APPROVED

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

No. CO/1896/2021

Royal Courts of Justice
Neutral Citation Number: [2022] EWHC 2464 (KB)

Monday, 1 August 2022

Before:

MR DEXTER DIAS QC
(Sitting as a Deputy High Court Judge,
Section 9(4), Senior Courts Act 1981)

B E T W E E N :

SHAMIM ANWAR

Claimant

- and -

LONDON BOROUGH OF EALING COUNCIL

Defendant

THE CLAIMANT appeared in person for judgment. At the substantive hearing, MR WILMSHURST of counsel appeared.

MISS KIMBERLEY ZIYA (instructed by London Borough of Ealing) appeared on behalf of the Defendant for judgment. At the substantive hearing, MR WILLIAMS of counsel appeared.

J U D G M E N T

APPROVED

DEXTER DIAS QC

sitting as a Deputy High Court Judge:

1 This is the judgment of the court. I divide it into seven sections to assist parties follow the court's reasoning.

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§I. INTRODUCTION

2 Who owns the kerbs, verges and footways outside our homes, and how much of it do they own? Who can do what to it, and what say do we have? These are not questions we give so much as a passing thought to as we proceed with our busy lives until something dramatic happens, as happened in the case of Mrs Anwar. Shamim Anwar lives at No.65 Balfour Road, Southall, although she does not own the freehold to the property. Towards the end of 2015 or the beginning of 2016 – the precise date has now been lost in the digital ether – she watched as the kerb outside her home was "dropped", that is, lowered. The highway authority constructed a crossover, a gentle slope on the roadway adjacent to the premises to permit vehicles to park on the forecourt of the neighbouring property, No.63. However, and

this is the cause of the trouble, the crossover overlapped to some degree, not fully, but unmistakably, with the boundary to No.65 – it was a joint crossover.

3 Mrs Anwar, the claimant in this case, had not asked for a flattening of the kerb outside her home. She did not want it. She never gave the slightest consent. A complaint procedure was pursued with the defendant local authority, the London Borough of Ealing. This complaint was made by the freeholder of her property, a Mr Caan. The London Borough of Ealing, the defendant in this case, like many other local authorities, acts as the highway authority with responsibility for most of the roads within its domain. Therefore, this complaint was pursued right up to stage three, the highest level, when it was considered by the chief executive of the local authority. He dismissed the complaint and refused to remove the crossover. It has caused much misery to Mrs Anwar for not only is she affronted that it was laid down in part outside her home without her consent, but it has permitted a neighbour, she says, to be able to drive onto her side of the boundary, at least partially, and cause her much distress.

4 With the complaint procedure exhausted, and her application to the Ombudsman rejected, Mrs Anwar sought relief in this court by way of judicial review. The highway authority is, of course, a creature of statute. The decision of the chief executive in refusing to remove the crossover that Mrs Anwar says was unlawfully laid down is amenable to public law challenge. That is the issue in this case. The refusal to remove by the chief executive is the impugned decision. Therefore, should the court quash the chief executive's decision not to remove the crossover and give Mrs Anwar the relief that she has for so long sought?

5 The parties to this judicial review claim are as follows. The claimant is Mrs Shamim Anwar. During the substantive hearing, she was represented by Mr Wilmshurst of counsel. Today she appears in person, assisted by her daughter as McKenzie Friend. The defendant

is the London Borough of Ealing. Ealing was represented at the substantive hearing by Mr Williams of counsel and today is represented by Miss Ziya of counsel. The court is grateful to everyone for their contributions.

6 I turn to the impugned decision in more detail. This is the decision of Mr Najsarek the chief executive of the council dated 11 February 2021 not to remove the crossover which provides vehicular access to the properties at No.63 and No.65 Balfour Road, Ealing in response to a stage three complaint. To repeat: No.65 is where Mrs Anwar lives. The claim is brought for judicial review and the quashing of Mr Najsarek's decision. It will always bear repetition that the function of judicial review that the High Court exercises is a supervisory jurisdiction. Its prime purpose is to vindicate the rule of law and it does that by scrutinising with rigour whether public authorities, that wield so much power over the life of us all, have exercised that power in accordance with law. Public authorities have an in-built latitude to make their own decisions about questions of discretion, judgment and policy. This court is not here to remake or second guess the decision of the chief executive. My duty is different. It is to consider whether that decision is lawful.

The procedural history

7 Mrs Anwar issued the claim on 28 May 2021. The defendant acknowledged service on 25 June 2021. On 9 July, Mr Peter Marquand, sitting as a Deputy High Court Judge, refused permission to apply for judicial review. He considered that the matter had not been issued promptly, he refused permission to extend time and, in any event, he would have refused permission as the claim, he found, disclosed no discernible error of law.

8 Notice of renewal was filed on 17 July 2021. The renewal hearing came before HHJ Alice Robinson, sitting as a Judge of the High Court, on 18 January 2022. She granted permission to bring a claim for judicial review on a single ground. It is:

> "The decision of the Chief Executive not to remove the crossover was unlawful because he had no, or no adequate, regard to a relevant consideration, namely that the crossover had been unlawfully constructed in the first place."

§II. Facts

9 The true status of Mrs Anwar at No.65 is unclear. She certainly lives there, and it is her home. A certain Fawad Anwar Raja owns the leasehold interest in No. 65 pursuant to a lease dated 23 July 1937 for a term of 99 years. Mr Adam Caan owns the freehold of No.65.

10 By a letter dated 10 December 2015, Satpal Riat, an assistant estates and development engineer for the council, wrote to the owner/occupier of No.63 – that is Mr Davinder Johal ("the neighbour") – to offer a reduced rate for the construction of a shared crossover between No.63 and No.65. This was part of the council's infrastructure renewal programme. That included resurfacing the footway outside of both properties. The letter states:

> "The reduced cost of a standard 3.6m wide shared vehicle crossover is £575, which represents a significant saving on the average cost of a 'one off' domestic vehicle crossover. Should you wish to take up this offer, please proceed to make full payment for the construction of the vehicle crossover and provide written approval from your neighbour (65 Balfour Road) for its construction."

The crossover

11 To understand why it was Mr Riat wrote in those terms, it is necessary to look at a photograph of the lay of the land. This is taken from p.178 of the hearing bundle.

12 In this photograph, you can see the two houses in Balfour Road, Southall. Number 63 is on the left and No.65 is on the right. The problem with constructing a crossover purely to serve No.63 (that is Mr Johal's property) is that there is a mature tree to the left of the photograph frame and, due to its roots and also a streetlamp, it would be necessary to lay down the crossover partly across the front of No.65, but not much, as can be seen in the photograph. Maybe 25 per cent of it fronts Mrs Anwar's home.

13 In this photograph what is evident is that both properties are able to use this crossover. One can see in the photograph a white car parked on the forecourt outside her home. If Mrs Anwar wished to get to that spot with a vehicle of her own, she would have to use the crossover and go across Mr Johal's land as well. That is inevitable.

14 These arrangements have caused tension between the neighbours. Indeed, in para.7 of her statement, Mrs Anwar states that she has been caused great distress by all this. She was sectioned under section 2 of the Mental Health Act 1983, although she maintains that was also an unlawful act. The responsible authority for her sectioning under the Mental Health Act characterised her mental illness as "persistent paranoid delusions concerning her neighbours" (see para.12 of the statement of her solicitor, Ms Sahib dated 24 February 2020).

15 I have been sent video clips depicting the activities of what it is claimed to be Mrs Anwar's neighbours. It is not appropriate to comment on these essentially private law matters, let alone making any findings of fact about them.

16 I turn back to the defendant local authority. Significantly, Ealing's own website for "dropped curves" stated:

> "Before you start,
> If you are not the property owner: please make sure you have the owner's written permission and include this with your application."

It continues:

> "Uploading supporting documents.
> You will be asked to upload some documents. Property owners' consent (if needed)."

17 Of course, while Mr Johal was the owner of No.63, Mrs Anwar was not the owner of No.65. Mr Caan was. No consent was obtained from him. In approximately December 2015 to January 2016, the council constructed the crossover shared between the front of No.63, primarily, and No. 65, partly.

Complaints

18 On 6 October 2020, the defendant accepted, in response to the complaint that had been made about all of this:

> "It is clear that you [the claimant] did not accept the offer for the crossover either. The lead engineer has retired and we do not have access to his records to be able to confirm why the crossover outside your property was constructed'."

19 The defendant also confirmed "I do not have any further information relating to the works, why it was constructed".

20 On 11 February 2021, there was the stage three letter that is the subject matter of this claim in judicial review. The council's chief executive, Mr Najsarek, sent it to Mr Caan, the freeholder. It states as follows, "The council accepted that the crossover was built without consent" – that is without the consent of Mr Caan, the freeholder of No.65, and also without the consent of Mrs Anwar, the occupier. The crossover was constructed by the council in December 2015 or January 2016 as part of the planned footway maintenance works in Balfour Road. The letter states:

> "You were also told that, as part of the works, residents of properties that did not have a crossover were invited to apply to make use of a reduced rate cost of construction."

21 It was accepted that "mistakes were made by officers". In initially responding to the claimant's complaint, some factual errors were made. It continued:

> "These latest enquiries do indicate that the crossover appears to have been constructed following an application from No.63 and I apologise that the previous responses were unable to confirm this. However, officers have been unable to locate any record of written consent from No. 65 in accordance with the council's requirements".

22 The claimant's concerns were not raised at or near the time of the construction of the crossover", Mr Najsarek writes, "and, if the crossover is removed, then No.63 will not be able to park on their forecourt as they have been able to do since 2015/2016."

23 He then continued that he understands that there is a shortage of parking in the road and, if the neighbours are unable to find space to park on the street, they may need to be able to park on their forecourt as they have been doing since 2015 or 2016.

24 There would be two alternatives to the removal of the crossover as follows:

> "[first], reposition the crossover towards No. 63, however this would not be possible for a number of reasons: there is not enough space to comply with policy; there is a mature tree which would impede construction; a streetlighting column which would impede construction and relocation would be difficult/costly.
>
> [second], place a bollard at the edge of the footway to prevent driving onto any part of No. 65, whilst retaining access and egress for No. 63.
>
> …
>
> Having considered the options above alongside your concerns regarding inconvenience and stress, and the likely inconvenience to the owner of No. 63, I am minded to retain the existing crossover and instruct officers to proceed with the option of the bollard."

The chief executive concluded,

> "Regarding your request for the removal of the shared crossover, I have noted your concerns and have also taken into consideration the need for access to off-street parking for the owners/occupiers of No.63 who are likely to have been using the crossover since 2015/2016. My decision is to retain the crossover with the offer to place a bollard to prevent access to any part of your property".

25 On 8 April 2021, the Local Government and Social Care Ombudsman refused to investigate the claimant's complaint in respect of the stage three letter, because:

> "The complaint is late and there is no good reason why it could not have been made sooner.
>
> The events [the Claimant] complains about happened some six years ago. We cannot investigate matters known to the complainant more than 12 months previously unless there are good reasons to do so. I am not satisfied that there are good reasons to investigate the complaint now."

26 Therefore, Mrs Anwar sought relief from this court and, as I indicated, the complaint form was filed on 28 May 2021, some seven weeks after the decision of the Ombudsman. It was sealed by this court on 1 June of that year.

§III. Legal framework

27 I subdivide my consideration of the law and statutory framework into three subsections: first, the law on what is a highway; second, the statutory framework that governs certain modifications to the highway; third, the canons of statutory construction.

(1) The highway

28 The law was recently reviewed by the Supreme Court in *London Borough of Southwark and Another (Respondents) v. Transport for London (Appellant)* [2018] UKSC 63. Lord Briggs gave the judgment of the court with which all of their Lordships agreed. I quote paras.6 to 11 of the judgment:

> "6. The word highway has no single meaning in the law but, in non-technical language, it is a way over which the public have rights of passage, whether on foot, on horseback or in (or on) vehicles. At common law, at least prior to 1835, there was, generally speaking, no necessary connection between those responsible for the maintenance and repair of a public highway and those with a proprietary interest in the land over which it ran. Prima facie the inhabitants of the parish through which the highway ran would be responsible for its repair, but they were not a corporate body suitable to hold ownership rights in relation to it: see Sauvain on Highway Law (5th ed, 2013) at para 3-05. As he puts it: "It was left to statute, therefore, to create an interest in land which was to be held by the body on whom the duty to

repair had fallen." Parliament began this task, in a rudimentary way, in section 41 of the Highways Act 1835, continued it in section 68 of the Public Health Act 1848, section 96 of the Metropolis Management Act 1855 and section 149 of the Public Health Act 1875. They all provided for a form of automatic vesting of a property interest in the land over which the highway ran in favour of the body responsible for its maintenance and repair.

7. A basic feature of the conveyance or transfer of freehold land by reference to an identified surface area is that, unless the context or the language of the grant otherwise requires or provides (eg by a reservation of minerals), its effect is to vest in the transferee not only the surface of the ground, but the subsoil down (at least in theory) to the centre of the earth and the air space up (at least in theory) into the heavens. Viewed in the vertical plane, the transferee acquires ownership not only of the slice on the surface but of the whole of the space above it, and the ground below it.

8. But a series of 19th century cases beginning with *Coverdale v Charlton* (1878) 4 QBD 104 and culminating in the decision of the House of Lords in *Tunbridge Wells Corpn v Baird* [1896] AC 434, established that the successive statutory provisions for the automatic vesting of proprietary interests in highways in the bodies responsible for their maintenance and repair operated in a much more limited way than would a simple conveyance or transfer of the freehold. First, it was a determinable, rather than absolute, fee simple, which would end automatically if the body responsible for its repair ceased to be so responsible (eg if the road ceased to be a public highway): see *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785. Secondly it was inalienable, for so long as that responsibility Page 6 lasted. Thirdly, and most importantly for present purposes, statutory vesting conferred ownership only of that slice of the land over which the highway ran, viewed in the vertical plane, as was necessary for its ordinary use, including its repair and maintenance. Following the example of counsel, I shall call this 'the Baird principle'.

9. That slice of the vertical plane included, of course, the surface of the road over which the public had highway rights, the subsoil immediately beneath it, to a depth sufficient to provide for its support and drainage, and a modest slice of the airspace above it sufficient to enable the public to use and enjoy it, and the responsible authority to maintain and repair it, and to supervise its safe operation. That lower slice was famously labelled 'the top two spits' in *Tithe Redemption Commission v Runcorn Urban District Council* [1954] 1 Ch 383 at 407. A spit is a spade's depth. Although colourful, that phrase says nothing about the necessary airspace above the surface. Again following counsel's example, I prefer the phrase 'zone of ordinary use'.

10. It is common ground that the zone of ordinary use is a flexible concept, the application of which may lead to different depths of subsoil and heights of airspace being vested in a highway authority, both as between different highways and even, over time, as affects a particular highway, according to differences or changes in the nature and intensity of its public use. A simple footpath or bridleway might only require shallow foundations, and airspace of up to about ten feet, to accommodate someone riding a horse. By contrast a busy London street might require deep foundations to support intensive use, and airspace sufficient to accommodate double-decker buses, and even

the overhead electric power cables needed, in the past, by trolley buses and, now, by urban trams.

11. The Baird principle was developed so as to limit, in the vertical plane, the defeasible freehold interest automatically vested in the body responsible for the repair of a highway. This was because, in a series of leading judgments, the court regarded this statutory vesting as a form of expropriation of private property rights without compensation, and was therefore concerned to limit its effect strictly to that which was necessary to achieve the Parliamentary objective, that is conferring upon highway authorities sufficient property to enable them to perform their statutory duties of the repair, maintenance and operation of highways. Thus for example, in *Coverdale v Charlton*, Bramwell LJ said (at p 116) that it would be monstrous if the highway authority thereby acquired rights in valuable minerals below the surface. In *Rolls v Vestry of St George the Martyr, Southwark* James LJ in a celebrated passage at p 796 said, of section 149 of the Public Health Act 1875:

> 'It seems to me very reasonable then to interpret this enactment in a way which gives everything that is wanted to be given to Page 7 the public authority for the protection of the public rights without any unnecessary violation of the rights of the landowner'.

In *Tunbridge Wells Corpn v Baird* Lord Halsbury LC said, after approving every word of what James LJ had said in the passage quoted above:

> 'That the street should be vested in them as well as under their control, may be, I suppose, explained by the idea that as James LJ points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and, therefore, there was given to them an actual property in the street and in the materials thereof. … It is intelligible enough that Parliament should have vested the street qua street and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street.'

At p 442 Lord Herschell said:

> 'My Lords, it seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use.'"

29 I add that, as Lord Justice Denning, as he then was, famously observed in *Tithe Redemption Commission v. Runcorn Urban District Council* [1954] 2 WLR 51 that the court considered

the effect of a strip of land being designated as a public right of way. Lord Justice Denning said:

> "The statute vests in the local authority for top spit or, perhaps, I should say the top two spits of the road for a legal estate in fee simple, determinable in the event of it ceasing to be a public highway."

(2) The statutory framework

30 The purpose of s.184 of the Highways Act 1980 ("the Act") is to ensure that, where appropriate, there is safe access to and egress from premises adjoining and having access to the public highway by constructing crossovers across footways and verges. Subsection (5) adds that the highway authority shall have to have regard to the need to prevent damage to the footway and verge. That is because such damage could present a risk to safety of the public. It may be that vehicles are constantly driving over the footways and verges and, thus, risk causing damage to the highway: see subsection (1). It may be that where land is developed with planning permission, there needs to be a crossing installed for access: see subsection (3). It may be that a request is made for a crossover to be constructed: see subsection (11).

31 The relevant provisions of section 184 of the Act are as follows:

> **"Vehicle crossings over footways and verges.**
>
> (1) Where the occupier of any premises adjoining or having access to a highway maintainable at the public expense habitually takes or permits to be taken a mechanically propelled vehicle across a kerbed footway or a verge in the highway to or from those premises, the highway authority for the highway may, subject to subsection (2) below, serve a notice on the owner and the occupier of the premises—

(a) stating that they propose to execute such works for the construction of a vehicle crossing over the footway or verge as may be specified in the notice; or

(b) imposing such reasonable conditions on the use of the footway or verge as a crossing as may be so specified.

…

(3) Where any land is being, or is to be, developed in accordance with a planning permission granted, or deemed to have been granted, under the Town and Country Planning Act 1990, and it appears to the highway authority for a highway maintainable at the public expense that the development makes it necessary—

(a) to construct a crossing over a kerbed footway or a verge in the highway so as to provide an access for mechanically propelled vehicles to or from the carriageway of the highway from or to premises adjoining or having access to the highway; or

(b) to improve or otherwise alter a made-up vehicle crossing that provides such an access as is mentioned in paragraph (a) above (whenever constructed),

that authority may serve on the owner and the occupier of the premises a notice stating that they propose to execute such works for the construction or, as the case may be, alteration of the crossing as may be specified in the notice.

…

(5) In determining whether to exercise their powers under subsection (1) or (3) above, a highway authority shall have regard to the need to prevent damage to a footway or verge, and in determining the works to be specified in a notice under subsection (1)(a) or (3) an authority shall have regard to that and the following other matters, namely—

(a) the need to ensure, so far as practicable, safe access to and egress from premises; and

(b) the need to facilitate, so far as practicable, the passage of vehicular traffic in highways.

(6) Schedule 14 to this Act has effect with respect to the making of objections to a notice under subsection (1) or (3) above and to the date on which such a notice becomes effective.

(7) Where a notice under subsection (1)(a) or (3) above has become effective, the highway authority by whom the notice was served may execute such works as are specified in the notice, subject to such modifications (if any) as may have been made by the Minister, and may recover the expenses reasonably incurred by them in so doing from the owner or occupier of the premises in question.

(8) A notice under subsection (1) or (3) above shall inform the person on whom it is served of his right to object to the notice and (except in the case of a notice under subsection (1)(b)) shall state the effect of subsection (7) above.

…

(11) Any person may request the highway authority for a highway maintainable at the public expense to execute such works as are specified in the request for constructing a vehicle crossing over a footway or verge in the highway, and the authority may approve the request with or without modification, or may propose alternative works or reject the request; and in determining how to exercise their powers under this subsection an authority shall have regard to the matters mentioned in subsection (5) above.

(12) An authority to whom a request under subsection (11) above is made shall notify the person making the request of their decision and if they approve, with or without modification, the works proposed in the request or propose alternative works, they shall supply him with a quotation of the cost of the works as approved or proposed by them, and he may, on depositing with them the amount quoted, require them to execute those works.

(13) As soon as practicable after such a deposit has been made with an authority the authority shall execute the works as approved or proposed by them."

32 Equally, Schedule 14 of the Act, entitled "Provisions with respect to notices under section 184", (1) reads as follows:

"A person on whom a notice under section 184(1) or (3) of this Act is served may within 28 days from the date of his being served therewith object to the notice on any of the following grounds which are appropriate in the circumstances of the particular case:—

(a) that the notice is not justified by the terms of section 184(1) or (3);

(b) that there has been some defect or error in, or in connection with, the notice;

(c) that the proposed works are unreasonable in character or extent, or are unnecessary;

(d) that the conditions imposed by the notice are unreasonable;

(e) that some other person having an interest in the premises also habitually takes or permits to be taken a mechanically propelled vehicle across the footway or verge and should be required to defray part of the expenses of executing the proposed works;

(f) that the authority are not entitled to serve the notice by reason of section 184(2);

(g) that a person carrying out or proposing to carry out such a development as is referred to in section 184(3) offers to execute the works himself".

(3) Canons of statutory construction

33 In *IRC v. McGuckian* [1997] 1 WLR 991 at 599, Lord Steyn noted the shift away from literalism in statutory construction and, as he stated:

> " the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it."

34 In *R v. Secretary of State for Health ex parte Quintavalle* [2003] UKHL 13 at 21, Lord Bingham stated that, "nowadays the shift towards purposive interpretation is not in doubt."

35 In *R (on the application of Black) v. Secretary of State for Justice* [2017] UKSC 81, Lady Hale at para.37 that the question of the statutory interpretation in that case depended on "the words used, their context and the purpose of the legislation".

36 The parties brought to my attention to various passages from **Bennion**, **Bailey and Norbury on Statutory Interpretation (2020) (**"**Bennion**"). At p.398 of **Bennion**, it is stated that:

> "Context requires taking the statutory words not in isolation, but by reference to other enacting provisions of the same statute.

Bennion continues at p.639:

> " '[a]n Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument … [which] may reveal that a proposition in one part of the Act sheds light on the meanings of provisions elsewhere in the Act'."

37 The Supreme Court has enunciated the correct modern approach to statutory construction in a number of cases recently, including *R v Luckhurst* [2022] UKSC 23, where at [23] Lord Burrows emphasised the "context and purpose" of the provision. In similar vein, in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, Lord Hodge stated:

> 29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."
>
> (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

> "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

38 The rejection of what Singh LJ in *R (Kaitey) v SSHD* [2021] EWCA Civ 1875 characterised as a "purely linguistic approach" echoed what Toulson LJ, as he then was, said in *An Informer v. A Chief Constable* [2012] EWCA Civ. 197. There it was stated at para.67 that:

> "Construction of a phrase in a statute does not simply involve transposing a dictionary definition of each word. The phrase has to be construed according to its context and the underlying purpose of the provision.

I take this to be the proper approach to interpreting the Highways Act 1980, the crucial statute at the heart of this dispute.

§IV. Issues

39 The decision impugned is the defendant's decision not to remove the crossover. On what basis can the removal decision be quashed? The claim is that the chief executive had no or no sufficient regard to the unlawful construction of the crossover. That raises two adjacent issues. First, whether the construction was unlawful; second, whether the chief executive had sufficient regard to its illegality. I will call these Issue 1 and Issue 2. If there was no underlying unlawfulness on Issue 1, then the basis of challenge on Issue 2 falls away. It must do as a matter of inexorable logic.

40 The defendant complains that it is too late to challenge the legality of construction. It would not be possible to challenge the decision to install the crossover. It was laid down in 2015 to 2016. The challenge would be time barred for judicial review purposes. There is some force in this argument, but I have been reflecting upon the unlawfulness question. That is

because both parties devoted a very substantial part of their submissions to the question. I judge that it needs an answer. The challenge on Issue 2 is entirely derivative of it. The court should not shy away from providing the answer to Issue 1 as it is a condition precedent to Issue 2. Thus, I will consider two questions:

Issue 1: was the construction of the crossover unlawful?

Issue 2: was the evaluative exercise undertaken by the chief executive flawed?

§V. Submissions

41 I will consider the claimant's submissions first and then those of the defendant. I am grateful both to Mr Wilmshurst and to Mr Williams for their focused and skilful contributions and assistance to the court.

The claimant's submissions

42 This crossover was unlawfully installed outside the powers conferred by s.184 of the Act. Although No.63 had been clearly informed by the defendant that he would need to obtain his neighbour's consent as a condition of construction, the neighbour at No.63 declined to seek such consent or even bring up the subject prior to its construction. The local authority, therefore, proceeded without consent, permission or application from the claimant as required by section 184 of the Act. The local authority had also failed in providing the notice that is required by Schedule 14 of the Act resulting in an inability of Mrs Anwar to react. It is asked, I take it rhetorically, how a neighbour can put you in a worst position than the highway authority? If there had been a subsection (1) notice by the authority, Mrs Anwar could have objected. Here the objection procedure was completely bypassed, unfairly and unlawfully. A shared crossover was unilaterally imposed. The starting point,

Mr Wilmshurst submits, is that this was, in fact, a subsection (3) case, as the "footway maintenance works" and the "infrastructure renewal programme" must have entailed planning permission. Subsection (3) triggers the objection protocol and that was bypassed in Mrs Anwar's case. The highway authority only owns the two top spits of land on the highway, as Lord Denning stated, and it is only for lawful purposes and for use as a highway. The land beneath is owned by the freeholder. Subsection (11) does not grant the power to "impose things on people", as Mr Wilmshurst graphically put it. The court must view the statute as a whole and can read a consent provision into subsection (11), particularly reading subsections (1) and (11) together. The authority is a creature of statute. The crossover was unlawfully constructed. Therefore, the only rational conclusion is that there should be removal and rectification. Thus, the refusal of the chief executive was unlawful. The installation of a bollard, which was the offer for relief, does not rectify the unlawful act. There must be removal as the proper rectification and it should not have come to a balancing-up of different factors by the chief executive.

The defendant's submissions

43 This is a subsection (11) case. Consent is not required by that subsection and you cannot read a consent requirement into it. It is evidently not a subsection (3) planning permission case. It is unsustainable to argue that. It was never treated as a subsection (1) compulsion case and it should not be viewed by this court now as such. The decision under challenge is the chief executive's decision not to remove the crossover. Plainly, he took into account the lack of consent and that was an appropriate approach. There was no finding before him, or one that has ever been made, that the crossover was, in fact, unlawful. No permission has been sought for an extension of time to adjudicate on that question. It would, in any event, be long-time barred. Instead the focus must be on the chief executive's decision. It was entirely lawful. There is no basis for this court to find it being unlawful. The lack of consent, although a courtesy and a practice of the local authority, was not a legal requirement. This is

a standard subsection (11) case. No consent is required. A lack of it does not render the chief executive's decision unlawful.

§VI. Discussion

44 One must start with what is indisputable. This crossover was built without Mrs Anwar's consent. It has deeply upset her. It has suited Mr Johal and No.63 more than it has suited her. The council wrote to the neighbour. It told him to seek Mrs Anwar's consent. He did not. The council proceeded with the installation, in any event. All that is given. I now turn to consider the two issues that I identified previously.

Issue 1 – illegality

45 This question is ultimately and inescapably one of statutory construction. The statute in question is the Highways Act 1980. It is a long complex piece of legislation. In this case, however, just one section is engaged and one schedule. That is section 184 and Schedule 14. Everything turns on what these provisions mean. It is clear that there are three distinct types of action that the highway authority can take in respect of crossovers. They are compulsive cases and request cases. I shall call them "Type 1", "Type 3" and "Type 11" cases, respectively, after their specific subsections.

46 Type 1 and Type 3 are compulsory or compulsive cases. Type 11 is a request case. To improve and flesh out the taxonomy: Type 1 is a habitual use compulsion case, Type 3 is a planning permission compulsion case and Type 11 is a request non-compulsion case.

Type 1

47 The classic compulsion case falls under subsection (1). Here, where an occupier of premises habitually takes a vehicle across the kerbed footway or the verge in the highway, the relevant authority can serve notice. The notice indicates an intention to construct a vehicle crossing, a crossover. An occupier served with such notice may consent or may not consent. What is critical is that the conditions precedent are established. Principally, this requires habitually driving across the kerbed footway or verge. If this happens, by virtue of subsection (7), the authority may recover the installation expenses incurred from the owner/occupier. They are likely to be several hundreds of pounds or more. In this case, the reduced cost of installation was £575. You could consent in principle, but object to having to bear the full cost, because somebody else has been habitually driving across the kerbed footway or verge and thus is partially responsible for the infraction. You could consent in principle but object to the conditions imposed by the notice as unreasonable – because the cost is excessive and exorbitant. Thus, I do not read subsection (1) as dispensing with consent. It is about what conditions must exist for the highway authority to take compulsory action and, critically, to be able to recoup the cost from the occupier or owner.

Type 3

48 The next type of case is the land development case. This is governed by subsection (3). That provision makes it clear that the power is focused upon improving access to land that is being developed.

Type 11

49 This is a request case and falls under subsection (11). Here "any person" may request that the highway authority constructs a crossover. The authority may accept or reject the request. If accepted, it will provide a quotation of the cost of the work. Once the requisite amount is deposited, the person may require the authority to construct the crossover.

50 So that deals with the three types of cases, but what happened here? It is clear that around the end of 2015, the defendant local authority was undertaking a planned footway maintenance in Balfour Road. Residents were "invited to apply". Thus, the Type 11 request process actually began with an invitation from the local authority which happened to be doing work in that part of Southall. The kit and crew would be on hand. No doubt there would be economies of scale. Thus it was that the local authority offered installation at a reduced rate. The owner/occupier of No.63 took up this offer.

51 Eventually, the council records revealed that it had received "an application" from him. That is a Type 11 request to install a crossover for the purposes of subsection (11). The complicating feature here is that it would be a joint or shared crossover, because it would be built in part across the front of Mrs Anwar's premises - not completely, but partially. It is a common position that Mrs Anwar did not consent. Further, there is no evidence that she was consulted. Yet the crossover adjacent to her premises was built. This facilitated No.63's access to parking on the forecourt in front of his house, but it also resulted in tremendous distress, upset and inconvenience to Mrs Anwar. Of that I have no doubt. I have seen the materials she sent to the court on a memory stick. They show what has been going on between the neighbours. It is not my job to adjudicate on that today. This is a dispute today between Mrs Anwar and the defendant local authority, not the neighbour. That is a matter of private law.

52 So does the indisputable fact that the shared crossover was built without Mrs Anwar's consent render that decision unlawful? More precisely for today's application, does it mean that the chief executive should have concluded that the decision to build the crossover and indeed to build across the front of Mrs Anwar's property (a term used loosely here) were unlawful acts? Should he, as a result, have ordered its removal?

53 This depends on a close and accurate reading of the Highways Act. I repeat: issue 1 turns on statutory construction. It is common ground that subsection (11) does not contain any explicit consensual requirement. The words make that clear. The reason is obvious. There has to be an initiating request. But Mrs Anwar's case is advanced energetically by Mr Wilmshurst on three bases. First, that you must read subsection (1) and subsection 11 together. Once done, it is clear that, when one looks at the statute as a whole, it must be a consent condition before building a crossover. How could there not be? Mr Wilmshurst asks.

54 Second, this is actually a subsection (1) (Type 1) case. This is an instance of compulsion. Therefore, the objection process under Schedule 14 has been entirely bypassed: unlawfully, a crossover has been built at the front of Mrs Anwar's property. That is an act of compulsion because she did not consent. She was not offered the opportunity to object. These are material failures. They render the construction unlawful. The chief executive should have found as much. He did not. Thus, his decision not to remove the crossover was, in turn, unlawful and should be quashed.

55 Thirdly, this can also be viewed as a subsection (3) (Type 3) case. The defendant has provided no information to indicate that this was not built in accordance with planning permission grant.

56 Before I consider each of counsel's three arguments, it is vital to understand what is actually happening here. Fundamental to that is where the council actually constructed the crossing.

57 The submission on behalf of the claimant is that Parliament did not intend the Highways Act 1980 to allow the local authority to construct crossovers "over third-party land and without

consent or permission or deprive of them of their right to consent". This raises the question whether the crossover was constructed "over" Mrs Anwar's land or indeed Mr Caan's.

58 Section 184(1) makes it clear that the provision is exclusively directed at crossings over footways and verges in the highway. It contemplates in those cases constructing a crossover across part of a highway that is maintainable at public expense. If an occupier of any premises adjoining, having access to the highway, habitually takes a vehicle across a kerbed footway or verge in the highway to and from those premises, then the authority may serve notice. That is the habitual-use compulsion case. Note that the crossover and the intrusion is in the highway.

59 Subsection (3) provides for the construction of a crossover in land development cases with granted or deemed planning permission but the crossover will be constructed "in the highway".

60 Subsection (11) contemplates requests to construct a crossover over a footway or verge in the highway. Thus, in all three types of cases, the crossing is laid down in the highway. It is, thus, a modification *to the highway*. The highway is maintained at public expense. It is not maintained by the occupiers or the owners of adjacent premises, whether neighbour, Mr Johal, No.63, or Mrs Anwar or Mr Caan. By reason of section 263 of the Act, the property in the highway is vested in the highway authority. The soil below, whether two spits or more, depending on the context, belongs to the freeholder, not Mrs Anwar, but the construction is actually laid on the highway, the property of which is by statute vested in the highway authority. This understanding is critical in assessing the various requirements and rights engaged.

61 Is notice required in Type 1 habitual use cases because the crossover proposed adversely affects the freeholder's land? One must look at this carefully. When notice is served in subsection (1) (Type 1) cases, the opportunity to object is granted by subsection (6) and Schedule 14. This is because, even though the crossing will be constructed in the highway, because of subsection (7), the authority may recover the expenses reasonably incurred by its construction from the occupier of adjacent premises. That is the critical reason why there is a right to object. There may be financial consequences to the occupier. Therefore, fairness and due process demand that she or he must have an opportunity to protest it. This analysis is reinforced by the terms of the objection schedule. For example, at para.(e)

> "that some other person having an interest in the premises also habitually takes or permits to be taken a mechanically propelled vehicle across the footway or verge and should be required to defray part of the expenses of executing the proposed works".

This makes plain that the focus is on the exposure to financial prejudice. This paragraph confirms that, where someone else has been engaged in the trigger habitual behaviour, then it is only fair that they should bear some of the cost of compulsory construction.

62 In Type 3 cases, with a land development, again, by virtue of subsection (7), the authority may recover from the occupier the reasonable expenses incurred in that species of compulsion case. So what unites the two compulsion cases is that there will be a compulsory cost to the occupier and that is why an objection procedure is provided. When one looks at subsection (11) request cases, the crossover will again be constructed in the highway. What is significant, it strikes me, is that subsection (11) explicitly states that *any* person can make the request. It is by the express term of the statute not restricted to the affected occupier. The highway authority will simply consider the merits of the request once the person, whoever it is, makes it, not whether or not that person is the occupier. No doubt, the fact that the request is not by an occupier will be taken into account, but, since

this is a request and not a compulsion case, there is no necessity for an objection by the person making the request and paying for the construction. That would be an absurdity: to have the right to object to something that you have requested yourself.

63 What then happens is that the highway authority provides the requesting person with a quotation and, if that person deposits the amount quoted, the person can require the highway authority to execute the work and to construct the crossing.

64 Now, it seems to me that, if there is a subsection (11) request by a neighbour and, because of the topography and the spatial limit, it has to be a joint crossing, then under the statute the situation is no different. There are no express terms to suggest so. This is because the non-requesting occupier cannot be compelled in a request case to pay or partly pay for the crossover *in the highway*. They have not requested it. But I am certain that, if there would be a financial levy of the construction expenses from the second and requesting neighbour, then plainly either consent or the opportunity to object must be in place. That would be because the authority would be affecting the financial rights of a non-requesting neighbour by imposing a charge, but that is not how the scheme works. The only person charged is the requesting person. That person must deposit the quotation sum.

65 I can entirely foresee that on a joint crossing the neighbours may club together to fund the deposit, but that would be a private arrangement between them. However, since the authority is not unilaterally imposing the charge on a non-requesting neighbour, fundamental financial rights are not interfered with. But are property rights being adversely affected? In my judgment, no. The highway authority is at all times constructing the crossing in the highway. The statutory authority has the property of that part of the vertical plane of the land in question vested in it by statute. It has to, in the public interest, as the long development of the law has made clear.

66 The foregoing analysis seems to me what the purpose and object of section 184 must be. The non-requesting neighbour has not been charged for the crossover. The crossing is laid on the highway. I cannot see, on any interpretation, how laying a joint crossing in a request case without consent by a non-requesting and unpaying neighbour could possibly be unlawful. It seems that the council had developed a practice in joint crossovers of asking the requesting person to seek the consent of the neighbour. I can see that it may be prudent for harmonious relations in the road, but it cannot have any legal effect. It cannot, and does not, rewrite a statute. It does not change the objective legal requirement. It does not change the true construction of the statute and the intention of Parliament.

67 Seen in this light, what unites all three types of crossover cases is the question of cost, imposed or compelled in Type 1 and Type 3 cases, and thus with the right to object; requested, and so voluntarily assumed, in Type 11 cases and thus,with no right to object, but with the condition that, unless the requesting person deposits the quotation sum, the crossover will not be constructed.

68 To that extent the submissions on behalf of the claimant are correct, when stating, "subsection (11) does not give the highway authority the right to impose things on people". Certainly, the provision confers no power for the authority to impose any financial consequence or levy on a non-requesting occupier like Mrs Anwar.

Argument 1

69 So, back to counsel's arguments: argument one (reading in consent). I agree that the statute must be read as a whole. That is a species of interpreting the context of the words on the provision in question. So, indeed, statutes must be read as a whole as judgments must be. The force in Mr Wilmshurst's central argument lies in a simple equivalence. In a classic

subsection (1) case, there is the opportunity to object. Where a neighbour requests the construction of a crossover, how can she receive fewer procedural opportunities to protest a position than if the council sought to compel the construction? The answer to this question posed on behalf of the claimant lies in the statue itself. It is clear from subsection (11) that "Any person may request the building of a crossover". If there is a crossover which, as here, due to limited space, will be shared by one that is adjacent to the front of part of each premises, then there is nothing in subsection (11) that explicitly requires the authority, as a matter of statute, to seek the consent of the other affected person, because although that person may request the crossover, that is not the end of it. It is clear that subsection (11) requires the authority to have regard to subsection (5) and the matters there. These are important questions in the exercise of the authority's discretion to construct or not to construct. But this subsection does not require the consent of the other affected party. Consequently, what appears to have happened is that the defendant authority has developed an internal practice of seeking consent. That is not a matter of law, but is a matter of good public relations with residents and, indeed, between them. I do not construe that practice as a concession that consent was required as a matter of law, either by statute or common law. I am mindful that, as Dillon LJ stated in *R v. Devon County Council ex parte Baker* [1995] 1 WLR 73 at p.85, "Judicial review is not granted for a mere failure to follow best practice".

70 I regard the defendant's practice of seeking the consent of a co-occupier in a joint crossover as good practice, but that does not elevate it into a legal requirement. It was held that there remains no general duty to consult in all cases (see *R(on the application of Bapio Action Limited) v. Secretary of State for the Home Department* [2007] EWCA Civ. 1139). For example, this court held in *R (on the application of Harrow Community Support Limited) v. Secretary of State for Defence* [2012] EHCA 1921 (Admin.) that there was no duty to consult in relation to a decision to place surface-to-air missiles on a tower block during London 2012 Olympics. There must be a failure of some legal obligation, whether imposed

by statute or common law. Of course, the right to object with a need for consent is very different to the duty to consult, but this court has expressed the view that, when Parliament has not imposed a duty to consult, the court should not do so (see *R (on the application of London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (Admin).

71 The classic statement about procedural fairness was enunciated by Lord Mustill in *R v. Secretary of State for the Home Department ex parte Doody* [1994] 1AC 531 at p.560:

> "1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. … 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects".

72 Here subsection (11) does not require that a non-requesting occupier in a joint crossover situation is consulted. I can entirely see that it would be sensible or good practice, but that is a very different matter from a requirement of law. I fail to see where a consent requirement in section 184 can be found for Type 11 request cases. I specifically asked claimant counsel this. Mr Wilmshurst realistically conceded that there was nothing expressly, although he urged the court to read section 184 as a whole. I have done that, but nowhere can I find the basis to read into section 184 a consent requirement for a subsection (11) request case. Subsection (1) and subsection (11) are different statutory animals: compulsion versus request. To change the analogy, I cannot extrapolate from apples to oranges.

73 I come to the fundamental flaw in the claimant's first argument. It is that it fails to understand why the objection mechanism exists for compulsion cases. The true explanation is that it exists because of the exposure to compulsory costs. The argument fails to understand why the consent requirement is absent for Type 11 request cases. The true

answer is because there is no exposure to compulsory cost for the non-requesting occupier, but a voluntary assumption of cost by the requesting person. I conclude that for Type 11 request cases, there is no need for consent from a non-requesting occupier and, further, that the absence of such consent does not render the crossover unlawful. But there is an existential question: is this, in fact, a Type 11 case?

Argument 2

74 This leads me to counsel's second argument: which type of case? The short answer is that this was never treated as a Type 1 habitual use compulsion case. Further, the evidence taken as a whole does not suggest that it should have been. Mr Wilmshurst pointed out that there are photographs in 2014 and 2015 showing vehicles parked past the kerb. There is a white car on the forecourt of Mrs Anwar's premises, so the kerb has been breached at least to some extent, it seems. But that does not mean that this was a subsection (1) case. It was not treated as such. The highway authority served no notice on No.63, that is Mr Johal, or, indeed, on Mrs Anwar, as was required by subsection (1). I conclude that this was not a Type 1 compulsion case, and thus there was no objection protocol for the purposes of Schedule 14 to follow in respect of subsection (1). But that still is not the end of the matter. There is a further argument. That is whether or not this was a subsection (3) case.

Argument 3 – Planning case

75 The claimant submits that "the starting point is that subsection (3) applies and that that can be read from the fact that this was an 'infrastructure renewal programme'." It is also submitted that there is no evidence that planning permission is not applicable and thus this is a subsection (3) case and subsection (3) applies with its inbuilt objection protocol. This strikes me as being a feat of forensic alchemy. The lack of proving a negative does not establish a positive. There is a distinction between the general infrastructure programme, which may have caused the authority to be in the area in the first place, and this request at

No.63 under subsection (11), because of the opportunity that that happenstance provided. These are distinct. The submission on behalf of the claimant conflates the two. I reject it.

76 Interestingly, in the bundle is a policy document from Ealing adopted in 2006. SPD8 can be found at p.133 of the bundle. It is entitled "Crossovers and parking in front gardens". It makes the distinction in areas where planning permission is required and areas where simple highway authority permission is required for crossovers. Some roads are of strategic importance, such roads generally require planning permission. It is clear from the information that I have been provided, including maps, photographs and videos, that Balfour Road is a relatively quiet residential road. Put the other way, there is no evidence that it falls within the category of road that would need planning permission for a crossover. I conclude this was not a Type 3 permission compulsion case.

77 It is submitted overall that failure to acknowledge the unlawfulness of the crossover "vitiates the decision". As I have explained, the construction of the crossover was not unlawful. It is submitted that "the only rational conclusion, if unlawful, is rectification and removal". The court does not need to adjudicate on this submission because the construction of the crossover was not unlawful, but I have a doubt about the accuracy of the submission, in any event. Removal, especially after such a long passage of time, is not the inexorable consequence of unlawfulness. That concludes issue 1.

Issue 2 – Failure in an evaluative exercise

78 I can deal with this swiftly given my decision on issue 1. I accept the submission on behalf of the defendant that at the time of the decision there was no finding that the crossover was unlawfully constructed. It is plain in the decision letter that the chief executive acknowledged that mistakes had been made and he took fully into account these mistakes

and the lack of consent in making his decision. He carefully weighed the options and alternatives to the situation. He took the competing interests into account and balanced them. It is unsustainable to argue that the chief executive did not consider the question of a lack of consent: he plainly did. Did he give it insufficient weight? It is impossible to argue that he did. It was one factor. What is most significant about it is that lack of consent *per se* did not render the crossover unlawful in a Type 11 request case such as this. It was rational and reasonable for the chief executive to look at the balance of convenience and all the factors and all the circumstances. By the time of his decision, the crossover had been used for about five years. I do not accept the characterisation of the decision in the claimant's skeleton argument dated 6 April 2022, where it is suggested that the inconvenience to the neighbour at No. 63 was determinative of the chief executive's decision. Reading his decision letter carefully, plainly he did not adopt that approach. Instead, he carefully considered the competing factors and weighed them and offered a solution to the problem. Having looked at the topography clearly depicted by the photograph at page 183 of the bundle, it is plain that a bollard demarking the boundary would have easily resolved this issue, but Mr Khan and/or Mrs Anwar did not take up this offer. In truth, the real concern has not been the crossover. It has been the alleged conduct of the neighbour, Mr Johal, at No.63, which has been, the claimant alleges, exacerbated by ready access to her property that the crossover has gifted him.

79 I will deal now with the defendant authority's practice. The highway authority is, as I have indicated, a creature of statute. The practice of seeking the consent of the "owner" of the property was not in furtherance of the express requirement of any specified statutory rule under subsection (11). The few words on the Ealing website add very little. There is the policy document to which I have referred. No meaningful argument was made about it to me, but I have considered it anyway. That policy document contains no stipulation that for joint crossovers there must be consent from both affected owners. Thus, the website words

cannot and should not be inflated into statutory terms or policy. Instead, they reflect a practice that was not mandated by statutory instrument nor statute. As Lord Bingham said in *Roberts (Appellant) v. Parole Board* (*Respondents)* [2005] UKHL 45 at para.40,

> "(i) An administrative body is required to act fairly when reaching a decision which could adversely affect those who are the subject of the decision.
>
> (ii) This requirement of fairness is not fixed and its content depends upon all the circumstances and, in particular, the nature of the decision which the body is required to make."

Therefore, standards of fairness are not set in stone, artificial and immutable. They must respond to the granular situation. The critical features in this case are, first, here Mrs Anwar and Mr Khan were not charged a penny for the crossover; second, the extent of it is only in a very limited way overlapping the boundary of No.65; third, the dropping of the kerb by a few inches was exclusively a modification of the highway authority's property. Thus, I cannot see, in the circumstances, that the dictates of fairness demand the consent of the "owner", whether freeholder or occupier.

80 This judicial review is a challenge to the lawfulness of the local authority's decision. I find that there was no flaw in the evaluative exercise undertaken during the chief executive's decision-making process.

§VII. Conclusion and disposal

81 For the assistance of parties, I conclude by setting out clearly my prime conclusions:

(1) This was a subsection (11) request case;
(2) There is no statutory consent requirement for subsection (11) cases;
(3) The defendant's practice of seeking consent in subsection (11) cases was not a consequence of a statutory duty to seek such consent: there is none;
(4) The true context is of a highway authority modifying its own highway and not the claimant's property or indeed that of the freeholder (someone other than the claimant);

(5) The defendant's practice in asking for non-requesting neighbour consent in subsection (11) joint crossover cases was, essentially, a matter of courtesy;

(6) The chief executive's refusal to order removal of the crossover was not unlawful as the crossover was not unlawfully constructed;

(7) In any event, the chief executive rationally and reasonably evaluated all the relevant competing factors and reached a rational and reasonable decision;

(8) The impugned decision of the chief executive is impregnable to public law challenge.

82 I, therefore, dismiss this claim for judicial review. The conventional legality challenge fails. The defendant did act within the scope of its powers and it did comply with its duties in its refusal to remove the crossover.

83 What is also significant here is that the highway authority was modifying its own highway. It was not interfering with the soil that belongs to the freeholder of No.65, lying in the darkness some way beneath the tarmacked footway of the highway. If Mr Khan had a bounty of some valuable minerals buried beneath the tarmac, he would be entitled to them. As Bramwell LJ said in *Coverdale v. Charlton* [1978] 4 QBD 104 at p.116, it would be "monstrous" if the highway authority thereby acquired such valuable goods. I have not been provided with information about whether any such trove has ever been found in Southall. Nevertheless, Mr Khan is not entitled to dictate to the highway authority how it should maintain or modify its own highway which it does for in the interests of public safety. The defendant did not charge either the freeholder, or Mrs Anwar for the cost incurred in the construction of the crossover on the highway authority's highway. It was right not to. It would have been unlawful to do so. A highway is a public right of way maintained by the defendant at its expense in the interests of all members of the public.

84 Interestingly, the council were unable to find any decided authority where this issue had been litigated, let alone decided. But such crossovers must be regularly built. Therefore, this case may have wider general interest and application. I recognise that. But to read a consent requirement into Type 11 request cases is not to interpret the statute. It is to rewrite it. It is legislating. This court cannot and must not do that. As Lord Burrows said at p.18 of his book on statutory interpretation:

> "There is a need to avoid crossing the important constitutional line between interpreting and legislating and, in that sense, it is a constant reminder of the separation of powers."

85 I am very sorry that Mrs Anwar has had to endure these years of distress and anxiety. I have seen how it has very visibly affected her and her family member who attended court to support her. But the legal construction of a statute is an exercise in forensic accuracy not sympathy, however strongly that sympathy might be deserved. The peril in such an approach is that law becomes uncertain and waivers, depending upon the personal characteristics of the individual claimant, rather than the democratic intention of Parliament.

86 Thus, I must apply the canons of proper statutory construction and reach a dispassionate conclusion. This court performs a critical function in the protection of the rule of law. It is here to ensure that the executive bodies of state comply with the will of Parliament. Here the defendant public authority acted in accordance with the law. Mrs Anwar's remedy against her neighbour is a question of private law. Without wishing to prejudge that, I wish Mrs Anwar well.

87 That is my judgment.

APPROVED