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:

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> "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.

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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