stopping up order does not C provide an opportunity to re-open the merits of the planning authority's decision to grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision.

As a form of shorthand it is convenient to refer to the test in (i) above as a "necessity" test and the test in (iii) above as a "merits" test.

50 *Vasiliou's* case decided that, although the satisfaction of the necessity test is a prerequisite to the exercise of the power to make (under D section 257) and to confirm (under section 259) an order, where there are relevant objections engaging the merits test, the satisfaction of that further test is also a prerequisite for the order to be made and confirmed (or for an order to be made under sections 247 and 252). However, *Vasiliou's* case did not decide, as Mr Buley suggested, that where both of those tests are engaged, the decision-maker must treat the necessity test as an initial hurdle E to be satisfied once and for all before the merits test may lawfully be considered, or that there is no overlap in the application of these two tests. Likewise, the language of the TCPA 1990 does not lend any support to his suggestion.

51 There are a number of other matters which were not decided in *Vasiliou's* case [1991] 2 All ER 77. In that case, unlike the present one, there was no issue as to whether the necessity test was satisfied and so the Court of F Appeal did not have to consider how that test may, or may not, be satisfied. In *Vasiliou's* case the stopping up order was necessary to enable the development to be carried out physically. Although the *Grampian* case 47 P & CR 633 and *K C Holdings (Rhyl) Ltd v Secretary of State for Wales* [1990] JPL 353 had already been decided (see further para 55 below), the Court of Appeal did not need to consider, and made no observations upon, G the relationship between a *Grampian* condition and the necessity test in sections 247 or 257 or indeed the merits test where that arises. It does not appear that these issues have been considered in any subsequent authority. *Vasiliou's* case does not provide any support for the contention that, as a matter of law, the necessity test cannot be satisfied where a *Grampian* condition provides for the restriction on development to be lifted in the event of a decision not to confirm the order.

H 52 Returning to the language of section 257(1) of the TCPA 1990, a local planning authority has a discretionary power to authorise by order the stopping up of a public right of way where it is necessary *to do so* to enable development to be carried out *in accordance with a planning permission*. Thus, the necessity test is concerned with whether such an order is necessary

for that purpose. Furthermore, the terms of the planning permission, including its conditions and the drawings determining how the development authorised is allowed to be carried out are relevant to the application of the necessity test. Mr Buley's submissions effectively disregarded the words "in accordance with a planning permission" and treated the question posed by the necessity test as simply being whether the order is necessary to enable the "relevant development" (as he put it) to go ahead. But effect must be given to the words I have emphasised in section 257(1). They are not surplusage and cannot be ignored.

53 The language used by Parliament in section 257(1) for the purpose of enabling, or facilitating, the carrying out of development, strongly suggests that the word "necessary" does not mean "essential" or "indispensable", but instead means "required in the circumstances of the case". Those circumstances must include the relevant terms of the planning permission (see by analogy the power of compulsory purchase in section 226 and the case law referred to in para 36 above).

54 During the course of argument Mr Buley and Mr Jonathan Easton (who appeared for the interested party) both submitted that the stopping up and diversion of the footpath across the railway line could have been achieved under sections 118A and 119A of the Highways Act 1980. I understand that to be disputed by NR. However, this is not a matter which the court needs to resolve, because both Mr Buley and Mr Easton accepted that this would not result in the Order failing the necessity test in *Vasiliou's* case [1991] 2 All ER 77. I agree. Their stance tacitly and rightly accepts the principle set out in para 53 above. The necessity test does not require an order under section 257 (or section 247) to be indispensable or essential.

Grampian conditions and the use of sections 247 and 257

55 It is well established that an order under sections 247 or 257 of the TCPA 1990 may be made, not only where a planning permission allows development to be physically carried out on the route of an existing footpath, but also where the *only* necessity for a stopping up order arises from a condition in a planning permission which restricts the whole or some part of the development authorised unless and until that stopping up is first authorised by order and is then carried out: see, for example, the *Grampian* case 47 P & CR 633 and the *K C Holdings* case [1990] JPL 353. In such cases it is the language by which the *Grampian* restriction is expressed that satisfies the necessity test under sections 247 or 257. The order is necessary so that the development may be carried out "in accordance with [the] planning permission," or, in other words, so as to overcome that negative restriction. As Lord Keith of Kinkel held in the *Grampian* case, at p 637 (substituting references for the corresponding provisions in the TCPA 1990):

> "In the circumstances, it would have been not only not unreasonable but highly appropriate to grant planning permission subject to the condition that the development was not to proceed unless and until the closure had been brought about. In any event, it is impossible to view a condition of that nature as unreasonable and not within the scope of section [70(1)] of the Act if regard is had to the provisions of *[section 247]. Subsection (1) provides: '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 order to enable development to be*

A *carried out in accordance with planning permission granted under Part III of this Act, or to be carried out by a government department*.'

"*A situation where planning permission has been granted subject to a condition that the development is not to proceed until a particular highway has been closed is plainly one situation within the contemplation of this enactment*, though no doubt there are others. *The stopping up of the highway would very obviously be necessary in order to enable the* B *development to be carried out*. So it is reasonable to infer that precisely the type of condition which is in issue in this appeal was envisaged by the legislature when enacting section [70(1)]. As it happens, the first respondents have themselves power, under section 12 of the Roads (Scotland) Act 1970, to promote an order for the closure of Wellington Road. But that is an accident, though it may perhaps make the case an a C fortiori one. *[Section 247] is entirely general and is apt to favour strongly the reasonableness of negative conditions relating to the closure of highways in all appropriate cases*." (Emphasis added.)

56 Mr Buley stated on behalf of the defendant that he accepts that this passage remains a correct statement of the law. This is important because it recognises that where the need for a stopping up order is based upon a D *Grampian* condition, this is because of the *terms* of the permission and not merely the *existence* of the permission. The phrase "existence of a planning permission" used by Nicholls LJ in *Vasiliou's* case (see para 47 above) was understandable in the context of that case, where self-evidently the development could not physically proceed unless the stopping up of the highway was authorised by the order. But that phrase cannot be taken to be an exhaustive description of the circumstances in which the necessity test, as E expressed in the language of sections 247(1) and 257(1) of the TCPA 1990, is satisfied. In the case of a *Grampian* condition relating to the stopping up of a highway it is not the mere existence of the permission which satisfies the necessity test, but the terms of that particular condition. Hence, the correct construction of the condition, an objective question of law, is necessary for the necessity test to be applied correctly.

F **57** It is also important because the following passage in paragraph 7.11 of DEFRA Circular 1/09 ("Rights of Way") has given the contrary impression to some readers:

> ". . . Authorities have on occasion granted planning permission on the condition that an order to stop-up or divert a right of way is obtained before the development commences. The view is taken that such a G condition is unnecessary in that it duplicates the separate statutory procedure that exists for diverting or stopping-up the right of way, and would require the developer to do something outside his or her control."

Indeed, this passage was relied upon by objectors in the present case as indicating that an authority is unable to found a section 257 order upon a *Grampian* condition. That, of course, would fly in the face of the decision of the House of Lords in the *Grampian* case 47 P & CR 633 itself. In a separate H note Mr Buley explains that this was not how the circular was intended to be read or should be read. He says that the only purpose of the passage was to discourage, as a matter of policy, the imposition of *Grampian* conditions in circumstances where an alternative power to section 257 of the TCPA 1990 is available. Given that the imposition of such conditions is a planning

function, it is relevant to ask whether the appropriate minister for these purposes, the Secretary of State for Communities and Local Government, has published any policy to the same effect. It does not appear that he has done so: see the National Planning Policy Framework (2012) and the Planning Practice Guidance.

58 In any event, paragraph 7.11 is confused in that it suggests that a *Grampian* condition is unnecessary because: (1) it duplicates the separate statutory procedure for diverting or stopping up a right of way; and (2) would require the developer to do something outside his control. Point (2) is incorrect; it ignores the rationale for the imposition of negative *Grampian* conditions. Such conditions restrict the carrying out of development authorised by a planning permission *unless* a specified act takes place, but *without imposing a positive obligation* on the developer to carry out that act. As for point (1), I do not see how it can be said that a *Grampian* condition duplicates the procedures in sections 247 and 257 of the TCPA 1990, or for that matter under sections 118A and 119A of the Highways Act 1980 or other stopping up powers. A restriction upon the timing or phasing of the carrying out of development (for example, to address highway safety issues) plainly does not involve any duplication of a stopping up procedure. It simply involves a prohibition on the carrying out of certain development unless and until a defined right of way is stopped up. It is plain from the principles stated in *Vasiliou's* case [1991] 2 All ER 77 that the imposition of a *Grampian* condition does not predetermine whether a section 257 order (or a stopping up order under any other power) should be made or confirmed. Fortunately, Mr Buley has been instructed that the circular is under review, which will provide an opportunity for paragraph 7.11 to be reconsidered and any confusion which it currently causes to be removed.

Principles upon which a quashing order may be granted

59 The principles upon which the court may be asked to intervene in a challenge under section 288 of the TCPA 1990 have been summarised by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283. It is common ground that essentially the same principles apply in this application for judicial review of the inspector's decision not to confirm the Order: see e g *E v Secretary of State for the Home Department* [2004] QB 1044, paras 41–42.

The flaws in the decision letter

60 This was a case where the defendant decided to hold a public inquiry because objections had been made to the Order regarding disadvantages to the public flowing from the proposed stopping up and diversion of the footpath. During the hearing the court was shown a selection of the objections the clear effect of which was to require the merits test in *Vasiliou's* case [1991] 2 All ER 77 to be applied, as well as the necessity test.

61 Mr Buley and Mr Easton accepted, rightly in my view, that condition 13 of the permission 14/0594 was sufficient to satisfy the necessity test in *Vasiliou's* case for a stopping up order made under section 257. The condition prevented part of the development authorised by the permission, namely that part of the 142 houses which exceeded the "*Grampian* limit" or cap of 32 houses (i e 110 houses), from being built unless that order was made

A and confirmed. Accordingly, the decision on whether the order should be confirmed, and hence the cap lifted, would also depend upon the application of the merits test in *Vasiliou's* case. If the Order was not confirmed the cap would remain. Condition 13 in the 2015 permission did not provide for any alternative outcome. The developer would only be able to overcome the restriction to 32 houses by making a fresh section 73 application to delete or amend the *Grampian* restriction in condition 13.

B **62** As Mr McNally explained in his witness statement on behalf of SHL, the objects of the application which resulted in the amended version of condition 13 in permission 15/1097 were firstly, to increase the *Grampian* restriction from 32 to 64 houses and secondly, to set out what would happen if the Order should not be confirmed, so as to obviate the need to make a fresh application under section 73 of the TCPA 1990 in that event. That C second purpose was the rationale for the addition of exception (ii). It is common ground that condition 13 in permission 15/1097 down to the end of exception (i) has the same legal effect for the purposes of section 257 as condition 13 of permission 14/0594, and therefore it satisfies the necessity test in *Vasiliou's* case. The defendant (and latterly SHL as well) says that it is merely because exception (ii) has been added to condition 13 in permission D 15/1097, so as to deal with the alternative scenario where the Secretary of State refuses to confirm the stopping up order, that the necessity test was not satisfied and so the Order before the Secretary of State fell outside the power conferred by section 257 of the TCPA 1990 and was incapable of being confirmed.

63 This outcome would render the amended condition 13 in permission 15/1097 effectively defunct. No matter what number the draftsman inserted E into that condition, whether 64 houses or any number between 1 and 141, the *Grampian* restraint would have no real teeth at all. EDC might just as well have deleted condition 13, although plainly that was not a position which it was prepared to accept. In my judgment, the correct approach is to seek to give effect to condition 13, rather than no effect, in so far as its language permits and subject to any construction being compatible with section 257 and the decision in *Vasiliou's* case.

F **64** Mr Buley suggested that the inspector' s conclusion did not render condition 13 defunct because it may be satisfied by the use of alternative powers, such as sections 118A and 119A of the Highways Act 1980, which do not require the necessity test in *Vasiliou's* case to be met. But, with respect, that argument is misconceived because condition 13 in permission 15/1097 is only satisfied if a stopping up order is first made "*by the [local* G *planning authority]*" and then confirmed or not confirmed. This reference to the local planning authority restricts this *Grampian* condition (unlike the one imposed in permission 14/0594) to orders made by a local planning authority under planning legislation, that is section 257 of the TCPA 1990. EDC is the relevant local planning authority but it is not a highway authority, and so would have been unable to exercise the powers conferred by sections 118A and 119A of the 1980 Act. Those powers are conferred on H the county council as highway authority, but that council is not a local planning authority for the purposes of the development to which condition 13 relates. There is nothing surprising about this reading of the condition, given that (1) permission 15/1097 was applied for and granted after the Order under section 257 had already been made by EDC and (2) the object

was to provide a mechanism for determining whether the development of the residual 78 houses should continue to be inhibited if that order should not be confirmed because of the objections which it had previously attracted.

65 Furthermore, Mr Buley's argument overlooks the basis upon which the inspector refused to confirm the Order. In para 22 of his decision letter (which follows on from the second sentence of para 21) he concluded that condition 13 of 15/1097 "permits the whole development of 142 houses to be built, irrespective of whether *the Order* is or is not confirmed" (emphasis added). Therefore, the inspector reached his decision on the basis that (a) condition 13 of 15/1097 refers to a stopping up order under section 257 of the TCPA 1990 and not under any other power and (b) the *Grampian* restraint was ineffective. The construction advanced by Mr Buley would necessarily involve rewriting this dispositive part of the decision letter, which is impermissible.

66 In any event, the inspector's conclusion about the effect of condition 13 involved a clear misinterpretation of permission 15/1097 and its relationship with the power in section 257. The language used in the condition simply provides for what is authorised, and in one scenario required, according to the outcome of the decision on whether the Order should be confirmed. But it does not purport to render the Order incapable of confirmation. So much is plain from exception (i). The inspector erred in law by concluding that the necessity test was not, or could not, be satisfied. Given that this was the sole basis for his refusal to confirm the Order, this error of law is sufficient to require the decision to be quashed and reconsidered.

67 Condition 13 begins by imposing a restriction on building more than 64 houses. Accordingly, the 2016 permission upon which the inspector found that SHL was relying prohibits it from building the residual 78 houses unless either exception (i) or exception (ii) is satisfied. Exception (i) essentially replicates the *Grampian* mechanism in condition 13 of permission 14/0594 for overcoming the restriction (save that in the 2016 permission only a stopping up order under section 257 of the TCPA 1990 may qualify for this purpose). Consequently, the same analysis applies to exception (i) as to condition 13 of 14/0594. First, exception (i) satisfies the necessity test in *Vasiliou's* case [1991] 2 All ER 77. Second, exception (i) cannot be satisfied, and the restriction to 64 houses lifted, unless the merits test is also satisfied.

68 One of the flaws in the inspector' s interpretation, and the defendant's argument, is that it involves reading exception (ii) in isolation from exception (i), in effect as a freestanding provision. It is not. Exception (ii) expressly refers to the consideration by the Secretary of State of "a lawfully made stopping up order as aforementioned *in point (i)*" (emphasis added). That language makes it perfectly plain that exception (ii) is coupled together with exception (i) and is to be read consistently with it. Both exceptions envisage that the embargo on carrying out the residual part of the development necessitates the making and consideration of a stopping up order under section 257 of the TCPA 1990 to divert the footpath in the manner described. The prohibition on the carrying out of the residual part of the development makes the stopping up order necessary. Thus, the necessity test in *Vasiliou's* case is satisfied in both cases. Both exceptions (i) and (ii) then go on to deal with the effect of the decision as to whether the section 257 order should be confirmed. This involves the application of the merits test in *Vasiliou's* case.

A The two exceptions differ in that exception (i) deals with the situation where the merits test is satisfied and the order is confirmed, whereas exception (ii) deals with the situation where the merits test is not satisfied and the section 257 order is not confirmed. Consistent with that straightforward and natural meaning of condition 13 in the 2016 permission, exception (ii) refers to the Secretary of State's "consideration" of the order. Thus, an essential difference between the two exceptions is that they address opposite sides of
B the same coin, the outcome of applying the merits test in *Vasiliou's* case, in accordance with the clear objective of the developer in making, and EDC in granting, the section 73 application. The other key difference is that where the order is confirmed, exception (i) in condition 13 *also prohibits* the occupation of the residual 78 houses *until the order comes into force and the diverted footpath route is made available for use*.

C **69** It therefore follows that there were three fatal flaws in paras 22–24 of the decision letter: (1) The inspector's interpretation fails to give any effect to exception (i) at all. He failed to recognise that it is a *Grampian* restriction which not only satisfies the necessity test under section 257 of the TCPA 1990, but in this case also engages the merits test, and imposes the further protection that the diversion must be brought into effect before the residual
D 78 homes may be occupied. Of course, if the stopping up order *passes* the merits test it follows that the confirmation of the order is still necessary (and its subsequent implementation) to enable the entire development to proceed. Both the necessity test and the merits test are considered alongside each other. (2) Reading condition 13 in 15/1097 as a whole, the *Grampian* restraint on carrying out the residual development continues to make the stopping up order necessary until at least the outcome of the merits test is
E known, and either exception (i) or exception (ii) can be applied. If the merits test is not satisfied, the order cannot be confirmed for that reason and at that point, but not before, the order ceases to be necessary to enable the residual development to be carried out *in accordance with the permission*. Thus, under both exceptions (i) and (ii) the necessity test and the merits test are considered alongside each other. (3) Condition 13 does *not* allow the whole scheme to be carried out on the basis that there is no need for the decision-
F maker to consider the merits test at all, because the stopping up order under section 257 fails the necessity test in *Vasiliou's* case [1991] 2 All ER 77 in any event. The draftsman did not manage to create a legally effective exception (i) which satisfies the necessity test in *Vasiliou's* case only to negate his efforts by the mere addition of exception (ii). The inspector' s construction of condition 13 begs the very question which it was designed
G to test, namely whether the stopping up order would be confirmed after applying the merits test as well as the necessity test. Condition 13 cannot sensibly be interpreted as meaning that the stopping up order was not necessary at all or under any circumstances, or that the whole development could be carried out irrespective of whether the Order was confirmed or not. Because of this misinterpretation of the condition and its legal relationship with the use of the power in section 257, the inspector brought the inquiry
H abruptly to a halt and, as is common ground, did not embark upon any hearing or determination of the merits test in *Vasiliou's* case as, in my judgment, he ought to have done.

70 Mr Buley submitted that reliance cannot be placed upon a planning condition so as to override the language used in section 257 or the proper

application of that provision in accordance with the decision in *Vasiliou's* case. I agree, but I reject his submission that the correct construction of condition 13 in 15/1097 set out above conflicts with that principle and is therefore defective. It does not follow from the mere *possibility* that the stopping up order may not be confirmed when the merits test comes to be applied under exception (ii), that the order fails the necessity test from the outset. That simply begs the question on what basis the order may or may not be confirmed. As with exception (i) that decision effectively hinges on the application of the merits test. To read exception (ii) properly in this way does not involve any rewriting of section 257(1) or departure from *Vasiliou's* case, any more than in the case of exception (i), or indeed condition 13 in the 2015 permission. Under exception (ii) the prohibition on carrying out the residual part of the development remains in force, and the stopping up order is necessary to overcome that prohibition and enable that development to proceed, unless and until it is decided that the arguments against the proposed stopping up and diversion outweigh those in favour (including the importance of that development). This analysis is entirely consistent with sections 257 and 259 of the TCPA 1990, which empower the making and confirmation of an order which is necessary to enable development to be carried out *in accordance with the relevant permission*, whether the conditions of that permission include a simple form of *Grampian* restriction as in the case of exception (i), or go on to lift that restriction in the event of the order not being confirmed, as in exception (ii).

71 This issue may also be tested in the following way. Suppose that a planning permission is granted for a development, subject to a condition in the same form as condition 13 in 15/1097, and a section 257 order is then made which did not attract any objections at all. As *Vasiliou's* case makes plain, there would be no need for the merits test to be applied. In that instance the necessity test would be satisfied and the inclusion of exception (ii) in condition 13 would not take the order outside the ambit of section 257. It could be confirmed by the local planning authority under section 259. If on the other hand the section 257 order did attract objections and it became necessary to apply the merits test to see whether the order should or should not be confirmed, there is nothing in the legislation or *Vasiliou's* case which alters that analysis or renders the condition defective.

72 For completeness, I would add that the quashing of the inspector's decision is not dependent upon construing condition 13 of 15/1097 as referring solely to an order under section 257 of the TCPA 1990: see paras 64–65 above. Even if, contrary to my view, that condition also embraces stopping up orders made under other powers and so the inspector's decision did not render the condition nugatory, his decision must still be quashed. First, it is common ground that the availability of those other powers would not cause the Order to fail the necessity test in *Vasiliou's* case [1991] 2 All ER 77: see paras 53–54 above. Second, irrespective of whether an order was made under section 257 or under alternative powers, condition 13 required a decision to be taken on whether or not that order should be confirmed before the *Grampian* restraint could be lifted. That would involve a decision being made on the merits of the order (e g the effects of the stopping up and diversion). Third, for the reasons already given above, where the order is made under section 257, it would still be wrong in law to say that the possibility of that order failing to pass the merits test made the

order unnecessary to enable the development to proceed in accordance with the planning permission, applying the language used in section 257(1) of the TCPA 1990.

73 For these reasons, the decision dated 4 January 2017 must be quashed, and the issue of whether the Order should be confirmed must be redetermined by a different inspector.

Other grounds of challenge

74 In Ground 4 the claimant complains that the inspector acted unfairly or in breach of the rules of natural justice, by not allowing the parties at the inquiry to deal with the merits of the Order. Mr Lopez accepted that this is not in fact a free-standing ground of challenge. Given the conclusions I have already reached that the inspector misinterpreted condition 13 in the 2016 permission and erred in law by concluding that the Order fell outwith section 257 and was therefore incapable of being confirmed, it follows that he ought to have allowed the cases of the various parties on the merits of the Order to be heard and then proceeded to apply both tests in *Vasiliou's* case. It is not so much a matter of the inspector having acted unfairly. Instead, because of the errors already identified he failed to take into account considerations which he was obliged to take into account applying *Vasiliou's* case.

75 I do not see any merit in the other grounds. The arguments advanced in support are confused and ultimately misconceived. They need only be dealt with shortly.

76 Under Ground 1 the claimant sought to argue that where a stopping up order is made on the basis of permission A, the necessity test in *Vasiliou's* case can only be applied by reference to that permission, and the subsequent grant of permission B is irrelevant to the application of that test. The contention is utterly hopeless. Mr Lopez accepted that there is nothing in the language of the TCPA 1990 which could support the restriction which he sought to place on the consideration of orders made under section 257. To take one practical example, a planning permission might be granted subject to a *Grampian* condition which, taken in isolation, would justify the making of a stopping up order under section 257. But if a second permission were to be granted without any *Grampian* condition and the landowner entered into a section 106 obligation running with the land not to carry out any development under the first permission, the basis for satisfying the necessity test would have been wholly removed. Mr Lopez accepted that he could not advance any legal justification for treating the second permission in such a case as irrelevant to the lawful operation of section 257. Indeed, during the first day of the hearing he expressly abandoned Ground 1. At the beginning of the second day he sought to resurrect the point, not because he had any legal argument to advance which could justify this *volte face*, but simply because his client wished that course to be followed. Given that it had become clear that the point was not properly arguable, that was inappropriate and not a proper use of the court' s resources.

77 Ground 2 sought to challenge the factual findings and inferences drawn by the inspector when he concluded that by the time of the inquiry SHL was relying upon and implementing the 2016 permission (15/1097) rather than the 2015 permission (14/0594). Mr Lopez accepted that he had to show that the inspector had acted irrationally in this regard. As Sullivan J

pointed out in the *Newsmith Stainless Ltd* case [2017] PTSR 1126, that is a particularly difficult hurdle for a claimant to meet. The lengthy submissions on this aspect failed to come anywhere near demonstrating irrationality. I have a good deal of sympathy for Mr Buley's submission that, on the material shown to the court, it could have been irrational for the inspector to have come to the opposite conclusion. In my judgment, it would certainly have been surprising, to say the least.

78 The second aspect of ground 2 was set out in para 67(iii) of the claimant's skeleton. The claimant criticises para 19 of the decision letter in which the inspector said that "the developer cannot mix and match between permissions as one of the purposes of granting permission is to provide certainty as to what will be built and where it will be built".

79 It is submitted that this amounted to a self-misdirection to the effect that, as a matter of law, the 2015 planning permission could not have been relied upon by the developer, or had effectively been abandoned. The argument is hopeless. The context in which the inspector wrote this passage was his discussion as to what the developer needed to do in order to build out the whole length of the alternative footpath in accordance with the drawing Rev V. He would need to make a further application under section 73 to substitute Rev V for the drawing Rev U approved by the 2016 permission 15/1097. He went no further than that.

80 Under ground 3 the claimant seeks to argue that the inspector failed to consider, as a freestanding issue, the need for the footpath to be stopped up and diverted because of the *consequences* of carrying out the development of 142 houses on the application site. That argument flies in the face of the language used in section 257 of the TCPA 1990 and the decision of the Court of Appeal in *Vasiliou's* case [1991] 2 All ER 77.

Conclusion

81 The decision must be quashed, but solely for the reasons set out in paras 60–73 above (drawing upon the preceding analysis of the legislation and case law). To that extent only, the claim for judicial review succeeds. I reject the other grounds of challenge raised by NR.

Claim allowed.

GIOVANNI D'AVOLA, Barrister

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.