5 December 2018

PRESS SUMMARY

London Borough of Southwark and another (Respondents) v Transport for London (Appellant) [2018] UKSC 63
On appeal from [2017] EWCA Civ 1220

JUSTICES: Lady Hale (President), Lord Reed (Deputy President), Lord Carnwath, Lord Lloyd-Jones, Lord Briggs

BACKGROUND TO THE APPEAL

This appeal concerns the effect of the GLA Roads and Side Roads (Transfer of Property etc) Order 2000 (SI 2000/1552) ("the Transfer Order") and the GLA Roads Designation Order 2000 (SI 2000/1117) ("the Designation Order"). By combined operation of those Orders, responsibility for Greater London Authority ("GLA") roads was transferred from individual London borough councils, including the Respondents ("the Councils") as local highway authorities, to the Appellant ("TfL"). The provision at the heart of this appeal is article 2(1)(a) of the Transfer Order, which provides for the transfer of "the highway, in so far as it is vested in the former highway authority".

TfL and the Councils convened a statutory arbitration before Mr John Males QC. The purpose was to determine exactly what specified property and liabilities transferred to TfL in relation to each highway. The dispute between the parties is whether the automatic transfer of "the highway" under article 2(1)(a) of the Transfer Order carried with it: (i) only the zone of ordinary use (i.e. the road surface and the airspace and subsoil necessary for the operation, maintenance and repair of the road) or (ii) the entire vertical plane (i.e. all the airspace above and the subsoil below the surface of the road), to the extent that the relevant council already owned it prior to the transfer date.

In the arbitration and at each stage on appeal, the Councils argued the transfer was limited to the former, while TfL argued for the latter, wider approach. The arbitrator broadly agreed with TfL's case. The caveat was that particular layers or slices of subsoil and/or airspace that had acquired a separate identity by the transfer date could not be treated as parts of the highway and so did not pass to TfL. On appeal to the High Court, Mr Justice Mann agreed with the arbitrator, recording a concession by counsel for TfL that its claim "related to land acquired for or appropriated to highway purposes".

However, on further appeal, the Court of Appeal adopted a narrower position. It considered that the word "highway" in article 2(1)(a) of the Transfer Order must have been intended to carry the same meaning as it had at common law, and in relation to section 263 of the Highways Act 1980 ("the 1980 Act"). Thus, the Court of Appeal held that only the zone of ordinary use had transferred to TfL.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Briggs gives the sole judgment of the Court.

REASONS FOR THE JUDGMENT

The word "highway" has no single meaning in the law **[6]**. The default land law position, that the conveyance of freehold land automatically involves the transfer of the entire vertical plane, was not

followed in successive statutory provisions dealing with automatic vesting of highway interests formerly in private ownership, as seen in the decision in *Tunbridge Wells Corpn v Baird* [1896] AC 434 (HL) ("the Baird principle") **[7-8]**.

The Baird principle provides that such a transfer was limited to the road surface, the subsoil immediately beneath it and airspace sufficient to enable use and enjoyment by the public and maintenance by the highway authority **[9]**. The limits set by the Baird principle reflected concerns about expropriation of private property without compensation resulting from statutory vesting **[11]**.

It was, rightly, common ground that the Baird principle applies to section 263 of the 1980 Act, replicating section 226 of the Highways Act 1959 ("the 1959 Act") **[12]**. However, section 265 of the 1980 Act and its predecessors make provision for the transfer of property and liabilities, as between successive highway authorities, of highways designated as trunk roads **[13]**. The first major property transfer scheme was undertaken in relation to newly designated trunk roads by section 7 of the Trunk Roads Act 1936 ("the 1936 Act") **[15]**. Despite differences in language, the substance of section 228 of the 1956 Act and section 265 of the 1980 are materially the same as section 7 of the 1936 Act **[16-19]**.

The extent of transfer of highway rights is complicated by the fact that local highway authorities often acquire property rights in relation to highways by means other than automatic vesting under section 263, such as compulsory purchase and acquisition by private treaty and, at times, for non-highway purposes **[21]**. Ownership of airspace above and subsoil below the zone of ordinary use may also be of substantial commercial or development value, particularly in urban areas like Central London **[22]**.

Disagreeing with the Court of Appeal, the Supreme Court decides that the Baird principle does not apply to article 2 of the Transfer Order or to section 265 of the 1980 Act, upon which article 2 was modelled **[28]**.

The words "[t]he highway, in so far as it is vested in the former highway authority" in article 2, properly construed, mean only that part of the vertical plane relating to a GLA road which was vested in the relevant council on the operative date, in its capacity as former highway authority, is transferred **[29]**.

The Supreme Court disagrees with the Court of Appeal's reasoning that the word "highway", used in article 2 and section 265, has a clear common law meaning – it is not a defined term and its meaning in this context is to be found through the almost identical wording of section 265 on trunk roads **[31-33]**. Given the different ancestry of, and purposes served by, section 263 and section 265 of the 1980 Act, the word "highway" used in both provisions cannot be given the same meaning **[34-36]**. The phrase beginning with "in so far as" in section 265(1)(a) of the 1980 Act, and in article 2, imports the ownership capacity limitation **[37-39]**.

The Court's approach, like that of the arbitrator, largely avoids irrational types of multi-layering on the vertical plane in the sense of different highway authorities owning parts of the vertical plane in the same highway **[40-43]**. Further, expropriation concerns are not well-founded because, generally, the transfer of property from one highway authority to another is simply the quid pro quo for relief from responsibility for operation and maintenance **[48]**. Lastly, there is no presumption or burden of proof as to the extent of highway rights transferred **[49-50]**.

This decision does not resolve any issues as to the ownership of the lateral plane of a highway **[51]**.

References in square brackets are to paragraphs in the judgment.