Trinity Term
[2012] UKSC 34
On appeal from: [2010] EWCA Civ 892

JUDGMENT

The Health and Safety Executive (Appellant) *v* Wolverhampton City Council (Respondent)

before

Lord Hope, Deputy President
Lord Walker
Lord Dyson
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

18 July 2012

Heard on 13 and 14 June 2012

Appellant
Philip Coppel QC
Carine Patry Hoskins
(Instructed by Treasury Solicitors)

Respondent
Robert Griffiths QC
Estelle Dehon
(Instructed by Wolverhampton City Council Legal Services)

Respondent
James Maurici

(Instructed by Reed Smith LLP)

LORD CARNWATH (WITH WHOM LORD HOPE, LORD WALKER, LORD DYSON AND LORD SUMPTION AGREE)

Introduction

1. The appeal raises a short issue of construction under the planning Acts, on which differing views have been expressed by experienced planning judges in the courts below. It arises in the context of a planning permission granted by the respondent council for four blocks of student accommodation in proximity to a site used for storage of liquefied petroleum gas ("LPG"). The question, as agreed by counsel for the purposes of the appeal, is:

> "In considering under section 97 of the Town and Country Planning Act 1990 whether it appears to a local planning authority to be expedient to revoke or modify a permission to develop land, is it always open to that local planning authority to have regard to the compensation that it would or might have to pay under section 107?"

The Court of Appeal by a majority (Longmore and Sullivan LJJ, Pill LJ dissenting) [2011] PTSR 645 decided it in the affirmative.

2. Unusually, the court is asked to consider this question, not in the context of a specific decision of the council to revoke the permission, but as an abstract point of construction in connection with a decision which may or may not be made in the future. As I understand it, the Court of Appeal has granted permission to appeal on the footing that the point is one of some general importance on which a definitive decision is desirable.

The parties

3. The Wolverhampton City Council ("the council") is the council for a metropolitan borough in the West Midlands. It is the local planning authority, and also the hazardous substances authority for the relevant area under the Planning (Hazardous Substances) Act 1990 ("the PHSA 1990").

4. The Health & Safety Executive ("the HSE") is a statutory non-departmental public body, established under the Health and Safety at Work etc. Act 1974. It has

a general duty under the Act to work with others to secure the health, safety and welfare of people at work, to protect the public against risks to health and safety arising from work activities, and to control dangerous substances. The statutory regime for the control of hazards involving dangerous substances includes the Control of Major Accident Hazards Regulations 1999 (SI 1999/743) (made under European Council Directive 96/82/EC (the "Council Directive")). The HSE together with the Environment Agency is the "competent authority" under that regime, with responsibility to oversee its operation and to co-ordinate the regulation of major hazards. As part of that role, the HSE sets acceptable levels for particular classes of risk to the health and safety of the population, measured by the probability of a particular occurrence.

5. The HSE's advice in relation to particular development proposals is, in most cases, generated by a risk model known as "Planning Advice for Developments near Hazardous Installations" ("PADHI"). There is a computer-based version of this model, known as "PADHI+", which allows local planning authorities to consult and obtain the HSE's advice online by entering various site-specific details. The distance between the hazardous installation and the proposed development is related to three "zones" (inner, middle and outer), the inner zone posing the greatest risk.

6. The interested party, Victoria Hall Ltd ("the developer"), is a private limited company whose main business is the provision of student accommodation, nationally and internationally. It was represented by counsel in the Court of Appeal, but not in this court.

Statutory provisions

7. The grant of planning permission is governed by section 70 of the Town and Country Planning Act 1990 ("the 1990 Act".) Where an application is made to the local planning authority, they may grant permission (conditionally or unconditionally) or refuse permission. In dealing with the application they must "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations" (s 70(2)).

8. Section 97, which is directly relevant to the appeal, provides:

> "**Power to revoke or modify planning permission**
>
> "(1) If it appears to the local planning authority that it is expedient to revoke or modify any permission to develop land granted on an

> application made under this Part, the authority may by order revoke or modify the permission to such an extent as they consider expedient.
>
> (2) In exercising their functions under subsection (1) the authority shall have regard to the development plan and to any other material considerations.
>
> …"

9. In relation to building operations, the power to revoke or modify may be exercised at any time before the operations have been completed, but will not affect those operations so far as previously carried out (section 97(3)(4)). If there are objections, a revocation order made by a local planning authority is subject to confirmation by the Secretary of State (section 98). If the order is confirmed, compensation is payable by the authority for abortive expenditure, and for other loss or damage directly attributable to the revocation or modification (section 107). Section 100 gives the Secretary of State a separate power to make an order under section 97. Such an order has the same effect as one made by the local planning authority (section 100(2)), with the consequence (inter alia) that the authority, not the Secretary of State, are liable to pay compensation.

10. Although not directly relevant to this appeal, parallels have been drawn in argument with the provisions of section 102 (and related sections) for "discontinuance orders", that is orders for the discontinuance of any use of land, or for the imposition of conditions on any such use. Under section 102(1) a discontinuance order may be made, if:

> "having regard to the development plan and to any other material considerations, it appears to a local planning authority that [such action] is expedient in the interests of the proper planning of their area (including the interests of amenity) ..."

11. Finally, reference should be made to the provisions for "hazardous substances consent" under the PHSA 1990. By section 4, subject to certain limits, the presence of a hazardous substance on, over or under land requires a hazardous substances consent. By section 9, consent may be granted by the hazardous substances authority. In dealing with an application for consent, the authority is required to have regard to "material considerations", which are defined as including in particular the existing and likely future uses of land in the vicinity, and the provisions of the development plan (s 9(2)). By section 14 the same

authority may make an order revoking or modifying such a consent, "if it appears to them, having regard to any material considerations, that it is expedient to revoke or modify it". By section 19, compensation is payable in respect of any loss or damage directly attributable to the revocation or modification.

Background facts

12. On 4 August 2008, following an application by the developer, the council granted planning permission for the erection of four blocks (blocks A-D) of student accommodation on land between Culwell Street and Lock Street, Wolverhampton. Some 95 metres away from the nearest block (Block D), on the other side of a railway line, there is a LPG facility operated by Carvers LPG (Wolverhampton) Ltd. ("Carvers"). LPG is a dangerous substance within the meaning of the Council Directive. The site accordingly requires, and has been granted, hazardous substances consent under the PHSA 1990.

13. Because of the proximity of the LPG site, the council was required to consult the HSE on the application. They did so on-line (by PADHI+) and received the following response:

> "The assessment indicates that the risk of harm to people at the proposed Development is such that HSE'S advice is that there are sufficient reasons, on safety grounds, for advising against the granting of planning permission in this case."

This advice was in due course reported to the planning committee by the officers, with an indication that though not mandatory it "should not be overridden without careful consideration".

14. What followed is summarised by Sullivan LJ (para 6):

> "Despite this warning, when considering the planning application Wolverhampton failed to consult further with the HSE, failed to obtain its own advice as to the safety implications of permitting a substantial amount of residential accommodation in this location and, despite being obliged to do so, failed to give the HSE advance notice of its intention to grant planning permission for the development, and failed to notify the HSE that it had granted permission. The HSE first discovered on 16 December 2008 that planning permission had been granted, over four months after the grant of permission and, since works had commenced prior to the

> grant of permission, five months after the works had commenced. By the time the HSE became aware of the development, work on three of the blocks, A, B and C, was well advanced. Work on block D, which was the closest block to the LPG facility, had not commenced."

15. Sullivan LJ also described the attempts which were made by the HSE over the following weeks to resolve the issue by agreement with the council and the other interested parties. They indicated initially that their preferred option would be to relocate the Carvers installation. But they also pointed out that the council's procedural failures had deprived the HSE of the opportunity to ask the Secretary of State to call in the application for planning permission; and they asked the council to remedy this by making a revocation order under section 97, at least to prevent the construction of block D.

16. The nature of the discussions between the council and the HSE can be seen from the notes of a meeting on 8 April 2009. It was recorded that there was "a verbal agreement" that building of block D would not be started "until market conditions improved". The other blocks were almost complete, in preparation for the first students to take up residence at the beginning of the academic year in October 2009. The HSE representative identified three "options to resolve the problem": (i) revoke the planning permission for blocks in the inner and middle zones; (ii) move Carvers from their site; or (iii) reduce the LPG inventory at the Carvers Site and "amend" the hazardous substance consent to a lower level. (I take the word "amend" to be a reference to modification under section 14 of PHSA 1990.)

17. The council's representative indicated that no decision had yet been taken by the council on any of the options. The first option (revocation) was considered most unlikely "because of the potentially high costs of doing so". It was noted that "any of the options would require compensation", and that there would therefore need to be "a dialogue between Carvers and Wolverhampton City Council on how best to achieve a positive outcome." The HSE representative emphasised the need for a quick decision by the council, and offered technical support for that purpose. He also advised that the HSE would consider further action, such as judicial review, if a satisfactory response were not received.

18. Thereafter progress was slow. On 18 May the HSE restated its wish to resolve the issue urgently and asked the council to indicate whether it was willing to make a revocation order. The council's reply was terse:

> "The Council has now taken some preliminary legal advice and from a careful consideration of all the information available can see no justification for revoking or modifying the planning permission in question…"

Apart from indicating that they were waiting for further information and would keep the HSE informed, they gave no further reasons for this decision, nor any clear indication of the council's view of the problem, or of how, if not by revocation, they proposed to deal with it.

19. On 22 June solicitors for the HSE gave the council notice of their intention to seek judicial review both of the grant of planning permission and of the decision not to revoke it. They noted that no work had yet started on block D, which was entirely within the inner zone. They suggested two courses open to the council: either to resolve on revocation of the permission in respect of block D, or to consent to the quashing of the permission as a whole. The HSE's preference was for the latter, because it also had concerns about block C, and would welcome the opportunity to ensure that the whole development could be reconsidered. In response the council indicated that, having taken leading counsel's advice, and in view of the number of people living in the area, and the scope for further development, it was "manifest that the most appropriate course is to relocate the installation, if need be compulsorily". The council would be considering this further with its advisers. It suggested that the HSE itself might wish to consider such a course.

20. The HSE's claim form was filed on 9 July. On 14 October 2009 the matter came before Collins J on a "rolled-up" hearing. He granted permission to apply for judicial review, but declined to quash either the planning permission or the decision not to revoke. Instead he ordered the council to provide a full summary of its reasons for granting planning permission and of the policies taken into account, and made a declaration that the council had acted in breach of the procedural regulations in a number of respects. On the issue of revocation, he noted that this was now impossible in respect of blocks A, B and C, and would be in any event inappropriate because of its serious financial implications for the developer (a relevant factor, as held in *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77). In respect of the HSE's submission that the cost of compensation was not a relevant factor (following *Alnwick District Council v Secretary of State for the Environment, Transport and the Regions* (2000) 79 P & CR 130), he said:

> "I do not need to decide whether this is correct since the impact on the interested party coupled with the completion of three of the four blocks and the reasonable view that the HSE's failure to take immediate action shows that the risk could not be regarded as

> immediate entirely justifies a refusal to revoke or modify. Certainly, the refusal cannot be regarded as irrational." (para 40)

21. The appeal was heard by the Court of Appeal in May 2010. Judgment was given on 30 July. Sullivan LJ, giving the leading judgment, noted (para 26) the HSE's argument that it had been seeking revocation only in respect of block D, and that in this respect Collins J had proceeded on a false premise. Sullivan LJ thought that, whatever confusion there might have been about the HSE's own position until the letter of 22 June 2009, it should before then have become clear to the council that the only practical possibility was the revocation of block D; and that this was an option which they should have considered with care (paras 29-30). Their failure to do so meant that their decision of 29 May 2009 not to make a revocation order was unlawful, and they should be ordered to reconsider (para 38). On that point the court was unanimous.

22. As to whether compensation would be a material issue in that reconsideration (the issue now before this court), the Court of Appeal was divided. Longmore LJ agreed with Sullivan LJ that it was capable in law of being a material factor, and ordered the council to reconsider the issue on that basis. Pill LJ disagreed. As already noted, they granted permission to appeal to this court. I shall return to their reasoning below.

23. On the material before this court, the position remains that the council has not made a formal decision on whether to make a revocation order in respect of block D. We were told by Mr Griffiths QC on instructions that the council had obtained its own expert advice as to the degree of risk posed by the proximity of the LPG business, and he also gave us some information about the progress of discussions for the relocation of the Carvers' business to another site owned by the council. However, since that information is not in evidence, and the HSE has not had an opportunity to respond to it, I leave it out of account for the purposes of this judgment.

A simple view

24. I start by looking at the position in general terms, before considering whether there is anything in the particular statute, or the relevant authorities, which requires a different approach. In simple terms, the question is whether a public authority, when deciding whether to exercise a discretionary power to achieve a public objective, is entitled to take into account the cost to the public of so doing.

25. Posed in that way, the question answers itself. As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking account of any more economic ways of achieving the same objective. Of course, the weight attributable to cost considerations will vary with the context. Where, for example, the authority is faced with an imminent threat to public security within its sphere of responsibility, cost could rarely be a valid reason for doing nothing, but could well be relevant to the choice between effective alternatives. So much is not only sound administrative practice, but common sense.

26. Does section 97 require a different approach? On an ordinary reading, the answer must be no. The section requires the authority to satisfy itself that revocation is "expedient", and in so doing to have regard to the development plan and other "material considerations". It is not suggested in this case that the development plan throws any light on this issue. The other two expressions are, at least at first sight, capable of encompassing the cost consequences of revocation. The word "expedient" implies no more than that the action should be appropriate in all the circumstances. Where one of those circumstances is a potential liability for compensation, it is hard to see why it should be excluded. Similarly, at least at first sight, there is nothing in the expression "material considerations" to exclude cost. "Material" in ordinary language is the same as "relevant". Where the exercise of the power, in the manner envisaged by the statute, will have both planning and financial consequences, there is no obvious reason to treat either as irrelevant.

27. The practical sense of this approach is illustrated by the facts of the present case. The safety concerns highlighted by the HSE would have made it hard for the council to justify doing nothing, at least once there was a risk of block D being built. But, assuming the need for compulsion, it appears that they had a choice of at least three statutory routes: an order under section 97 of the 1990 Act to prevent the building of block D, an order under section 14 of the PHSA to limit the hazardous substances which could be stored at the LPG site, or a compulsory purchase order to remove the Carvers installation altogether. Action under any of these powers would result in a claim for compensation, but not necessarily of the same order. The choice between the options would no doubt involve a range of planning and other issues, but it would be curious if comparative cost could not be at least one factor in the overall balance.

Authorities

28. The principal authority relied for the contrary view, which had the support of Pill LJ in the present case, is the judgment of Richards J in the *Alnwick District Council* case 79 P & CR 130. The district council had granted permission for a

large superstore, under a misapprehension as to the size of what was proposed, and in contravention (as the inspector found) of national planning policy. In the face of the council's objections, the Secretary of State made a revocation order, the compensation for which (estimated at £3-4m) would fall on the council. The inspector described the decision as "grossly wrong" and "seriously perverse", and likely to cause "significant harm to Alnwick's vitality and viability as a shopping centre". He indicated that he regarded the issue of compensation as irrelevant. The Secretary of State adopted his reasoning.

29. The council applied to the High Court to quash the order. The principal argument was that liability for compensation of this order would put the council in severe financial difficulties, and in particular would put at risk a planned development of leisure facilities elsewhere in the district. This argument had been touched on only lightly at the inquiry, and seems to have been developed largely by counsel in the High Court. The Secretary of State submitted that compensation was irrelevant as a matter of law, but also that, even if it had been relevant, relief should be refused as a matter of discretion, because on the material before the Secretary of State there was no likelihood of it having led to a different decision.

30. Richards J accepted both submissions. The second, which is not in dispute, is sufficient to support the decision in the case. On the first, in view of the importance attached to his reasoning by the appellants, I will quote most of the relevant passage, at pp 142-143, in full:

> "A decision maker will often be entitled, if not required, to take into account as a relevant or material consideration the financial consequences of his decision. Consideration of the effects of a decision on others is a normal aspect of the decision-making function and there is no difference of principle between financial effects and other effects. The observations of Nicholls LJ, in *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77 as to the relevance of the adverse effects of a ministerial order were directed to the specific context of an order extinguishing or expropriating an individual's rights but are in my view capable of more general application. Nor is the point limited to the effects of a decision on others. It also applies to the financial consequences for the decision maker himself. Where decisions involve the expenditure of public funds, the decision maker will normally be entitled or required to take into account matters such as the availability of funds and competing demands on those funds.
>
> All that, however, is at a level of generality. Whether a particular consideration is one that a decision maker is entitled or required to

take into account in the exercise of a statutory power depends ultimately on the statute conferring that power. A statute may restrict the range of permissible considerations either expressly or by implication. Whether it does so is to be determined by reference to its provisions and to the statutory purpose.

In the exercise of their functions under sections 97 and 100 of the 1990 Act with regard to the revocation and modification of planning permissions, local planning authorities and the Secretary of State are required to have regard to "material considerations" (see section 97(2)). *What is capable of amounting to a material consideration for this purpose must in my view be the same as in relation to the initial determination of planning applications, i.e. the "material considerations" referred to in sections 70(2) and 54A.* Although the courts have adopted a flexible approach towards the concept, a consideration must in broad terms be a "planning" consideration in order to be material for that purpose. Any consideration which relates to the use and development of land is capable of being a planning consideration (see *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281, 1294).

It follows that financial consequences are capable of amounting to a material consideration in so far as they relate to the use and development of land. *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 is an example. The need for a connection with the use and development of land was helpfully spelled out in the application of that decision in *Northumberland County Council v Secretary of State for the Environment* (1989) 59 P & CR 468.

It also follows, however, that *in so far as financial consequences do not relate to the use and development of land, they are not capable of amounting to material considerations*. In my view that is fatal to the general proposition for which [leading counsel on behalf of the council] contends, that the cost to the local authority may be taken into account irrespective of land-use consequences. I see no warrant for treating cost as a permissible consideration even where it is not a "material consideration" within the meaning of the legislation. It is wholly consonant with the statutory purpose that decisions under sections 97 and 100 should be guided only by planning considerations. It cannot have been the legislative intention, in introducing provision for the payment of compensation, that the impact of such payment upon a local planning authority's financial position should condition the exercise of the powers to revoke or modify planning permissions. *Payment of compensation enters into*

> *the picture only after a decision to revoke or modify has been taken.* Its purpose is simply to ensure that persons interested in the land are compensated for any loss they suffer by reason of the revocation or modification of the permission." (Emphasis added)

31. It is to be noted that Richards J accepted as a general proposition that, where a decision involves the expenditure of public funds, the decision maker will normally be "entitled or required" to take into account "matters such as the availability of funds and competing demands on those funds". His reasoning for taking a different view in the present context depended (as seen in the emphasised passages) on three steps:

> i) The meaning of the term "material considerations" must be consistent throughout the Act, including as between section 70 and section 97.
>
> ii) The authorities show that financial considerations unrelated to the use and development of land are not material in relation to the grant or refusal of planning permission. They cannot therefore be material in relation to the making of a revocation order.
>
> iii) Under the statutory scheme compensation enters the picture only after the order has been made.

32. I say at once that I find the third point very difficult to follow. The fact that a restaurant bill normally arrives after the meal does not mean that the likely cost of the meal has to be ignored in deciding where and what to eat. Similarly, potential liability to compensation cannot be said to be irrelevant merely because it is not fixed and payable at the outset. I will return to the other points when considering the appellants' arguments in this court. It is necessary first to refer to the other main first instance authority, and the judgments of the Court of Appeal in the present case.

33. In *R (Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] 2 P & CR 198 (relating to a discontinuance order under section 102), Ouseley J disagreed with Richards J's interpretation. He was willing to accept step (i) of the argument, that the term "material considerations" required a consistent interpretation, which limited it to "planning" considerations (para 202); but he thought that the concept of "expediency" implied a wider approach:

> "198. An *expedient* decision would, to my mind, necessarily require attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under section 102. These advantages and disadvantages should not be confined to those which the subject of the notice would face; they should be measured against the advantages and disadvantages to the public interest at large, including the costs and effectiveness of the various possibilities. The question of whether the cost to the public is worth the gain to the public is, I would have thought, the obvious way of testing expediency. At least, it is difficult to see that expediency could be tested without consideration of that factor."

34. In the Court of Appeal in the present case, Sullivan LJ thought that the introduction of the word "expedient" was not "of itself" sufficient to justify a different approach as between section 70 and section 97 (para 47). He also accepted (para 46) that "there must be a consistent approach to the meaning of 'material considerations' in the enactments which comprise the 'planning code'", a term which he treated as including the provisions both for the grant of permission (section 70), and those for revocation (section 97) and discontinuance (section 102) (para 45).

35. However, as I understand his reasoning, he saw the two expressions as working together. First, he highlighted the different decision-making process as between section 70 on the one hand, and sections 97 and 102 on the other. The authority does not initiate the decision-making process under section 70, and "a decision to take no action is not an option": para 49. By contrast, under section 97 or 102, the authority initiates the decision-making process, and, having done so, may decide to take no action because it considers it not "expedient" to do so. In that process it needs to consider the consequences under the Act, and whether action under some other provision would be more appropriate. He continued:

> "The 1990 Act must be read as a whole for the purpose of ascertaining Parliament's intention. Since Parliament expressly provided that the local planning authorities will be liable to pay compensation if they decide that action should be taken under certain powers conferred by the Act, it must be inferred, in the absence of clear words to the contrary, that Parliament expected that a local planning authority would have regard to its liability to pay compensation under one part of the Act when deciding whether or not to exercise a power under another part of the Act. A decision under section 97 is not taken in isolation, it is taken within the statutory framework of the 1990 Act. If that statutory framework imposes a liability to pay compensation if a certain course of action is taken, there is no sensible reason why that liability should be

> ignored (in the absence of an express instruction to do so) when a decision is reached under the Act as to whether that action should be taken." (para 50)

36. Longmore LJ agreed with Sullivan LJ, partly because of the differences between section 70 and section 97, but also because he considered "brightline rules" to be "much more troublesome" in public law than in private law:

> "The view that the fact and the amount of compensation can never be taken into account by a planning authority has, to my mind, an inappropriately absolute ring to it. A private pocket may be required to pay up although the heavens fall around it, but such a principle can be awkward where the public purse is involved and public authorities have budgets within the limits of which they must, if possible, keep." (para 66)

37. He added that a planning authority would not be entitled to refuse to modify or revoke a planning permission "by invoking a vague concept of cost to the public purse":

> "They would have to say in terms what the amount of compensation is likely to be and precisely why it is expedient for that sum not to be paid in circumstances in which modification or revocation might otherwise be appropriate. That is unlikely to be an easy or straightforward exercise." (para 67)

38. Pill LJ took a different view:

> "I agree with Richards J in the *Alnwick* case that what is capable of amounting to a material consideration for the purposes of section 97 must be the same as in relation to the determination of planning applications under section 70. Its use in a context in which compensation may follow from a decision does not affect what is comprehended by the term "material considerations", which are planning considerations related to the character, use or development of the land." (para 76)

39. He noted, but was unimpressed by, the argument (reflected in the judgment of Sullivan LJ at para 53) that, when the original version of section 102 was enacted in 1947, Parliament cannot have intended financial considerations to be

ignored, since that would have led to a spate of expensive discontinuance orders to put right the "legacy of numerous inappropriately sited uses and buildings":

> "I do not accept that analysis. The consistent theme in the legislation has been that planning decisions should be made in accordance with the development plan and any other material considerations. The 1947 Act introduced the concept of the development plan which became the primary planning document for the local planning authority's area.... A good environment and development were to be achieved by means of a development plan, or a series of development plans. It was not contemplated in 1947 that England (and Wales) would be transformed overnight into Blake's Jerusalem. The route to progress was through the new development plans and not through extensive use of discontinuance orders." (para 87)

40. The introduction of the word "expedient" made no difference:

> "The word expedient must be read in context: is it expedient having regard to the development plan and to any other material considerations? The word permits latitude in an evaluation but the evaluation must be based on matters lawfully taken into account, in my view considerations relating to the character, use or development of the land." (para 91)

41. From a practical point of view, he saw a risk that, if undue weight were given to financial considerations, "the careful procedures normally followed to ensure that decisions inappropriate on planning grounds are not taken will operate less effectively", and a "deterrent to facile decision-making would be removed." (para 107)

The appellants' arguments

42. Mr Coppel QC, for the HSE, has helpfully grouped his submissions under four main heads:

(1) Consistency

43. In his printed case, Mr Coppel went to some lengths to counter the various elements in Ouseley J's detailed reasoning in *Usk*. However, the key points, and

those most directly relevant to the majority's reasoning in this case, can I think be summarised as follows:

i) There is a presumption that words are used with a consistent meaning throughout a statute. There is no good reason to depart from that presumption in this case.

ii) The meaning of the phrase "material considerations" in the planning Acts is well-established. It does not include financial considerations, except where they have planning consequences.

iii) Consistent with that principle, it is axiomatic that a planning permission cannot be bought and sold.

iv) The majority were right to accept in principle that the expression "material considerations" should be given the same meaning throughout the planning code.

v) They were wrong to hold in respect of section 97 that either the nature of the decision-making process, or the inclusion of the concept of expediency, altered the range of factors to be taken into account. That term gave the decision-maker a wide latitude when evaluating "the development plan and . . . other material considerations"; but it did not widen the range of matters to which the authority could properly have regard when carrying out that evaluation.

(2) Effective judicial supervision

44. The majority's interpretation would deprive the court of any effective power to control the exercise of the discretion under section 97. The word "expedient" has been interpreted as giving the decision-maker a wide latitude, which allows little room for intervention by the courts. Further, the courts are reluctant to interfere with decisions involving allocation of limited resources, or to substitute their own views of relative priorities.

45. If material considerations include the financial impact on the authority, a case for revocation, however compelling on planning grounds, could lawfully be overridden by other demands on limited resources. The authority's functions under the planning Acts, including those relating to hazardous substances, should not capable of being "traded" against its other functions.

(3) Self-interest

46. The corollary of the proposition that a planning permission cannot be bought or sold is that the decision to revoke or modify a permission cannot be devalued by consideration of its cost to the authority. This lessens the independence of the local planning authority, and is alien to the integrity of the planning system. The authority should not be tempted to deviate from the best planning decision by financial self-interest.

(4) The importance of the development plan

47. Mr Coppel echoes Pill LJ (para 87) in emphasising the "consistent theme" of the legislation, that planning decisions should start from the development plan. If "material considerations" extend to non-planning considerations, the importance of the development plan is weakened, and its "paramountcy" cannot be secured against the "wildcard of financial considerations" (printed case, paragraph 78).

Discussion

48. In considering these arguments, and the reasoning of the courts below, I hope I will be forgiven for going back to the "simple approach" with which I started. As I said then, and as Richards J accepted, general principles would normally dictate that a public authority should take into account the financial consequences for the public purse of its decisions. I also said that, at least at first sight, I could find nothing in section 97 which requires it to be treated as an exception to those principles. Nothing I have heard or read in this case has led me to change that view.

49. The principal argument to the opposite effect is the appeal to "consistency". I accept of course the ordinary presumption that Parliament is taken as using the same words in the same sense. I am aware also that in planning law the apparently innocent expression "material considerations" has acquired an impressive overburden of case law going back more than 40 years. However, none of the authorities before *Alnwick* were directed to the provisions related to revocation or discontinuance. Sufficient consistency is given to the expression if the word "material considerations" is treated as it is elsewhere in administrative law: that is, as meaning considerations material (or relevant) to the exercise of the particular power, in its statutory context and for the purposes for which it was granted.

50. So read, the Court of Appeal's interpretation creates no inconsistency between section 70 and section 97. The meaning is the same, but the statutory

context is different. Under section 70 the planning authority has a duty to act, and it has a limited choice. It must either grant or refuse permission. Its decision must be governed by considerations material to that limited choice. Further, the decision normally has no direct cost consequences for the authority (unless exceptionally it has a direct financial interest in the development, when other constraints come into play).

51. Under section 97, by contrast, the authority has no obligation to do anything at all; it has a discretion whether to act, and if so how. Secondly, if it does decide to act, it must bear the financial consequences, in the form of compensation. No doubt under section 70, planning permission cannot be "bought or sold". But section 97 creates a specific statutory power to buy back a permission previously granted. Cost, or value for money, is naturally relevant to the purchaser's consideration. To speak of the "self-interest" of the authority in this context is unhelpful. A public authority has no self-interest distinct from that of the public which it serves.

52. The same result can be achieved even on a narrower interpretation of the expression "material considerations". In other words, planning considerations, including the development plan, are the starting-point. Thus the primacy of the plan, if it has anything relevant to say on the issue, is not in doubt, but it may need to give way to other factors, including practicalities. A decision to act under section 97 must be motivated by planning considerations, and directed to a planning objective. But the converse does not follow. Inaction is also an option. In exercising its choice *not* to act under section 97, or in choosing between that and other means of achieving its planning objective, the authority is to be guided by what is "expedient". No principle of consistency requires that process to be confined to planning considerations, or to exclude cost.

53. This approach to the section does not exclude effective judicial supervision when necessary. It is true that the word "expedient" normally implies a wide discretion reviewable only on conventional public law grounds. However, as already noted, its scope in practice depends on the circumstances. A public authority, faced with a serious threat to public safety within its sphere of responsibility, would find it difficult to defend the rationality of a refusal to act, if the only reason were other demands on its budget. In any event, the Act contains its own remedy. If the authority fails to act, the Secretary of State may be asked to make a revocation order (as happened in *Alnwick*), leaving the planning authority to pick up the bill.

54. I see no reason to doubt Richards J's actual conclusion in *Alnwick.* On the facts and arguments as presented to the Secretary of State, it is difficult to see how his decision could have been different. However, Richards J, with respect, took too

narrow a view of the law. Had there been more substantial evidence that the order would leave the authority in serious financial difficulties, I see no reason why the Secretary of State should have been obliged to leave it out of account, at least to the extent of considering whether a financial contribution might have been available from central or other sources.

55. Finally I should comment briefly on the point made at the end of Longmore LJ's judgment. I agree with his instinctive reaction against "brightline rules" governing the exercise of discretionary powers in public law. I have more difficulty with his comment on the level of precision required to justify refusal to make an order. Mr Coppel made a similar point, suggesting that authorities might find it difficult in practice to arrive at a clear estimate of the likely level of compensation, particularly in the absence of co-operation from the landowner.

56. I do not see these as practical issues. It is not possible in the abstract to say what kind of information, or what degree of precision, may be required by, or available to, the authority when making a decision of this kind. It will depend on the circumstances. That is neither unusual nor a cause for concern. The same issues may arise, for example, whenever an authority is considering a major compulsory purchase project. It will need at the planning stage to form a general view of the overall cost, including the cost of compensation, and of the resources available to meet it. Initially, this view will need to be based largely on the advice and estimates of its expert advisers, the precision and certainty of which will depend on the timing and subject-matter. That uncertainty is not a reason for not conducting the exercise, still less for leaving cost considerations out of account altogether.

Conclusion

57. For these reasons, which essentially follow those of the majority of the Court of Appeal, I would dismiss the appeal.