Official Transcripts (1990-1997)*

Calder v Secretary of State for the Environment and Another

[1996] Lexis Citation 1926

(Transcript: Smith Bernal)

COURT OF APPEAL (CIVIL DIVISION)

NEIL, MORRITT, HUTCHISON LJJ

25 APRIL 1996

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N Ley for the Appellant; D Holgate for the First Respondent; C George QC for the Second Respondent

J E Armah & Co; The Treasury Solicitor; Tarmac Housing Division

HUTCHISON LJ

This is an appeal by Renee Joyce Calder from the dismissal on 9 March 1995 by Mr Nigel McLeod QC sitting as a deputy High Court Judge of her application pursuant to s 287 of the Town and Country Planning Act 1990 whereby she sought to quash an order of 26 July 1994 for the diversion of a bridleway at Nailsea in the County of Avon. Her notice of motion included an application to quash the grant on the same date of planning permission to developers, Tarmac Homes (Bristol & West) Ltd, now called McLean Houses (Bristol & West) Ltd, for the erection of three houses and associated works at Vynes Farm, Lodge Lane, Nailsea. This part of the application was not pursued before the judge.

The decision of the Secretary of State for the Environment (the First Respondent) to make the order and to grant permission, followed a local inquiry on 7th and 8 December 1993 which led to a report by the inspector which had recommended the grant of permission and the making of the diversion order.

The planning history of the site which had preceded matters with which this appeal is concerned is complicated and, since it is to an extent relevant in the appeal, I must make some reference to it. I shall, however, do so in summary form, drawing in large measure on the judge's own summary.

In March 1988 the developers obtained planning permission to build 37 houses on the site. Shortly after construction began in 1989 the local authority told the developers that a bridleway crossed the plots of some of the houses; those affected were numbers 17-19. In June 1989, on the application of the developer, the council made a diversion order but, following objections and an injunction, work on the three houses was suspended. One was complete, one half built and the third had not been started, and this remains the position.

Enquiries were held into the objections and eventually, in July 1991, a modified diversion order was made and permission granted for the works necessary to implement it. However, in October 1991 the diversion order was quashed by the High Court, apparently by consent.

The developer applied to the county council pursuant to s 257 of the Act for a further diversion order, but the council refused it. The developer then requested the Secretary of State to make an order pursuant to his powers under s 247, but he refused to do so in February 1993.

In April 1993 the developer submitted to the council a further planning application for the erection of three houses on plots 17-19 which contained some additional features. The council in June 1993 refused the application, and the developer appealed under s 78 of the Act. At the same time the developer requested the Secretary of State to exercise his powers under s 253 to publish a notice, in accordance with s 252(1), of a draft diversion order under s 247, in advance of the grant of planning permission. The Secretary of State is entitled do so in cases where there is a s 78 appeal, and he decided in his discretion to do so. Notices in conformity with s 252 were published: some points were taken as to their adequacy but these are no longer material. The public inquiry in December 1993 embraced the s 78 planning appeal and the objections to the Secretary of State's proposal to make, pursuant to s 247, a diversion order. Among the objectors were the appellant and her mother, who lives at a house called Renroc which is the closest of the houses in Lodge Lane to the route of the diversion. The appellant is a frequent visitor to her mother, and it has not been suggested that she did not have a sufficient interest in the matter.

In the event, after a full hearing, the inspector in his report to the Secretary of State recommended that full planning permission should be granted, subject to conditions, for the erection of the three houses and associated works; and that the proposed diversion of the bridleway should be confirmed.

The April 1993 application for planning permission, the refusal of which by the council gave rise to the s 78 appeal, was, it will be appreciated, for permission to build three houses in respect of which permission had been granted as part and parcel of the original scheme. However, the April 1993 application included the removal and relocation of a hedge, the repositioning of the rear boundary fence to the three plots to form a bridleway diversion as indicated in the first inspector's report, together with a cattle grid and kissing gate at Vynes Farm; and the two last-mentioned features were new. The local authority refused the application because it considered that the cattle grid would be a source of danger to horse riders using the bridleway. It was not as a matter of law open to the local authority to grant the application apart from the cattle grid and the kissing gate.

The explanation for the Secretary of State's willingness to make the diversion order which previously he had refused is apparent, if regard is had to para 17 of Annexe A of Circular 2/93 which reads as follows:

"Orders under section 247 of the 1990 Act can be made by the Secretary of State in appropriate cases, for example where an application for planning permission is before him either on appeal or following call-in and it is considered expedient to invoke the concurrent procedure under section 253 of the Act in anticipation of planning permission. Otherwise, it is only in exceptional circumstances, for example in relation to development of strategic or national importance, that the Secretaries of State would expect to be asked to exercise this power. It should not be regarded by planning authorities as an alternative to the exercise by them of their order-making powers under section 257 of the Act. In such circumstances the Secretaries of State expect the authority to make the order."

The inspector recommended that the planning appeal should be granted subject to conditions, and that the diversion order should be confirmed. The Secretary of State on 26 July 1994 accepted his recommendations, granted permission subject to conditions and confirmed the diversion order. Among the conditions was a requirement that the development should not include the cattle grid and the kissing gate.

The relevant parts of s 247 are 247:

"(1) The Secretary of State may by order authorise the stopping up or diversion of any highway if he is satisfied that it is necessary to do so in order to enable development to be carried out

(a) in accordance with planning permission granted ..."

As to s 253, so far as relevant, they are:

"(1) Where -

(a) the Secretary of State would, if planning permission for any development had been granted under Pt III, have power to make an order under s 247 or 248 authorising the stopping up or diversion of a highway in order to enable that development to be carried out; and

(b) subsection (2) (3) or (4) applies, then, notwithstanding that such permission has not been granted, the Secretary of State may publish notice of the draft of such an order in accordance with s 252.

(2) This subsection applies where the relevant development is the subject of an application for planning permission and either ...

(c) the applicant has appealed to the Secretary of State under s 78 against refusal of planning permission ..."

Before I come to the issues arising on this appeal, I should say a little about the geography of the site in order that matters can be better understood.

The difficulties occasioned by the bridleway affected the three most northerly of the houses to be built, on a part of the site a little to the south of Renroc, the appellant's mother's house. The eastern boundary of her property and of the development site are bordered by Lodge Lane, a narrow rural road of varying width and alignment which runs north-south. To the south of Renroc, running east-west is a hard-surfaced private road opening into Lodge Lane just by the south-east corner of Renroc's garden, where there is a hedge. The existing bridleway, as it proceeds east, runs along this private road for some distance but, at the north-west corner of the site, it leaves the private road and deviates south-east for some 45 metres across the site, opening into Lodge Lane at a point some 25 metres south of the point where the private road meets the lane. The diversion sanctioned by the Secretary of State involves continuing the bridleway along the private road in an easterly direction to a point some 6 metres short of the junction of that road with Lodge Lane; it then makes a right-angled turn south and proceeds, behind the hedge bordering the western side of Lodge Lane, to a point coincident with its previous junction with Lodge Lane. The result is an increase in overall length of some 16 metres.

The point about the cattle grid and kissing gate was that it was suggested that they would inhibit any eastbound horse riders from succumbing to the temptation, instead of turning right, to go straight on along the last 6 metres of the private road and enter Lodge Lane by that means; but it would allow cars and pedestrians to continue to have access to Lodge Lane. The visibility to the north is notably more restricted there than it is 6 metres further south. The main argument about the grid was, in effect, that the cure would be worse than the disease, in that an unruly or frightened horse might get onto the grid. There were, as one would expect, other arguments raised in relation to safety matters in opposition to the proposal but, since nothing now turns on them, I do not rehearse them.

Before the judge a number of arguments were raised but, as the judge recognised, the core of the appellant's case was the contention that the final planning application was just a device to circumvent the difficulties posed by the terms of Circular 2/93. The judge put it in this way:

"... but quite central to the challenge was a claim that the final planning application was a device to circumvent the principles of Circular 2/93, so as to get the First Respondent to exercise his powers in accordance with the first part of paragraph 17, when he had previously refused an application for the diversion order because that application did not fall within the criteria laid down in the second part of paragraph 17. The final application was said to be for consent which the Third Respondent already had, with the exception of the kissing gate and cattle grid. The Third Respondent, it was said, knew that it would never obtain permission to construct the grid and gate, and that it could not get the necessary agreements from the owners of rights of way for implementation even if planning permission was granted; the Third Respondent therefore knew that the planning application would be refused, and that in consequence the situation would come within the more favourable limb of policy. The application was therefore a device for that purpose."

This passage was consistent with the way the matter had been put in the applicant's affirmation of 14 October 1994, in particular para 6 and 7 thereof. While there were and are certain discrete arguments advanced by the appellant, it is obviously appropriate first to consider this ground, the judge's rejection of which constitutes ground 1 of the appellant's appeal. I begin by seeing how the judge dealt with it. He gave a number of reasons for his rejection.

First, the judge considered and rejected the contention that the planning application was a device. This was on the basis of a passage in the inspector's report which the judge cited in his judgment:

"Following the refusal of the council to make a diversion order in March 1992, the planning application, the subject of this appeal, was submitted so that the development of the remainder of the estate would not be delayed. In formulating its latest proposals for the site Tarmac Homes considered that the permitted scheme could be improved upon. The issue of safety of horses and riders emerging directly onto Lodge Lane from the private road had been raised in the past. The council had passed on comments from a riding instructor and former objector to the bridleway diversion which suggested the inclusion of a cattle grid at the junction of the private road and Lodge Lane to encourage horse and riders to use the bridle path along the entirety of the proposed diversion. The use of the private road by cars and pedestrians would be unaffected."

The judge then said:

"Although submissions on behalf of the applicant were made to the inquiry similar to those made to this court, I have seen no indication that the facts set out in this paragraph were challenged; Mr Holgate for the First Respondent stated in argument that they were not challenged, and Mr Ley in his reply did not seek to dispute what Mr Holgate said.

These circumstances indicate to me that the allegation that the application was a device is not sustainable. The first ground of challenge would fail on this ground alone, but there are other [grounds]."

The judge then identified other reasons which in his view meant that this argument must fail. The second, which he explains in a passage between 9E and 11A of the transcript, can be summarised by saying that he considered that the Secretary of State had addressed the argument and in effect determined that the planning application was a different application; and that the Secretary of State, who did not misdirect himself in any way as to the meaning of the application of his policy as expressed in Circular 2/93, was not to know when he decided to use his powers under s 253 that the outcome of the planning application would involve the exclusion of the grid and gate.

The judge went on to point out that the applicant's main argument faced further difficulties, which he explained in passages to be found at pages 11 and 12 of his judgment. These are in summary that, even if the new application for permission had been exactly the same, the Secretary of State would have had to determine the planning appeal; and that, if such an application and appeal was the only remedy left to the developer, there was nothing in s 247 to preclude the making of a diversion order, if the Secretary of State thought it appropriate; once there was before him an appeal and an application for him to use his s 253 discretion, the only question for him was whether to exercise it -- a discretionary decision challengeable only in judicial review proceedings. Once he had decided to use that discretion, the only question for him was whether the diversion was necessary to enable the permitted development to be carried out and, if so, whether in his discretion to make a s 247 order. Finally the judge accepted the validity of a point made by counsel for the developer that the Secretary of State, having implemented the s 253 procedure, held a public inquiry and received the inspector's report saying that there was no sound reason against making the order, would have been perverse to decline jurisdiction on the basis that the council could have authorised it under s 257.

Ground 1, as I have indicated, is the appellant's main ground of appeal, and these conclusions are challenged as every other conclusion which the appellant seeks to impugn is challenged on the basis that the judge "erred in law and misdirected himself in fact" in holding as he did.

Developing that contention before us this morning, Mr Ley has in effect reiterated the arguments which he deployed before the learned judge. First of all, he drew our attention to a decision of this court which is, as it seems to me, one case of many which could be found to exemplify this principle that, in planning matters, regard has to be had to policy statements by the Secretary of State, and that a disregard of an established policy is a ground for impugning a decision.

He submits that the Secretary of State never addressed his mind to the question why a further application for planning permission was being made in respect of a matter for which the developer already had planning permission; why they did not simply apply for permission in respect of the kissing gate and cattle grid. To that question he submits that no answer was given or ever has been given. He accepted however that, as a matter of law, it was open to the Secretary of State to entertain an application for planning permission in respect of a development for which permission already existed, but he submitted that the Secretary of State, had he made the proper inquiries and asked the right questions of himself, should have realised that the second planning application was merely a device. Therefore, while conceding that the Secretary of State had power to entertain the appeal and indeed to grant it, and to make a diversion order, he submitted that his failure to consider the real motives for the applications was fatal; and that, had he considered them, he should either have given reasons for nevertheless giving leave for the development and the diversion or for refusing it. That in substance is the basis on which Mr Ley submits that the Secretary of State erred under this first ground.

He also advanced, as it were as a postscript, a submission in relation to the reference to judicial review, but I propose to say nothing more about that because, in the course of argument, Mr Ley recognised, as I understood it, that that was not a point which he could pursue; and that in truth, in the passage which I have cited, the Secretary of State was not saying that the applicant should have made an application for judicial review but was merely emphasising that, if all that was challenged was his exercise of discretion, that was not a matter which was appropriate to be advanced under s 247 of the Act.

The main part of the argument which Mr Ley advances is perhaps best summarised in two sentences in the skeleton argument which has been provided to the court and which Mr Ley, who did not himself prepare it, has adopted where, on page 3 it is said:

"It is submitted that the Secretary of State should definitely have considered why developers applied for permission which they already had together with permission for a development which they could never implement. This he failed to do."

The conclusion that I have reached in relation to this matter is that the learned judge arrived at the right conclusion essentially for the reasons that he gave. Once the planning application was before the Secretary of State, together with a request that he exercise his powers under s 253, he was obliged to deal with both those applications and, as was pointed out, he was not to know at the stage when he exercised his s 253 power, that the appeal against the refusal of the kissing gate and cattle grid would in the event be refused. In any event, it seems to me that the judge had before him material on which he was perfectly entitled to come to the conclusion that he did, that the application was not a device, and that no good ground has been shown for impugning his decision as to that. Accordingly I would reject the first ground.

The next point taken before the judge and reiterated as ground 2 of the appeal is that, whereas s 252(4) requires (in the event of objections to the proposal) that before an order under s 247 is made there must be a local inquiry, this inquiry was held at Weston-Super-Mare which is some 15 miles away from the site. Accordingly, it is argued, the inquiry was not a local one and was not an inquiry within the section. Reliance was placed before the judge on Lord Parmoor's words in Local Government Board v Arlidge [1915] AC 120 where, at 143, he said that a public local inquiry meant "no more than that the inquiry should be held in the locality."

The circumstances in which that point arises are as follows. Just before the inquiry the appellant applied for leave to move for judicial review of the decision to hold the inquiry at Weston arguing, as she did before the judge, that local people, especially horse-riding schoolchildren, would otherwise be prevented from attending and giving evidence. Laws J, who heard the application for leave, refused leave saying that the suggested difficulties did not begin to raise a case of Wednesbury unreasonableness.

The judge, who rejected the appellant's contention that he was raising a different issue -- construction of "public local inquiry" rather than unreasonableness -- expressed his agreement with Laws J saying this at page 14:

"The venue of a public local inquiry is a matter within the discretion of the First Respondent. (See, in respect of the appeal, Rule 20(3) of the Town and Country Planning (Inquiries Procedure) Rules 1992, which say that it is for the First Respondent to determine and give notice of 'the date, time and place fixed by him for the holding of the inquiry'). I cannot see how the question of the reasonableness of the exercise of that discretion, in terms of distance from the site, can be exercised without considering whether or not the venue could reasonably be said to be in the locality of the site. I can find no perversity in the First Respondent decision. So on the reasoning of Laws J, on effectively the same issue, I reject Mr Ley's second point."

Before us Mr Ley has advanced arguments, which I deduce he advanced before the learned judge, which were to this effect. First of all, he submits a local inquiry means an inquiry which must be nearby, that is to say that people can reach. He draws our attention to the affidavit of the applicant, paras 9 and 10, from which it appears that, whereas a previous inquiry (resulting in the diversion order which was subsequently quashed) was held in Nailsea and a number of schoolchildren attended, at this inquiry none did; and he submits that the plain inference is that those children who were interested enough to attend on that previous inquiry, which they were able to do after school hours because it was close by, were precluded from attending 15 miles away in Weston.

Mr Ley makes a particular point of the fact that no evidence was adduced to contradict the inference, which he says is to be drawn from the appellant's evidence, that children would have wished to come. In that connection he drew our attention to the decision of Simplex GE (Holdings) and Another v Secretary of State for the Environment and the City and District of St Albans District Council [1957] P & CR 300 at 306, a case which, though relevant to a later point that he takes, is, as it seems to me, not relevant in this connection.

I have given careful consideration to those arguments but, in my judgment, the learned judge was right for the reasons he gave. As a matter of construction, as it seems to me, the term "local inquiry" must admit of a degree of flexibility in choice of site, and I would unhesitatingly hold in modern conditions that an inquiry at a centre as close as this falls within those words.

If, as in my view the judge rightly held, it was as a matter of law open to the Secretary of State to regard the venue as satisfying the requirement for a local inquiry, then, even if some children who might have attended at an inquiry in Nailsea did not attend this inquiry, that would not entitle the court to interfere. In my judgment the learned judge was correct in the conclusion he reached.

The next point, embodied in ground 3, was that the Secretary of State was wrong to accept that the diversion was needed so that three houses could be built; he should have considered whether the other two could have been re-sited so as to avoid the necessity for a diversion, which it is said could have been done.

The judge rejected this argument on the ground that, there being no challenge to the grant of planning permission for the three houses in the position shown, it was not for the Secretary of State to postulate other developments, if he was satisfied of the necessity for the diversion to enable that permitted to be carried out. Mr Ley, while reiterating before us the arguments relied on before the judge, came to recognise the force of the learned judge's answer. Insofar as he felt able to continue to press the point, I consider that it is a bad one for the reasons given by the judge.

Ground 4 is a point to do with some trees the subject of a Tree Preservation Order. This order covers a group described as containing six elms. The inspector (who visited the site and saw the trees) said that there was a dense group of seven tall and rather thin and spindly elms and some ten suckers located to the west of a decaying stump. He found that the provision of the bridleway on the diverted route would involve the removal of one elm and several suckers which he did not consider would adversely affect the contribution made by the group to the character and appearance of the area; and he suggested a condition (in the event imposed) to ensure that the works should not adversely affect the rest of the group.

The Secretary of State, like the inspector, gave consideration to the matter of these trees. He noted that the local area planning committee's report of 9 June 1993 stated that consent would not be required for the removal of any trees the subject of the Tree Preservation Order, if necessary for the implementation of the

development for which planning permission was granted. He concluded that the tree identified by the inspector as needing to be removed was unlikely to be any of the six; expressed the view that the suckers were not included within the Tree Preservation Order in any case; and said that he was satisfied that

"even if the tree that might be felled is covered by the Tree Preservation Order, its loss would not be sufficiently detrimental to the character and amenity of the area to justify refusing the appeal."

For the appellant it was submitted before the judge that the suckers were part of a tree and therefore covered by the order; and that the Secretary of State should have visited the site to ascertain whether the tree was within the Tree Preservation Order because of the importance of tree protection.

The judge found it unnecessary to deal with the question whether the suckers fell within the order. He decided the matter on the basis that it was open to the Secretary of State to reach the view he did, which involved a perfectly reasonable judgment which he was entitled to make; and that the suggestion that the Secretary of State or his officials should themselves have gone to the site to check was untenable. He held that even if, contrary to his view, the Secretary of State had overlooked the suckers, that did not justify quashing the decision because there was nothing to indicate that regard to the suckers would have led him to reach a different conclusion.

The submissions made by Mr Ley before us are essentially consistent with the submissions he made before the judge (which were rejected) that the Secretary of State was wrong in law in relation to the suckers; and that he should have informed himself of whether the tree to be felled was one that was covered by the Tree Preservation Order.

In connection with the judge's conclusion that whatever the status of the suckers it could have made no difference, he relied on the Simplex decision to argue that it might have done.

That case is authority for the proposition that, unless the court can be confident that it would have made no difference, then a wrong view of the law is a matter which will lead to quashing of the decision. The learned judge here of course did address that point and concluded that he was satisfied that it could have made no difference.

It seems to me that two matters are of crucial significance. The first is that the authority did not require the consent to be obtained for the cutting down or lopping of a tree where it was immediately required for the purpose of carrying out development authorised by the planning permission. It is to my mind clear that in the circumstances the real question for the Secretary of State was what effect the removal would have on the environment and amenities of the area in general.

Secondly, I consider it is crucial that the Secretary of State, who had plainly given very full and careful consideration to the issue of the trees and the Tree Preservation Order, concluded that he was satisfied from the inspector's report that, even if the tree that might be felled was covered by the order, it would not be detrimental to the character and amenity of the area. That was said a propos the planning appeal; and in connection with the diversion application he made similar remarks.

It is, in my judgment, quite impossible in proceedings such as those before the judge -- or indeed in any proceedings one could envisage -- to challenge such a conclusion.

As to the suggestion that the Secretary of State or his officials should have visited the site, I, like the judge, would reject it out of hand.

As to the suckers, I agree with the judge that in the circumstances it is unnecessary to decide as a matter of law whether they were covered by the Tree Preservation Order because it is, in the light of the description given by the inspector in his report, inconceivable that the Secretary of State would have regarded them or the possible loss of some of them as a significant matter.

The fifth ground advanced before the judge and on appeal was that the Secretary of State erred in failing to take account of the evidence of the council that it had already granted enough planning permissions to fulfil its five-year housing requirement without these houses. Accordingly, so the argument went, there was no need to grant planning permission which entailed a diversion.

Mr Ley conceded in his argument before us this morning that, if he were wrong in respect of ground 3, it must follow that this ground must also fail, and I need say no more about it.

Then it was argued -- and is repeated as ground 6 of which ground 7 is really a development -- that the Secretary of State erred in having regard, as it were as a point in the developer's favour, to the fact that one house had been built and one partly built, whereas, if it were legitimate to have regard to that fact at all, it should have gone against the developer.

The judge, implicitly accepting the proposition (based on an observation of Goff LJ in Ashby v Secretary of State for Environment and Another [1980] 1 All ER 508, [1980] 1 WLR 673 at 515 of the former report) that it was inappropriate to put in the scales the fact that the way sought to be diverted had already been obstructed by development, found that the Secretary of State had not done so. He cited in support of this conclusion a passage from the decision letter, which can be found set out at page 23 of the transcript. I need not read it because it is plainly the case, as the judge went on to observe, that

"... while the obstructions were being taken into account, this amounted to no more than explanation of the reason why riders had been taking a particular course for some time, in the context of the discussion about danger."

Mr Ley in his submissions this morning took us again to that particular paragraph, which is para 14 of the decision letter from the Secretary of State; and I can only say, having carefully considered it, that it is clear to me that the Secretary of State was indeed doing precisely what the judge attributes to him, referring to the matter in the context only of the question of whether it was dangerous to emerge into Lodge Lane at the northern entry point.

The final substantive argument advanced before the judge and repeated in the notice of appeal is that the Secretary of State erred in the exercise of his discretion, in accordance with Circular 2/93, in taking account of the earlier planning permission when agreeing to confirm the diversion order, when he should only have had regard to the planning permission granted at the same time, pursuant to the new application.

Mr Ley, in his submissions this morning, conceded that this was really another way of putting his ground 1, but I do not so read it. It is in fact a distinct ground which was developed before the judge. He dealt with it by pointing out that, whereas the inspector did say that the implementation of both the previous permission and the appeal proposal necessitated the diversion, the Secretary of State did not. Given that we have heard no

argument on the point, I need say no more than that I consider that the judge was right about that.

That disposes of all the substantive points taken by way of challenge to the judge's rejection of the challenge to the Secretary of State's decision. It follows that on those substantive grounds this appeal must fail and, in my judgment, be dismissed.

However, the last point taken before us is in relation to costs. The judge was, at the conclusion of the hearing, invited to make an order for costs not only in favour of the Secretary of State but also in favour of the developer and, after hearing argument, he acceded to that application and made (which is somewhat unusual) two orders for costs in favour of the Secretary of State and the developer.

The argument was advanced by Mr George and, as it happens, we have the transcript of that argument from which it is clear that the matter was very fully and carefully considered by the judge. I should say that the relevant authority at that time was the case of Wychavon District Council v Secretary of State for the Environment 69 P & CR 94, a case which had introduced a change from what had previously been the practice under Waverley Borough Council v Secretary of State for the Environment 3 PLR 101, a case which contemplated the much more ready grant of two orders. The authority which now governs the matter, Bolton Metropolitan District Council and Others v Secretary of State for the Environment and Others [1996] 1 All ER 184, [1995] 1 WLR 1176, had not then been decided.

Mr George therefore conceded that normally the court is disposed to make only one order for costs, and he accepted that it was inappropriate that the costs should be split between his clients and the Secretary of State. He did however advance four distinct points in seeking to discharge what he accepted was the onus on him to show that circumstances existed justifying a departure from the normal rule.

The judge rejected two of those out of hand and invited Mr Ley to address him on the remaining two. In the course of Mr Ley's address, he indicated that he need not trouble further with the fourth point, and there was therefore left only the third point which Mr George put thus:

"Thirdly, and entirely a separate matter, your Lordship will recall that the principal allegation of the applicant was that the third respondents Tarmac had engaged in a spurious device. The word 'spurious' appears in the affidavit of the applicant at paragraph 6 in a passage to which I drew your Lordships' attention in argument, and this matter is of course addressed in your Lordship's judgment."

He then continued with the citation. A little later he said this:

"Where there is a suggestion effectively amounting to bad faith on behalf of the applicant, that is an exceptional circumstances where it is right and proper that the person whose faith has been questioned should appear and if he be successful should be entitled to his costs."

The judge gave his decision in the following terms:

"I do consider that there are very special circumstances here: the third reason advanced by Mr George that the developer had had an allegation that it had involved itself in putting forward a spurious device to circumvent the policy of the Secretary of State. In those circumstances it seems to me entirely appropriate that they should be able to come forward to defend their actions and to respond to this appeal. Accordingly the applicant will pay the full costs of the first and third respondents."

It is to be noted therefore that, whereas Mr George in his argument categorised the assertion of a spurious application as amounting to a charge of bad faith, the judge does not appear to have accepted that, but simply relied on the undoubted fact that what had been alleged was that the application had amounted to a spurious device.

The principles which should govern a judge in deciding whether to grant costs are now, as I have indicated, to be found in the Bolton case. I need cite only part of Lord Lloyd's summary:

"(2) the developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.

(3) A second set of costs is more likely to be awarded at first instance than in the Court of Appeal or House of Lords, by which time the issues should have crystallised, and the extent to which they are indeed separately nought should have been clarified."

The part of para 2 on which particular reliance would be placed by the developer -- and would have been placed before the judge had this authority been available at that stage -- is the words

"... or unless he has an interest which requires separate representation."

Mr Ley's arguments on this ground are to be the following effect. He points to the fact (which for present purposes I accept) that, before the judge, counsel for the Secretary of State did urge all the arguments that could properly be urged on behalf of the developer, and accordingly in the event it was not essential for representation of the developer on that account.

He submits that the suggestion of bad faith is entirely unjustified, whereas the suggestion that the device was a spurious device is justified. He draws our attention to the fact that the word spurious means "not being what it pretends to be" and that, he argues, is precisely what this application was. It was an application for planning permission which already existed, and its purpose was in truth to enable the Secretary of State to exercise his discretion to make a diversion order.

Accordingly, Mr Ley argues that there was no justification for the developer to be represented. All the more is that so, he submits, when not an iota of an explanation has been given as to why the course that was adopted was adopted. However, his main point is that the developer did not say a word which counsel for the Secretary of State, Mr Holgate, was not able to say. Accordingly, he submits, we should interfere with the judge's discretion.

I approach the matter by asking whether in the light of, firstly, the way the case has been put; secondly, the judge's conclusions about the allegations of a spurious device which he dismissed; and, thirdly, the principles explained in Bolton's case, the judge was entitled in his discretion to make the order that he did. In my judgment, it has not been demonstrated either that he failed to take material matters into account, or that he had regard to immaterial matters, or that he reached a conclusion which was plainly wrong. In my judgment, there is accordingly no basis on which this court could interfere with the exercise of the judge's discretion as to costs, and I would dismiss the appeal on that ground also.

MORRITT LJ

I agree.

NEILL LJ

I also agree.

Appeal dismissed.