ID 021

C/2001/1322

Neutral Citation Number: [2001] EWCA Civ 1293

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE QUEEN'S BENCH

DIVISION, ADMINISTRATIVE COURT

(MR JUSTICE SULLIVAN)

Royal Courts of Justice

Strand

London WC2

Monday, 23rd July 2001

B e f o r e :

LORD JUSTICE SCHIEMANN

-and-

LORD JUSTICE KEENE

- - - - - - - - - - - -

THE QUEEN ON THE APPLICATION OF

BATCHELOR ENTERPRISES LTD

- v -

THE SECRETARY OF STATE FOR THE ENVIRONMENT,

TRANSPORT AND REGIONS

- - - - - - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of

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Official Shorthand Writers to the Court)

MR J FINDLAY (instructed by Battens, Somerset BA2O 1HB) appeared on behalf of the Appellant

The Respondent did not attend and was unrepresented

JUDGMENT

1. LORD JUSTICE SCHIEMANN:Lord Justice Keene will deliver the first judgment.

2. LORD JUSTICE KEENE: This is a renewed application for permission to appeal from a decision of Sullivan J who refused permission to bring judicial review proceedings against the Secretary of State for the Environment Transport and the Regions.

3. The Secretary of State had by a letter dated 29th November 2000 agreed with the conclusions of an inspector that a stopping up order under section 247 of the Town and Country Planning Act 1990 should not be made.

4. The applicant had sought such an order in respect of a road which formed one of two legs leading from the A350 at Charlton Marshall in Dorset to a cul-de-sac called Greenfield Road. There had been a planning permission granted in 1999 for five houses to be built on the land adjoining the A350 and both the inspector and the Secretary of State accepted that it was necessary to stop up the highway in question to enable the residential development to be carried out in accordance with the 1999 permission.

5. The condition in section 247(1) which had to be met for the stopping up power to exist in the first place was met. However, the Secretary of State has a discretion under that provision as to whether he will exercise the power, and in the present case he concluded, as had his inspector, that the increased use of the remaining leg from Greenfield Road to the A305 if the order was made would result in a serious degree of risk to road users because of the sub-standard visibility for drivers and inadequate geometry of the junction. He therefore declined to make the stopping up order.

6. Mr Findlay, on behalf of the applicant, raises two matters by way of challenge. Logically, the one which comes first is his second point as argued this morning, and I propose to take it first in the course of this brief judgment. The issue essentially is this. The applicant had argued at the inquiry that it was not appropriate for highway safety issues to be taken into account at this stage because the planning authority would have considered them when deciding whether or not to grant planning permission for the development. The Secretary of State did not accept that and nor did Sullivan J.

7. In his written skeleton argument on this issue reliance is placed by Mr Findlay on the case of Vasiliou v The Secretary of State for Transport [1991] 2 All ER 77 where some dicta of Nicholls LJ, as he then was, indicate that on a stopping up order the Secretary of State cannot go behind the planning authority's decision on the planning issues (see page 86 of that report).

8. It is argued that that is what has happened here and that the Secretary of State has, in effect, allowed the county council as highway authority to change its mind on the safety issue. I have said already that the Secretary of State clearly has a discretion under section 247. That is implicit in the words in that provision "may authorise if he is satisfied." But that he has a discretion has been confirmed by a number of authorities, Vasiliou itself, but also K C Holdings Ltd v The Secretary of State for Wales [1990] JPEL 353.

9. Clearly the stopping up order process is not intended to provide a rerun of the essential planning merits which fell to be dealt with at the stage of the planning application. But to say that the Secretary of State cannot when considering a stopping up order application take into account the consequences of such an order on highway safety is to my mind quite unarguable and not what was contemplated in Vasiliou. The Secretary of State has a separate discretion from that of the planning authority and it is to be borne in mind that section 247 is a power which has its origins in section 49 of the Town & Country Planning Act 1947, where the power is conferred on the Ministry

of Transport. It is in that capacity that the Secretary of State today possesses this power, that is say as the minister responsible for the highway network. Road safety is a matter of central importance to the exercise of his functions under section 247 and he must, in my judgment, be able to take it into account when considering such an application, irrespective of the views taken by the local highway authority or the local planning authority. The minister is, after all, dealing with the consequences of him making the stopping up order, not the consequences of the grant of planning permission. There may be some overlap between matters relevant to planning control and those relevant to the section 247 orders but that is legitimate as was recognised in Vasiliou. In my judgment Sullivan J was entirely right on this issue. Nor in my view is it appropriate to draw any distinction between direct and indirect consequences in the way for which Mr Findlay contends.

10. The other issue which has been put at the forefront of the case today arises from the fact that the inspector in his report stated that the fact that county council officers had initially taken the view that it would be acceptable to stop up this stretch of road was not in his view a material consideration. Sullivan J concluded that he was wrong in so saying but regarded it as of no significance in the overall context of the decision.

11. It is now contended that this factor, namely the initial views of the county council officers, could have been of significance had the inspector taken them into account. Mr Findlay emphasises that the highway authority had previously regarded a 60m site line as acceptable whereas the inspector's conclusion was that a 70m site line was the irreducible minimum. That minimum could not be achieved by the remaining leg leading to the A350. Yet only a small reduction below the 70m standard would be needed for the stopping up to be acceptable.

12. It is argued that the inspector in this case had to choose between two experts and that in arriving at his conclusion he made a number of value judgments on some of the factors which he took into account. He in effect, it is said, accepted the case presented by the county council. He had choices to make between a number of objective facts and he could have been influenced in his choice, had he taken account of the views previously expressed by the county council.

13. For my part I am prepared to work on the basis that when the inspector used the phrase "material consideration" he was using it in the strict Wednesbury sense; although I can see that it may well be that he merely wished to indicate that he did not think that significant weight should be attached to the fact that the county council had initially seen the proposed new highway situation as acceptable.

14. But even if one adopts what one might call the strict Wednesbury interpretation of the words "material consideration", I am bound to say that I cannot take the view that, had the inspector adopted a different approach, there is any prospect that he would have arrived at a different conclusion. One only has to read his report, to see the thoroughness with which he examined the factors which had to go into the conclusion as to whether the new highway situation would be safe or not. He dealt with this matter in great detail, some three pages of typescript being occupied in his consideration of the detailed factors in his report before he arrived at his conclusion that the reduction in site lines would not be acceptable. It was an impressive, thorough and detailed analysis of the objective facts about the highway hazards.

15. Certainly he had to make some value judgments about those facts but there is no reason to believe that those valued judgments could have been materially altered had he said to himself that the highway authority originally had taken a different view. The analysis which he presents in his report clearly pointed to the conclusion which he reached. In my judgment that conclusion is not one which is capable of being altered merely because of a view initially formed by county council officials. In those circumstances, even if one adopts in favour of the applicant the interpretation of

the words "material consideration" (to which I have referred), I cannot see that it provides any real prospect of success were this matter to go on appeal to the full court.

16. For my part I take the view that there is no real prospect of success and I would dismiss this renewed application.

17. LORD JUSTICE SCHIEMANN:I agree with the judgment that has just been delivered.

(Application refused; no order for costs).