Court of Appeal A

Regina (Network Rail Infrastructure Ltd) *v* Secretary of State for Environment, Food and Rural Affairs

[2018] EWCA Civ 2069

B

2018 June 19; Sept 21 Lewison, Lindblom, Flaux LJJ

Planning — Planning permission — Conditions — Grant of planning permission for residential development — Condition restricting completion of balance of development until order for stopping up of footpath confirmed or not confirmed — Inspector declining to confirm order as condition not meeting statutory test of necessity — Whether statutory test properly applied — Whether planning condition properly construed — Whether stopping up order "necessary" to implementation of planning permission — Whether decision to be quashed — Town and Country Planning Act 1990 (c 8) (as amended by Growth and Infrastructure Act 2013 (c 27), s 12(2)(4)(5) and Planning (Wales) Act 2015 (anaw 4), s 38(2)(3)(a)), ss 257, 259 C

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The local planning authority granted planning permission for the development and construction of up to 142 houses and the provision of associated infrastructure. The claimant having raised safety concerns in relation to a footpath running close to the boundary of the development site and crossing both tracks of a railway line, the authority made an order under section 257 of the Town and Country Planning Act 1990[1] providing for the stopping up of the footpath and the provision of an alternative route crossing the railway line via a bridge. The planning permission contained a negative condition ("the *Grampian* condition") which provided that no more than 64 of the houses were permitted to be built unless (i) the stopping up order was confirmed by the Secretary of State or (ii) the Secretary of State did not confirm the order. Objections to the order were made and a public inquiry was convened. At the inquiry, the inspector invited submissions on the preliminary question whether in the light of the terms of the *Grampian* condition the stopping up order was legally capable of being confirmed. The inspector, without hearing the evidence on railway safety or considering the merits of the order, concluded that the order was incapable of being confirmed since the effect of exception (ii) to the *Grampian* condition was that the order was not "necessary … in order to enable the development to be carried out … in accordance with the permission" within the meaning of section 257 of the 1990 Act. The claimant sought judicial review of that decision. The judge quashed the inspector's decision on the basis that he had misunderstood the true relationship between the negative condition and sections 257 and 259 of the 1990 Act and had failed to address the questions he was obliged to consider under those provisions. E F G

On appeal by the Secretary of State—

Held, dismissing the appeal (Lewison LJ dissenting), that a *Grampian* condition attached to planning permission by the local planning authority in the exercise of its powers under section 257 of the Town and Country Planning Act 1990, which provided for an order stopping up a footpath and which contemplated the development going ahead even if the stopping up order was not confirmed, was plain in its purpose and intent and did not prevent the order from being confirmed; that H

[1] Town and Country Planning Act 1990, s 257, as amended: see post, para 9.
S 259, as amended: see post, para 10.

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A sections 257 and 259 of the 1990 Act, under which the Secretary of State by his inspector had a discretion to confirm or not to confirm a lawfully made stopping up order, obliged him to decide whether the stopping up or diversion was necessary to enable the development to proceed and whether, on its merits, the order should be confirmed, an exercise that involved a consideration of the public interest in the order being confirmed or not; that the provisions of the condition in issue envisaged a full consideration of both the necessity and the merits of a stopping up order, they B were entirely consistent with and respected the statutory scheme for the making and confirmation of such an order, and they acknowledged that the process involved a determination being made on the confirmation of the order as a distinct exercise of statutory discretion, separate from, and in addition to, the determination of an application for planning permission; that inherent in the condition, therefore, was the need for the stopping up order process to be gone through fully and for the decision-maker's statutory discretion exercised freely in applying both the merits test and the C necessity test; that it was therefore for the decision-maker in the stopping up order process to decide whether both tests were met or not; that if, having fully applied both tests, the decision-maker concluded that confirmation of the order was justified, the condition did not debar him from making that decision; and that, accordingly, the judge had been correct that the inspector's approach was in error and his decision unlawful (post, paras 12, 40–41, 49–52, 57, 59–60, 61, 62).

D *Grampian Regional Council v City of Aberdeen District Council* (1983) 47 P & CR 633, HL(Sc), *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77, CA and *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, SC(Sc) considered.

Per Lindblom LJ. While, in the circumstances, a more appropriate means of achieving the diversion of the footpath may have been the procedure for a "rail crossing diversion order" in section 119A of the Highways Act 1980, that does not E mean that the authority was wrong to provide as it did in the condition in question (post, para 59).

Decision of Holgate J [2017] EWHC 2259 (Admin); [2017] PTSR 1662 affirmed.

The following cases are referred to in the judgment of Lindblom LJ:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
F *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1994; [2003] JPL 1048, CA
Fawcett Properties Ltd v Buckinghamshire County Council [1961] AC 636; [1960] 3 WLR 831; [1960] 3 All ER 503; 59 LGR 69, HL(E)
Grampian Regional Council v City of Aberdeen District Council (1983) 47 P & CR 633; 1984 SLT 197, HL(Sc)
G *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12; [1998] JPL 1073
Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74; [2016] 1 WLR 85; [2017] 1 All ER 307, SC(Sc)
Vasiliou v Secretary of State for Transport [1991] 2 All ER 77; 61 P & CR 507, CA

No additional cases were cited in argument.

H **APPEAL** from Holgate J

By a claim form, and pursuant to permission granted by Dove J, the claimant, Network Rail Infrastructure Ltd, sought judicial review of the decision dated 4 January 2017 of an inspector appointed by the defendant, the Secretary of State for Environment, Food and Rural Affairs, not to confirm a stopping up order made under section 257 of the Town and

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Country Planning Act 1990 by the first interested party, Eden District Council, relating to a footpath situated within a proposed development site and crossing the Settle–Carlisle railway line. The principal ground of challenge was that the inspector's sole basis for declining to confirm the order, namely that the conditions of the planning consent granted to the developer, the second interested party, Story Homes Ltd, made it legally impossible for the order to be confirmed under section 259 of the 1990 Act, was wrong in law. By an order dated 8 September 2017 Holgate J [2017] PTSR 1662 allowed the claim.

By an appellant's notice dated 19 September 2017, the Secretary of State appealed with permission of the Court of Appeal (Lewison LJ) granted on 3 November 2017. The sole ground of appeal was that the judge had erred in construing condition 13 of the planning permission and in finding that it was capable in law of satisfying the test for diversion of a right of way under sections 257 and 259 of the 1990 Act.

By a respondent's notice dated 5 January 2018, the claimant sought to uphold the judgment on the further grounds (1) that the inspector had acted in breach of natural justice and unfairly in reaching his decision solely on the preliminary issue, without hearing the evidence on railway safety; (2) that the inspector ought to have considered the case for confirmation on its merits; and (3) that his decision was irrational.

The facts are stated in the judgment of Lindblom LJ, post, paras 3–6, 17.

Tim Buley (instructed by *Treasury Solicitor*) for the Secretary of State.

Juan Lopez (instructed by *Womble Bond Dickinson (UK) llp*) for the claimant.

The court took time for consideration.

21 September 2018. The following judgments were handed down.

LINDBLOM LJ

Introduction

1 Did a planning condition prevent a stopping up order being confirmed by the Secretary of State for Environment, Food and Rural Affairs under section 259 of the Town and Country Planning Act 1990 because it contemplated the development going ahead even if the order was not confirmed? That is the basic question in this appeal.

2 With permission granted by Lewison LJ on 3 November 2017, the Secretary of State appeals against the order of Holgate J, dated 8 September 2017 [2017] PTSR 1662, upholding a claim for judicial review by the claimant, Network Rail Infrastructure Ltd ("Network Rail"), in which it challenged an inspector's decision, in a decision letter dated 4 January 2017, refusing to confirm the Eden District Council Public Path Stopping Up Order (No 1) 2015 Cross Croft, Appleby (footpath 303028) ("the Order").

3 The Order had been made by Eden District Council, the local planning authority, on 22 April 2015. In making the Order the council had stated itself to be satisfied that it was necessary to stop up the footpath to enable development to be carried out in accordance with a planning permission it had granted for the construction of 142 dwellings on land adjacent to Cross

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A Croft in Appleby. The site of the development lies to the south-west of the Settle to Carlisle railway line, a short distance to the south of Appleby station. The developer, and applicant for planning permission, is Story Homes Ltd.

4 The relevant planning permission, granted on 9 March 2016, was subject to a condition—condition 13—restricting development to no more than 64 specified dwellings unless the circumstances in either of two "exceptions" should occur. The first exception was that a stopping up order B —diverting the footpath, stopping it up to prevent access to a railway crossing, and rerouting it to the north-east—had been made and confirmed. The second was that the Secretary of State did not confirm the Order.

5 Objections were made to the Order. An inquiry was duly held on 29 November 2016. On a preliminary issue the inspector concluded that condition 13 permitted the whole development to be carried out, regardless C of whether the Order was confirmed, and therefore that it could not be necessary to divert the footpath to enable development to be carried out.

6 Holgate J quashed the inspector's decision on the basis that the inspector had misunderstood the true relationship between condition 13 and the provisions in sections 257 and 259 of the 1990 Act and had failed to address the questions he was obliged to consider under those provisions.

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The issue in the appeal

7 The main issue in the appeal is whether, contrary to the judge's conclusion, the inspector's decision was a lawful exercise of his statutory power under section 259 of the 1990 Act because condition 13, properly construed, negated the requirement that the confirmation of the Order was E "necessary ... in order to enable the development to be carried out ... in accordance with the permission".

8 In its respondent's notice, Network Rail contends, first, that the inspector acted in breach of natural justice and unfairly in reaching his decision solely on the preliminary issue, without hearing the evidence on railway safety; and, secondly, that he ought to have considered the case for F confirmation on its merits, and that his decision was irrational. Those issues, as the parties agree, hang on the outcome of the main issue in the appeal.

The statutory powers

9 Section 257 of the 1990 Act, as amended, provides:

G "(1) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath ... if they are satisfied that it is necessary to do so in order to enable development to be carried out— (a) in accordance with planning permission granted under Part III ...

"(1A) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath ... if they are H satisfied that— (a) an application for planning permission in respect of development has been made under Part III ... and (b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.

"(2) An order under this section may, if the competent authority are satisfied that it should do so, provide— (a) for the creation of an

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alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use …" A

"(4) In this section 'competent authority' means— (a) in the case of development authorised by a planning permission, the local planning authority who granted the permission …"

10 Section 259, as amended, provides: B

"(1) An order made under section 257 … shall not take effect unless confirmed by the appropriate national authority or unless confirmed, as an unopposed order, by the authority who made it.

"(1A) An order under section 257(1A) may not be confirmed unless the appropriate national authority or (as the case may be) the authority is satisfied— (a) that planning permission in respect of the development has been granted, and (b) it is necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission. C

"(2) The appropriate national authority shall not confirm any order under section 257(1) … unless satisfied as to every matter as to which the authority making the order are required under section 257 … to be satisfied." D

"(5) The appropriate national authority, for the purposes of this section, is— (a) in relation to England, the Secretary of State …"

11 Powers for the stopping up and diversion of highways are also contained in Part VIII of the Highways Act 1980. Sections 118A and 119A of the 1980 Act (as inserted by section 47 of and paragraphs 3 and 4 of Schedule 2 to the Transport and Works Act 1992 and further amended) provide, respectively, for the stopping up and diversion of footpaths crossing railways. Section 119A provides for the making of a rail crossing diversion order by a council E

"(1) … where it appears to a council expedient in the interests of the safety of members of the public using it or likely to use it that a footpath … in their area which crosses a railway, otherwise than by tunnel or bridge, should be diverted …" F

The Secretary of State must not confirm a rail crossing diversion order, and a council must not confirm such an order as an unopposed order, unless satisfied that it is "expedient to do so having regard to all the circumstances", including "(a) whether it is reasonably practicable to make the crossing safe for use by the public" (subsection (4)). G

12 In the light of relevant authority, it was agreed before us that the provisions of sections 257 and 259 of the 1990 Act, under which the Secretary of State has a discretion to confirm or not to confirm a lawfully made stopping up order, oblige him to decide whether the stopping up or diversion is necessary to enable the development to proceed and whether, on its merits, the order should be confirmed, an exercise that will involve a consideration of the public interest in the order being confirmed or not. Holgate J referred to these two questions as, respectively, the "necessity" test and the "merits" test (in para 49 of his judgment). H

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A **13** It was also common ground, and I accept, that the requirement of "necessity" for the making and confirmation of an order under sections 257 and 259 may be satisfied by the existence of either a physical or a legal obstacle to the development proceeding. A physical obstacle would be, for example, some practical impediment to the development proceeding—typically, a footpath running across a development site that would make it impossible for the proposed development to be carried out without its B being stopped up or diverted. A legal obstacle could be a "*Grampian*", or negative, condition preventing the development being carried out, in whole or in part, until an order stopping up or diverting a footpath had been made and confirmed, and the footpath had then been stopped up or diverted: see the speech of Lord Keith of Kinkel in *Grampian Regional Council v City of Aberdeen District Council* (1983) 47 P & CR 633, 637.

C **14** In *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77, a case concerning the scope and operation of the provisions then in section 209 and 215 of the Town and Country Planning Act 1971, Nicholls LJ observed, at p 81:

> "when determining which matters may properly be taken into account on an application for planning permission or an application for D an order stopping up a highway, it is important to have in mind the different functions of a planning permission and of a stopping up order."

As he said, at p 83:

> "These sections confer a discretionary power on the minister. He cannot make the order unless he is satisfied that this is necessary in E order to enable the development in question to proceed. But even when he is satisfied that the order is necessary for this purpose he retains a discretion: he may still refuse to make an order."

15 Nicholls LJ, at p 85, rejected the concept that there was "no overlap between matters which can properly be considered by the planning authority on the one hand and those which can properly be considered by the Secretary F of State for Transport on the other hand". He went on to say, at p 86, that "[a] prerequisite to an order being made … is the existence of a planning permission for the development in question", that "the … power to make a closure order arises only where the local planning authority, or the Secretary of State for the Environment, has determined that there is no sound planning objection to the proposed development", and it is on this basis that the G Secretary of State for Transport "must determine whether the disadvantages and losses, if any, flowing directly from a closure order are of such significance that he ought to refuse to make the closure order". The weighing of disadvantages and losses, "either (a) to members of the public generally or (b) to the persons whose properties adjoin the highway being stopped up" is "a matter for his judgment". As Nicholls LJ emphasised: "In reaching his decision he will, of course, also take into account any advantages under H heads (a) or (b) flowing directly from a closure order: for example, the new road layout may have highway safety advantages."

16 The thrust of those observations was reflected in the Government's advice, under the heading "The making of an order" in paragraph 7.15 of DEFRA Circular 1/09 ("Rights of Way") issued by the Department for Environment, Food and Rural Affairs in October 2009:

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> "The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order."

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Condition 13

17 The factual background was described by Holgate J (in paras 14–19 of his judgment). He referred to the series of planning permissions granted for the proposed development. I need not repeat the full narrative here.

18 In response to consultation on Story Homes Ltd's proposed development, representations were made by Network Rail, and others, raising concerns about the possibility that the increased use of the existing railway crossing would make accidents more likely. Those concerns led the council, when granting planning permission, to impose conditions in "*Grampian*"—or negative—form, to restrict the implementation of the development until a footpath diversion order had been made and confirmed.

19 On 30 July 2013 the council granted planning permission (on application no 11/0989). Condition 14 on that planning permission stated:

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> "No development hereby approved shall take place beyond plots 1–22 and 133–142 [32 plots] until a footpath diversion order has been made and confirmed. The order shall incorporate the diversion of the [existing] footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle–Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and rerouting of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane. The footpath shall be fully completed, including lighting, and made available prior to the occupancy of plots 23–132. Reason—In the interests of procedural correctness. To support local transport plan policy LD5, LD7 and LD8 and structure plan policies T25, T27 and L53."

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20 On 13 March 2014 the council granted planning permission on an application under section 73 of the 1990 Act (application no 13/0969), for the variation of a single condition, condition 2, on the permission granted on 30 July 2013. On 13 May 2015 the council granted planning permission on an application under section 73 (application no 14/0594) for the variation of the permission granted on 13 March 2014, and the removal of three conditions, one of which was condition 14. Condition 13 on this permission was in the same terms as the previous condition 14, but the reason given for its imposition was different:

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> "Reason—To ensure that the proposed development does not have an unacceptable impact on highway safety. To support local transport plan policy LD5, LD7 and LD8, structure plan policies T25, T27 and L53 and Eden core strategy policies CS5 and CS18 and the NPPF."

21 On 9 March 2016 the council granted planning permission on a further application under section 73 (application no 15/1097) for a variation to condition 13 on the permission granted on 13 May 2015. Condition 13 now stated:

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> "No development hereby approved shall take place beyond plots 1–22, 49–53, 87–95, 73–74, 98–113 and 133–142 [64 plots] unless any of the following exceptions occur: (i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle-Settle public railway crossing [from the] site (including the erection of signage and fencing prohibiting such access) and rerouting of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane, [has] been made and confirmed by the [local planning authority] or the Secretary of State, or (ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point (i) does not confirm the order; Upon any confirmed diversion and stopping up order coming into force, the new footpath route shall be fully completed including lighting and made available prior to the occupation of units 39–48 and 126–132 [17 plots]. Reason—To overcome adjacent public highway safety conflict. To support local transport plan policy LD5, LD7 and LD8, structure plan policies T25, T27 and L53 and Eden core strategy policies CS5 and CS18 and the [National Planning Policy Framework]."

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The Order

22 The Order stated that it was made by the council under section 257 of the 1990 Act because the council was

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> "satisfied that it is necessary to stop up the footpath to which this Order relates in order to enable development to be carried out in accordance with planning permission granted under Part III of [the 1990 Act] by [the council] namely: Planning permission numbers 11/0989 and 14/0594 for the erection of 142 dwellings … at land off Cross Croft/ Back Lane, Appleby."

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It provided for the stopping up of the existing footpath and the creation of a replacement footpath, whose route was described in Part 2, "Description of site of alternative footpath". The "Plan" attached to the Order showed the "existing route to be stopped up", including the existing railway crossing, and the "alternative route to be provided", which would run along the eastern boundary of the development site to a bridge across the railway.

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The inspector's decision

23 At the inquiry into the Order, the inspector invited submissions on the preliminary issue raised by objectors: whether, given the terms of condition 13 on the planning permission of 9 March 2016, the Order was legally incapable of being confirmed, because

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> "[the] effect of the 'exception' described in (ii) of condition 13… being that closure of the path across the railway is not necessary to enable the development [to] be carried out; [and] consequently, the order does not meet the statutory criteria of section 257 of the 1990 Act and could not be confirmed" (para 9 of the decision letter).

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He decided that preliminary issue without hearing any evidence. He found that the development being carried out was that for which planning permission had been granted on 9 March 2016 (para 12). He concluded that the Order had been "validly made" (para 16), and that "the Order has to be considered in the light of the current permission being implemented and the conditions which govern that development" (para 18).

24 He determined the preliminary issue in this way, in paras 20–23:

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> "20. The test to be applied under section 257 of the 1990 Act is whether it is necessary to divert the footpath at issue in order to allow development to take place in accordance with the planning permission granted. The development permitted under 15/1097 is in progress but has not been completed. The diversion of the path is not necessary to allow the physical construction of houses on the site to be carried out as the majority of the path at issue is outwith the boundary of the development.

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> "21. If it is not necessary to allow physical construction to take place on site, the question arises therefore as to whether it is necessary to divert the path in order to satisfy condition 13 of 15/1097? Reading the condition, it would appear not; the second part of the condition would permit the full development of the site if the Order was not confirmed.

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> "22. In contrast to condition 13 attached to 14/0594 which would have prevented the development of more than 32 houses if the Order was not confirmed, condition 13 of 15/1097 permits the whole development of 142 houses to be carried out irrespective of whether the Order is or is not confirmed. If the full development of the site can be carried out without the Order being confirmed, it cannot be necessary to divert the footpath in order for development to be carried out.

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> "23. I concur with the objectors that, in the light of the terms of the condition attached to the planning permission being implemented the Order fails the statutory test for confirmation."

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His "conclusion", therefore, was that "as the diversion of the footpath is not necessary to allow development to take place, the Order should not be confirmed" (para 24), and his "formal decision" was that he did "not confirm the Order" (para 25).

The judgment of Holgate J

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25 Holgate J observed at [2017] PTSR 1662, para 50 that in *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77 the Court of Appeal did not decide that "the decision-maker must treat the necessity test as an initial hurdle to be satisfied once and for all before the merits test may lawfully be considered, or that there is no overlap in the application of these two tests", and "the language of [the 1990 Act] does not lend any support to [this] suggestion"; and (in para 51) that *Vasiliou's* case

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> "does not provide any support for the contention that, as a matter of law, the necessity test cannot be satisfied where a *Grampian* condition provides for the restriction on development to be lifted in the event of a decision not to confirm the order".

The word "necessary" in section 257(1) of the 1990 Act, he said, "does not mean 'essential' or 'indispensable', but instead means 'required in the B circumstances of the case' …" (para 53).

26 The judge described the argument accepted by the inspector as rendering condition 13 "effectively defunct". In his view, the "correct approach" was "to seek to give effect to condition 13, rather than no effect, in so far as its language permits and subject to any construction being compatible with section 257 and the decision in *Vasiliou's* case" (para 63). C The inspector had misinterpreted the condition and its relationship with the power in section 257. The language used in it "simply provides for what is authorised, and in one scenario required, according to the outcome of the decision on whether the Order should be confirmed", but "it does not purport to render the Order incapable of confirmation". This much was "plain from exception (i)" (para 66). That "exception", said the judge, "satisfies the necessity test in *Vasiliou's* case, and "cannot be satisfied, and D the restriction to 64 houses lifted, unless the merits test is also satisfied" (para 67).

27 The crucial part of Holgate J's reasoning is in para 68 of his judgment, where he said:

> "One of the flaws in the inspector's interpretation, and the [Secretary of State's] argument, is that it involves reading exception (ii) [in E condition 13] in isolation from exception (i), in effect as a freestanding provision. It is not. Exception (ii) refers to the consideration by the Secretary of State of 'a lawfully made stopping up order as aforementioned *in point (i)*'(emphasis added). That language makes it perfectly plain that exception (ii) is coupled together with exception (i) and is to be read consistently with it. Both exceptions envisage F that the embargo on carrying out the residual part of the development necessitates the making and consideration of a stopping up order under section 257 … to divert the footpath in the manner described. The prohibition on the carrying out of the residual part of the development makes the stopping up order necessary. Thus, the necessity test in *Vasiliou's* case is satisfied in both cases. Both exceptions (i) and (ii) then G go on to deal with the effect of the decision as to whether the section 257 order should be confirmed. This involves the application of the merits test in *Vasiliou's* case. The two exceptions differ in that exception (i) deals with the situation where the merits test is satisfied and the order is confirmed, whereas exception (ii) deals with the situation where the merits test is not satisfied and the section 257 order is not confirmed. Consistent with that straightforward and natural meaning of condition H 13 in the 2016 permission, exception (ii) refers to the Secretary of State's 'consideration' of the order. Thus, an essential difference between the two exceptions is that they address opposite sides of the same coin, the outcome of applying the merits test in *Vasiliou's* case, in accordance with the clear objective of the developer in making, and [the council] in granting, the section 73 application. The other key difference is that

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where the order is confirmed, exception (i) in condition 13 *also prohibits* the occupation of the residual 78 houses *until the order comes into force and the diverted footpath route is made available for use*." (Original emphasis.) A

28 The judge therefore identified (in para 69) "three fatal flaws" in paras 22–24 of the inspector's decision letter. The three flaws were these:

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"(1) The inspector's interpretation [of condition 13] fails to give any effect to exception (i) at all. He failed to recognise that it is a *Grampian* restriction which not only satisfies the necessity test under section 257 … but in this case also engages the merits test, and imposes the further protection that the diversion must be brought into effect before the residual … homes may be occupied. Of course, if the stopping up order *passes* the merits test it follows that the confirmation of the order is still necessary (and its subsequent implementation) to enable the entire development to proceed. Both the necessity test and the merits test are considered alongside each other. (2) Reading condition 13 in 15/1097 as a whole, the *Grampian* restraint on carrying out the residual development continues to make the stopping up order necessary until at least the outcome of the merits test is known, and either exception (i) or exception (ii) can be applied. If the merits test is not satisfied, the order cannot be confirmed for that reason and at that point, but not before, the order ceases to be necessary to enable the residual development to be carried out *in accordance with the permission*. Thus, under both exceptions (i) and (ii) the necessity test and the merits test are considered alongside each other. (3) Condition 13 does *not* allow the whole scheme to be carried out on the basis that there is no need for the decision-maker to consider the merits test at all, because the stopping up order under section 257 fails the necessity test in *Vasiliou's* case in any event. The draftsman did not manage to create a legally effective exception (i) which satisfies the necessity test in *Vasiliou's* case only to negate his efforts by the mere addition of exception (ii). The inspector's construction of condition 13 begs the very question which it was designed to test, namely whether the stopping up order would be confirmed after applying the merits test as well as the necessity test. Condition 13 cannot sensibly be interpreted as meaning that the stopping up order was not necessary at all or under any circumstances, or that the whole development could be carried out irrespective of whether the Order was confirmed or not." C D E F

Because of his "misinterpretation of the condition and its legal relationship with the use of the power in section 257", the inspector had "brought the inquiry abruptly to a halt and … did not embark upon any hearing or determination of the merits test in *Vasiliou's* case as … he ought to have done". G

29 Under exception (ii), said the judge (in para 70), the

"prohibition on carrying out the residual part of the development remains in force, and the stopping up order is necessary to overcome that prohibition and enable that development to proceed, unless and until it is decided that the arguments against the proposed stopping up and diversion outweigh those in favour (including the importance of that development)". H

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A In his view, this analysis was

> "entirely consistent with sections 257 and 259 ... which empower the making and confirmation of an order which is necessary to enable development to be carried out *in accordance with the relevant permission*, whether the conditions of that permission include a simple form of *Grampian* restriction as in the case of exception (i), or go on B to lift that restriction in the event of the order not being confirmed, as in exception (ii)".

Was the inspector's decision unlawful?

30 For the Secretary of State, Mr Tim Buley submitted that the judge's analysis was wrong. The inspector's conclusions in paras 20–23 of his C decision letter were correct, and his decision not to confirm the Order lawful. In this case, Mr Buley submitted, the only relevant potential obstacle to the progress of the development was condition 13 on the planning permission granted on 9 March 2016. If, under that condition, the development would be able to proceed without the stopping up and diversion of the footpath, the tests for confirmation could not be met. The critical question for the D inspector, therefore, was what would happen if, as exception (ii) in condition 13 envisages, he refused to confirm the Order—with the consequence that the footpath would not be diverted. As the answer to this question was that his refusal to confirm the Order would not prevent the development from proceeding in accordance with the planning permission, including condition 13, he could only conclude that the requirements for confirmation were not satisfied. Condition 13 did not stand in the way of the development being E carried out, in full, if the Order was not confirmed. Inevitably, therefore, the "necessity test" in section 259 was never going to be met—no matter when it came to be applied. The inspector was bound to refuse to confirm the Order, regardless of any view he might have taken of its substantive merits had he gone on to consider them. This being so, no purpose would have been served by his hearing the parties' evidence at the inquiry. He made no error of law F in deciding as he did.

31 Mr Buley also contended that the more appropriate statutory procedure in this case was the procedure for a rail crossing diversion order under section 119A of the 1980 Act, whose provisions are tailored for the diversion of footpaths crossing railway lines. If that procedure had been used here, he submitted, the difficulty that has arisen over the interaction between G condition 13 and sections 257 and 259 of the 1990 Act would have been avoided.

32 Mr Juan Lopez, for Network Rail, supported Holgate J's reasoning and conclusions. The judge's understanding of the word "necessary" in section 257(1) as meaning "required in the circumstances of the case" was, he submitted, correct. Condition 13, properly understood, looked to the Secretary of State to apply both the "necessity test" and the "merits test", H and enabled him to conclude that it was appropriate on the merits and consequently necessary for the diversion of the footpath to be authorised and completed before the whole development could proceed "in accordance with the [planning] permission", and to decide, therefore, that the Order must be confirmed—as provided for in exception (i). Otherwise, the condition would be otiose. In exercising his statutory discretion, the inspector could not

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lawfully avoid grappling with the considerations for and against the Order being confirmed, including the potential disadvantage and inconvenience to the public if the footpath were diverted, balanced against Network Rail's concerns on railway safety. He had to decide whether the public interest in the Order being confirmed was outweighed by the public interest in its not being confirmed.

33 As to Mr Buley's suggestion that the appropriate procedure here would have been under section 119A of the 1980 Act, Mr Lopez submitted that condition 13 did not provide for that procedure, but for a "footpath and stopping up order" under sections 257 and 259 of the 1990 Act to be made by the council and confirmed, or not confirmed, in that statutory process. In any event, he submitted, whether or not the section 119A procedure might have been appropriate here, there was nothing inappropriate in the council having proceeded as it did.

34 As Mr Lopez accepted, the respondent's notice adds nothing significant to his main argument. If that argument is right, it follows that the inspector wrongly refrained from considering the evidence before him, and, in doing so, he would have been acting in breach of natural justice and unfairly, and unreasonably in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). If, on the other hand, his approach was correct, there would have been no need for him to consider the evidence, no breach of natural justice or unfairness, and no *Wednesbury* unreasonableness.

35 I cannot accept the argument advanced by Mr Buley. In my view the judge's analysis was, in substance, correct.

36 The logic of Mr Buley's submissions is basically this. The so-called "necessity test" is, as he put it, the "threshold question" to be considered when a confirmation decision is being made under section 259, and the so-called "merits test" the "second question"—though, he submitted, the "necessity test" must be satisfied at the end of the process, and throughout, rather than merely treated as a preliminary step before consideration of the "merits test". Either way, however, condition 13 on the March 2016 planning permission renders the consideration of a lawfully made stopping up order on its merits a pointless exercise, because it expressly allows for the development to proceed even if the order is not confirmed. A *Grampian* condition framed in this way contains an insurmountable barrier to confirmation, for the "necessity test" is never going to be met.

37 The difficulty with this argument, in my view, is that it involves a misinterpretation of condition 13 and a misunderstanding of its relationship with the provisions of sections 257 and 259.

38 The principles relevant to the interpretation of planning conditions are well established. In *Fawcett Properties Ltd v Buckinghamshire County Council* [1961] AC 636, 678 Lord Denning said it was "the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them", adding that "this applies to conditions in planning permissions as well as to other documents".

39 That observation of Lord Denning was cited in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, both by Lord Hodge JSC (in para 27) and by Lord Carnwath JSC (in paras 58 and 66). Lord Hodge JSC referred to *R v Ashford Borough Council,*

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A *Ex p Shepway District Council* [1999] PLCR 12 and *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048, and went on to say this, at para 34:

> "When the court is concerned with the interpretation of words in a condition in a public document such as a [consent under section 36 of the Electricity Act 1989], it asks itself what a reasonable reader would B understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

C Lord Carnwath JSC, agreeing with Lord Hodge JSC, said, at para 66:

> "I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in the *Fawcett* case ... Any such document of course must be interpreted in its particular legal and factual context ... D Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission ..."

40 It seems consistent with those statements of basic principle that, when one is construing a condition imposed by a local planning authority on a grant of planning permission, one should avoid, if one can, a construction E that defeats the obvious purpose of the condition, and seek to give it the effect it was plainly meant to have. Otherwise, not only will the condition be deprived of its intended effect as a restriction or control on the grant, but the authority's decision to approve the development may itself be cast into doubt.

41 Condition 13 does not, in my opinion, allow for any dispute as to its purpose and intended effect.

F **42** The condition is in typical *Grampian* form. Its point and purpose are evident both in its own terms and in the "Reason" for its imposition. It partly restricts the progress—both construction and occupation—of the development permitted by making it depend on events yet to occur through a further statutory process—the process for the making and confirmation of a "footpath diversion and stopping up order", and on a decision being made, G one way or the other, in the course of that process. And the "Reason" for the condition explains why: "[to] overcome adjacent public highway safety conflict", and to support the policies of the local transport plan and of the development plan to which it refers.

43 The intended effect of the condition is also quite clear. The condition does nothing to prevent the 64 specified plots being developed in accordance with the planning permission before the further statutory process, under H sections 257 and 259 of the 1990 Act, is undertaken, and subject to compliance with the other conditions imposed—none of which are relevant here. But it does prevent any further development beyond those 64 plots unless one of the two specified "exceptions" has occurred. The use of the word "exceptions" here may be thought slightly odd. But the meaning is perfectly clear. The two "exceptions" are the two alternative outcomes to the

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performance of the statutory process for the making and confirmation of a stopping up order whose content is defined in exception (i). The condition makes it impossible for the 65th and remaining plots to be developed until one or other of those two outcomes has occurred at the end of that statutory process, in a decision by the council or the Secretary of State to confirm or not to confirm the Order. And "[upon] any confirmed diversion and stopping up order coming into force", it also precludes the occupation of the 17 further specified "units"—namely "units 39–48 and 126–132"—until the diversion of the footpath has been put into effect and the new route made available for use.

44 Essential to understanding how condition 13 regulates the carrying out of the development is to recognise that it contains not merely one *Grampian* restriction, but two. These two controls operate together, in sequence. Both entail the performance of the statutory process under sections 257 and 259. The first *Grampian* restriction applies to the construction of dwellings on the 78 plots beyond the 64 specified in the condition. None of those "units" can be built until the statutory process has been fully performed and its result is known. Under the restriction on construction the development of those particular "units" must await the outcome of the statutory process—either the confirmation or the non-confirmation of the "footpath diversion and stopping up order". The second and additional *Grampian* restriction is different. It bites on the occupation of the 17 specified "units". And it depends upon the outcome of the statutory process—that is, whether the stopping up order has been confirmed—exception (i)—or not—exception (ii). Under this restriction—the "other key difference" to which the judge referred—the occupation of all 142 dwellings for which the planning permission was granted is only possible in the stipulated circumstances. The restriction cannot work unless the statutory process is performed. And it is engaged if, but only if, the outcome of the process is that the order has been confirmed. If the order is not confirmed, the limitation on the particular "units" in the development that may be occupied is not activated. But if the order is confirmed and comes into force, it is. In that event, the development may only be fully occupied when the "new footpath route" has been completed and is capable of being used by members of the public, including those who will live in the new dwellings on the site. Under this second *Grampian* restriction, therefore, there are two distinctly different consequences according to the two possible outcomes of the statutory process.

45 All of this emerges on a straightforward reading of the condition. Nothing has to be implied, nor is there any need to look at extraneous documents or material.

46 That exceptions (i) and (ii) require the statutory process under sections 257 and 259 to be performed in full is, I think, clear. Compliance with both of the two *Grampian* restrictions in the condition can only be achieved when that has been done. As the judge observed (in para 68 of his judgment), both exceptions envisage that the embargo on carrying out the residual part of the development necessitates the making and consideration of a stopping up order. Because this prohibition on the carrying out of the residual part of the development makes the stopping up order necessary, the "necessity test" is, as he said, "satisfied in both cases". As he also said, both "exceptions" deal with the effect of the decision as to whether the Order should be confirmed,

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A and "[this] involves the application of the merits test" (para 68). If the "merits test" is satisfied, the confirmation of the Order, under exception (i) is still necessary to enable the entire development to proceed. If, however, the "merits test" is not satisfied, the Order cannot be confirmed for that reason, and at that point, but not before, it ceases to be necessary to enable the residual development to be carried out in accordance with the permission. Thus, for both exceptions, the two tests are, as the judge put it, "considered B alongside each other" (para 69). Which of the two "exceptions" applies, and which of the alternative consequences of those two "exceptions" arises, will only become apparent once the process is complete and a decision has been made.

47 Exception (ii) refers to the "consideration" of the stopping up order referred to in exception (i), once lawfully made. Either alternative will be, and C can only be, the result of that "consideration". Whether it is "necessary" to authorise the stopping up or diversion of the footpath "in order to enable the development to be carried out in accordance with [the] planning permission" depends on the outcome of a substantive consideration of the stopping up order itself on its merits, including, in particular, the implications for public safety—whether, in the balance of all relevant considerations, the need "[to] D overcome adjacent public highway safety conflict" should prevail. It will become "necessary" to authorise the Order, in that statutory sense, if the decision-maker, having considered the order on its merits, concludes that it ought to be confirmed.

48 There is no basis for taking the concept of "consideration" in condition 13 to mean anything less than a complete assessment of the need for the Order to be confirmed, in accordance with the statutory scheme. In that E assessment, as the judge recognised, the "necessity test" and the "merits test" are applied in conjunction with each other. The parameters for it are firmly set by the condition itself. Under the condition, the opportunity to assess the cases for and against the confirmation of an order incorporating the defined stopping up and rerouting of the existing footpath is given to the decision-maker in the statutory process, in this instance an inspector appointed by F the Secretary of State, before the development can proceed beyond the 64 specified plots. The inspector must make his decision at that stage, having in mind the *Grampian* restrictions on construction and occupation provided in the condition. In the light of those restrictions, he must consider whether the development should be permitted to progress further without a confirmed order in place, given the increase in use of the existing "Carlisle–Settle public railway crossing" that would be likely to come about if it did. In deciding G whether or not the Order ought to be confirmed, he must ultimately judge for himself whether in all the circumstances it is "necessary" to authorise the stopping up and diversion of the footpath to enable the development of 142 dwellings approved by the planning permission to proceed subject to the *Grampian* restriction applicable in the event of an order being confirmed and coming into force—and thus, in that respect, "in accordance H with the permission" as the statute provides. If he concludes that this is "necessary", he confirms the Order. He does so knowing two things: first, that in accordance with the condition, the whole development can now go forward, but that it will only do so with a confirmed stopping up order in place; and also, secondly, that the development can only be occupied in its entirety once "the new footpath route" has been "fully completed". If,

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on the other hand, he concludes that it is not "necessary" to authorise the stopping up, he does not confirm the Order, and the consequences then are quite different: first, that the development can proceed without a confirmed order in place, and secondly, that it can also be occupied to its full extent without further restriction under the condition. That, in my view, is how the *Grampian* restrictions in the condition operate in synergy with the statutory provisions.

49 Understood in this way, the provisions of condition 13 are entirely consistent with, and respect, the statutory scheme for the making and confirmation of a stopping up order. They do not pre-empt that process, or dictate its result. They acknowledge that it involves a determination being made on the confirmation of the Order as a distinct exercise of statutory discretion, separate from, and in addition to, the determination of an application for planning permission. The scope of that exercise is not controversial. It was thoroughly considered and explained by this court in *Vasiliou's* case (see paras 14–15 above). We do not need to add to that explanation, or venture into any further discussion of the "necessity test" and the "merits test" as components of the decision-maker's discretionary jurisdiction under section 259.

50 Under the condition, properly construed, the decision-maker charged with determining whether or not a lawfully made stopping up order ought to be confirmed—here the Secretary of State through his inspector—is required to consider the necessity for the stopping up or diversion to be authorised, in the manner described, to enable the development to be carried out "in accordance with" the planning permission, having had regard to the possible advantages and disadvantages of this being done. Condition 13 does not break the integrity of that process, or intrude upon it. The condition expressly contemplates the possibility of the decision-maker confirming the Order, which must involve his being satisfied that it is, in the words of section 259(1A)(b), "necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission". Inherent in the condition, therefore, is the need for that process to be gone through fully, and the decision-maker's statutory discretion exercised freely in applying both the "merits test" and the "necessity test".

51 The correct analysis here, therefore, is that it is for the decision-maker in the stopping up order process to decide whether both tests are met or not. This part of the statutory process is left exclusively where it belongs, with the decision-maker in that statutory process. It is not predetermined by condition 13. If, having fully applied both the "merits test" and the "necessity test" in the course of his consideration of the stopping up order, the decision-maker concludes that the confirmation of the Order is justified, the condition does not debar him from making that decision. In that event the confirmation of the Order will have become "necessary" through the operation of condition 13, in accordance with the terms of the condition and the reason for its imposition, and thus in accordance with the planning permission itself. The potential necessity for the Order to be confirmed, authorising the stopping up or diversion, and the need for that question to be addressed and resolved by the decision-maker under section 259, is thus intrinsic to the condition. The condition does not make confirmation unnecessary simply by spelling out the possible outcomes of the statutory process in which necessity has to be considered.

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A **52** This analysis does not ignore the "necessity test". On the contrary, it gives that test its proper role in the statutory process. It recognises that, when he is considering whether the stopping up order should be confirmed under section 259, the decision-maker must apply the "necessity test" himself in the light of his conclusions on the "merits test", and that this is what condition 13 both allows and expects him to do. Under the condition the application of both tests is indispensable, and there are two possible scenarios—either that B they are satisfied or that they are not, each with consequences of its own.

53 For at least three reasons, in my view, the interpretation of condition 13 urged upon us by Mr Buley, and rejected by the judge, cannot be right.

54 In the first place, it requires one to accept that condition 13 predetermines the outcome of the very statutory process for which it provides, by detaching the "necessity test" from the "merits test", reading the C condition as having, effectively, forestalled the performance of the decision-maker's task under section 259, and thus making the outcome an automatic refusal to confirm the Order. This is to assume that the council misunderstood the statutory process for the confirmation of a stopping up order, or that it unintentionally frustrated that process and with it the operation of the *Grampian* restrictions in the condition by framing the condition to anticipate D each of the two possible outcomes the process could have. In effect, therefore, when determining the application for planning permission as local planning authority, the council would have had taken upon itself, and performed, the statutory role of decision-maker in that distinct and separate statutory process. It would have decided, before that statutory process had even begun, that it was not "necessary" to authorise the stopping up and diversion of the footpath to which the condition refers, and therefore that the Order should E not be confirmed.

55 Secondly, simply as a matter of construction, this understanding of condition 13 does not work. It overlooks the fact that the condition provides expressly for a stopping up order being made, for the possibility of that order being confirmed, and for the particular consequences of that decision, which it would have had no need to do if the Order could never be confirmed in F any event. This introduces into the condition a contradiction that Mr Buley's argument cannot avoid and does not explain.

56 Thirdly, therefore, a consequence of Mr Buley's interpretation of condition 13 is that the condition becomes self-defeating, and the statutory process in sections 257 and 259 of the 1990 Act ineffective. As the judge recognised, it reads the condition as negating the "consideration of a lawfully made stopping up order" to which it refers, whereby the decision-maker G establishes for himself, on the evidence before him, whether it is "necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission". On Mr Buley's construction of the condition, this would always be a futile endeavour—because the condition does not impede all 142 dwellings being built whether or not a stopping up order is confirmed. So, it is said, the "necessity H test" will invariably be failed. The "consideration" of the Order would then be short-circuited, with the unavoidable result that confirmation is refused, however strong the case for it may be on the merits. The condition would be rendered redundant—in the judge's words "effectively defunct"—and therefore unreasonable too. In effect, the council would have set up the statutory process to fail. And in doing so it would have nullified

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the *Grampian* restrictions it had imposed to control the carrying out of the development under the planning permission. This is not merely an unattractive conclusion, but also, in my view, mistaken.

57 It seems to me, therefore, that the judge was right to conclude as he did. The inspector's approach was in error, and his decision unlawful.

58 That is enough to dispose of the appeal. So there is no need to consider the submissions Mr Lopez based on the respondent's notice.

59 Finally, I should add this. Mr Buley may have been right to submit that in the circumstances here a more appropriate means of achieving the diversion of the footpath would have been the procedure for a "rail crossing diversion order" in section 119A of the Highways Act 1980. But this does not mean that the council was wrong to provide as it did in condition 13 for the process under sections 257 and 259 of the 1990 Act.

Conclusion

60 I would therefore dismiss the appeal, and uphold the judge's order.

FLAUX LJ

61 Although I see the force of Lewison LJ's contrary views, I agree with Lindblom LJ that the appeal should be dismissed for the reasons he gives in his judgment. I find the three reasons he gives at paras 54–56, as to why the Network Rail's construction of condition 13 cannot be correct, particularly compelling.

LEWISON LJ

62 I have read the judgment of Lindblom LJ in draft, and I agree with much of what he says. Specifically: (i) I agree that the correct approach to the interpretation of planning permissions is as set out by the Supreme Court in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85. (ii) I agree that, in accordance with normal principles of interpretation, one should try to validate a provision if possible; and that an interpretation should not defeat the purpose of the provision, unless no other interpretation is possible. (iii) I agree that the purpose of condition 13 was to overcome the council's concerns about highway safety. (iv) I agree that the council envisaged that there would be a full consideration of both the necessity and the merits of a stopping up order.

63 The overall purpose of condition 13 seems to me to have been to leave the ultimate question whether the highway should be stopped up to the Secretary of State.

64 But the question for me is: did the council exercise the appropriate statutory power in making the stopping up order under section 257, which then required confirmation under section 259? The planning authority cannot by means of a condition confer on the Secretary of State a statutory jurisdiction that he does not have. Whether section 257 was the appropriate statutory power seems to me to be a question of construction of the *statute*; not a question of construction of the *condition*. On that question I respectfully disagree with Lindblom and Flaux LJJ. Since I am in the minority, I will state my reasons shortly.

65 Mr Buley did not suggest that under section 259 the "necessity test" was a prior ("threshold") or overriding test to which the "merits test" was

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A secondary and subordinate. As I understood his submission it was that the necessity test must be satisfied at some stage, whether it is considered before, after, or in conjunction with the merits test. That that is so is, in my judgment, plain both from the words of the section and also from *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77 83, per Nicholls LJ. Indeed, the necessity test is the only test for which sections 257 and 259 B explicitly provide. The merits test arises only because the sections do not compel stopping up merely because it is necessary to enable development to go ahead. So I agree with Mr Buley that the necessity test must be satisfied at some stage.

66 It seems to me that Mr Buley's submission can be tested in this way. Suppose that on consideration of the merits, an inspector decided that the council's concerns about highway safety were misplaced. He would refuse C to confirm the order. But in that event the development could go ahead. There would have turned out to be no necessity for the stopping up order to be made. Suppose that, on the merits, an inspector decided that although the council's concerns about highway safety were justified, there were so many countervailing considerations that the order should not be confirmed. In that event the development could also go ahead. So again it would have D turned out that there was no necessity for the stopping up order. Suppose, on the contrary, that the inspector decided that on the merits it would be desirable for the highway to be stopped up and re-routed. What is it in those circumstances that makes it *necessary* for that to be done in order to allow the development to proceed? I cannot see anything. We have seen that in the previous two hypothetical scenarios refusal of confirmation did not prevent the development. Nor would it in the third. Accordingly, I agree E with Mr Buley that the logical conundrum is inescapable. Whichever way the inspector decides the merits test it is never *necessary* to stop up the highway under section 259 in order for the development to proceed. That being so, there is no point in his embarking on that exercise.

67 However, I must stress that I do not consider that this conclusion would invalidate either the condition or the grant of planning permission. F Condition 13 does not tie itself to the exercise of any particular statutory power to stop up highways. As Lindblom LJ has said, section 119A contains a specific power to divert a footpath crossing a railway. That section does not contain the necessity test that is inherent in section 259. So what has gone wrong is not the imposition of condition 13, or the way in which it is expressed, but the statutory method chosen by the council to attempt to implement it. That is a purely procedural question. The council can still G obtain its objective of leaving the decision to the Secretary of State. It simply needs to choose a different route by which to bring the matter to his attention.

68 I would have allowed the appeal.

Appeal dismissed.

H ALISON SYLVESTER, Barrister

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