

**KINGSWOOD DISTRICT COUNCIL v. SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER**

QUEEN'S BENCH DIVISION (Mr. Graham Eyre, Q.C., sitting as a Deputy Judge): July 15, 1987

*Town and country planning—Planning permission—Permission granted by inspector on appeal—Inspector imposed conditions without representations from parties—Secretary of State submitted to judgment—Whether Secretary of State had to start again de novo—Whether obliged to have regard to new material considerations—Whether applicants could use documents outside decision letter*

An application for planning permission for the development of Ashlands, a substantial Victorian stone building in the Bristol green belt, involving a change of use from eleven flats to a single dwelling and the conversion of a coach-house to a single dwelling including a 12-car garage was refused by the local planning authority. On appeal, the inspector granted permission subject to condition No. 3 that the garages were not to be used for any business purpose except the exhibition of vintage or classic cars. In fact, the application had not encompassed that form of use, neither party had been given any opportunity to make representations upon it, and the inspector appeared to be "on a frolic of his own." On appeal by the local planning authority, the Secretary of State submitted to judgment:

**Held**, allowing the appeal, that where a decision was quashed under section 245 of the Town and Country Planning Act 1971, the Secretary of State had to start again *de novo* with a clean sheet and so was under an obligation to have regard to the development plan and all other material considerations and to matters that may be material considerations which had arisen since the matter was originally considered. Further, an applicant must be prepared at the outset of his case to justify a contention that documents outside the decision letter and, if there was one, the inspector's report, be used, on the grounds that a question of real substance could not be resolved without recourse to them.

**Cases cited:**

(1) *Ashbridge Investments v. Minister of Housing and Local Government* [1965] 1 W.L.R. 1320; [1965] 3 All E.R. 371, C.A.

(2) *Gill v. Secretary of State for the Environment and North Warwickshire District Council* [1985] J.P.L. 710.

(3) *Hartnell v. Minister of Housing and Local Government* [1963] 1 W.L.R. 1141; [1963] 3 All E.R. 130; 15 P. & C.R. 178 considered. (This case was affirmed by the C.A. at [1964] 2 Q.B. 510; [1964] 2 W.L.R. 425; [1964] 1 All E.R. 354; 15 P. & C.R. 161 and by the H.L. at [1965] A.C. 1134; [1965] 2 W.L.R. 474; [1965] 1 All E.R. 490; 17 P. & C.R. 57).

(4) *Newbury District Council v. Secretary of State for the Environment and Another* (1988) 55 P. & C.R. 100.

(5) *Price Bros. (Rode Heath) Ltd. v. Secretary of State for the Environment* (1979) 38 P. & C.R. 579, not followed.

(6) *Rogelan Building Group Ltd. v. Secretary of State for the Environment and Kettering Borough Council* [1981] J.P.L. 506 considered.

(7) *Sabey (H.) & Co. Ltd. v. Secretary of State for the Environment* [1978] 1 All E.R. 586, considered.

(8) *Seddon Properties Ltd. v. Secretary of State for the Environment* (1978) 42 P. & C.R. 26.

**Legislation construed:**

Town and Country Planning Act 1971 (c.78), s.245. This provision is set out at pp. 158–159, *post*.

**Appeal** in the form of an application by way of originating motion under section 245 of the Town and Country Planning Act, 1971.

The applicant, Kingswood District Council, as the local planning authority, sought to challenge a decision of an inspector dated April 18, 1986, whereby planning permission was granted, subject to conditions, to the second respondent, R. J. Tanner, for development involving a change of use from 11 flats to a single dwelling and the conversion of an existing coach-house to a single dwelling including a 12-car garage on land of just over four acres sited within the Bristol Green Belt. Express condition No. 3 stated: "The garages are not to be used for any business purposes except the exhibition of vintage or classic cars."

The grounds of the appeal included, *inter alia*, the following:

(i) the imposition of condition 3 of the decision letter was irrational. The inspector had extended the use of the garages beyond that applied for by permitting a business use which for example, would allow the establishment of a motor museum open to paying visitors; and

(ii) the imposition of condition 3 was procedurally improper and in breach of the rules of natural justice in that the applicants were given no opportunity of commenting on the condition before it was imposed.

*Michael J. Burrell* for the appellant.

*David Holgate* for the first respondent.

*Rhodri Price Lewis* for the second respondent.

**MR. GRAHAM EYRE, Q.C.** This is an appeal in the form of an application by way of originating motion under section 245 of the Town and Country Planning Act 1971 by the applicant, the planning authority, which seeks to challenge a decision dated April 18, 1986 in which an inspector granted planning permission, subject to conditions, for development involving a change of use from 11 flats to a single dwelling and the conversion of an existing coach-house to a single dwelling including a 12-car garage, on land of just over four acres, on which stands a substantial Victorian stone building previously occupied as a hostel. The former coach-house is also a relatively substantial building. The site is within the Bristol green belt, and that notation is reflected on all the relevant statutory development plans.

The second respondent has set out on a substantial project, which he regards as one concept, involving the restoration of Ashlands House, or the house on which Ashlands stood, with extensive landscaping, tree planting, and certain other works, which for the most part have been welcomed by the applicants. It is understandable that the second respondent wishes to restore the coach-house for residential occupation, and in the immediate future he plans that his father should live there.

The application for planning permission was refused by the planning authority on August 19, 1985 on the following grounds:

(a) The coach-house is located within the Bristol Green Belt, and the proposal to convert the building to form a separate residential unit would be contrary to the policies of Central Government and

the District Planning Authority regarding development in Green Belt areas. (b) The proposed twelve car garage would involve the felling of trees which are the subject of a Tree Preservation Order, and their loss would be detrimental to the visual amenities of the area.

The inspector dealt with the appeal by way of written representations, and he gave his decision on April 18, 1986 by letter. He said in paragraph 3:

From my inspection of the site and its surroundings and the representations made I consider the principal issue in this case to be whether the planning benefits obtained by the reduction in occupation of Ashlands and the improvement of the frontage and amenity of the site are such that the proposal could be permitted as an exception to the strict policies of restraint of development in the Green Belt.

He records that the council has no objection to the conversion of Ashlands to a single dwelling-house, and then he goes on to deal with the proposal in respect of the coach-house. He expresses the view that if converted as proposed it will be beneficial to the overall improvement of the site and not be an intrusion into the rural amenity of the landscape. He said:

I accept the conversion into a dwelling is contrary to Green Belt policy, however the site is not in the rural part of the Green Belt and the overall planning benefit in reducing the occupation of Ashlands is such that in my view no demonstrable harm to the interests of acknowledged importance or precedent is likely to be caused by permitting the proposal in accordance with the policies set out in Circular 14/85.

He made certain other findings, but they relate to the garages for the most part. Having come to that conclusion, he grants planning permission. The grant is subject to an express condition No. 3: "The garages are not to be used for any business purposes except the exhibition of vintage or classic cars."

To say the least, that was a matter of surprise both to the planning authority and indeed to the second respondent, because the application was so drawn as not to encompass that form of use in any event. The reference to vintage cars is a reference in a very early document, and was not a matter pressed by the appellant before the inspector at the inquiry. Neither the second respondent nor the applicants had any chance of making representations on it, and it appears, as it was described by counsel, to be the inspector on a frolic of his own. That becomes material for reasons which will emerge.

The decision was therefore challenged in this court on a number of grounds, and I will read grounds 9 and 10:

9. The imposition of Condition 3 in paragraph 9 of the decision letter was irrational. The Inspector has extended the use of the garages beyond that applied for, by permitting a business use of the garages, which for example, would allow the establishment of a motor museum open to paying visitors.

10. The imposition of Condition 3 was procedurally improper and in breach of the rules of natural justice, in that the Applicants were given no opportunity of commenting on the condition before it was imposed.

I read those two grounds together, and if I read them together they suffice to justify the statement by the Secretary of State, and indeed the second respondent on this score, namely, that each of them is prepared to submit to judgment by virtue of the matters pleaded in those two grounds.

It is important that the action of the Secretary of State is not misconstrued. He emphasises that he submits to judgment in this court by virtue of the fact that this decision was wholly unrelated to the application and to the case that was pressed in the written representations but introduced a wholly new matter which would not have been in the minds of the parties to the appeal. It is important to realise that the submission to judgment on the part of the Secretary of State is based on the very particular circumstances that obtain in this particular case.

The second respondent also submits to judgment by virtue of the matters pleaded in paragraphs 9 and 10. I should add that in relation to condition 3, the authority, in their written representations, put forward three conditions in the event of permission being forthcoming. It is not necessary for me to look at them in detail, because the appellant indicated that those conditions would be acceptable to him, and I have to say that none of those conditions goes anywhere near the nature, content and implications of the condition which the inspector appears to have plucked out of mid-air.

There is one other ground in the notice of motion in respect of which, if it were pressed, the Secretary of State would submit to judgment, and that relates to a misdirection in respect of the green belt. I say no more about that, because it was not argued before me, and in the result the parties are content that the decision should be quashed, by virtue of the matters pleaded in paragraphs 9 and 10 in any event.

It follows, therefore, that the decision will be quashed, but this case raises, almost by a side wind, two important and interesting matters. Indeed, it raises in a stark manner the question as to what is the effect or the result of a court quashing a decision by reference to certain specific identified grounds in a notice of motion whereas the court takes no action in relation to the remainder.

Mr. Burrell, on behalf of the applicants, expresses some anxiety that if the court restricts itself to the matters raised in grounds 9 and 10 of the notice of motion, it might put him in a position where he was unable to raise or re-emphasise matters relating to the green belt issue which is the issue with which his authority is primarily concerned. At the outset he indicated to me that he wished to argue the other grounds so as to ensure that the whole matter was considered by the Secretary of State.

Mr. Holgate has come to the assistance of the court yet again. He has told me what the practice of the Secretary of State is in these matters. The Secretary of State's practice is to deal with the matter *de novo*, and in addition, in this case, in order to allay Mr. Burrell's fears, the Secretary of State, through counsel, gave an undertaking that the matter in this case would be considered *de novo* in any event and would

inevitably involve, as a potential issue, the green belt policy considerations.

Notwithstanding that undertaking, all three counsel indicated to me that there appeared to be inconsistencies in the various authorities where this or a similar point has been considered. Indeed, there may be inconsistencies in a particular judgment, which it is contended should really be resolved. As the matter has been raised, and I am invited to resolve it, I will attempt that task. Accordingly, I heard most helpful argument upon the point, and I was taken to the relevant authorities.

If I observe the chronology, I was first reminded of a passage in the judgment of Sachs J. (as he then was) in *Hartnell v. The Minister of Housing & Local Government*. The facts mercifully are not of significance. I was taken straight way to where the learned judge said<sup>1</sup>:

In those circumstances, the Minister's order in so far as it dismisses the appeal to him in relation to those two conditions must be quashed. It is, however, to be noted that under the terms of section 31(6) of the Town and Country Planning Act, 1959, which govern the present application to the High Court, it is not open to this court to substitute any order for that made by the Minister: the order quashing the Minister's decision is thus in the present case somewhat akin to an order remitting the matter to him for further consideration. The result is that the appeal to him as initiated by the notice dated December 12, 1961, is still pending. It is thus for him in due course to make such order as he may deem proper after ascertaining such further facts as may be necessary to enable him to make a decision in accordance with a correct view of the law.

It is an appropriate comment that the matter with which I am concerned is not resolved by Sachs J., and there was no reason why he should have resolved it. It is of interest to note that section 31(6) gives powers of appeal in circumstances similar to section 245 in respect of quashing whereas the power to remit a decision is to be found in section 246. Section 246 in fact enables the court to remit a matter to the Secretary of State for further consideration in relation to the opinion expressed by the court in the judgment. It is quite clear that Sachs J. is envisaging a similar situation in relation to the position under section 31(6) which is similar in terms to section 245 of the 1971 Act. That is as far as that particular authority takes me.

I was then referred to the case of *H. Sabey & Co. Ltd. v. Secretary of State for the Environment*. It is a relatively complex case, so far as the facts are concerned, and most unusual. Having resolved the question with which he had to deal, Willis J. ended his judgment by saying<sup>2</sup>:

In the circumstances of this case I do not think anyone is to blame, but I am left with the strong feeling that justice will not be done unless the applicants are afforded an opportunity to present their evidence on the "moisture question" before the Secretary of State reaches his final conclusion. Accordingly the decision must be quashed. I only add that while, of course, it is a matter entirely for the Secretary of State, there being no longer any criticism of the

---

<sup>1</sup> [1963] 1 W.L.R. 1141; 15 P. & C.R. 178 at p.190.

<sup>2</sup> [1978] 1 All E.R. 586 at p.590.

decision save in this one particular, one can naturally hope that any re-hearing can be limited to this single question.

I would most respectfully make two observations about that short passage. In a sense it is a matter for the Secretary of State, but in another sense he has no discretion in the matter, for the reasons which I shall indicate at the appropriate point in this judgment. All Willis J. is suggesting is that the narrow question should be considered because other questions appear to have been resolved. That was an expression of hope, and it certainly was not anything of a mandatory nature, and would depend, in my judgment, on the parties agreeing to take the course that the learned judge was suggesting in this passage. That, as I suggest, really takes me no further forward.

Then I was referred to *Price Brothers (Rode Heath) Ltd. v. Department of the Environment*. This is also a relatively complex case, but again I do not think it is necessary for me to canvass the facts. I was taken to the judgment of Forbes J., where he deals with the matters in principle and the matters which are germane to my decision in this case. In particular, I was taken to where the learned judge said<sup>3</sup>:

What about the situation when the Secretary of State's original decision is quashed? I think that Mr. Schiemann is right that, once the decision is quashed, it must be treated as not having been made. Therefore, the Secretary of State has, as it were, a blank sheet, and he has to make another decision, of course in accordance with any view of the law that the court may have indicated at the time of making its decision to quash the Secretary of State's order. Mr. Schiemann points out that, under section 245 of the Act of 1971 in this jurisdiction, the court may quash a decision of the Secretary of State, which is what Ackner J. did here, but that, in another jurisdiction, concerned with enforcement notices and governed by section 246, there are different procedures, because section 246 provides for the Secretary of State to state a case. The matter goes before the Divisional Court, and the powers of the court in dealing with enforcement notices are quite different.

At this stage I will go to the relevant subsections of section 245 and 246. The relevant subsections of section 245 are:

- (1) If any person
  - (a) is aggrieved by any order to which this section applies and desires to question the validity of that order, on the grounds that the order is not within the powers of this Act, or that any of the relevant requirements have not been complied with in relation to that order; or
  - (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and desires to question the validity of that action, on the grounds that the action is not within the powers of this Act, or that any of the relevant requirements have not been complied with in relation to that action, he may, within six weeks from the date on which the order is confirmed or the action is taken,

<sup>3</sup> (1979) 38 P. & C.R. 579 at p.590.

as the case may be, make an application to the High Court under this section.

Subsection (3) indicates the action or order on the part of the Secretary of State which is the subject matter of this section.

- (4) On any application under this section the High Court . . .
- (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation thereto, may quash that order or action.

I emphasise that of course the appeal lies on a very narrow ground indeed, and is primarily concerned with *vires* and procedure, and that the court has only the alternative of not quashing or quashing.

I now turn to section 246. This is a section which relates to appeals in respect of enforcement notices and similar notices. Subsection (1) reads:

Where the Secretary of State gives a decision in proceedings on an appeal under Part V of this Act against

- (a) an enforcement notice;
- (b) a listed building enforcement notice; or
- (c) a notice under section 103 of this Act,

the appellant or the local planning authority or any person (other than the appellant) on whom the notice was served may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court.

Order 94, rule 12(5) R.S.C. provides:

. . . If the court is of the opinion that the decision appealed against is erroneous in point of law, it shall not set aside or vary that decision but shall remit the matter to the Secretary of State with the opinion of the court for rehearing or determination by him.

The jurisdiction of the court is to deal with the appeal and remit the matter with the opinion of the court, which is of course usually contained in the judgment. On the face of it, there appear to be different consequences, depending upon which section is appropriate. In the first place, section 245 merely gives the power to quash, whereas section 246 permits the court to remit with the opinion of the court, which is usually contained, as I say, in the judgment.

That is the distinction which Forbes J. is about to draw in this passage in his judgment. Indeed, he reads the relevant sections and rules, and continues:

Although the situation is that the Divisional Court not infrequently makes an order remitting the matter back to the Secretary of State for decision, the power to make any order that the court thinks fit instead is there. This is in stark contrast to the power of the court under section 245, which is merely to quash the decision.

Then he looks at the position of the Secretary of State on the basis of a "blank sheet," as he describes it. The relevant passage reads<sup>4</sup>:

---

<sup>4</sup> *Ibid.* at p.591.

It seems to me, therefore, that we have got to the stage where the decision of the court to quash the decision of the Secretary of State means that the Secretary of State must look at the matter again. What is he to do? Is he to put his mind in blinkers at that stage, despite the fact that he may know of a whole series of highly material considerations that have arisen since the date of his first decision, and decide it only on those matters that were before him at that time? Or is he to be able to say: 'as my first decision is wiped out, I now have to come to a fresh decision, and in doing that I am entitled to look at every material consideration that exists at present?' I have no doubt at all about the answer to this question. Section 36 of the Act of 1971, importing section 29, regulates the duties of the Secretary of State in relation to a decision on a planning appeal. He has to take into account, *inter alia*, any material consideration. If his initial decision is quashed, that decision is wiped out as if no decision had been made. In coming to a fresh decision, he must, it seems to me, be entitled to take into account any material consideration that has arisen, whether before his original decision or after it. He must, it seems to me, necessarily take into account any material consideration that affects the matter up to the very moment of his own decision. I think that there can be no doubt that that is the situation, and that the Secretary of State must be entitled to take into account every material consideration then known to him.

I, with great respect and deference, would agree with the two passages, subject to this observation, that it is not a question of entitlement, so far as the Secretary of State is concerned, as appears from the second passage. It is a question of duty imposed upon him by virtue of section 36 of the 1971 Act. I go briefly to it:

(1) Where an application is made to a local planning authority for planning permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by that authority or is granted by them subject to conditions, the applicant, if he is aggrieved by their decision, may by notice under this section appeal to the Secretary of State. . . .

(3) Where an appeal is brought under this section from a decision of a local planning authority, the Secretary of State, subject to the following provisions of this section, may allow or dismiss the appeal, or may reverse or vary any part of the decision of the local planning authority, whether the appeal relates to that part thereof or not, and may deal with the application as if it had been made to him in the first instance.

In subsection (5) the provisions of section 29(1) apply. Broadly, that means that the Secretary of State is in the same position as the local planning authority when dealing with and determining applications for planning permission. Subsection (1) of section 29 reads:

Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in

dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.

So it is not a question of entitlement, it is a question of duty, and in the event of the planning authority or the Secretary of State considering an appeal and failing to have regard to the provisions of the development plan, or any other material consideration, then that would vitiate the decision.

Against that background I therefore return to the judgment of Forbes J. I should say that the issue in that case related to the way in which the Secretary of State dealt with a condition that was recommended by the inspector. Ackner J. took the view that there was no material or no proper material on which the Secretary of State could reject that recommendation with regard to the condition.

It is in that context that I read this passage<sup>5</sup>:

I turn now to the question of what is the position about Ackner J.'s decision and whether or not the only thing left to the Secretary of State when receiving that decision was simply to allow the appeal. I have read Ackner J.'s judgment—or the relevant parts of it—and, as I have indicated, it seems to me that, first of all, Ackner J. was at pains to point out that the Secretary of State did not say, and was not purporting to say, that he could not impose conditions of this kind because it would be illegal to do so. What the Secretary of State did say was that it was not practicable, and the ratio of Ackner J.'s decision is that he could find no evidence on which a reasonable Secretary of State could have found that it was impracticable to impose these conditions. If no more had occurred, it seems to me that, nevertheless, the Secretary of State would have been perfectly entitled to come back and issue a fresh decision letter saying: "I did not mean to say impracticable," and, when one reads the passage in the letter, I myself have no doubt that that is not [*sic*] really what he meant to say. I think, however, that he is perfectly entitled to come back and say:

"I did not really mean that it was impracticable. I meant that it would be unfair on the appellant to saddle him with a condition that would mean that the whole question of whether he could develop this land realistically would be out of his control."

He postulates what the Secretary of State might say, as follows<sup>6</sup>:

"The draftsman of the original letter did it so infelicitously that the appellant could not understand what it was about. I now propose to draft another letter that will make it perfectly clear."

He must be entitled, it seems to me, to do that.

Finally, the learned judge said<sup>7</sup>:

---

<sup>5</sup> *Ibid.* at p.592.

<sup>6</sup> *Ibid.* at p.593.

<sup>7</sup> *Ibid.* at p.596.

He is entitled to take into account every material consideration that arises until he makes his final decision, and the argument to the contrary has no real foundation.

Here again, with the utmost respect and deference to the learned judge, it is not a question of entitlement, as I have already pointed out. For my part, I cannot follow the reasoning of Forbes J., he having found that the Secretary of State is in a clean sheet situation, that the Secretary of State merely has to come back and correct that passage in the letter as a matter of drafting. It seems to me that those two circumstances are inconsistent, one with the other. The Secretary of State, in my judgment, is not entitled merely to correct the language of the decision letter in order to put the matter right. That inconsistency has stood apparently without comment for many years, but both I and counsel are unable to offer any real explanation as to why he qualifies the blank sheet situation in that way.

Then I was taken to the case of *Rogelan Building Group Ltd. v. Secretary of State for the Environment and Kettering Borough Council*. Here again, the facts of the case are not material. Glidewell J. starts his judgment<sup>8</sup> by looking at the substance of the appeal, by reference to the very well-known passages contained in *Seddon Properties v. Secretary of State*, in the decision of Forbes J. I turn to the second ground on which there was attack or challenge before Glidewell J.:

The meaning of the decision letter was unclear: in particular, it was impossible to tell from paragraph 4 of the letter whether the Secretary of State had taken the history and harshness into account but said that they were outweighed by the structure plan policies, or was merely regarding the history and harshness as incidental matters which were not material.

The learned judge found for the appellant in relation to that ground.

However, at the end of the judgment Glidewell J. is recorded as quashing the decision and saying words to this effect:

However, it was now open to the Secretary of State to re-phrase his decision letter so as to make clear what his reasons are for disagreeing with his Inspector. In this respect he (Glidewell J.) agreed with what Forbes J. had said in *Price Brothers (Rode Heath) Ltd. v. Secretary of State for the Environment*.

It follows, with the greatest respect to Glidewell J. (as he then was) that he was looking at one part of Forbes J.'s judgment, which in my judgment is plainly inconsistent with what I conceive to be a correct statement of the law. For my part I do not believe that the Secretary of State should change his practice, which is to look at these matters *de novo*, and merely re-phrase his decision. Indeed, that would be a course which would be unacceptable, for a number of reasons which I do not intend to canvass.

At the end of the day I am firmly of the view that the Secretary of State has to start again *de novo* with a clean sheet. In that clean sheet situation he is under the obligation to have regard to the development plan and other material considerations, and indeed he is obliged by virtue of the statutory provisions to have regard to matters that may be

---

<sup>8</sup> [1981] J.P.L. 506 at p.508 and *see* (1978) 42 P. & C.R. 26.

material considerations which have arisen since the date when the matter was originally considered. Otherwise, as explained by Forbes J., there will be an absurd artificiality about the whole exercise, apart from the fact that there would be a breach of the clear duty under the relevant sections.

I refer finally to *Newbury District Council v. Secretary of State for the Environment and Another*. I know that it is a somewhat truncated report,<sup>9</sup> and does not precisely indicate the position, but I ought to say that Kennedy J. did rely on the case of *Gill*. He was influenced by the decision in the *Gill* case, in which Glidewell J. had said, in relation to a challenge in respect of conditions applied to a planning permission:

An appellant seeking to challenge that situation could use either the machinery in section 245 or the machinery in section 246.

It may be that on the particular facts of that case that was right, but I have to say that section 245 is definitive of the matters with which it is concerned, as is section 246.

In any event, Kennedy J. found that the matter should be remitted under section 246 and that in a reconsideration with the advantage of the opinion of the court under section 246 the Secretary of State was obliged to treat the matter as being at large, even to the extent of putting at large a planning permission which had been granted some years before the *Newbury* case came to the court albeit that he expressly recognised that there would have to be compelling new material upon which the Secretary of State could act.

I forebear to make any other comment, save this. If it is right that the whole matter is reconsidered *de novo* on a remission under section 246, *a fortiori* where a decision is quashed, manifestly the matter should be reconsidered *de novo*. In the former case the advice of the court is forthcoming, and the Secretary of State has to have regard to it. In the second case the advice of the court may be apparent in the judgment, but the court is only entitled to quash the matter, and not specifically offer guidance to the Secretary of State, in a situation where he has to start all over again *de novo*. Thus I look at that decision in support of the proposition that in relation to the more draconian measure of quashing, one would expect the Secretary of State to re-open, particularly if he is obliged to re-open the whole matter on a remission which might or might not be related to a very narrow point in the case itself. Accordingly, it seems to me, on examination of the statutory structure and the authorities which bear on the matter, there can be no doubt that the Secretary of State must consider the matter *de novo* in circumstances where a decision is quashed under section 245.

I make no comment on the position that that might arise in relation to other powers of the court under other sections giving rights of appeal against the various actions, orders and decisions that the Secretary of State is entitled to make under the planning legislation.

That is the first point, which arose, as I said, largely as a side wind, but there is a further point, which emerged in this way. When I was informed that the Secretary of State was prepared to submit to judgment in relation to three grounds, so that inevitably the court must quash and

<sup>9</sup> The judge had only the *Times Law Report* of July 2, 1987, to refer to when making his decision. This case is now to be found at (1988) 55 P. & C.R. 100.

indeed the second respondent was prepared to submit to judgment in respect of two of the grounds, I posed the question: was it necessary to look at the other grounds? Mr. Burrell suggested to me that it was, for the reasons which I have already canvassed.

However, when I came to look at the documents it seemed to me that the inspector had applied planning judgments in a balancing exercise which looked at and gave weight to a number of specific matters, and he thereafter came to his conclusions. Equally, from the documentation a similar exercise appears on the face of it to have been carried out by the planning authority, as is manifest from paragraph 5.5 and paragraph 6.3. I must emphasise that I did not hear argument in respect of this matter, although both Mr. Burrell and Mr. Holgate made some preliminary observations on the situation.

When I looked at the notice of motion and the grounds therein, other than the three grounds to which I have already adverted, it seemed to me that the thrust of the case was that the inspector may have done the wrong balancing operation in that he accorded different weight to a number of factors and thus, in the result, it differed from the planning authority's balancing operation because he had not had sufficient regard to the same matters that were apparently taken into account. If that be the case, this appeal in relation to those grounds should never have been made, because this court does not indulge in balancing operations. The court is only concerned with the *vires* of the decision. For that, the appropriate procedure has been complied with. Too many cases are coming to the court, where the court is in fact being invited by reference to the documents before the inspector to come to judicial conclusions on the facts and in relation to matters such as planning judgments.

I suppose I should rehearse yet again the limited circumstances when the court will look outside the four corners of the decision letter, or if an inspector's report is available on which the decision letter is based, the four corners of the inspector's report. The court should not stray outside the four corners of those documents save in exceptional circumstances. Yet again, I feel constrained to read the well-known passage in the judgment of the Master of the Rolls in the *Ashbridge* case where he said<sup>10</sup>:

Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.

It must be apparent on the face of it that where it is alleged there was no material on which the inspector or the Secretary of State could found their decision, it may be necessary to look outside the documents to examine that situation, but even in that situation the extent to which the court would go outside the documentation will, as a generality, be limited. Of course, if the inspector or the Secretary of State has, in

---

<sup>10</sup> [1965] 1 W.L.R. 1320 at p.1326.

relation to a real matter of real importance and substance, had evidence before him, but omits to refer to it in his report or decision letter as the case may be, again it may be necessary to go outside the four corners of the documents. In order to establish perversity it may be that the court is required to look at material outside the four corners of the documents, but even in that case, it is not necessarily so.

The approach of the court thus far is to look askance at an early stage at the material which it is invited to consider, and then to look at the documents *de bene esse*, and come to a decision on the substantive point. That is a convenient approach in circumstances where the point is manifestly a short one, but there are circumstances, or could be circumstances, where that approach could involve the court in looking at documents, which might take days or weeks, essentially for the purpose of deciding whether such documents should be looked at at all.

Accordingly, in my judgment, an applicant under section 245 or section 246 must be prepared at the outset of his case to justify his contention as to documents outside the decision letter and, if there is one, the inspector's report, on the grounds that a question of real substance cannot be resolved without recourse to such material. That disposes of the two matters which arise for consideration in this case, and I will quash the decision of the inspector.

*Appeal allowed. No order as to costs.*

*Solicitors*—Sharpe Pritchard & Co., London WC2; the Treasury Solicitor; Lloyd Burch & Inskip, Bristol.