Michaelmas Term
[2018] UKSC 63
On appeal from: [2017] EWCA Civ 1220

JUDGMENT

London Borough of Southwark and another (Respondents) *v* Transport for London (Appellant)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Carnwath
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

5 December 2018

Heard on 24 and 25 October 2018

Appellant	*Respondents*
Timothy Morshead QC Charles Banner (Instructed by Gowling WLG (UK) LLP (Birmingham))	David Elvin QC Richard Moules (Instructed by Dentons UK and Middle East LLP (London))

Respondents:-

(1) London Borough of Southwark
(2) City of London Corporation

LORD BRIGGS: (with whom Lady Hale, Lord Reed, Lord Carnwath and Lord Lloyd-Jones agree)

Introduction

1. This appeal raises an interesting but complicated question as to the meaning of the GLA Roads and Side Roads (Transfer of Property etc) Order 2000 (SI 2000/1552) ("the Transfer Order") made by the Secretary of State in exercise of powers conferred by section 405 and following of the Greater London Authority Act 1999 ("the GLA Act"). By that Act Parliament reorganised local government in London and created the Greater London Authority ("GLA") under a directly elected Mayor of London. The GLA performs its strategic transport and road traffic functions through the appellant Transport for London ("TfL"), which became the highway authority for those public highways in London designated as GLA roads, in the GLA Roads Designation Order 2000 (SI 2000/1117) ("the Designation Order"). Previously those highways had been the responsibility of individual London borough councils as local highway authorities including, for their respective areas, the respondents London Borough of Southwark and the City of London Corporation ("the Councils").

2. As its name implies, the Transfer Order provided for the transfer from local highway authorities to TfL of specified property and liabilities relating to highways designated as GLA roads by the Designation Order. The present dispute concerns, in particular, the meaning of the following provisions in article 2 of the Transfer Order ("article 2"):

> "(1) Subject to paragraph (2) and article 4 below, on the operative date there are hereby transferred to Transport for London in relation to each GLA road -
>
> (a) the highway, in so far as it is vested in the former highway authority;
>
> (b) the property mentioned paragraph (3) in so far as, on the designation date, it was vested -

(i) in the former highway authority for the purposes of their highway functions in relation to the GLA road …

…

(3) The property referred to in paragraph (1)(b) is -

(a) land, other than land -

(i) vested in the former highway authority for the purpose of being used for the storage of material required wholly or mainly for the maintenance and improvement of other highways;

(ii) where the former highway authority is a relevant authority, held by that authority for the improvement or development of frontages to the highway, or of land adjoining or adjacent to the highway; ..."

The dispute arose, and was directed to be determined as a preliminary issue, in an arbitration held under article 8 of the Transfer Order. At its heart, the appeal is about what is transferred by the words in paragraph (1)(a) of article 2:

> "the highway, in so far as it is vested in the former highway authority."

The question is whether that phrase captures everything which the former authority owns in the vertical plane bounded by the road, which may include all the airspace above and all the subsoil below the surface of the road, or only that part which is necessary for the operation, maintenance and repair of the road, ie a slice of the airspace and a slice of the underlying subsoil.

3. The Secretary of State's drafting team adopted, as their model for article 2, the content of section 265 of the Highways Act 1980 ("section 265") which provides for the transfer of property and liabilities upon a highway becoming, or ceasing to be, a trunk road. Although not part of that Act, article 2 therefore forms part, at least

by inheritance, of what counsel fairly described as the rich tapestry of the highways legislation in England and Wales.

4. In *Farrell v Alexander* [1977] AC 59, at 73, Lord Wilberforce said:-

> "… self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve."

Goodes v East Sussex County Council [2000] 1 WLR 1356 was a case about the Highways Act 1980, and its predecessor, the Highways Act 1959. After citing Lord Wilberforce's well-known dictum, Lord Hoffmann continued, at p 1360H:

> "It seems to me quite impossible, in construing the Act of 1959, to shut one's eyes to the fact that it was not a code which sprang fully formed from the legislative head but was built upon centuries of highway law. The provisions of the Act itself invited reference to the earlier law and in some cases were unintelligible without them."

See also, to much the same effect: *Cusack v Harrow London Borough Council* [2013] UKSC 40; [2013] 1 WLR 2022, per Lord Carnwath at para 19 and per Lord Neuberger at paras 64-65.

5. Lord Wilberforce's wise words have lost none of their force, in an era which has seen an exponential increase in the complexity of legislation. It is hard enough on the law-abiding public that legislation is often unintelligible without the assistance of skilled lawyers. It is even worse if its meaning requires, in addition, the assistance of a legal historian. None the less, this is a case, as were the *Goodes* and *Cusack* cases, where neither the analysis of the dispute as to statutory meaning, nor the appropriate solution to it, can be undertaken without substantial recourse to the history of English and Welsh highways law and in particular legislation. Even the innocent sounding word "highway" is itself capable of having a range of different meanings, dependent upon the context in which it is used.

The Statutory History

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

> "It was left to statute, therefore, to create an interest in land which was to be held by the body on whom the duty to repair had fallen."

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

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

8. But a series of 19th century cases beginning with *Coverdale v Charlton* (1878) 4 QBD 104 and culminating in the decision of the House of Lords in *Tunbridge Wells Corpn v Baird* [1896] AC 434, established that the successive statutory provisions for the automatic vesting of proprietary interests in highways in the bodies responsible for their maintenance and repair operated in a much more limited way than would a simple conveyance or transfer of the freehold. First, it was a determinable, rather than absolute, fee simple, which would end automatically if the body responsible for its repair ceased to be so responsible (eg if the road ceased to be a public highway): see *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785. Secondly it was inalienable, for so long as that responsibility

lasted. Thirdly, and most importantly for present purposes, statutory vesting conferred ownership only of that slice of the land over which the highway ran, viewed in the vertical plane, as was necessary for its ordinary use, including its repair and maintenance. Following the example of counsel, I shall call this "the Baird principle".

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

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

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

> "It seems to me very reasonable then to interpret this enactment in a way which gives everything that is wanted to be given to

> the public authority for the protection of the public rights without any unnecessary violation of the rights of the landowner."

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

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

At p 442 Lord Herschell said:

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

12. The modern successor currently in force, to the 19th century legislation to which those authorities refer, is section 263 of the Highways Act 1980. It provides, so far as is relevant, as follows:

> "Vesting of highways maintainable at public expense.
>
> (1) Subject to the provisions of this section, every highway maintainable at the public expense together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway.

(2) Subsection (1) does not apply -

to a highway with respect to the vesting of which, on its becoming or ceasing to be a trunk road provision is made by section 265 below, …"

It was, rightly, common ground between counsel that the Baird principle is firmly embedded in section 263. Apart from the section numbers, this provision for automatic vesting was taken, word for word, from section 226 of the Highways Act 1959. In its 1959 Report, the Committee of Consolidation on Highway Law, chaired by Lord Reading, which had been asked to consider the then draft bill, and whether amendments "not of substantial importance" to existing legislation should be made, clearly understood the rationale for the application of the Baird principle to what became section 226 (then clause 225), at para 135. They said:

"The enactments reproduced in the clause have frequently been considered by the courts and it has been held that they vest in the highway authority the property in the surface of the highway and in so much of the actual soil below and the air above as may be reasonably required for its control, protection and maintenance as a highway."

13. Of rather more recent origin are those statutory antecedents to what is now section 265 of the Highways Act 1980, which make provision for the transfer of property and liabilities in connection with the designation of a highway as a trunk road, and the revocation of any such designation. These provisions respond, not to the need to vest in a highway authority rights formerly enjoyed by private owners of the land, but rather to the need to transfer such rights (and liabilities) from one highway authority to another where the changed status of the highway causes a change in the identity of the public body responsible for its maintenance, repair and operation. Prior to 1929 there was no specific statutory provision for this purpose. In *Finchley Electric Light Co Ltd v Finchley Urban District Council* [1903] 1 Ch 437 the question was whether the defendant as local highway authority could restrain the running of a power cable by the plaintiff at a height of 34 feet above Regents Park Road in London. The council had acquired property rights in relation to the road by automatic vesting under section 149 of the Public Health Act 1875 (a direct statutory predecessor of what is now section 263), the previous owners having been turnpike trustees, who had acquired it for the construction of a road. The fact that the council's predecessors in title were turnpike trustees did not permit the Court of Appeal to do otherwise than apply the Baird principle to the automatic vesting achieved by section 149, even though the turnpike trustees had acquired their title by conveyance in unqualified terms, so as to have been the owners of the whole of the vertical plane above and below the location of the road. Collins MR said:

> "It seems to me that the standard which determines this question is, not how much the owner has to give, but how much the local authority under the Public Health Act have the right to take."

14. A hesitant start towards a more bespoke regime for transfers of property between successive highway authorities was made in section 29 of the Local Government Act 1929, in relation to main roads (renamed county roads) for which, thereafter, county councils rather than local councils were to be responsible. Section 29 affords little assistance for present purposes because it appears to provide for the vesting only of the materials of the road and the drains belonging to it, leaving the vesting of property in the land itself (including the airspace above it) to the then provision for automatic vesting, in the Public Health Act 1875.

15. A more ambitious property transfer scheme was undertaken in relation to newly designated trunk roads by section 7 of the Trunk Roads Act 1936. It provided as follows:

> "*Transfer of property and liabilities.*
>
> (1) When a road becomes a trunk road, then, subject to the provisions of this section, of the property which immediately before the date on which the road became a trunk road was vested in the former highway authority for the purposes of their functions in relation to the road … there shall, as from that date, be transferred to, and vest in, the Minister, by virtue of this section, the following property, that is to say:-
>
> > The road and any land (not being land vested in the former highway authority for the purpose of being used for the storage of materials required wholly or partly for the maintenance, repair or improvement of other roads or land acquired for the improvement or development of frontages or of land abutting on or adjacent to the road); …"

16. This was the provision in force in relation to trunk roads when the Reading Committee came to review the consolidating and amending Highways Bill in 1959. Clause 229 of the Bill (which became, without amendment, section 228 of the 1959 Act) provided as follows:

"*Transfer of property and liabilities on change of status of highway.*

(1) Where a highway becomes a trunk road, then, subject to the provisions of this section, there shall, as from the date on which the highway becomes a trunk road, be transferred to the Minister by virtue of this section -

(a) the highway, in so far as, immediately before said date, it was vested in the former highway authority, and

(b) the property mentioned in the next following subsection, being property which, immediately before the said date, was vested -

(i) in the former highway authority for the purposes of their functions in relation to the highway, or

(ii) in a council for the purposes of functions in relation to the highway under any enactment to which this section applies, …

and the highway and other property so transferred shall by virtue of this section vest in the Minister:

(2) The property referred to in paragraph (b) of the foregoing subsection is -

(a) land, other than land -

(i) vested in the former highway authority for the purpose of being used for storage of materials required wholly or mainly for the maintenance or improvement of other highways, or

> (ii) acquired for the improvement or development frontages to the highway, or of land adjoining or adjacent to the highway …"

17. It will be immediately apparent that there are significant linguistic similarities and differences between section 7 of the 1936 Act and section 228 of the 1959 Act. What was previously called "the road" is now called "the highway". Whereas, in the 1936 Act, the transfer both of the road and other property (including land) was all regulated by the condition that it had been vested in the former highway authority "for the purposes of their functions in relation to the highway" that condition is, in the 1959 Act, applied in the same language to other property including land, but not in express terms to the highway. Rather, the condition relating to the highway itself is that it is transferred "in so far as, immediately before the said date, it was vested in the former highway authority". There is also, in section 228(6), a provision for reverse transfer where a trunk road ceases to be a trunk road but it is not suggested that this significantly affects the present dispute.

18. Nothing in the Reading report (which includes a short commentary on what was then clause 227) suggests that the Committee thought that these changes to the language and layout of the provisions for transfer of property in relation to trunk roads effected any material change to the substance of those provisions.

19. The wording of section 228 of the 1959 Act was carried forward into what is now section 265 of the 1980 Act with very little alteration. The phrase "and the highway and other properties so transferred shall by virtue of this section vest in the Minister" has been removed. As already noted, article 2 of the Transfer Order takes as its model the provisions of section 265, again with no amendment which has any consequence in relation to the present dispute. It was, more or less, common ground that since article 2 had been drafted on the basis of the model constituted by section 265, it was to that section that recourse had to be made to resolve the dispute as to the meaning of the article.

Analysis

20. The question for determination on this appeal, which is more focussed than the more widely-drawn preliminary issues, is whether the provision in article 2(1)(a) for the transfer to TfL of "the highway" in relation to a GLA road, and the identical provision in section 265(1)(a) in relation to a trunk road, is governed by the Baird principle so as, in every case, to limit the property transferred within the vertical plane above and below the highway to the zone of ordinary use. The appellant TfL claim that it is not so limited. The respondent Councils say that it is.

21. This would be an arid academic question if the only way in which local authorities (including the respondent Councils) could ever acquire property rights in relation to highways was by automatic vesting under section 263 and its predecessors. If that were so, the former highway authorities would only own the zone of ordinary use, and nothing in the airspace above it or the soil below it could ever be transferred, either under section 265(1)(a) or under article 2(1)(a). But local highway authorities may also acquire, and the Councils certainly have acquired, property rights in relation to highways by other means. They include compulsory purchase and acquisition by private treaty, which is completed in both cases by conveyance or transfer. Furthermore, local authorities may come to have property rights in relation to highway land for purposes other than highways purposes, and may acquire such rights, again, by compulsory or voluntary purchase, by means of conveyance or transfer. In the generality of such cases (save, that is, where there is a reservation of part of the vertical plane in the conveyance, or where the transferor does not own the whole of it) the local authority will acquire ownership of the whole of the vertical plane, not just the zone of ordinary use. Local authorities may also come to have ownership rights in relation to highways by being or becoming adjoining owners: see below.

22. Furthermore, the ownership of airspace above, and subsoil below, the zone of ordinary use relating to a highway may, particularly in Central London, be of substantial commercial value. Buildings are commonly constructed across a highway in the airspace above that part needed for its use as such. The ground beneath highways is often intensively used for other purposes, such as underground railway stations, public lavatories and even, under the approach to Blackfriars bridge, a shooting gallery. Similarly, ownership of the airspace and subsoil, even where not yet used for buildings or other structures, may have substantial development value. These complexities are well illustrated in the admirable award of the arbitrator Mr John Male QC, and in the supporting materials.

23. There is nothing new about disputes concerning highway ownership arising from commercial motivation. The question in the very earliest case, *Coverdale v Charlton*, was whether the highway authority had a sufficient proprietary right in the surface of the highway to let it for pasturage, sufficient to enable the plaintiff as lessee to bring proceedings for interference with it. It was sufficient for the court's affirmative conclusion that the highway authority did own the surface of the highway, so that the vertical plane issue in the present case did not arise.

24. TfL's case, which was broadly accepted both by the arbitrator Mr John Male and, on the first appeal, by Mann J, may be summarised in this way. The purpose of the Transfer Order, as part of a scheme under which TfL replaced the Councils as highway authority in relation to GLA roads was, at least in relation to property rights, to place TfL squarely in the shoes of those Councils. Accordingly, whatever

part of the vertical plane was owned by the Councils on the operative date, transferred under article 2(1)(a) to TfL.

25. From the generality of this conclusion the arbitrator made this exception. Where particular layers or slices of subsoil and/or airspace (for example, certain structures) may have received or acquired a separate identity by the operative date, such that they could not properly be called parts of the highway, ownership in those slices would not pass to TfL. This qualification is recorded in paragraph 265.2(1)(c) of his award.

26. On appeal, Mann J recorded a more significant concession made by Mr Morshead QC on behalf of TfL, namely that its claim "related to land acquired for or appropriated to highway purposes": see para 56 of his judgment. At common law (and subject to any statutory vesting) the owner of land adjoining a highway is taken to be the owner of the subsoil beneath it and the airspace above it "*ad medium filum*" ie as far as the centre line of the highway. If the same person owns the adjoining land on both sides of the highway, then prima facie that person owns the whole of the vertical plane defined by the highway, outside the zone of ordinary use. As the judge explained, the specific purpose of TfL's concession, quoted above, was to renounce any claim to a transfer of parts of the vertical plane above and below a GLA road where the Council's ownership of it derived from its status as the owner of adjoining land.

27. The Councils' case, which was broadly accepted by the Court of Appeal, may be summarised as follows. The purpose of the Transfer Order, like the purpose of all provisions for statutory vesting of property in highway authorities, was to vest in TfL only those ownership rights in the vertical plane of the highway which were necessary to enable it to perform its functions as highway authority. Thus the Baird principle applied to article 2 just as much as it did to statutory vesting under section 263 and to transfer of property relating to trunk roads under section 265. That was apparent from the fact that in all those instances, the drafter defined the property transferred as "the highway", which had by the time of the Transfer Order come to have a clear and consistent meaning, limited to the zone of ordinary use. Further, any more generous interpretation of article 2(1)(a) would expropriate from the Councils valuable property rights, particularly in Central London, without compensation to their ratepayers. Accordingly, article 2(1)(a) transfers as "the highway" only the zone of ordinary use, leaving the Councils as continuing owners of anything else which they owned on the operative date within the vertical plane.

28. The question really boils down to this: does the Baird principle apply to article 2? In respectful disagreement with the Court of Appeal, I do not regard article 2 or, for that matter, section 265, as governed or constrained by the Baird principle. My reasons follow.

29. In my judgment article 2(1)(a) transfers to TfL ownership of all that part of the vertical plane relating to a GLA road vested in the relevant council on the operative date, but only to the extent that ownership was then vested in the council in its capacity as former highway authority. That is, in my view, the true meaning of the phrase "the highway, in so far as it is vested in the former highway authority". It follows that:

i) rights held by the Councils in the vertical plane of a highway as adjoining owner, for purposes other than highway purposes, do not pass under article 2(1)(a). This is because they are not held by the Council in its capacity as highway authority.

ii) rights originally acquired for purposes other than highway purposes, or appropriated to those other purposes by the operative date, do not pass under article 2(1)(a). This is so whether or not some non-highway structure has by then been constructed. If acquisition or appropriation for non-highway purposes has occurred by the operative date, it matters not that the relevant purpose has yet to be fulfilled, so that the relevant part of the vertical plane remains undeveloped.

iii) rights originally acquired for highway purposes in the vertical plane, for example by conveyance on compulsory acquisition for highway purposes, do pass under article 2(1)(a), even if they extend beyond the zone of ordinary use, provided that they have not, by the operative date, been appropriated to some non-highway use outside the zone of ordinary use.

iv) All these consequences, and in particular the first, flow from the true construction of article 2, rather than merely by way of TfL's concession as recorded by Mann J.

30. It may be that sub-paragraph (ii) of the above summary differs a little from the reasoning of the arbitrator. This is because, whereas he regarded a non-highway structure actually built in the vertical plane (like an over-flying building of underground public lavatory) as falling outside the definition of "highway" for all purposes, he did not (at least expressly) also regard the acquisition or appropriation of part of the vertical plane for non-highway purposes as sufficient on its own to take that part, even if undeveloped, out of the property transferred under article 2(1)(a).

Meaning of "highway"

31. The Court of Appeal concluded that "highway" as used in article 2 and section 265 had a clear common law meaning, limited in the vertical plane to the zone of ordinary use. I respectfully disagree. The word "highway" is not a defined term, either in the 1980 Act, in the Transfer Order, or in the GLA Act. There is a limited explanation, in section 328 of the 1980 Act that:

> "In this Act, except where the context otherwise requires, 'highway' means the whole or a part of a highway other than a ferry or waterway."

This is largely circular so far as concerns the core meaning of "highway" and, in any event, subject to context. It does not follow that the interpreter is therefore required to find some uniform meaning of the word "highway" wherever it is used, either in the relevant legislation or, as the Court of Appeal thought, at common law.

32. There is in my view no single meaning of highway at common law. The word is sometime used as a reference to its physical elements. Sometimes it is used as a label for the incorporeal rights of the public in relation to the locus in quo. Sometimes, as here, it is used as the label for a species of real property. When used within a statutory formula, as here, the word necessarily takes its meaning from the context in which it is used.

33. In agreement with counsel and with the Court of Appeal, I do consider that the meaning of article 2 is to be found by an examination of the meaning of the almost identically worded section 265. This is not merely because of the linguistic similarity between those two provisions, but because the whole of the structure for the transfer of property and liabilities in the Transfer Order is closely modelled on the pre-existing structure of the provisions in section 265 relating to trunk roads.

34. It is tempting but, in my view, wrong to assume that, where sections 263 and 265 both refer to "highway" as a label for real property rights which are to be vested in a highway authority, the word "highway" must therefore have precisely the same meaning in both sections. This is not merely because the word appears as part of two quite differently worded provisions. Rather, it is because, although now lying almost side by side in a consolidating statute, the two sections have completely different ancestry, and serve two very different purposes. As already noted, section 263 takes away from private ownership only those rights in the vertical plane of the highway which are necessary to enable the highway authority to perform its statutory functions of operation, maintenance and repair. By contrast, section 265 merely

transfers rights in the vertical plane already owned by one public authority to a successor public authority, so that the successor can stand in the shoes of its predecessor so far as ownership is concerned. This is, in particular, apparent from the way in which the Bill which became the Trunk Roads Act 1936 was described to Parliament by the then Minister for Transport at its second reading. Speaking of clause 7, he said:

> "The basis for the transfer is, as laid down in clause 7, that the Minister should take over the road and all properties and liabilities attaching to it …"

35. In the House of Lords the Earl of Erne, speaking for the Government, described the objectives of the Bill as follows:

> "The principle on which the Bill is based is to make a clean transfer of responsibility …"

36. As already explained, section 7 of the Trunk Roads Act 1936 is the original progenitor of what is now section 265, having been significantly re-worded in 1959 as section 228 of the Highways Act 1959, without any apparent intention thereby to effect any change of substance in its meaning.

37. There is no reason why the Baird principle should apply so as to restrict the nature or extent of property being transferred between two public highway authorities, one of which is stepping into the shoes of the other. The only limitation which does need to be imposed is one which restricts the rights transferred to those enjoyed by the former highway authority in its capacity as such. If the former authority enjoys rights in the vertical plane of the highway in some other capacity, such as adjoining owner, or for other public purposes, there is no sensible reason why those rights should be transferred to its successor as highway authority, merely because of the happenstance that they were vested in the former authority on the operative date.

38. Full effect to that qualification upon the extent of the rights transferred is given if the words in section 265(1)(a) "in so far as, immediately before the operative date, it was vested in the former highway authority" are taken as meaning vested in the former highway authority in its capacity as such. When this way of interpreting section 265(1)(a), and the similarly worded article 2(1)(a), was suggested by the court to Mr Morshead for TfL, he acknowledged, upon reflection although not by way of concession, that this might well be correct.

39. By contrast, the respondent Councils' case, that "highway" in section 265 and article 2 can never mean more than the zone of ordinary use, makes the words which immediately follow, quoted above, redundant. A highway authority always has vested in it the zone of ordinary use, because of section 263, so the qualification beginning with the words "in so far as" then becomes meaningless.

Multi layering

40. Both the arbitrator and Mann J were powerfully affected by a perception of the unattractive consequences of the Councils' construction, under what may be labelled as multi-layering of the vertical plane. Where a local highway authority had acquired land by compulsory purchase (or private treaty) for the purpose of building a road, and thereby had the whole of the vertical plane conveyed or transferred to it, the effect of the Councils' construction of section 265 and article 2 would be, for the first time, to split that vertical plane between two successive highway authorities, one owning the top slice and the bottom slice, and the other owning the middle slice constituted by the zone of ordinary use. As the arbitrator put it, at para 104:

> "With all due respect to the Councils, I cannot see what rational purpose is served by there being two public bodies owning different layers of what was formerly owned by one single public body."

41. I agree. The Court of Appeal acknowledged that this was a consequence of its interpretation but noted that multi-layering of the vertical plane was already endemic within Central London, and that it was an insufficient factor to overcome what it regarded as the plain meaning of the word "highway". In my view, where the transposition of the settled meaning of a word from one section to another section of a complex consolidating statute produces an irrational result, that is a powerful reason for treating the word as having different meanings in those different contexts. Furthermore, although article 2 only has effect in London, section 265 has effect in urban and rural areas alike.

42. It is of course true that some layering of the vertical plane is inevitable in relation to highways, both in rural and urban areas. For example, it occurs whenever there is automatic vesting under section 263. But in such a case the layering arises between a public authority on the one hand and private owners on the other, for reasons which are not irrational. Equally, and particularly in the modern urban environment, there may be layering of the vertical plane between different public authorities, such as those responsible for highways, sewers and underground railways. Again, this is for reasons which have a rational purpose. By contrast, the irrationality identified by the arbitrator is that arising from two different highway

authorities owning parts of the vertical plane in the same highway. To that I would add that, on the Councils' case, by virtue of the transfer of highway functions from one to the other, the former authority, which held rights in the vertical plane only as highway authority, continues to enjoy those rights while it has no further statutory responsibilities to discharge in its capacity as such. It is difficult to identify any sensible purpose served by such an outcome.

43. I acknowledge also that my interpretation of article 2(1)(a), which limits the rights transferred to those transferred by the former highway authority in its capacity as such, will also lead to layering of the vertical plane in some cases where it did not previously exist. This will occur, for example, where the former authority is an adjoining owner (with rights *ad medium filum*) or where the former authority has rights in part of the vertical plane for other statutory purposes, such as sewerage or the operation of underground railways. But again, there is nothing irrational about layering of that kind.

Section 266A

44. The Court of Appeal was significantly influenced in its reasoning by a perception of the difficulties which might flow from TfL's interpretation of article 2, in conjunction with section 266A of the Highways Act 1980. Mr Elvin QC for the respondent Councils pressed the same point upon us in his own excellent and succinct submissions. Section 14B of the 1980 Act empowers the Mayor of London to direct that a highway or proposed highway shall become or cease to be a GLA road. Section 266A provides for transfer of property and liabilities upon such an event. It contains provisions which broadly reflect article 2(1)(b) and (3) of the Transfer Order, for the transfer of property including land, but contains no equivalent to article 2(1)(a) providing expressly for the transfer of the highway itself. Mr Elvin submits that this must mean that in such a case, rights in the highway itself are transferred only under section 263, subject of course to the Baird principle. Thus, if TfL's interpretation of article 2(1)(a) is correct, TfL would receive more of the vertical plane upon the original designation of a GLA road under the Designation Order than it would have to give back under section 266A if that designation was subsequently revoked under section 14B, an irrational outcome which cannot have been intended.

45. I agree that this would be a surprising and probably unintended outcome, but not that it is the consequence of the omission of an express reference to the highway in section 266A. In my judgment, a preferable view may be that when a highway becomes or ceases to be a GLA road by virtue of an order made under section 14B, rights in the nature of real property in the vertical plane of the highway pass under section 266A(4)(a) as "land". It is preferable to Mr Elvin's construction because a conclusion that rights in the highway itself only pass by virtue of section 263 would

introduce the Baird principle into a context (transfer between successive public highway authorities) to which it has no sensible application. I accept that this requires the word "land" to be given a different, larger, meaning in section 266A than it has in article 2, but this is simply because its narrower meaning in article 2 is necessitated by the separate express treatment of rights in the highway as real property; ie as land. It is another example of identical words having different meanings as necessitated by their different contexts.

46. I need express no final view on the interpretation of section 266A because it is not directly in issue in this case. Its later date means that it cannot be an aid to the interpretation of section 265, which was the model chosen for article 2, rather than the differently framed section 266A.

The *Baylis* case

47. Mr Elvin sought also to derive assistance from dicta of Mr Lewison QC (as he then was) in *Secretary of State v Baylis (Gloucester) Ltd* (2000) 80 P & CR 324, in a judgment with which the Court of Appeal agreed. The issue in the *Baylis* case did relate to what had by the time of the trial become a trunk road, but it had nothing to do with the extent of rights in the vertical plane of a highway transferred between highway authorities under what is now section 265. The dispute was about whether the strip of land in dispute, which adjoined the physical surface of the road, had ever been dedicated to the public as part of a highway, and that turned upon the true construction of a written agreement between the then owner and the county council. The adjacent highway (for which the dedicated strip was to facilitate an improvement) had later been designated a trunk road, but that had no consequence for the determination of the dispute. In an otherwise unimpeachable summary of the effect of land becoming part of a highway, Mr Lewison said:

> "The effect of 'trunking' a highway is that the highway vests in the Minister (now the Secretary of State). The extent of such vesting is such part of the land as is necessary for the highway authority to perform its statutory functions. It has been described as the 'top two spits'."

It did not matter in that case whether the Secretary of State received the top two spits (or as I would prefer to call it the zone of ordinary use) or the whole of the vertical plane. Furthermore the former highway authority had never obtained more than the zone of ordinary use, because its title depended upon automatic vesting under what is now section 263, following dedication. I therefore respectfully disagree with that small (and obiter) part of Mr Lewison's succinct summary of the relevant highways law, for the detailed reasons which I have given.

Expropriation

48. A final reason why the Court of Appeal was persuaded that transfers under article 2 should be subject to the Baird principle of necessity was that, otherwise, the residents and ratepayers of the respondent Councils would be deprived, without compensation, of more property than was necessary to fulfil the purpose of constituting TfL as the relevant highway authority. I have not been persuaded by this analogy. In every case of a transfer between highway authorities, whether under section 265 or article 2, the former authority is being relieved of its responsibilities for operation, maintenance and repair of the relevant highway, and all associated liabilities (subject to certain exceptions). The transfer of property held by the former highway authority in its capacity as such is simply the quid pro quo for that relief from responsibility. The ratepayers get the full financial benefit of that relief from responsibility. There may be cases where the value of the transferred ownership of the vertical plane exceeds the financial burden of the responsibilities, eg where the vertical plane outside the zone of ordinary use has development value. That may be part of the reason for this long and costly litigation. But usually it will have no such excess value. The meaning of article 2 and section 265 cannot vary as between one highway and another by reference to such infinitely variable economic comparisons.

Burden of Proof

49. While acknowledging that article 2(1)(a) of the Transfer Order might best be interpreted as subject to the limitation that rights in the highway should have been vested in the former highway authority in its capacity as such, Mr Morshead for TfL submitted that there should, nonetheless, be a strong presumption that all rights in the vertical plane as were in fact vested in the former highway authority on the operative date were vested in it in that capacity. It would be, he said, for the former authority (here the respondent Councils) to prove otherwise, the burden being firmly upon them.

50. I can see no good reason why any such presumption or burden of proof should be identified as flowing from the true interpretation of article 2. The papers lodged with the court on this appeal demonstrate that the resolution of these vertical plane issues in the context of highways in Central London, where they cannot be agreed, is an intensely fact-sensitive and complex task. As already explained, the Councils will have acquired rights in the vertical plane in a variety of different ways, and it will be necessary to analyse both the extent of the rights acquired, and the capacity in which the Council acquired those rights. Sometimes the GLA road has a non-GLA highway running over or under it. There are frequently buildings and other structures encroaching upon the vertical plane of the highway, outside the zone of ordinary use. The arbitrator should not be saddled with a presumption as to the outcome of that difficult factual analysis, one way or the other.

The Lateral Plane

51. It was mentioned by counsel, and in the statement of agreed facts and issues, that the resolution of the dispute in this appeal would also have consequences in the lateral plane, rather than only the vertical plane, of land defined by a highway. That may be so, but all the argument before this court has been directed to the vertical plane. Nothing in this judgment should be taken as implying any view about lateral plane issues, which were not explored.

Conclusion

52. For the above reasons, I consider that this appeal should be allowed. The interpretation which I conceive to be correct differs in some small respects from that adopted by the arbitrator and indeed by Mann J, in dismissing the first appeal. Furthermore the questions as originally framed in the preliminary issues determined by the arbitrator have since narrowed. It will therefore be necessary to receive submissions about the precise form of order which this court should now make in relation to the preliminary issues which are the subject of this appeal.