IN THE HIGH COURT OF JUSTICE CO/2280/96
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand
London WC2

Date: Thursday, 29 January 1998

B e f o r e:

MR JUSTICE LAWS

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R E G I N A,

Applicant

ex parte D E THORPE

-v-

NORFOLK COUNTY COUNCIL Respondent

- - - - - -

Handed-down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
(Official Shorthand Writers to the Court)

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MR J HOLT QC (Instructed by Messrs Cunningham John & Co, Norfolk IP24 3PL) appeared on behalf of the Applicant.

MR D HOLGATE (Instructed by Norfolk County Council Legal Services) appeared on behalf of the Respondent.

J U D G M E N T (As approved )

1. MR JUSTICE LAWS: This application for judicial review raises a short but important point as to the construction of s.66(1) of the Highways Act 1980, which provides:

> "It is the duty of a highway authority to provide in or by the side of a highway maintainable at the public expense by them which consists of or comprises a made-up carriageway, a proper and sufficient footway as part of the highway in any case where they consider the provision of a footway is necessary or desirable for the safety or accommodation of pedestrians; and they may light any footway provided by them under this subsection."

2. The question I must decide is whether the financial resources of the highway authority may be taken into account as a material consideration in the authority's approach to s.66. There are three possibilities: (1) The authority may have regard to their financial resources in considering whether "the provision of a footway is necessary or desirable..". (2) The authority may have regard to their financial resources in deciding *when* they are to carry out the duty to provide a footway, having earlier concluded (without regard to financial resources) that its provision is necessary or desirable; (3) the authority's financial resources play no part whatever in the lawful administration of s.66.

3. There is a subsidiary issue. It is whether, before certain development took place in the area in question in 1990, there was an existing useable footway (in the shape of a grassed verge), and if there was whether the respondent authority acted unreasonably in the *Wednesbury* sense in ignoring that fact when, in May 1996, they decided not to accept a s.66 duty to provide a footway. Though I have yet to describe the facts, which I shall do shortly, I may say at once there is nothing in this second point. There is a *bona fide* dispute whether before 1990 there existed any such footway. The respondent maintains that there was not. It is wholly impossible to characterize that stance as *Wednesbury* unreasonable. It follows that there cannot be any *Wednesbury* complaint as to the respondent's failure to have regard to any such earlier footway when they declined to promote a new one in 1996. The only real point in the case is as to the construction of s.66.

4. The applicant, who suffers from a visual disability, has lived at 36 Barnham Broom Road, Wymondham for over 50 years. His home is on the eastern side of the road. In 1990 a housing estate was developed on the western side of Barnham Broom Road. To the south of the applicant's property, the road was diverted from its earlier course. There is a good deal of planning history to the development. I do not think it necessary to go into it. The upshot was that the alignment of the road was so arranged that, close to the applicant's home and I think a little to the south of it, there is a stretch of about 31 metres where, as is common ground, there is no useable footway on the eastern side. There is a footway on the western side of the road; that was required by the relevant planning permission.

5. The application for judicial review is in terms directed to a resolution of the respondent's Highways Committee of 22nd May 1996 by which the Committee refused to include in its Footway Programme for 1996/7 a scheme put forward by the Area Engineer for a footway on the eastern side of Barnham Broom Road which would have covered the 31 metre stretch in question. There is no doubt that in arriving at this decision the Committee took account of the respondent's financial resources. I may refer first to a report prepared in 1994 by the Director of Planning and Transportation headed "Assessing Priorities for Pedestrian Crossing, Traffic

Calming, Footways and Small Highways Improvements". As its opening words state, the report "gives details of the efforts used to assess the need for footways.." Para 3.2 states:

> "The assessment takes into account the following factors:
>
> (a) Traffic flow
> (b) Pedestrian flow
> (c) Accidents
> (d) Pedestrian age
> (e) Average carriageway width
> (f) Verges/escape route/other footways
>
> and points are allocated to each of these to determine a 'points score' for each request [sc. for a footway to be provided]"

6. These various factors are then gone into and the points system explained in relation to each of them. Para 3.9 and 3.10 are as follows:

> "3.9 On completion of the survey and calculation of the points score the Area Engineer seeks the comments of the Parish Council, Local Member and District Council if the request is within a conservation area. Each year the Area Engineer submits a list of schemes which he suggests should be considered for inclusion in a programme.
>
> 3.10 These suggestions are then considered against other factors such as value for money, practicalities of construction, the need for land purchase or whether similar benefits could be achieved using traffic management measures and a list of schemes presented to the committee in priority order for approval. Those that are not included in the suggested programme are considered again in following years. At some locations where conditions are likely to change requests are re-assessed at an appropriate time before being reconsidered."

7. On 19th October 1995 the Area Engineer produced an assessment of a request that had been made by the Wymondham Town Council for the completion of a footway along the length of Barnham Broom Road on the east side. All the factors relevant to the "points" system were considered, and a total of 74 points was given. The evidence shows that where a proposal has passed a threshold of 40 points the Area Engineer tends to recommend it for consideration by the respondent for inclusion in the footways programme. The Area Engineer indeed put forward the Barnham Broom Road scheme; but a decision was made to reduce the level of funding available for footways from £789,000 plus per annum (agreed in May 1995) to £450,000 for the year 1996/97. In the result, no new schemes were added to the footway programme for that year.

8. The background to the decision of May 1996 is described in the affidavit of the respondent's Section Engineer (Investment Programmes), Mr Elliott. He had prepared a report for the Committee meeting on 22nd May 1996 which suggested the reduction of the annual footway budget to £450,000, and his recommendations did not include the implementation of the Barnham Broom Road footway scheme; and as I have said, at the Committee meeting on 22nd May 1996 it was not included. He exhibits the report of March 1994, which I have cited, and which he prepared, and says of the "points" system there referred to:

> "Clearly, that technique does not purport to include all the circumstances which may be relevant to a decision under s.66 when considering any particular case. Moreover, the technique or method does not, indeed could not, indicate a level or score at which a footpath becomes 'desirable' or 'necessary'. Ultimately, that is a matter of judgment for the County Council."

9. Then in para 2.6 of his affidavit he describes the budget reduction for the footways programme which I have mentioned. I should set out paras 2.7 and 2.8:

> "2.7 In my judgment the proposal for the footway is not necessary for the 'safety or accommodation of pedestrians' on Barnham Broom Road. S.66 does not indicate any timescale over which the duty is to be complied with. It does not state, for example, that any scheme which is considered 'desirable' must be provided 'forthwith'. Therefore the County Council is able to consider the relative importance of each of such proposals put before it as well as the amount of money it has available to spend on such schemes from time to time.
>
> 2.8 In formulating the recommendations to the Committee I certainly had regard to the fact that insufficient funds would be available to enable a new scheme, such as the proposal at Wymondham, to be added to the County Council's programme. In addition, I did not consider that the proposal at Barnham Broom Road was of such significance to pedestrians that it ought to be substituted for an existing programmed scheme. I did not consider that it had sufficient merit to justify recommending that action."

10. After the judicial review papers had been lodged, and notice given of the application to the respondent, the applicant was informed that the Planning and Transportation Committee, which was to meet on 12th December 1996, would receive a report about the prospective judicial review and would also be asked to consider whether the Barnham Broom Road footway proposal was "necessary or desirable and whether it is so important that it ought to be added to the Footway Programme or substituted for an existing programme scheme" (respondent's letter, 11th November 1996). The applicant was afforded an opportunity to make written representations, and did so. There was some silly correspondence about whether the document put in by the applicant was "succinct" or not. In due course the matter went before the Committee on 12th December. The Committee decided, agreeing with the conclusions of the Director of Planning and Transportation who had put in a full report, that provision of the footway was not "necessary or desirable for the safety or accommodation of pedestrians". The significance of these events consists in the submission by Mr Holgate QC for the respondent in his skeleton argument that the whole matter was reconsidered by the Committee on 12th December 1996 and on any view a lawful decision was then made; so that any legal defect in the decision of May 1996 is rendered academic. However, in his oral argument Mr Holgate as I understood him accepted that even if the decision of December was plainly a lawful one, there might be some utility in my declaring the law upon the question whether a council is entitled to have regard to financial priorities, and the extent of its financial resources, in arriving at a conclusion under s.66.

11. The report, prepared by the Director of Planning and Transportation for the December meeting is before me. In it the Director referred to the survey report of October 1995 and said this (para 4.2):

> "The points score was 74, ie over the threshold of 40 above which the Area Engineers tend to recommend schemes for consideration for inclusion in the programme. However, the assessment does not purport to include all the circumstances which may be relevant to a decision under s.66 when considering any particular case. Moreover, the technique does not, and indeed cannot, indicate a level or score at which a footpath becomes 'desirable' or 'necessary'. In short, the points system does no more than provide a common basis for assessing all footpath proposals so that their relative merits can be compared. This then assists the Highways Sub-Committee in deciding how best to utilize its limited financial resources."

12. If, on 12th December 1996, the Committee had accepted the applicant's contention (plainly put before them) that financial resources were irrelevant to a s.66 decision, and had concluded that nonetheless the Barnham Broom Road footway proposal was neither "necessary" or "desirable" on its merits, that would, as it seems to me, have rendered the earlier decision of May 1996 academic and I would have disposed of the judicial review application accordingly, by dismissing it as a matter of discretion. But that is not what the Committee did. They adopted the report of the Director, whose reasoning in the paragraph I have set out plainly engages the respondent's financial resources as a relevant issue. In my judgment, therefore, there is no pre-emptive response here available to the respondent such as might justify my denying the applicant relief even if his submissions upon s.66 were good; and, as I have indicated, I do not think in the end that Mr Holgate persisted in the submission that I should do so. His case is that the respondent's financial resources were a perfectly legitimate matter for the Committee to consider in relation to s.66.

13. I turn therefore to the sole remaining question in the case: how far, if at all, may a local authority have regard to its own financial resources, or more accurately their limited nature, in arriving at a conclusion whether under s.66 they are obliged to provide a footway?

14. Mr Holt QC for the applicant referred to the legislative history of s.66. Its predecessors were first s.58 of the Road Traffic Act 1930, and then s.67 of the Highways Act 1959. But with respect to Mr Holt these earlier provisions do not, I think, cast light on the question I must decide.

15. Plainly s.66 is on its face silent as to any regard which the highway authority might properly have to the extent of its financial resources, or to any priority which it may attribute between competing claims upon them.

16. But that, I think, is by no means the end of the matter. A similar contention was advanced before the House of Lords in *ex parte Barry* [1997] AC 584, though upon different legislation; the case concerned the provisions of s.2(1) of the Chronically Sick and Disabled Persons Act 1970:

> "Where a local authority having functions under s.29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section apply who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters [a whole series of matters is then set out] it shall be the duty of that authority to make those arrangements in exercise of their functions under the said s.29."

17. Lord Nicholls of Birkenhead identified the question for the House thus at 604B-C: "Can a local authority properly take into account its own financial resources when assessing the needs of a disabled person under s.2(1)?" He proceeded to describe the argument that a person's needs cannot be affected by or depend upon the resources available to the authority to meet them. Then at 604E-F he said:

> "This is an alluring argument but I am unable to accept it. It is flawed by a failure to recognize that needs for services cannot sensibly be assessed without having some regard to the cost of providing them. A person's needs for a particular type or level of service cannot be decided in a vacuum from which all considerations of cost have been expelled."

Then at 605G - 606B:

> "In the course of the argument some emphasis was placed upon a submission that if a local authority may properly take its resources into account in the way I have described, the s.2(1) duty would in effect be limited to making arrangements to the extent only that the authority should decide to allocate money for this purpose. The duty, it was said, would collapse into a power. I do not agree. A local authority must carry out its functions under s.2(1) in a responsible fashion. In the event of a local authority acting with *Wednesbury* unreasonableness, a disabled person would have a remedy.
>
> This interpretation does not emasculate s.2(1). The section was intended to confer rights upon disabled persons. It does so by giving them a valuable personal right to see that the authority acts reasonably in assessing their needs for certain types of assistance, and a right to have their assessed needs met so far as it is necessary for the authority (as distinct from others) to do so. I can see no basis for reading into the section an implication that in assessing the needs of disabled persons for the prescribed services, cost is to be ignored. I do not believe Parliament intended that to be the position."

18. Lord Clyde placed emphasis upon the context of s.2(1), which involved, as its terms demonstrated, s.29 of the National Assistance Act 1948. He said at 609G:

> "Now there is no doubt that in the exercise of its powers under s.29 of the Act of 1948 it was proper for a local authority to take into account the extent of the resources which were available to it. So in approaching s.2(1) of the Act of 1970, set as it is in the context of s.29, one would expect that the extent of available resources would remain a proper consideration.."

Then at 610B-D:

> "The right given to the person by s.2(1) of the Act of 1970 was a right to have the arrangements made which the local authority was satisfied were necessary to meet his needs. The duty only arises if or when the local authority is so satisfied. But when it does arise then it is clear that a shortage of resources will not excuse a failure in the performance of the duty. However neither the fact that the section imposes the duty towards the individual, with the corresponding right in the individual to the enforcement of the duty, nor the fact that consideration of resources is not relevant to

> the question whether the duty is to be performed or not, means that a consideration of resources may not be relevant to the earlier stages of the implementation of the section which lead up to the stage when the satisfaction is achieved. The earlier stages envisaged by the section require to be distinguished from the emergence of the duty. And if that distinction is kept in mind, the risk of which counsel for Mr Barry warned, namely the risk of the duty becoming devalued into a power, should not arise.
>
> The words 'necessary' and 'needs' are both relative expressions, admitting in each case a considerable range of meaning."

19. While of course it is of great importance to have in mind that this decision of their Lordships' House was arrived at upon altogether different legislation, it seems to me with great respect to exemplify a proposition which is, perhaps, too easily ignored. It is that the concept of "necessity", while certainly *objective*, is not *absolute*: at least where by statute a public authority is required to make a judgment whether a particular course of action is necessary, as the precursor of a duty arising upon the authority's shoulders to carry out the action in question. This seems to me to be in accord both with common sense and with the ordinary meaning of "necessity" and its cognates. I see no reason why such an approach should not be applied to s.66.

20. In his skeleton argument Mr Holt sought to distinguish *Ex parte Barry* primarily on the ground, which he developed in his oral submissions, that an important element of their Lordships' reasoning - at any rate that of Lord Clyde - depended upon the statutory context of s.2(1) of the Act of 1970, and in particular the force of s.29 of the Act of 1948. In that connection Mr Holgate drew my attention to s.62 of the Highways Act 1980, whose cross-heading is "General Power of Improvement". Ss.3 provides that work of any of the descriptions set out in the subsection "shall be carried out only under the powers specifically conferred by the following provisions of this Part of this Act, and not under this section". The descriptions of work which follow do not include the provision of footways. Mr Holgate's purpose in referring to this provision was to indicate that by virtue of s.62 a highway authority possessed a discretionary power, free-standing from the duty arising under s.66, to improve a highway by the provision of a footpath; and he submitted that that might be read as conditioning the s.66 duty on a basis analogous to the way in which s.29 was held by the House of Lords to bear upon s.2(1). I do not consider that the provisions of s.62 offer anything approaching a critical determinant of the correct construction of s.66. However, I do not understand the overall conclusion of their Lordships who were in the majority in *Ex parte Barry* to depend upon the bite of s.29. (Lord Lloyd of Berwick and Lord Steyn were in the minority; perhaps I may be forgiven for not referring to their speeches, since no particular reliance was sought to be placed upon any passage from them by Mr Holt.) Lord Hoffmann agreed with both Lord Nicholls and Lord Clyde. While as I have made clear Lord Clyde placed some emphasis on s.29 the core of his speech is perhaps to be found in the passage at 610B-D which I have set out; and that reasoning, I think, is not dependent upon the backdrop of s.29.

21. However that may be, I can see no basis for a construction of s.66 which would treat the concept of "necessity" in absolute terms. If anything, such distinctions as exist between the statute under consideration in *Ex parte Barry* and s.66 suggest that a looser view might properly be taken of the latter. The duty which s.66 imposes is not a duty to individuals, but to the public at large. I think that means that a wider range of considerations may be taken

into account by the highway authority in assessing whether the duty arises. Moreover, although I have so far emphasized the concept of "necessity", it is I think highly significant that s.66 imposes the relevant duty upon the highway authority where they are satisfied that the footway is necessary " *or desirable* for the safety or accommodation of pedestrians". Upon Mr Holt's construction of the section, an absolute duty would arise to create a footway in circumstances where the authority concluded only that such provision was desirable for the accommodation of pedestrians. The ambit of the section is thus not limited to safety factors. I cannot believe that Parliament intended to require a highway authority to decide, irrespective of all its other obligations and its financial resources, whether it would be desirable to provide a footpath to make it easier and more convenient for pedestrians to pass along the highway, and if that conclusion were reached, to impose an absolute duty to provide the footpath. As Mr Holgate submitted, there might well be a case where such a literal and confined view of the section would oblige the authority to undertake enormous costs by way of compulsory purchase in order to secure a modest, perhaps marginal, benefit. But there cannot be a different test as between putative "necessary" and "desirable" cases under the section.

22. In the course of argument other authority was relied on. Mr Holgate submitted, I think correctly, that in *Ex parte Tandy* [1997] 3 WLR 884 (an education case) the Court of Appeal, following and relying on their Lordships' decision in *Ex parte Barry* did not regard what may be called the s.29 point as determinative of the House's decision. At 905G-H Mummery LJ made the following general observation:

> "Although the legislation construed by the House in that case [ *Barry*] had a different subject matter and was framed in different terms, the speeches of Lord Nicholls and Lord Clyde afford guidance on the relevance of resource considerations (though not mentioned in the legislation) to the performance of duties which involve the application of criteria in a decision-making process affecting the relative needs of individuals in those groups of people for whom special provision must be made."

23. Mr Holgate had other submissions, some of which engaged the well known case about fares on the Underground, *Bromley* [1983] AC 768, and the nature of a local authority's fiduciary duty to the local taxpayers. I need not, I think, go into them. It is in the result clear to me that in approaching their functions under s.66 a highway authority is entitled to have regard to its financial resources in deciding whether any particular footway proposal is necessary or desirable. That conclusion does not collapse the duty which the section imposes into a mere power. The authority is obliged to consider objectively the merits of footway proposals put to it. It may then conclude, on all the facts, including its financial resources, that a proposal in hand is or is not necessary or desirable. It must of course arrive at its conclusion within *Wednesbury* principles. There is no general discretion to regard footways as important or unimportant. I conceive this reasoning to be in accordance with what was said by Lord Nicholls in *Ex parte Barry* in the passage at 605G - 606B which I have set out. In addition, it seems to me that the relevance of the authority's financial resources comes in at the first stage where "necessity" or "desirability" is being considered; and this, I think, is consistent with Lord Clyde's reasoning at 610B-D. In the papers in this case the respondent authority has made much of the fact that s.66 imposes no time limit upon the performance of the duty which it creates, and Mr Holgate's submissions have in part reflected that circumstance. However, I do not think that this is a crucial consideration for the proper construction of the section. The authority is entitled to have regard to its financial resources in considering whether a footway is necessary or desirable; once it accepts that it is, the duty arises, and must be fulfilled, within a reasonable time according to the circumstances of the

case. I quite accept that there may in individual instances be questions as to what would amount to a reasonable time. But the absence of any provision as to time in the section does not in my judgment itself condition the extent to which financial resources may be taken into account.

24. At the outset of this judgment I indicated that there were three possibilities as to the proper construction of the section. For the reasons I have given, the first of these represents the section's correct interpretation: the authority may have regard to their financial resources in considering whether "the provision of a footway is necessary or desirable.."

25. For all the reasons I have given, this application will be dismissed. I should notice that Mr Holt submitted at one stage that the later decision of December 1996 fell foul of *Wednesbury* principles even upon the assumption that financial considerations played no part in it. But there is *ex facie* no challenge to that decision. In any event, I do not consider that any such *Wednesbury* argument could possibly prevail. The respondent was entitled to have regard to financial resources, as I have held; I accept also that the "points" system is not, and was never intended to be, a determinant of what was "necessary" or "desirable". In December 1996 the authority had regard to the whole case, including the provision of the footway on the western side of Barnham Broom Road. It is not, I think, necessary to say any more about the decision then taken.

Yes, Mr Holgate?

**MR HOLGATE**: My Lord, I am grateful. May I ask for an order dismissing the application? My learned friend is legally aided, so I would ask for the usual order against -----

**MR JUSTICE LAWS**: A football pool order, as it used to be called. Yes, Mr Holgate. Mr. Holt, that must be right, is it not?

**MR HOLT**: My Lord, that must be right. I do have an application for leave to appeal. My Lord is aware that it is the first time this section has been construed by the court, and it is a matter not only of importance to the plaintiff but also a matter of some public importance.

**MR JUSTICE LAWS**: Mr. Holt, I entirely follow that, but for my part, the reasoning in my judgment is conformable with the House of Lords decision and I think you must ask the Court of Appeal.

**MR HOLT**: So be it.

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