Neutral Citation Number: [2020] EWHC 801 (Admin)

Case No: CO/3310/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

Before :

MR JUSTICE DOVE

- -

Between :

John Philip Sawkill	**Claimant**
- and -	
Highways England Company Limited	**Defendant**
-and-	
The National Trust	**Interested Party**

Tim Mould QC (instructed by **Hewitsons LLP**) for the **Claimant**
Timothy Corner QC and Andrew Byass (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: 21st and 23rd January 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be listed on 3rd April 2020 at 1030

Mr Justice Dove :

Introduction

1. The Claimant is an arable and livestock farmer who has the benefit of an agricultural holding tenancy at West Amesbury Farm. The Defendant is the Strategic Highways Authority for the A303 Trunk Road. The Defendant has made an application for a Development Consent Order ("the DCO") for works to the highway, including replacing the current single carriageway road running past the Stonehenge World Heritage site with a tunnel near to the monument. The tunnel will pass through a chalk aquifer underlying the Claimant's land.

2. In order to design the tunnel works it is necessary for the Defendant to undertake pumping tests so as to gain an understanding of the transmissivity of the chalk aquifer under different groundwater level conditions. These pumping tests involve the construction of monitoring boreholes and then the pumping of water from a well which is also part of the construction, following which the level and rate of recharge at the monitoring boreholes is measured. In order to undertake the tests, the water that is pumped from the well needs to be discharged, and in the present case the discharge would occur on to the Claimant's land. The Claimant is concerned both as to the Defendant's proposed use of section 172 of the Housing and Planning Act 2016 ("the 2016 Act") as the power which the Defendant says entitles it to enter onto the Claimant's land to undertake the tests, and also the involvement of the discharge of substantial quantities of the pumped groundwater onto his land, and whether that is a permissible activity covered by the power to undertake the survey in any event.

The facts

3. It appears that the Defendant first approached the Claimant in relation to the proposed DCO in May 2016. The Defendant indicated that there was a need to carry out tests on the Claimant's land in order to obtain technical information to support the DCO project. Following discussions, it appears that some geo-technical surveys were permitted by the Claimant in February 2017 with which he was dissatisfied. Further negotiations were undertaken following these works between the Claimant and the Defendant in respect of additional proposed testing.

4. On the 20th July 2017 the Defendant made an application to the Secretary of State for Communities and Local Government under section 53(1) of the Planning Act 2008 ("the 2008 Act") for the Secretary of State's authorisation to undertake the surveys which were specified in the application. In fact, for the purposes of such applications, the power under section 53 of the 2008 Act is exercised by the Planning Inspectorate ("PINS"). The pumping tests were described in the application in the following terms:

> "5. Pumping tests
>
> The pumping tests each require the construction of a well and an array of 5 monitoring boreholes around the well at distances of up to 100m from the well. In the test the groundwater level is

> lowered by pumping water from the well and the water level in the surrounding monitoring boreholes is measured.
>
> It is proposed that the water pumped from the well is piped to a discharge area in Stonehenge Bottom in the south of land parcel 78/16 where it will be discharged through a spreader pipe array to soak away.
>
> Pumping tests are proposed at each location in both summer (low groundwater level) and winter (high groundwater level) conditions as this provides data for different depth ranges in the aquifer. There will thus be a total of 6 pumping tests carried out over a period of up to approximately 9 months following completion of the construction of the pumped well and monitoring wells. The time being dependant upon when land access is obtained, the availability of the investigation contractor and the need to undertake pumping tests in both summer and winter (or winter and summer) conditions.
>
> The duration of each pumping test is approximately 2 to 3 weeks including the time taken to install and remove pumps, monitoring equipment and discharge pipes.
>
> The pumping tests require consent under s.32 of the Water Resources Act 1991 from the Environment Agency which has been applied for and obtained. The current s.32 consent is valid until 31 January 2018, hence an application will need to be made to the Environment Agency to extend the current consent."

5. As set out in the application, consent was required under section 32 of the Water Resources Act 1991 for the pumping tests. That had in fact been obtained from the Environment Agency on the 3rd February 2017. As the application noted, there was a need for that section 32 consent to be extended in order to accommodate the proposed testing works. The Claimant made submissions in relation to the application including, in particular, the contention that section 53 of the 2008 Act did not give the power to pump water and then discharge it on to land with the likely deleterious impact on that land.

6. On the 21st December 2017 PINS made its recommendation report to the Secretary of State recommending that the authorisation should be granted to the Defendant. In the course of reaching the recommendation, the report provided the following in relation to the Claimant's contention that the pumping and discharge of groundwater could not properly be said to fall within the scope of the power:

> "5.2.56 The Inspectorate is clear that any authorisation to enter land under s53 in no way alters the roles and responsibilities of other consenting bodies (for example the Environment Agency) whose permission may be required in connection with undertaking the surveys. In this instance, the Environment Agency gave consent (subject to conditions) under the Water

Resources Act 1991 for the Applicant to undertake the works in two phases (early 2017 and summer 2017).

5.2.57 The Applicant has included provision within the conditions to be attached to any authorisation that *"any activities undertaken in connection with the Authorised survey(s) will not constitute an offence in themselves including an offence under Regulation 41 of the Conservation of Habitats and Species Regulations 2010 (as amended)"* and that entry is only authorised "subject to all necessary consents (if any) in relation to carrying out the Authorised survey(s) having first been obtained".

5.2.58 The draft conditions that the Applicant proposed to be attached to any authorisation also provide that persons authorised to enter the Land in which carrying out the surveys are *"Not do any act, matter of [sic] thing which would or might constitute a breach of any law (including without limitation common law) statute, regulation, rule, order, byelaw, or notice which would or might vitiate in whole or in part any insurance effected by or on behalf of the Landowner in respect of the land from time to time*".

5.2.59 In considering this point, the Inspectorate requested further information from the Applicant as to the additional permissions/consents that may be required in connection with the survey activities and whether these consents are in place. The further information request also asked the Applicant to explain the extent to which it has or has not considered alternative schemes of investigation which are capable of meeting the stated objectives of the proposed works.

5.2.60 In response, the applicant states that the Environment Agency has authorised them to undertake the hydrological surveys included within the s53 application and that "nearly all of the activities and works described as being required for the surveys are authorised by the consent under Section 32 of the Water Resources Act 1991 that was issued to Highways England in February 2017. The Section 32 consent permits the construction of three boreholes for the purposes of obstructing water, (termed pumping wells on the plan in Annex B)" and that "..an application to extend the consent will be necessary to allow boreholes to remain and water table monitoring to continue over the proposed 3 year land access authorisation period".

5.2.61 The Inspectorate notes that the existing consent issued by the Environment Agency in connection with the surveys in question expires on 31st January 2018, but sees no reason to dispute the expectation of the Applicant that a new consent will be granted. The Inspectorate is not responsible for the granting

of consents under the Water Resource Act 1991 but is satisfied that the Applicant would only be able to undertake the pumping tests in accordance with 'appropriateness' of the works has been satisfied in this sense, and there are likely to be conditions attached to any consent which relate to the protection of the land.

5.2.62 It is the responsibility of the consenting body to determine for example, in relation to the discharging of water to the Land whether there are other suitable mechanisms that could be utilised in achieving the objective of the survey work.

5.2.63 The Inspectorate has considered if alternative solutions for the disposal of water generated from the pumping tests exist. However, the Inspectorate considers that such matters are more appropriately addressed by the relevant consenting body and are not relevant to the determination of the Applicant's authorisation request under s53.

5.2.64 Neither the Tenant's agent nor the NFU has suggested that there are credible alternatives for the disposal of water generated from the pumping tests.

5.2.65 The Inspectorate is of a view that this authorisation request accords with s53(1) and 1(A) of the PA2008. Entry to the Land is necessary to undertake surveys in order to facilitate compliance with s53(1A) ie for the purpose of implementing the EIA Regulations. The Applicant has genuine need to enter the Land in fulfilling these obligations. In making this determination, the Inspectorate is aware that the surveys may require additional and separate consents (in particular from the Environment Agency under s32 of the Water Resource Act 1991) and their acceptability will be determined under the relevant statutory processes. The Applicant has obtained such consent, and the Inspectorate is satisfied that there appear to be no obvious reasons that any future application for consent for these activities would not be forthcoming having regard to the date of expiration if the current consent (31 January 2018).

…

5.2.67 The Inspectorate therefore considers authorisation of entry to the Land is also supported in fulfilling the Applicant's obligation in this respect."

7. The authorisation granted by the Secretary of State was set out in the following terms:

"AUTHORISATION

1. The terms used in this Authorisation and its Annexes are defined in Annex 2.

> 2. In exercise of the power conferred by section 53(1) of the Planning Act 2008, the Secretary of State authorises the Applicant and any Authorised Persons to enter the Land in order to carry out the Authorised Surveys.
>
> 3. This authorisation is granted:
>
> (1) for the Authorisation period;
>
> (2) subject to compliance with the Conditions (which are necessary to protect the Landowner's Tenent's legitimate interests); and
>
> (3) solely for the purpose of undertaking the Authorised Surveys in connection with the proposed application for the Proposed Development.
>
> 4. This authorisation to enter the Land does not obviate the need for the Applicant to obtain any other statutory licences or consents or to comply with any other statutory requirements in relation to the Authorised Surveys."

8. This authorisation was accompanied by a statement of reasons which, so far as relevant to present issues provided as follows:

> "The Secretary of State considers the Applicant has satisfied s53(2) of the PA2008, in that the Applicant is considering a project of real substance. The Secretary of State is also satisfied that entry to the Land is genuinely required in order to facilitate compliance with the provisions mentioned in subsection s53(1A) of the PA2008 (implementing Council Directive 2011/92/EU (as amended) on the assessment of the effects of certain public and private projects on the environment). In authorising entry to the Land, the Secretary of State is satisfied that although other consents are required under separate statutory regimes to physically carry out the survey works for which the Applicant has requested authorisation, there is no evidence that such consent(s) would not be forthcoming."

9. Annex 4 to the authorisation contained a schedule of authorised surveys which, again so far as relevant to the present case, provided as follows:

> "1. Subject to the conditions in Annex 3 to the Authorisation, entry to the Land to carry out the activities listed in paragraph 2 is authorised for the following purposes:
>
> (a) sampling and testing of the phosphatic chalk to provide information on its extent and engineering characteristics;
>
> (b) providing information on hydrogeological conditions including evaluation of the volume and flow rate of water

> passing through the chalk, and monitoring of groundwater levels; and
>
> …
>
> 2. The following activities are authorised for the purposes identified in paragraph 1:
>
> …
>
> (3) installation of 8 boreholes without raised caps located in general accordance with the plan at Annex 5 of this Authorisation;
>
> (4) installation of 3 boreholes to be used as pumping wells for the purposes of pumping tests, and 18 monitoring boreholes each with installed piezometers, located in general accordance with the plan at Annex 5 of this Authorisation;
>
> …
>
> (6) carrying out 2 sets of groundwater pumping tests at the 3 pumping wells which include the installation of pipe infrastructure and soakaway areas with associated flood mitigation (in accordance with Conditions 10 and 11 and in general accordance with the plan at Annex 5 of this Authorisation);
>
> (7) removal and reinstatement of 8 boreholes without raised caps (as identified on the plan at Annex 5 of this Authorisation);
>
> (8) retention of 18 monitoring boreholes for ongoing water table monitoring (see item (9) below) (as identified on the plan at Annex 5 of this Authorisation) for the period as specified in Annex 3 of this Authorisation);"

10. Finally, within Annex 5 of the authorisation, timescales of the authorised survey activities were set out. In relation to both the first and second pumping tests the charts set out periods of three weeks for each test.

11. It appears that in March 2018, pursuant to the authorisation which had been granted, the Defendant's contractors entered on to the Claimant's land and the necessary boreholes and well were constructed along with other works. Thereafter, between June and August 2018 pumping tests were carried out and water was discharged from the pumping tests on to the Claimant's land which at the time had an established growing crop upon it. Fortunately, at the time when the water was discharged it was during a period of severe drought and the harm caused to the land and crops was less significant than had the ground conditions been in a more normal state.

12. Negotiations continued between the Claimant and Defendant for obtaining access to the land to undertake additional pumping tests. These were unsuccessful and on the

28th February 2019 the Defendant gave notice under section 174 of the 2016 Act that it intended to exercise its power under section 172 of the 2016 Act in relation to the Claimant's land (see below). This was disputed by the Claimant's solicitors who drew attention to the potential for such action to give rise to an application for judicial review. On the 24th May 2019 the solicitors acting on behalf of the Defendant wrote to the Claimant's solicitors in the following terms:

> "Highways England will need to undertake further surveys involving the discharge of water on the Land prior to the commencement of the A303 Amesbury to Berwick Down Scheme. We understand that these surveys are required to measure the high-water mark over the winter months.
>
> The date of entry for these surveys has not yet been determined but Highways England can confirm that the surveys will not be undertaken before 1 October 2019.
>
> As for previous surveys, Highways England will endeavour to obtain access for these surveys by agreement with your client. In the event that the agreement cannot be reached, a notice pursuant to s172 of the Housing and Planning Act 2016 may need to be served in order for Highways England to access the Land.
>
> Highways England maintains its position that the use of s172 of the Housing and Planning Act 2016 to undertake surveys in respect of the A303 Amesbury to Berwick Down Scheme is not ultra vires."

13. In effect, this letter of the 24th May 2019 forms the decision on the basis of which this application for judicial review has been launched. No point is taken in relation to prematurity. Both parties are content that the court should proceed to rule on the two grounds upon which the claim is brought.

The grounds in brief

14. The Claimant's ground 1 is that, on the basis that the 2008 Act provides a comprehensive statutory code for all applications for DCOs, it is not open to the Defendant to use the power under section 172 of the 2016 Act. The only basis upon which entry on land can be sought for surveys associated with a DCO is to exercise the power contained within section 53 of the 2008 Act. On the basis of the legal maxim that the general words in a later statute cannot exclude the specific provisions of an earlier statute it is contended that the general provisions of section 172 of the 2016 Act do not provide an alternative for the Defendant to the specific powers contained within section 53 of the 2008 Act. By contrast, the Defendant contends that the powers under both section 53 and section 172 overlap, to the extent that it is entirely permissible for the Defendant to choose which of these two powers to deploy in order to obtain access to land for the purposes of undertaking a survey.

15. In ground 2 the Claimant contends that, in any event whatever the conclusion may be under ground 1, the statutory term "survey" cannot embrace operations on land which

involve the discharge of very substantial quantities of water on to the land and that therefore the activity of discharging water as a consequence of the pumping tests cannot be authorised by a power which simply authorises entry on to the land in order to undertake a "survey". The Defendant counters this submission by contending that the term "survey" includes the activities, and all of the activities, which are engaged in undertaking the pumping tests.

The law

16. The preamble to the 2008 Act provides as follows:

> "An Act to establish the Infrastructure Planning Commission and make provision about its functions; to make provision about, and about matters ancillary to, the authorisation of projects for the development of nationally significant infrastructure…"

17. The Act provides that certain types of infrastructure of a particular scale qualify to be designated as nationally significant infrastructure projects. Section 14(8) of the 2008 Act identifies "highway-related development" as being a nationally significant infrastructure project subject to it qualifying under subsequent sections, and in particular section 22 of the 2008 Act which set out the criteria under which whether a highway-related development qualifies as a nationally significant project is to be judged. Once a development is identified as falling within the definition of a nationally significant infrastructure project, section 31 of the 2008 Act provides that consent for a nationally significant infrastructure project can only be granted by a development consent order made pursuant to the provisions of the 2008 Act.

18. Section 53 of the 2008 Act deals with rights of entry and, so far as material to the issues in the case, provides as follows:

> "53 Rights of entry
>
> (1) Any person duly authorised in writing by the Secretary of State may at any reasonable time enter any land for the purpose of surveying and taking levels of it, or in order to facilitate compliance with the provisions mentioned in subsection (1A), in connection with-
>
> (a) an application for an order granting development consent, whether in relation to that or any other land, that has been accepted by the Secretary of State,
>
> (b) a proposed application for an order granting development consent, or
>
> (c) an order granting development consent that includes provision authorising the compulsory acquisition of that land or of an interest in it or right over it.

(1A) Those provisions are any provision of or made under an Act for the purpose of implementing-

(a) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended from time to time,

(b) Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended from time to time, or

(c) any EU instrument from time to time replacing all or any part of either of those Directives.

(2) Authorisation may be given by the Secretary of State under subsection (1)(b) in relation to any land only if it appears to the Secretary of State that-

(a) the proposed applicant is considering a distinct project of real substance genuinely requiring entry onto the land

(3) Subject to subsections (9) and (10), power conferred by subsection (1) to survey land includes power to search and bore for the purpose of ascertaining the nature of the subsoil or the presence of minerals or other matter in it.

(3A) Power conferred by subsection (1) for the purpose of complying with the provisions mentioned in subsection (1A) includes power to take, and process, samples of or from any of the following found on, in or over the land-

(a) water,

(b) air,

(c) soil or rock,

(d) its flora,

(e) bodily excretions, or dead bodies, or non-human creatures, or

(f) any non-living thing present as a result of human action

…

(7) Where any damage is caused to land or chattels-

(a) in the exercise of a right entry conferred under subsection (1), or

(b) in the making of any survey for the purpose of which any such right of entry has been conferred, compensation may be recovered by any person suffering the damage from the person exercising the right of entry.

(8) Any question of disputed compensation under subsection (7) must be referred to and determined by the Upper Tribunal."

19. Section 120 of the 2008 Act entitles an order granting development consent to make provision relating to the development for which consent is granted, and matters ancillary to it. In addition, by section 120(4) of the 2008 Act the order may make particular provision in respect of any of the matters set out in Part 1 of Schedule 5 of the 2008 Act. Those matters include the carrying out of surveys or taking of soil samples. By virtue of section 122 of the 2008 Act, a development consent order can include provision authorising the compulsory acquisition of land. Subsequent sections provide a statutory framework for the authorisation of compulsory purchase.

20. Turning to the provisions of the 2016 Act, section 172 provides for a right by "an acquiring authority" to enter and survey land set out in the following terms:

"172 Right to enter and survey land

(1) A person authorised in writing by an acquiring authority may enter and survey or value land in connection with a proposal to acquire an interest in or a right over land.

…

(4) An authorisation under subsection (1) may relate to the land which is the subject of the proposal or to other land.

…

(6) In this section and sections 173 to 178

(a) "acquiring authority" means a person who could be authorised to acquire compulsorily the land to which the proposal mentioned in subsection (1) related (regardless of whether the proposal is to acquire an interest in or a right over the land or to take temporary possession of it), and

(b) "owner" has the meaning given in section 7 of the Acquisition of Land Act 1981."

…

21. It is agreed by virtue of the Appointment of a Strategic Highways Company Order 2015 that the Defendant is a strategic highways company, appointed to be the highways authority for the A303 amongst other highways. Under this appointment the Defendant is by virtue of section 1(a) of the Highways Act 1980 appointed as a highway authority. Consequentially, by virtue of section 239 of the 1980 Act the Defendant has the power to acquire land for the construction of a trunk road. The

Defendant is, thus, an "acquiring authority" for the purposes of section 172(6) of the 2016 Act. Further provisions are made by the 2016 Act in relation to the procedures to be adopted in exercising section 172. These provisions are set out as follows in section 174 of the 2016 Act:

> "174 Notice of survey and copy of warrant
>
> (1) The acquiring authority must give every owner or occupier of land at least 14 days' notice before the first day on which the authority intends to enter the land in exercise of the power conferred by section 172.
>
> (3) If the authority proposes to do any of the following, the notice must include details of what is proposed-
>
> (a) searching, boring or excavating;
>
> (b) leaving apparatus on the land;
>
> (c) taking samples;
>
> (d) an aerial survey;
>
> (e) carrying out any other activities that may be required to facilitate compliance with the instruments mentioned in subsection (5).
>
> …
>
> (5) The instruments referred to in subsection (3)(e) are-
>
> (a) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended from time to time,
>
> (b) Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended from time to time, or
>
> (c) any EU instrument from time to time replacing all or parts of those Directives."

22. It is to be noted that in Schedule 14 of the 2016 Act at paragraph 12 an amendment is affected to section 289 of the 1980 Act in the following terms:

> "12. In section 289 of the Highways Act 1980, after subsection (1) insert-
>
> '(1A) A person may not be authorised under subsection (1) to enter and survey or value land in connection with a proposal to

> acquire an interest in or a right over land (but see section 172 of the Housing and Planning Act 2016)'

23. As set out above, it is the essence of the Claimant's case that in the light of the specific and defined purpose of both the 2008 Act and also section 53 within it, which are related specifically to the DCO process, it is not open to the Defendant to use the power under section 172 of the 2016 Act in one of the circumstances set out in s53(1)(a) to (c). The starting point for this submission is reliance upon the principle of statutory construction in respect of general and specific enactments in different Acts of Parliament. This is set out and described in "Bennion on Statutory Interpretation" in section 21.4 as follows:

> "General and specific enactments in different Acts
>
> Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly, the earlier specific provision is not treated as impliedly repealed.
>
> The presumption in this context is sometimes expressed in terms of the maxim generalia specialibus non derogant (a general provision does not derogate from a special one), which is in Jenkins' Exchequer Reports.
>
> The explanation of the rule by Earl of Selbourne LC in Seward v The Vera Cruz (owners), The Vera Cruz is often cited:
>
> "…where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

24. The application of this maxim is invoked in the PINS Frequently Asked Questions document associated with the exercise of the power under section 53, which was published by them on the 13th July 2017. In that document the question of whether an applicant for a development consent order can use section 172 of the 2016 Act instead of section 53 of the 2008 Act is posed and answered in the following terms:

> "6.1 Can an Applicant for development consent use s172 of the Housing and Planning Act 2016 (as amended by the Neighbourhood Planning Act 2017) instead of s53 of the PA2008 to gain access to land?

> In the case of a prospective DCO, the policy intention is that the power of entry in S53 of the Planning Act 2008 should be used.
>
> Where an existing specific power of entry has not been limited in scope by Schedule 14 to the Housing and Planning Act 2016, the policy intention is for this existing power to continue to be used in the same way. The Inspectorate notes the principle of statutory interpretation that where a general enactment covers a situation for which specific is intended to continue to be dealt with by the specific provision rather than the later general one.
>
> Therefore, while the Neighbourhood Planning Bill amends the definition of "acquiring authority" in S172 of the Housing and Planning Act 2016 to remove the link to the definition of "compulsory purchase" in the Acquisition of Land Act 1981, in the case of a prospective DCO, the policy intention is that the more specific power in s53 of the Planning Act 2008 should remain in use."

25. It is the Claimant's contention that section 172 of the 2016 Act is in general terms, and in accordance with the maxim, does not impact upon the earlier special provisions under section 53 which pertains to the specific circumstances of the making of a DCO. Not all exercises of CPO powers by the Defendant would require a DCO and, for instance, a scheme of localised widening would engage CPO powers but would probably not be a DCO, and therefore the powers under section 172 of the 2016 Act would be available and appropriate. However, the Claimant submits that there is no indication in section 172 of the 2016 Act that it was to supersede the specific procedure provided by section 53 of the 2008 Act where a DCO is being pursued. Thus, in the context of the making of a DCO the power under section 53 of the 2008 Act is specific and bespoke, and is the power that has to be exercised by the Defendant in circumstances where the generality of section 172 of the 2016 Act has not overtaken or superseded the section 53 procedure.

26. In support of this approach the Claimant relied upon the decision of the Supreme Court in R (Newhaven Port and Properties Limited) v East Sussex County Council [2015] AC 1547; [2014] UKSC 7 which dealt with an application under section 15 of the Commons Act 2006 to have a beach (which formed part of the foreshore owned by the Claimant who was the operator of a port in which the beach was situated) registered as a village green. The Supreme Court concluded that amongst the grounds on which it could be found that the beach could not be registered as a village green was the incompatibility between the provisions of the 2006 Act and the statutory regime under which the Claimant was empowered to operate as a port authority and maintain the port as a functioning harbour. As a result, the public were not able to acquire user rights over the beach since such rights would be incompatible with the continued use of the land for the statutory purposes for which it was held by the port authority. In his judgment Lord Neuberger supported this proposition in relation to statutory incompatibility by reference to the principle of statutory construction that a general provision does not derogate from a special provision. His reasoning is set out as follows:

"93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in *Bennion, "Statutory Interpretation"* 6th ed (2013):

"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act.

94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates (section 33 of the 1847 Clauses Act). NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore (section 57 of the 1878 Newhaven Act, and paras 10 and 11 of the 199 Newhaven Order).

95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 - or to encroach on or interfere with the green - section 29 of the Commons Act 1876. See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann at para 56.

> …
>
> 101… The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.
>
> 102. In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility."

27. A further example of the principle being deployed is the decision of the Divisional Court in R (on the application of British Telecommunications PLC) v Her Majesty's Treasury and Another [2018] EWHC 3251 (Admin). The Claimant in that case applied for judicial review of a decision of Her Majesty's Treasury to implement an extension of indexation of the guaranteed minimum pension payable to all members of public service pension schemes reaching a pension age between December 2018 and April 2021. This decision affected the Claimant because under the terms of this pension scheme it was obliged to mirror or reflect the decision in respect of indexation for certain members of its pension scheme which was going to prove costly. As part of the grounds of dispute HMT contended that legislation (known within the case as the Increases Legislation) provided a specific and bespoke statutory regime for regulating increases to public service pensions in order to protect their value. They contended that it was specifically designed for that purpose and was the only legislation which had ever been used to achieve that end. Further, it was submitted by HMT that general powers conferred by the Superannuation Act 1972 did not derogate from that specific and bespoke regime provided by the Increases Legislation, contrary to the submission made by the Claimants that the powers under the Superannuation Act 1972 were not inconsistent with the statutory provisions of the Increases Legislation. The pertinent conclusions of the Divisional Court in relation to these submissions were set out as follows:

> "144. In this connection, HMT relied on the canon of construction *generalia specialibus non derogant* as summarised by *Bennion on Statutory Interpretation* (6th ed.) at Section 88. *Bennion* there cites from the judgment of the Earl of Selborne LC in *The Vera Cruz* (1884) 10 App Cas 59 at p68:
>
> "Where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specifically dealt with by earlier legislation, you are

not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

145. HMT submitted that this principle applies here. Sections 59 and 59A specifically dealt with indexation increases to official pensions and are deemed to be part of the PIA 1971. The SAA 1972 is a later Act and contains only general words.

146. BT contended that the SAA 1972 was intended to modernise the way that PSPS were administered and formed. The aim was to take them outside direct statutory control and put them under the control of a minister, with particular statutory safeguards, such as the duty to consult (s.1(3)) and the duty not to reduce accrued pension rights (s.2(3)).

147. Subject to these safeguards, it was submitted that the powers to make and amend PSPS under the SAA 1972 are intentionally very broad. Section 1 provides that the minister may "make, maintain and administer schemes" with respect to "pensions, allowances or gratuities". Section 2(9) provides that any s.1 scheme "may amend or revoke any previous scheme made thereunder". The wording of these provisions is wide enough to cover increases to pensions generally, including to allow for inflation.

…

156. In our judgment, HMT's case as to the applicable statutory regime is correct, largely for the reasons given by it. In particular:

(1) The starting point is the PIA 1971. As its title, preamble and contents make clear, this was an Act introduced for the specific purpose of providing for increases to official pensions to allow for inflation. Sections 59 and 59A have effect as if contained in that Act.

(2) The SAA 1972 established a general power to establish PSPS and to make the rules by which they are governed. Although the powers conferred thereunder may be wide enough to amend PSPS rules to provide for pension increases, the Act says nothing about providing for increases, still less increases to allow for inflation.

(3) Sections 59 and 59A set out a detailed and self-contained regime for the indexation of official pensions. Section 59(1) provides for an order to be made to increase official pensions to reflect inflation based on a specified percentage. That specified percentage is required to mirror that specified in relation to

> social security benefits. Section 59(5) requires that GMP be deducted from the amount by reference to which the indexation increase is to be calculated. A s.59A Direction is the specified means by which, for classes of case, that deduction is not to be made, or not to be made in full.
>
> (4) The statutory scheme is therefore for indexation increases to be specified under s.59(1), but for indexation of the GMP element of the increase to be switched off under s.59(5), unless for any particular class of case there is a contrary direction under s.59A. Sections 59 and 59A contained detailed provisions as to how that scheme is to operate.
>
> (5) To allow general powers under the SAA 1972 to be used to specify indexation increases would be contrary to and undermine this carefully structured statutory regime and thereby conflict with it. The SAA 1972 says nothing about increases to official pensions to allow for inflation, about how and when such increases are to be calculated or announced, or about how the GMP element of such increases is to be addressed.
>
> (6) The obvious intent of Parliament was that it was the Increases Legislation, and that legislation only, that should be used for increases to official pensions to allow for inflation. It is not necessary to resort to canons of construction to arrive at that conclusion, but it is further supported by the principle *generalia specialibus non derogant.*
>
> (7) The SAA 1972 and the Increases Legislation are not overlapping provisions, still less, as in *Cusack*, overlapping provisions contained in the same statute. They are different statutes addressing different purposes. The Increases Legislation addresses increases in official pensions to allow for inflation. It applies across the board to all official pensions. The SAA 1972 addresses the establishment and government of individual PSPS. Its focus is those schemes and their rules, not official pension indexation increases.
>
> (8) The issue is not, as much of BT's argument assumed, whether the SAA 1972 can ever be used to effect a pension increase for a PSPS, but rather whether it can be used to carry out, in whole or in part, the indexation increases provided for under the Increases Legislation, thereby cutting across and supplanting the ss.59/59A statutory regime. In our judgment SAA 1972 powers cannot be so used."

28. The decision in the Divisional Court was upheld (see [2020] EWCA Civ 1) but the Court of Appeal did not address the arguments in relation to this principle of statutory construction. It will be noted that in the course of their decision the Divisional Court made reference to Cusack v Harrow London Borough Council [2013] 1 WLR 2022.

The case of Cusack was an authority relied upon by the Defendant in the present case. The essence of the Defendant's submission is that the powers under section 53 of the 2008 Act and those under section 172 of the 2016 Act are overlapping and that the existence of the earlier power to survey created under section 53 of the 2008 Act associated with the promotion of a DCO does not exclude reliance by the Defendant on the powers under section 172 to enter upon land and survey it. A number of authorities illustrating the Defendant's argument were relied upon and it is convenient to start with the Cusack case. The Defendant in the case was a highway authority who notified the Claimant that it intended to erect bollards to prevent vehicles from crossing the footway outside his property. The Claimant sought an injunction to prevent the Defendant from doing so, and in its defence the Defendant pleaded that driving cars over the footway endangered the safety of other road users and pedestrians. The Defendant relied primarily upon its power under section 80 of the 1980 Act to put up fences or posts without paying compensation. Alternatively, it relied upon the power afforded it by section 66 of the 1980 Act, a power to erect posts or fences where necessary for the safety of highway users, which did provide a right of compensation to any affected landowners. The Claimant submitted that the council, if it erected barriers, should act under section 66 and not section 80 of the 1980 Act so as to provide the Claimant with a right to compensation.

29. The decision in the Court of Appeal turned upon the application of the principle of statutory construction that the specific overrides the general. The decision of the Court of Appeal and its conclusions were set out in the judgment of Lord Carnwath in the following terms:

> "9. The Court of Appeal accepted the submission of Mr Green, for Mr Cusack, that viewed in the context of the structure of the Act as a whole, the appropriate power for what the council wanted to do was section 66 not section 80. As Lewison LJ recorded his submission:
>
> "Section 66(2) applies where the highway authority consider that the erection of posts etc is 'necessary for the purpose of safeguarding persons using the highway'. This is a much more specific reason for invoking a statutory power than the more nebulous statement of purpose in section 80. Indeed this is precisely the reason, according to the council, why it wishes to erect barriers across the forecourt of 66 Station Road."
>
> Lewison LJ found support for that submission in the principle that in statutory construction the specific overrides the general - generalia specialibus non derogant (see eg *Pretty v Solly* (1859) 26 Beav 606 53 ER 1032). In his view the council's proposed action and the reason for taking it "fall squarely within section 66(2)", and accordingly section 80 did not apply to the facts of the case (para 21). He considered an alternative argument based on section 3 of the Human Rights Act 1998, but did not think that argument took Mr Cusack's case any further (para 27).
>
> 10. In this court Mr Sauvain for the council challenges that conclusion. There is no justification, he says, for application of

> the general/specific principle where there is no conflict between the two provisions. Although they may overlap, they are provided for different purposes and apply in different situations. Where the council has two alternative statutory methods of achieving the same objective, it is entitled to adopt the one which imposes the least burden on the public purse (*Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508, 530). Whether compensation is payable depends on the particular statutory provision.
>
> 11. Mr Green, as I understood his arguments in this court, relied less on the general/specific principle as such, than on a purposive interpretation of the statutory provisions in their context. Although he put his arguments in a number of ways, the common theme was that the broad, unfettered power asserted by the council, without the protection of compensation, was irreconcilable with the general scheme of the Act and the pattern of other comparable provisions. In particular the council's construction of section 80 would enable it to override the safeguards provided in other sections. In particular, it would deprive section 66(2) of most of its apparent content, and, if applied to footpaths and bridleways, would enable it to bypass the prohibition on the use of section 66 to obstruct a private access (section 66(3)(5)).
>
> 12. With respect to the Court of Appeal, I am unable to see how the general/specific principle assists in this case. I see no reason to regard either power as more specific or less general than the other. It is true that section 66(2) is directed to a specific purpose ("safeguarding persons using the highway"), but the powers are defined in relatively wide terms, not necessarily related to private accesses. The powers in section 80 are expressed in narrower terms, related specifically to the prevention of access to an existing or future highway. Although there is no express mention of safety as a purpose, it is implicit that the section must be used for purposes related to those of the Act, which of course include, but are not necessarily confined to, highway safety. Before considering Mr Green's more general submissions it is necessary to say something about the legislative background of the relevant provisions."

30. Lord Carnwath went on to observe that since it was a consolidation Act it was unsurprising that the Highways Act 1980 contained "a varied miscellany of sometimes overlapping and not always consistent statutory powers". He went on to conclude that the correct approach to section 80 of the 1980 Act was as follows:

> "27. In my view, apart from the Human Rights Act 1998, Mr Sauvain is right in his submission that the council is entitled to rely on the clear words of section 80 for the power they seek. There is no express or implied restriction on its use. On the basis of the pre-1998 Act authorities, the fact that section 66(2)

may confer an alternative power to achieve the same object, which is subject to compensation, is beside the point. That is clear in particular from the *Westminster Bank* case (see above). There also the legislation provided two different ways of achieving the council's objective, one under the planning Acts and the other under the Highways Act, only the latter involving compensation. The authority was entitled to rely on the former.

28. Lord Reid (giving the majority speech) said:

"Here the authority did not act in excess of power in deciding to proceed by way of refusal of planning permission rather than by way of prescribing an improvement line. Did it then act in abuse of power? I do not think so.

Parliament has chosen to set up two different ways of preventing development which would interfere with schemes for street widening. It must have been aware that one involved paying compensation but the other did not. Nevertheless it expressed no preference, and imposed no limit on the use of either. No doubt there might be special circumstances which make it unreasonable or an abuse of power to use one of these methods but here there were none." ([1971] AC 508, 530)

The passage (in the final sentence) also provides an answer to Mr Green's concern that the power might be abused in particular cases, for example, to override specific prohibitions in section 66. Judicial review is not excluded in such circumstances."

31. Lord Neuberger agreed with Lord Carnwath in relation to the proper outcome of the appeal. He provided further reasoning in respect of the issues in the following terms:

"54. As has been accepted by both parties, at least as a matter of language, section 66(2) and section 80(1) of the 1980 Act each appear to be capable of justifying the council's actions in blocking the access. If indeed they do both apply in this case, then, subject to the effect of A1P1, it appears clear the council would be entitled to choose which of the two statutory provisions to rely on. In *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508, 530, having said that where "Parliament has chosen to set up two different ways of preventing development" and that "[i]t must have been aware that one involved paying compensation but the other did not", Lord Reid concluded that in the absence of "special circumstances which make it unreasonable or an abuse of power to use one of these methods", a highway authority was entitled to rely on either method.

55. Indeed, it was suggested that, bearing in mind the council's obligation to conserve public funds, the council has a duty to

rely on section 80. Thus, in a slightly different context, Lord Radcliffe said in *Ching Garage Ltd v Chingford Corporation* [1961] 1 WLR 470, 475, that if a highway authority "can do what they want to without having to pay compensation, they have no business to use public funds in paying over money to an objector who is not entitled to it". It seems to me that the correct test in a case such as this, where there are two separate statutory provisions which could apply, is that, as Lord Reid stated, it is open to the council to rely on either provision, provided that it is reasonable in all the circumstances for it to do so.

56. However, the Court of Appeal concluded that, despite the language of section 80(1), it could not be relied on here, because, construing the 1980 Act as a whole, section 66(2) was the specific statutory provision which applied to the council's actions in this case, and the council could not effectively disapply it by invoking the more general power contained in section 80(1). In his clear and succinct judgment, Lewison LJ identified the relevant approach to interpretation by quoting from a judgment of Sir John Romilly MR in *Pretty v Solly* (1859) 26 Beav 606 53 ER 1032, 610. Sir John said that "wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply".

57. It was suggested on behalf of the council that this case represented an opportunity for this court to "make it clear that canons of construction should have a limited role to play in the interpretation" of statutes (and indeed contracts). In my view, canons of construction have a valuable part to play in interpretation, provided that they are treated as guidelines rather than railway lines, as servants rather than masters. If invoked properly, they represent a very good example of the value of precedent.

58. Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents: that would be inconsistent with the rule of law, and with the need for as much certainty

and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.

59. Thus, there are some rules of general application – eg that a statute cannot be interpreted by reference to what was said about it in Parliament (unless the requirements laid down in *Pepper v Hart* [1993] AC 593 are satisfied), or that prior negotiations or subsequent actions cannot be taken into account when construing a contract. In addition, particularly in a system which accords as much importance to precedence as the common law, considerable help can often be gained from considering the approach and techniques devised or adopted by other judges when considering questions of interpretation. Even though such approaches and techniques cannot amount to rules, they not only assist lawyers and judges who are subsequently faced with interpretation issues, but they also ensure a degree of consistency of approach to such issues.

60. Hence the so-called canons of construction, some of which are of relatively general application, such as the so-called golden rule (that words are prima facie to be given their ordinary meaning), and some of which may assist in dealing with a more specific problem, such as that enunciated by Sir John Romilly in *Pretty v Solly*. With few, if any, exceptions, the canons embody logic or common sense, but that is scarcely a reason for discarding them: on the contrary. Of course there will be many cases, where different canons will point to different answers, but that does not call their value into question. Provided that it is remembered that the canons exist to illuminate and help, but not to constrain or inhibit, they remain of real value.

61. Although the principle expressed by Sir John Romilly, sometimes referred to by the Latin expression generalia specialibus non derogant, is a valuable canon of construction, I do not consider that it applies in relation to section 66 and section 80 of the Highways Act 1980. That is because I do not think that it is possible to treat section 66(2) as a specific provision in contrast with section 80(1) as the more general provision. They are, as Mr Sauvain QC for the council submitted, simply different provisions concerned with overlapping aims and with overlapping applications.

62. Each provision authorises a highway authority to erect posts, in the case of section 66 to "[safeguard] persons using the highway", and in the case of section 80 "for the purpose of preventing access to … a highway". There is a relatively narrow exception, in section 66(5), to the circumstances in which section 66(2) can be relied on but by virtue of section 66(8), if it is relied on, it carries with it compensation; on the other hand, there are fairly widely drawn circumstances, set out

> in section 80(3), in which section 80(1) cannot be invoked, but, where it is relied on, it carries no compensation.
>
> 63. The notion that either of two independent provisions in the same statute can be invoked for a particular purpose may seem surprising, especially when that purpose involves an interference with a frontager's right of access by a public body, and when the provisions have significantly different consequences for the frontager. Accordingly, one can well understand why the Court of Appeal sought to reconcile section 66(2) and section 80(1) so as to avoid, or at least to minimise, any overlap.
>
> 64. However, as Lord Carnwath's analysis in paras 13-19 above shows, the 1980 Act, like its predecessor was a consolidating statute, and, while it included amendments, it did not purport to rationalise and re-codify the existing law. Rather, it sought to bring into a single Act of Parliament most, if not all, of the various existing and rather disparate statutory provisions relating to highways, which had developed over the years in a piecemeal way, with a few amendments. That was equally true of the 1959 Act, as evidenced by the statutory provisions considered, and the approach taken to them by the House of Lords, in *Westminster Bank*."

32. In the case of R (Sharp) v North Essex Magistrates Courts [2017] 1 WLR 3789 the Court of Appeal dealt with a case concerning a flood alleviation scheme promoted by the Environment Agency which had been granted planning permission. The Environment Agency served notices under section 172 of the Water Resources Act 1991. Section 172 of the 1991 Act grants the Environment Agency a power of entry for the purposes of carrying out surveys or tests to determine whether, and if so in what manner, any power or duty invested in it should be exercised, including its power to make compulsory purchase orders or compulsory works orders. The matter came before the Defendant Magistrates Court and the District Judge concluded that he was satisfied that there were reasonable grounds for the Environment Agency to exercise their power of entry under section 172 of the 1991 Act. The affected landowners, the Claimants, contended that in the case of new works involving the entry on to land or premises without the consent of the landowner, the Environment Agency was confined to exercising its powers of compulsory purchase under section 165(6) of the 1991 Act or its powers in relation to compulsory works orders under section 168 of the 1991 Act. It could not deploy the powers of entry under section 172. In particular the Claimant relied upon the statutory language contained in section 165 of the 1991 Act and in particular 165 (6), which provides as follows:

> "General powers to carry out works
>
> The appropriate agency may:
>
> (a) carry out flood risk management work within subsection (1D)(a) to (f) if Conditions 1 and 2 are satisfied;

(b) carry out flood risk management work within subsection (1D)(g) or (h) if Condition 1 is satisfied.

(1A) Condition 1 is that the appropriate agency considers the work desirable having regard to the national flood and coastal erosion risk management strategies under sections 7 and 8 of the Flood and Water Management Act 2010.

(1B) Condition 2 is that the purpose of the work is to manage a flood risk (within the meaning of that Act) from—

(a)the sea, or

(b)a main river.

(1C) In subsection (1B)(b) the reference to a main river includes a reference to a lake, pond or other area of water which flows into a main river.

(1D) In this section "flood risk management work" means anything done—

(a)to maintain existing works (including buildings or structures) including cleansing, repairing or otherwise maintaining the efficiency of an existing watercourse or drainage work;

(b) to operate existing works (such as sluicegates or pumps);

(c) to improve existing works (including buildings or structures) including anything done to deepen, widen, straighten or otherwise improve an existing watercourse, to remove or alter mill dams, weirs or other obstructions to watercourses, or to raise, widen or otherwise improve a drainage work;

(d) to construct or repair new works (including buildings, structures, watercourses, drainage works and machinery);

(e) for the purpose of maintaining or restoring natural processes;

(f) to monitor, investigate or survey a location or a natural process;

(g) to reduce or increase the level of water in a place;

(h) to alter or remove works

…

> (6)Nothing in subsections (1) to (3) above authorises any person to enter on the land of any person except for the purpose of maintaining existing works."

33. Gross LJ, giving the leading judgment in the Court of Appeal, concluded that the Environment Agency was not confined by section 165(6) of the 1991 Act to its CPO or CWO powers under sections 154 and 168 of the 1991 Act, and was instead entitled to exercise its powers of entry conferred by section 172 of the 1991 Act in that case. The reasons for that conclusion were set out as follows:

> "30. On the face of it, the language of s.172 of the WRA confers on the EA a general power of entry for the purposes there set out, including the works contemplated by s.165. Moreover, ss. 154 and 168 of the WRA are couched in the permissive language of *powers* rather than *duties*, so suggesting that the EA is entitled but not obliged to proceed by way of its CPO or CWO powers. If this be right, then it is necessary to find a hook on which to hang the restriction for which the Appellants contend, precluding the use of s.172 for entry onto land or premises in the case of new works.
>
> 31. As is clear, the hook suggested by the Appellants is s.165(6) of the WRA. To dispose of it at once, it was common ground that no significance attached to the difference in language between s.165(6) – which refers to "land" – and s.172, which speaks of "premises".
>
> 32. At least at first blush, there is some attraction in Mr Edwards' submission: the WRA draws a clear distinction between "maintaining existing works", for which purpose entry onto land is not precluded by s.165(6) and undertaking *new works*, which falls squarely within the s.165(6) prohibition. Moreover, questions of policy could be invoked to lend support to this argument. It is one thing to enter onto private land for the purpose of maintaining existing works; it is quite another to do so for the purpose (*inter alia*) of constructing new works, without the safeguards for the landowner contained in the CPO and CWO regimes – and moreover leaving open questions of some nicety as to the structures subsequently left on the landowners' land. Still further, I would not, for my part, be dismissive of the concern highlighted by Mr Edwards' submissions as to the tension between individual rights of property and the interests of society in general; striking the right balance in that area is important and not necessarily straightforward. Interference with private rights of property plainly requires careful justification.
>
> 33. All that said, Mr Edwards' submission faces the central difficulty that, unadorned, it proves too much. S.165 (1D) is not confined to a simple dichotomy between *maintenance* of existing works and the construction or repair of *new* works. As

Briggs LJ observed in argument, there is an "undistributed middle"; thus s.165 (1D) (b), (c) and (f), deal with operating existing works, improving existing works and monitoring, investigating or surveying a location or a natural process.

…

Nonetheless, overall, I have a clear preference for the EA's construction of s.165(6) and s.172.

i) First, all the various formulations of Mr Edwards' submissions suffer from the weaknesses already outlined.

ii) Secondly, I am not persuaded that the permissive language of ss. 154 and 168 is to be converted into obligatory language requiring the EA to use its CPO or CWO powers in the case of new works. I am unable to accept Mr Edwards' submission that this renders the CPO or CWO powers otiose. They are available for use, in a proper case, when the EA decides to deploy them. By contrast, if Mr Edwards' submission was well-founded then, at the least, the EA would be significantly circumscribed in the performance of its powers of flood risk management work.

iii) Thirdly, as highlighted by the Judge (at [23] of the judgment), the Appellants' case means that *any* new works – no matter how minor – provided only that they deprived landowners of the smallest parcel of land, would oblige the EA to proceed by way of its CPO or CWO powers. Such an outcome appears improbable and casts further doubt on the Appellants' proposed construction.

iv) Fourthly, the natural construction of s.172 of the WRA is that it confers an independent and general power of entry. Nothing said by the Appellants has persuaded me otherwise. Put another way, I am not persuaded that s.165(6) supplies a sufficient hook on which to attach a restriction to the statutory language.

(v) Fifthly, I acknowledge that this conclusion constrains the ability of those affected to challenge the *merits* – as distinct from the *legality* – of the EA's proposals and process. This consideration does not dissuade me, both because I am satisfied that that is the balance struck by the legislature and because, in any event, there remains opportunity for challenge on public law grounds, albeit not an open-ended challenge on the merits."

34. The final authority to which reference was made was R (Friends of Finsbury Park) v Harringay London Borough Council [2018] PTSR 644; [2017] EWCA Civ 1831. This was a case concerned with the use of a public park for a large-scale music festival. The Defendant's local authority purported to exercise its powers under section 145 of

the Local Government Act 1972 in order to authorise the music festival. This led to a significant part of the park being closed to non-paying members of the public for 16 days. The Claimant challenged the use of the powers under section 145 of the Local Government Act 1972 by the Defendant to permit the festival to occur. The powers under section 145 of the 1972 Act were as follows:

> "(1) A local authority may do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything (whether inside or outside their area) necessary or expedient for any of the following purposes, that is to say—
>
> (a) the provision of an entertainment of any nature or of facilities for dancing;
>
> (b) the provision of a theatre, concert hall, dance hall or other premises suitable for the giving of entertainments or the holding of dances;
>
> (c) the maintenance of a band or orchestra;
>
> (d) the development and improvement of the knowledge, understanding and practice of the arts and the crafts which serve the arts;
>
> (e) any purpose incidental to the matters aforesaid, including the provision of refreshments or programmes and the advertising of any entertainment given or dance or exhibition of arts or crafts held by them.
>
> (2) Without prejudice to the generality of the provisions of sub-section (1) above, a local authority—
>
> (a) may for the purposes therein specified enclose or set apart any part of a park or pleasure ground belonging to the authority or under their control;…"

35. The use of open space in London was addressed in the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967. Having defined open space in article 6 to include public parks, article 7 of the Schedule to the 1967 Act provided as follows in relation to authorising the use of open space for the provision of entertainment:

> "29. …(1) A local authority may in any open space—
>
> …
>
> (b) provide amusement fairs and entertainments including bands of music, concerts, dramatic performances, cinematograph exhibitions and pageants;… (g) set apart or enclose in connection with any of the matters referred to in this article any part of the open space and preclude any person from entering that part so set apart or enclosed other than a person to

> whom access is permitted by the local authority or (where the right of so setting apart or enclosing is granted to any person by the local authority under the powers of this part of this order) by such person.
>
> Provided that… (ii) the part of any open space set apart or enclosed for the use of persons listening to or viewing an entertainment (including a band concert, dramatic performance, cinematograph exhibition or pageant) shall not exceed in any open space one acre or one tenth of the open space, whichever is the greater." "

36. On behalf of an intervener it was submitted that both the 1967 Act and the 1972 Act dealt with the same set of facts, namely the proposed enclosure or setting apart of a park under the control of a London borough council for the purpose of providing public entertainment. In those circumstances the principle of statutory interpretation that a general provision does not derogate from a special one was, it was contended, of application. Giving the leading judgment of the Court of Appeal, Hickinbottom LJ summarised both the argument and his conclusions in the following terns:

> "51. Mr Laurence submitted that, read in context, the 1967 Act effectively provides a comprehensive regime for the holding of entertainments in parks and pleasure grounds in London. That separate and distinct regime, he submits, has been in place since the 1935 Act. He rejects the suggestion that section 132 of the 1948 Act applied to London at all; because it too was general, and bowed to the special provisions of the 1935 Act. Of course, the 1972 Act expressly applies to London (including the City of London); but, he submitted, the 1972 Act confers upon authorities a mass of powers not covered by the 1967 Act (e.g. the provision of swimming baths etc). Given that the 1972 Act was passed only five years after the 1967 Act, the "glaring contradiction" between the explicit spatial limitation in article 7 and the lack of any such limitation in section 145 can only be explained by such a construction. Had it been intended that the former should be made redundant, it is inconceivable that the draftsman would not have made that clear.
>
> 52. In my view, this was the most powerful argument against the construction of section 145 pressed by the Council, skilfully put by Mr Laurence; but, again, I have been ultimately unpersuaded. It is based on the premise that Parliament intended article 7 of the 1967 Act to be specifically directed towards the holding of entertainments in parks and pleasure grounds in London to the extent that it can be assumed that Parliament intended that section 145 of the 1972 Act, that would otherwise apply, should not apply to London. That is a premise I cannot accept.
>
> i) The 1967 Act, and the provisional Order that preceded it, were adopted after the local government reorganisation in

London, expressly to secure "uniformity in the law applicable with respect to parks and open spaces". There is nothing to suggest that it was intended to effect any radical change.

ii) It is also noteworthy that section 145(3) of the 1972 Act expressly retains private covenants and conditions upon which a gift of a public park has been made; but remains silent about the rights of the public to enjoy the park and the proviso (ii) in article 7(1) of the 1967 Act.

iii) The 1972 Act is, of course, the later statute. Section 145 of it applies to all local authorities, which include all 32 London borough councils (section 270). It is especially clear that the draftsman intended section 145 to apply to London because (a) section 145(5) expressly includes the City of London within its scope, and (b) it is clear that, where the draftsman intended to exclude London, he did so, as in the immediately previous section (see section 144(3)). Section 145 also expressly includes the power to enclose (and, hence, restrict general public access to) any part of a park or pleasure ground. It is clear that it is intended to give power to enclose any part of a park in London for the purposes of "an entertainment of any nature", which includes music festivals.

iv) The 1890 Act provides a specific power to close a public park or pleasure ground for a limited number of days for any charitable or other public purpose. It is not suggested that that is a special provision which trumps the general power in the 1972 Act. In respect of the 1967 Act and the 1972 Act, Supperstone J concluded that, as Mr Kolvin submitted before him and this court, article 7 and section 145 are stand alone provisions, creating "different powers for different places subject to different limitations" (see [46]). I agree. The 1972 Act is restricted in its scope to parks and pleasure grounds; whilst the 1967 Act applies to "open space" which is defined much more widely to include, not only those, but also heaths, commons, walks, and disused burial grounds. The 1972 Act is specifically focused on "entertainment" of a performing kind; whilst the 1967 Act has within its scope a much wider variety of facilities for public entertainment, including swimming baths, golf courses, gymnasia, swings and other such apparatus, and centres and facilities for clubs and other organisations. The whole focus of these two (indeed, three) statutes is different. I do not accept the submission that the two sets of provisions "conflict": they are, in my view, simply separate and distinct powers, subject to different criteria and restrictions. That seriously undermines the contention that the 1967 Act was a special provision for the same "state of facts" as those for which the 1972 Act provided. It is insufficient for the application of the maxim – and, hence, the assumption that the

> Parliamentary intention was to deny London boroughs the powers in relation to entertainment in parks provided by the 1972 Act – that there was merely some overlap.
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> v) Indeed, far from suggesting that the 1967 Act excluded powers which, on the face of it, were given to London boroughs in respect of entertainment in parks, the various statutes expressly provide that the powers they give are supplementary to any powers derived from other Acts (see, especially, article 20 of the 1967 Act). In my view, that is a clear flag of the intention of Parliament.
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> vi) Section 145 replaced section 132 of the 1948 Act. Insofar as out of London authorities are concerned, it removed the spatial restriction imposed by section 132(2)(a) of the 1948 Act on the power to enclose or set apart any part of a park (i.e. the greater of one acre or one tenth of the area of the park. Of course, one can see why the extension of powers in respect of a particular area may be appropriate: I have referred to some such local extensions. But there does not appear to be a logical reason why London boroughs should be deprived of the powers which non-London local authorities have in respect of entertainment in park under section 145. Mr Harwood suggested that there might be a rationale in the population density in London and/or the size of the capital, but there is nothing to suggest that Parliament had that in mind as a reason to reduce the powers in London.
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> vii) I do not accept Mr Laurence's submission that the provisions of section 42 of the 1935 Act were, so far as London is concerned, *specialia* to the provisions of section 132 of the 1948 Act's *generalia*, so that the latter did not apply to London either. For the same reasons, I consider those two statutes gave London authorities two distinct powers, under either of which they could have acted in particular circumstances."

37. Thus, this was a further authority relied upon by the Defendant, by analogy, to contend that the provisions with which the present case is concerned were, in effect, overlapping statutory powers and that section 53 of the 2008 Act was not a specific power of the kind to which the principle of statutory interpretation applied so as to preclude the Defendant making use of the power under section 172 of the 2016 Act.

Submissions and conclusions:

38. Dealing first with Ground 1 the submissions of the Claimant in relation to whether or not it is open to the Defendant to use the power to survey under section 172 of the 2016 Act have, in large measure, been set out above. However, a number of points are relied upon by the Claimant in order to make good his claim that it would be ultra vires to use section 172 of the 2016 Act in circumstances where the Defendant is promoting a DCO under the 2008 Act. The points which are raised arise under the broader proposition that because section 53 of the 2008 Act creates a power to survey

for a specific and defined purpose, namely the circumstances described in section 53(1)(a) to (c) set within a specific statutory framework for the making of DCOs, it is not open to the Defendant to rely upon the general provision contained within section 172 of the 2016 Act. In particular, section 172 of the 2016 Act is a general power to survey granted to the Defendant in circumstances where it is exercising compulsory powers and very many of these circumstances will not involve the making of a DCO. By contrast, it is submitted on behalf of the Claimant that section 53 is an integral feature of the specific statutory code for DCOs contained within the 2008 Act.

39. Secondly, it is submitted that it is an important and specific feature of section 53 of the 2008 Act that the power can only be exercised subject to the supervision of the Secretary of State. This is intended to be an important procedural safeguard, so as to ensure that the intrusion upon a private landowner's property does not occur when it is unnecessary or inappropriate. Thirdly, it is a further important specific feature of the section 53 power that there are other specific powers contained within the bespoke statutory code for the approval of DCOs within the 2008 Act which have been set out above in relation to, for instance, undertaking surveys pursuant to powers pertained within the DCO itself or taking soil samples as part and parcel of the powers granted by the DCO. These are further features which emphasise the specific character of the 2008 Act and, therefore, the specific nature of section 53 of the 2008 Act.

40. Further, it is submitted that the supervision of the Secretary of State is in particular a specific feature of the 2008 Act regime which is necessary because of the potentially large scale of DCO projects which it was realistic for Parliament to contemplate when the legislation was being passed. The scale and extent of such projects justified the inclusion of supervision by the Secretary of State, further reinforcing the specific nature of the section 53 power.

41. In the light of the authorities, it is therefore submitted on behalf of the Claimant that this is a situation in which the maxim that a later general statutory provision cannot overrule an earlier specific statutory provision that was invoked, for instance, in the BT case, applies to the statutory provisions under consideration here, leading to the conclusion that it would be ultra vires for the Defendant to rely upon section 172 of the 2016 Act.

42. Having considered this submission I am not satisfied that the Claimant's contentions are correct. In my judgment the proper approach to these statutory provisions are that they are, in fact, overlapping, and that the Defendant can choose or elect which of them to invoke in circumstances where a DCO is being promoted by the Defendant. My reasons for concluding the statutory provisions are overlapping, rather than a specific provision in the 2008 Act and a general one in the 2016 Act to which the cannon of statutory construction applies, are as follows.

43. Firstly, in my judgment, it is necessary to start with the plain and ordinary meaning of the language contained in the statutory material. It is not disputed that what is proposed by the Defendant falls properly within the scope of the power granted by section 172 of the 2016 Act. Nothing in the language of section 172 of the 2016 Act excludes cases where a DCO is being promoted by an acquiring authority. It follows, secondly, that when enacting the 2016 Act, and amending the provisions of section 289 of the 1980 Act, Parliament did not amend the power to exclude circumstances where a DCO was being promoted. There is in reality, thirdly, no material difference

between the nature of the powers which are involved. Their subject, matter and purpose, the ability to enter on to third-party land in order to undertake surveys, are essentially similar. The context in which the 2008 Act arises does not make the purpose of the power or its subject matter materially different. As a consequence there is no conflict between these two statutory powers, and the specific context of section 53 of the 2008 Act granting the power in the context of the promotion of a DCO or proposed DCO does not alter that subject matter or purpose. Unlike the case in Newhaven, there is no conflict between these two sections and they are not inconsistent with one another. Akin to the provisions in Cusack they are straightforwardly to be understood to be overlapping or alternative statutory provisions addressing the same objective.

44. Fourthly, the existence of the difference between the two powers constituted by the need for the Secretary of State's approval under section 53 of the 2008 Act is not determinative of the point, and is readily explicable. The power to use section 172 of the 2016 Act has been granted by Parliament specifically to the Defendant, in particular, in its role as an acquiring authority: it is therefore an organisation with a particular standing, to which the statutory power has been granted. By contrast it is open to any individual to make an application for a DCO and to pursue it through the provisions of the 2008 Act. When that fact is borne in mind, the need for supervision by the Secretary of State in cases where the power under section 53 is invoked can be readily understood. The Secretary of State's supervision is not therefore a factor of any significant weight in resolving the question of whether or not the Defendant is obliged to use section 53 of the 2008 Act and is excluded from using section 172 of the 2016 Act.

45. In summary, in my view the application of the maxim or canon of statutory construction upon which the Claimant relies is not apposite in the circumstances of these two statutory provisions. I am unable to conclude that reading these legislative provisions together and in context that the power in section 53 of the 2008 Act is a specific power, and that the power in section 172 of the 2016 Act a general one, such that the application of the maxim of construction relied upon by the Claimant requires the conclusion that the Defendant can only rely upon the section 53 power when a DCO is involved in its project. In my view the legislation in relation to these powers was enacted such that they are coexistent powers, which on their true construction are similar in purpose and sit alongside each other, rather than the section 53 power excluding the possibility of reliance on the section 172 power when the Defendant requires a DCO for its proposals to be implemented. They sit alongside each other and are overlapping or alternative powers available to the Defendant in order to undertake entry on to the Claimant's land and conduct surveys upon it. I am therefore satisfied that the Claimant's claim under Ground 1 should be dismissed.

46. I therefore turn to Ground 2 of the Claimant's claim. It will be recalled that Ground 2 is put on the basis that even if the Defendant is entitled to use the power under section 172 of the 2016 Act to enter onto the Claimant's land in order to undertake a survey of it, the activity of discharging pumped groundwater arising from the surveys of the aquifer directly on to the Claimant's land is an activity which does not fall within the definition of a survey. On behalf of the Claimant it is submitted that during the course of the tests contemplated by the Defendant in the vicinity of 45 million litres of pumped groundwater will be discharged on to the Claimant's land. This specific

figure is disputed by the Defendant, but what cannot be gainsaid is that a very substantial amount of groundwater generated by the pumping tests will be discharged on to the Claimant's land with the clear potential for damage arising.

47. The Claimant contends that the concept of a survey arising under section 172 of the 2016 Act cannot be unlimited as to the activities it comprises. Attention is drawn to the Shorter Oxford Dictionary definition, which defines "survey" as "to examine and ascertain the condition, tenure, or value etc. of an estate, a building or a structure". It is submitted on behalf of the Claimant that where the activities which an acquiring authority wishes to undertake amount in reality to entry on to the land and the exercise of prolonged or even temporary dispossession of the land, effectively depriving the landowner of the enjoyment of his land, then that activity falls outside of any notion of survey and is more properly understood as a form of expropriation as opposed to what is to be legitimately understood as a survey. Where the boundary lies between a legitimate survey and effective temporary dispossession or expropriation is, it is submitted, a matter of judgment and fact-sensitive. In the present case, it is contended by the Claimant that it is clear and obvious that the discharge of a very significant quantity of pumped groundwater on to the Claimant's land, with the impact that this will have upon its condition and productivity, clearly exceeds what could properly be understood as a survey within the power created by section 172 of the 2016 Act.

48. It is further submitted that the reliance of the Defendant upon the availability of compensation for any harm arising from the survey is not an adequate answer to the Claimant's complaint. It does not engage with the substance of the Claimant's submission which relates to the legal content, or proper interpretation, of the term survey within the 2016 Act. Further, the Claimant contends that the Defendant's reliance upon a residual power to judicially review the issuing of the notice under section 174 of the 2016 Act is of very limited utility. It is to be noted that only 14 days notice is required under section 174(1), and any application for a stay would have to be made extremely quickly and potentially subject to costly undertakings. Again, the Defendant's submission does not engage with the substance of the Claimant's complaint that the term "survey" is necessarily limited and incapable of comprehending the kind of activity which is proposed by the Defendant in the present case.

49. In my judgment there is considerable force in these latter submissions made by the Claimant. The existence of an entitlement to compensation has little or no bearing on what an acquiring authority may be entitled to do under the power to survey created by section 172 of the 2016 Act. Similarly, whilst there is an opportunity to undertake proceedings for judicial review in respect of the exercise of the power, that again begs the question of whether or not the kinds of activities which the Defendant intends to undertake fall within the scope of a survey will, in fact, lawfully do so.

50. The start of the consideration of this issue, in my judgment, depends upon the way in which the 2016 Act itself requires particularity as to the details in the notice of the activities which are proposed. In particular, it is notable that in section 174(3) a sequence of different types of activities are identified as ones which should be specifically particularised on the notice of the intention to exercise the power conferred by section 172 of the 2016 Act. They include activities such as boring, excavating, leaving apparatus on the land and taking samples, each of which will

impact upon the landowner's possession and enjoyment of his land together with, potentially, its productivity, if it is as in the present case agricultural land. Importantly, at section 174(3)(e) the notice must contain details of any activities required in order to undertake surveys to secure compliance with the EIA Directive and the Habitats Directive. It is straightforward to contemplate surveys that will be necessary in order to compile or refresh environmental information which would give rise to intrusion upon a landowner's possession and enjoyment of his or her land as well as impacting upon its productivity. An obvious example canvassed during the course of argument was the need to undertake an archaeological survey, which would involve the potential for an extensive array of trial trenches being created in the land and subsequently restored by back-filling after an investigation had been undertaken of the archaeological potential of the land. Such a survey would be intrusive and take time. Thus it follows that matters which are obviously contemplated by the notification details under section 174(3) of the 2016 Act include activities which would involve, effectively, dispossessing the landowner of parts or all of their land whilst subject to survey for a temporary period, subject to reinstatement at the conclusion of the surveys.

51. Whilst, therefore, both the creation of the pumping wells and boreholes comprised in the testing of the aquifer which is required by the Defendant will involve temporary interruption of the Claimant's enjoyment of his land, as will the discharge of the water pumped out of them which will arise in a substantial quantity, I am unable to conclude that this activity is excluded from the definition of a survey contemplated by section 172 of the 2016 Act and its supporting statutory framework. I accept the submission made on behalf of the Defendant that the requirements of the EIA directive to provide appropriate environmental information do not cease at the point of time when the DCO is submitted. Further, the DCO which has been submitted to the Secretary of State, includes a number of requirements which need to be discharged before development pursuant to it, if it is granted, could commence. A groundwater management plan is part of those details. Thus, the further testing that is required goes hand in hand with both the preparation of detailed design for the project, and also the provision of environmental information necessary to ensure satisfactory compliance with the further regulatory safeguards contained in the proposed DCO. The fact that the further testing to be undertaken serves, in effect, a dual purpose, related both to the preparation of the final detailed engineering of the project and also the furnishing of environmental information to fulfil the ongoing requirements of the EIA Directive, does not invalidate the point that these activities are within the scope of section 174(3)(e). Further, whilst I accept the submission made on behalf of the Claimant that section 174 does not seek to exhaustively define the term "survey", nonetheless if an activity is properly understood to be within the scope of section 174(3), in my view, it should be understood as being within the scope of a survey for which there is power under section 172 of the 2016 Act.

52. It follows from the reasons I have just set out that I am satisfied that the Defendant is correct to contend that the discharge of groundwater is part and parcel of the pumping tests to be undertaken on the Claimant's land and properly falls within the definition of a survey authorised by section 172 of the 2016 Act. It follows that ground 2 of the Claimant's case must also be dismissed.

53. For all of the reasons set out above the Claimant's case on both grounds advanced must be dismissed.