*343 Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
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(1991) 61 P. & C.R. 343

Court of Appeal

(Glidewell and Mccowan L.JJ. , and Sir Roualeyn Cumming-Bruce):

July 27, 1990

Compulsory purchase—Acquiring authority and land-owner making agreement in consideration of owner withdrawing objections—Before order confirmed Green Paper issued which, if implemented, would reduce benefit of agreement to land-owner—Owner attempting to reinstate objections—No evidence that objections communicated to Secretary of State—Whether failure to take account of a relevant consideration

The respondent (Bolton) owned 103.9 acres of land, which was included in 195 acres which was being acquired by compulsory purchase by the appellant (G.M.W.D.A.). Bolton agreed to withdraw its objections to compulsory purchase following an agreement whereby the G.M.W.D.A. undertook not to act on the power to acquire Bolton's land but would take a 16½-year licence on it and, at the end of the period, convey to Bolton the other land acquired under the order. The agreement hinged on the directing power of the G.M.W.D.A, to compel the districts to dump all their rubbish on the site, resulting in its being filled within the period of the licence. Bolton withdrew its objection, but did not explain its reasons to the inspector. Thus, the Secretary of State was unaware of the agreement. Before he had confirmed the order, his Department issued a Green Paper which proposed changing the status of authorities such as the G.M.W.D.A., freeing the district councils from the statutory duty to deliver waste to the G.M.W.D.A. and introducing competitive tendering. Bolton's solicitor telephoned the Department, outlined the effect of the Green Paper, and stated that in view of the changed position Bolton would object to the compulsory purchase order as it had only withdrawn its objection on the ground that the dumping of rubbish would be completed within a short period. The points were never committed to writing, and the Secretary of State confirmed the compulsory purchase order. Following Bolton's application to the High Court, submitting that if the proposals became law the G.M.W.D.A. would lose the power to ensure that the site would be filled within the timescale, and that the basic reason for Bolton's withdrawal of its objection would thus disappear, the order was quashed. On appeal it was argued for the G.M.W.D.A. that Bolton was effectively asking the Secretary of State to receive an objection which it had not hitherto put forward because of the agreement. The failure to follow the telephone call up with a letter relieved the Secretary of State from having to take account of whatever material Bolton wished to put before him.

Held, dismissing the appeal, that a decision maker ought to take into account matters which might cause him to come to a different decision if taken into account. He was only entitled to disregard those matters which were so trivial, in relation to the particular decision, as not to affect it. There was a distinction between matters which a decision maker was obliged by statute to take into account and those where the obligation was to be implied from the nature of the decision and the matter in question. In the latter case it was for the judge to decide whether it was a matter to which the decision maker should have had regard. Where the judge had decided that the matter was fundamental to the decision and could well have made a difference

he could hold that the decision was not validly made. Even so, in exceptional **344* circumstances, the judge was entitled, in the exercise of his discretion, not to grant relief.

In this case it was accepted that Bolton had drawn the attention of the officers of the Secretary of State to the effect of the Green Paper and to its reason for reinstating its objection and in spite of the fact that this information might not have reached the Secretary of State, it was accepted that it might have affected his decision and for this reason the decision must be quashed.

Cases cited:

(1) *Ashbridge Investments Ltd. v. Minister of Housing and Local Government [1965] 1 W.L.R. 1320; [1965] 3 All E.R. 371, C.A.*
(2) *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.*
(3) *Creed N.Z. Incorporated v. Governor-General [1981] N.Z.L.R. 172 .*
(4) *Eckersley v. Secretary of State for the Environment and Southwark London Borough (1977) 34 P. & C.R. 124, C.A.*
(5) *Prest v. Secretary of State for Wales (1983) 81 L.G.R. 193, C.A.*
(6) *R. v. Brent London Borough Council, ex p. Gunning (1985) 84 L.G.R. 168 .*
(7) *R. v. Hillingdon Health Authority, ex p. Goodwin [1984] I.C.R. 800 .*
(8) *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014; [1976] 3 W.L.R. 641; [1976] 3 All E.R. 665, H.L.*
(9) *Seddon Properties v. Secretary of State for the Environment and Macclesfield Borough Council (1981) 42 P. & C.R. 26 .*

Appeal by the Greater Manchester Waste Disposal Authority against the decision of Hodgson J., on March 26, 1990, quashing the compulsory purchase order on land at Red Moss, Horwich which comprised some 195 acres, including 103.9 acres belonging to Bolton Metropolitan Borough Council.

Representation

J. Sullivan, Q.C. and P. Village for the appellant (second respondent).
D. Keane, Q.C. and C. Cross for the respondent (applicant).

Glidewell L.J.

Under the Control of Pollution Act 1974 district councils are responsible for the collection of refuse. In Greater Manchester there is a statutory authority, the Greater Manchester Waste Disposal Authority, which is responsible for the disposal of waste collected in all but one of the districts in the former Greater Manchester County. Bolton Metropolitan Borough Council (which I shall call Bolton), one of the district councils in Greater Manchester and the respondent to this appeal, is the owner of some 103.9 acres of land at Red Moss, Horwich, in its district which adjoins an existing refuse tip.

On March 9, 1987, the authority made a compulsory purchase order on land at Red Moss, Horwich, comprising altogether some 195 acres including all Bolton's 103.9 acres. Bolton objected to the confirmation of the order, as did other people and statutory authorities. An inspector appointed by the Secretary of State for the Environment held an inquiry on January 12, 1988, and reported to the Secretary of State by letter. Over a year later, on March 28, 1989, the Secretary of State sent a letter indicating that he confirmed the compulsory purchase order with modifications. Bolton applied, under section 23 of the Acquisition of Land Act 1981 , to the High Court to quash the Secretary of State's decision. On March 26, 1990, Hodgson J. gave judgment quashing the compulsory purchase order. The **345* authority now appeals against his decision. Bolton seeks to support the judge's decision, having given a respondent's notice indicating one further ground. The Secretary of State does not appear.

Bolton's grounds for quashing the Secretary of State's decision, which the judge accepted, can be summarised as follows. The need for more land for the disposal of refuse in Greater Manchester is not and was not at any material time disputed. There was, however, strong local opposition to the authority's proposal to acquire the Red Moss site because of the effect which local residents feared tipping refuse on the land would have on the environment of the area. Despite this, shortly before the inquiry in January 1988 Bolton reached agreement with the authority that it would, in return for the authority's undertakings, withdraw its objection to the confirmation of the compulsory purchase order.

That agreement, which it would not be proper to dignify with the term of a contract, was embodied in a letter from the authority to Bolton dated January 11, 1988, which read as follows:

> **Red Moss—public inquiry.**
>
> I refer to our "without prejudice" meetings, letters and discussions regarding the GMWDA need to acquire the Red Moss site and your council's desire to negotiate a licence subject to satisfactory terms being agreed.
>
> I am authorised to give this undertaking on behalf of the GMWDA as one responsible public authority to another (subject to your council not pursuing a substantive objection at the forthcoming public inquiry as to the GMWDA need to acquire the Red Moss site for waste disposal purposes or the economic justification for such acquisition) that the authority in respect of all the land agreed owned by the council at Red Moss will accept:
>
> (a) licence of not less than 16½ years giving 15 years of active tipping over the total area to be acquired by the GMWDA at Red Moss;
> (b) licence will contain detailed provisions'to cover the substantial matters already agreed as follows (precise wording and effect to be agreed).

and then there follows a number of sub-paragraphs containing detailed provisions relating to the reinstatement and the waste reclamation plant and an annual payment to the council, based upon the tonnage tipped, and sub-paragraph (viii) reads:

> At expiry of the licence and after reclamation of the lands all the lands owned by GMWDA will be conveyed to the council and current negotiations have regard to this provision.
>
> If it is not possible to agree further matters outstanding between the parties in respect of the contemplated licence the authority would seek to implement the compulsory purchase order subject to confirmation by the Secretary of State. Matters of compensation would then be settled by the Lands Tribunal, failing agreement.
>
> I would be obliged if you would confirm your Council's agreement to the above arrangements.

The bundle does not include a letter indicating the council's agreement, but it is common ground that Bolton did agree. The outstanding matter ***346*** was effectively the not unimportant question of price per tonne, or thousand tonnes, or whatever it was to be, for the material to be tipped.

It is perhaps not entirely clear from that letter but it is the fact, as was explained to us, that the agreement between these two authorities was that if Bolton withdrew its opposition to the confirmation of the compulsory purchase order and if it was confirmed, then, despite having thus gained the power to acquire Bolton's land, the waste disposal authority would not acquire an interest in Bolton's land, but would take the licence from Bolton referred to in the document and then, at the end of the 16½-year term, would convey to Bolton the remainder of the land which it had acquired from other persons and authorities under the compulsory purchase order so that Bolton would then become the landowner of the reclaimed land.

The whole of the 195 acres or so was already the subject of a planning permission for tipping. It was a planning permission granted by the former Greater Manchester Council to itself under the notional procedure for the granting of planning permissions in that respect and it was subject to a number of detailed conditions, including the phasing of the tipping and works of restoration. Bolton's case before Hodgson J. was that under existing legislation the authority had the power, which it intended to use, to direct that refuse from the various metropolitan districts should all be disposed of at the Red Moss site. It would follow then that large amounts of refuse would be tipped every year and the site would be filled, it was anticipated, in not more than 15 years. The ability to fill and reclaim the site within this period outweighed, in Bolton's view, the disadvantages of receiving the large amounts of refuse in the meantime. For this reason Bolton agreed to withdraw its objection. The agreement hinged on the authority's power to direct refuse to the site. Hodgson J. in his judgment put that in this way, quoting an affidavit sworn by Mr. McGregor, the solicitor to Bolton:

> This directing ability of the authority goes to the heart of the case for the acquisition of the Red Moss site from the applicant as the landfill solution to the waste disposal problems of the Greater Manchester conurbation.

The inspector who held the inquiry reported to the Secretary of State for the Environment by a letter written in February 1988. The reason for Bolton's withdrawal of its objection was, it seems, not made clear to him. He was not given a copy of the letter from the authority of January 1988 and it seems that he was not told that Bolton had weighed the advantages and disadvantages and were particularly concerned with the rate at which the site would be refilled. And so all the inspector recorded in paragraph 2 of his decision letter was:

> During the first day of the inquiry all of the statutory objections were withdrawn unreservedly or subject to agreed modifications to the compulsory purchase order area as follows:
>
> (e) Bolton M.B.C.: Objection withdrawn subject to reservations regarding environmental protection measures;

which of course did not tell the Secretary of State anything about the issue to which I have been referring.

In January 1989 however, before the Secretary of State issued his decision letter and thus while he was considering whether or not to confirm ***347** the compulsory purchase order, his department issued a consultative document in the form of a government Green Paper entitled "The role and functions of waste disposal authorities." This proposed new legislation which would alter the nature of waste disposal authorities. What was proposed was the replacement of the existing waste disposal authorities with local authority waste disposal companies, to be jointly owned by the various contributing district councils. The document contains this passage at paragraph 39:

> When the local authority waste disposal companies are formed, English collection authorities (districts) will be freed from their duty under section 14(1) of the Control of Pollution Act to deliver waste to the waste disposal authority. Instead all collection authorities will be required to seek competitive tenders for the disposal of collected waste. This will transfer the duty to arrange for disposal under section 14(4) of the Control of Pollution Act from waste disposal to waste collection authorities but waste collection authorities will not have powers to provide facilities themselves except insofar as they might also have a controlling interest in a local authority waste disposal company. Local authority waste disposal companies will be free to submit tenders for work from the waste collection authority and to seek any other private or public sector waste disposals contracts they wish, either within or outside their areas …

Bolton's case is that if the Green Paper proposals become law they will remove the ability of the authority to direct that refuse should all come to its site from the various districts and thus remove from what will become the waste disposal company the power to ensure that the land be refilled within any particular given period of time. It follows, Bolton argue, that the basic reason for its withdrawal of its objection would disappear.

In the affidavit sworn by Mr. McGregor to which I have already referred he says this:

> 12. It is important to understand that against a background of strong local opposition with Bolton people not being enamoured of the proposition of being the dumping ground for all Greater Manchester's refuse the applicant took a decision to accept the use of its land for waste disposal in the belief on advice that it would be to the benefit of Greater Manchester generally. Importantly, the applicant's decision at that time on advice not to oppose acquisition was set in the knowledge that because of the high volumes of waste intended to be brought to the site by road and rail the local disruption had to be viewed against the prospect of obtaining the reclamation by tipping of a substantial area of land over a short period of time some ten to fifteen years to produce a beneficial recreation and agricultural after-use. It is material to understand the reclamation within the power of the authority to achieve within that timescale given the conurbation wide waste collection at its disposal.

and then he draws attention to a paragraph in the inspector's letter and a paragraph in the Secretary of State's letter:

> 13. Under the terms of the said consultation paper it is understood that the applicant's land if acquired will vest in a newly created Greater Manchester Local Authority Waste Disposal Company. That ***348** company will only utilise the applicant's land if it is successful in winning tenders for waste disposal from the respective metropolitan districts and the private sector. There can therefore be no practical certainty as to how, when or if, the land of the applicant will be restored in whole or in part. In these circumstances the applicant will have been seriously prejudiced if they are deprived of their land in not having the substantive benefit of large scale reclamation within a definite timescale. The applicant in its concern for its area and in particular the township of Horwich (with a population of 18,200) agreed that the land of the applicants should be the subject of a tipping licence made between the applicant and the authority; the land to remain within the ownership of the applicant

> and on the expiry of that licence the restored land of the applicant would be returned together with all other lands acquired for the purposes of the order being transferred at that time to the applicant.

And then he refers to the letter of January 1988:

> It is significant that this arrangement made with the authority was in consideration of withdrawal of the strategic and economic objections of the applicant to the compulsory purchase order.
>
> 14. Whilst the authority is empowered lawfully and have the means practically to honour such agreement the proposed successor Greater Manchester Local Authority Waste Disposal Company would appear not to be able to honour its terms (for example guaranteeing provision regarding the minimum amount of waste to be tipped each year) because it does not have the legal duty to arrange for disposal of waste within Greater Manchester nor (as described earlier) can the districts with such duty generally be charged with honouring such agreement as they are individually obliged under the new proposal to put their waste out to tender for subsequent disposal. Nor is it clear that such a tipping licence would automatically vest in the proposed company.

Then at paragraph 22 of his affidavit Mr. McGregor says:

> At the time the paper came to the knowledge of the applicant first in early February 1989 I spoke on the telephone to a Mr Coles a civil servant within the Department of the Environment a person whose name I had been given as being responsible for processing the work on obtaining the Secretary of State's decision on his inspector's report of the public inquiry into the order. I pointed out the significance of the consultation paper to him and the fact that in the light of the consultation paper the applicant was likely to object if the order was confirmed. I was told that there was nothing he could do and he explained at that time the Secretary of State's decision letter was “before their lawyers for scrutiny.” He explained that the provisions of the consultation paper were the responsibility of the local environment quality division of the department. I spoke to Mr S. Webb (who is referred to in the consultation paper as the person to whom comments should be sent) over the telephone to explain the applicant's concern and to clarify with him aspects of the consultation paper. He was unaware of the compulsory acquisition of land of the applicant or its context. I pursued the matter with the head of the division Mr F. Argent and Mrs Pender, a principal in the department. Whilst it seemed to me that ***349** both these civil servants after my explanations saw the relevance of issues in the consultation paper to determination or otherwise of the compulsory purchase order neither appeared willing or able to help address that issue with the division processing the work on the compulsory purchase order determination.

Despite those telephone calls, the Secretary of State, as I have said, confirmed the compulsory purchase order.

Hodgson J.'s reasoning for his decision to quash the compulsory purchase order was as follows. First, he concluded:

> There is clearly a distinction between matters which a decision maker is required by statute to take into account and matters which the law adds to those matters.

Then he refers to a previous decision of his own in *R. v. Brent London Borough Council* , and to three other decisions to which I shall have to refer later, one of which is *Creed N.Z, Inc. v. Governor-General, a decision of the Court of Appeal* of New Zealand. Hodgson J. said:

> I also referred to Cook J's distinction between relevant matters which an authority is entitled to take into account and that which it is required to take into account.

(Cook J. gave the first judgment in the *Creed N.Z.* case). Then over the page he referred to the argument of Mr. Sullivan for the waste disposal authority before him in the following words:

> Upon these authorities the submission is made that unless a decision maker is especially required to take into account some matter he is only "impliedly" required by law to take a matter into account if it is one which no reasonable Secretary of State would fail to take into account, because so fundamental to the decision which he has to take. I do not think that this conflation of *Wednesbury* principles is legitimate. One obvious difficulty is that, if the decision maker fails to consider a matter at all, he cannot decide upon its importance. And if he does consider it and decides that it is of no or little importance then that, *Wednesbury* reasonableness apart, is something with which the Court is wholly unconcerned. It seems to me that Mr Sullivan is, with great respect to his able argument, trying to consider, under one head two different questions, whether the decision maker has fallen into error and whether the court should grant relief. In my judgment the principle is as stated by Lord Bridge.

[That is a reference to a decision of the *House of Lords in Ex parte Bakhtaur Singh* to which he had already referred]

> A decision maker falls into error if he fails to take into account a relevant consideration. Some things are made relevant by statute, some things the judge decides are relevant. Relevance, it need hardly be said, is something which judges are well fitted to decide. I do not think there is any distinction to be drawn between what I might call statutory relevance and legal relevance, (though I concede that terminology is not altogether happy).
>
> At the second stage the matter is entirely different. Although the decision maker must consider all relevant matters, it by no means follows ***350** that, if he fails to consider one, the decision will necessarily be quashed. (If he does consider a relevant matter the weight he attaches to it is, of course, a matter for him). It is the standard not of relevance but of importance which at this stage is, in my judgment, an issue, although the courts have not always (because it is unnecessary) considered the two stages separately.

And then a little later he said:

> In many cases (though not this one) a court, when quashing a decision, can remit the matter to the decision maker to reconsider the matter, taking account of that which has previously been ignored. The test of importance in such a case must, I think, be whether the court concludes that the decision might have been different if the maker had had regard to the matter ignored. Whether the test is different when (as here) the only options open are quashing or refusing relief is a question which I shall have to consider hereafter. In general, it seems to me that, once a court has decided that a relevant matter has been ignored, the question it then has to ask is whether the ignored matter was so important that it ought not to have been ignored. And I think the test of importance must be whether, in the court's opinion, the decision might have been different if the matter had been considered.

Mr. Sullivan for the authority challenges this analysis. He says, and for this purpose I am grateful for the encapsulation of his argument in his skeleton argument, that he accepts that the relevant time for considering the validity of the compulsory purchase order is the date of confirmation by the Secretary of State. He accepts that while the Secretary of State is entitled to take into account changes in policy which come about after the inquiry and before confirmation that he is not obliged to take into account every policy change. Whether the Secretary of State is obliged to take into consideration any particular policy change depends on the circumstances, the importance, the relevance and the context of the inquiry, and the status of the policy. He quotes a sentence from *Ashbridge Investments Ltd. v. Minister of Housing and Local Government* from the judgment of Lord Denning [1] : "If … he has taken into consideration matters which he ought not to have taken into account, or vice versa."

Mr. Sullivan submits that in deciding what ought to be taken into consideration, it is necessary to distinguish between obligatory and permissible considerations. Obligatory considerations are matters which statute expressly or impliedly requires the decision maker to take into consideration, and he gives two examples of cases where that has been applied. Then he submits that the decision maker is impliedly required, because empowered, to take into consideration, if necessarily relevant, a factor because it is "so fundamental that it will be quite wrong as a matter of law for the authority not to have regard to its existence." [2] That is a quotation from the judgment of Woolf J. in *R. v. Hillingdon Health Authority, ex p. Goodwin* , an employment issue. Mr. Sullivan submits that since there is a discretion to take into consideration late policy and that discretion is vested in the Secretary of State, the question is whether the applicant can establish ***351** that no reasonable Secretary of State would have failed to take into consideration a particular policy change.

For the submission that, to be said to be relevant, a matter must be one which no reasonable Secretary of State would have failed to take into account, Mr. Sullivan refers us to a number of authorities. In date order they are, firstly, *Eckersley v. Secretary of State* , a decision of this court, in which Brown L.J., giving the leading judgment, said [3] :

> That it was conceded on both sides that the question whether in that case the cost of either acquiring property or of refurbishing it was a relevant consideration was a crucial issue.

Secondly, an authority to which I have already referred, the New Zealand *Court of Appeal decision in Creed N.Z.* where Cook J., now President of that court, said [4] :

> A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [5] :
>
> > If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.
>
> More recently in *Secretary of State for Education and Science v. Tameside Borough Council* Lord Diplock put it as regards the statutory powers of a Minister that [6] :
>
> > … it is for a court of law to determine whether it has been established that in reaching his decision … he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered …
>
> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision. And when the tests are whether a work is likely to be in the national interest and is essential for one or more of the purposes specified in s.3(3), it is not easy to assert of a particular consideration that the ministers were legally bound to have regard to it.
>
> Questions of degree can arise here and it would be dangerous to dogmatise. But it is safe to say that the more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account.

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Thirdly, *Prest v. Secretary of State for Wales* , a case about the acquisition of a site for a sewage disposal works where another site was suggested, in the course of which Watkins L.J. referred to the question of the relative costs of the development on the alternative sites as being something so fundamental that it was wrong not to take it into account.

Fourthly, *R. v. Hillington Health Authority, ex p. Goodwin* , to which I have already referred, where Woolf J. (as he then was) said [7] that a factor was "so fundamental that it would be quite wrong as a matter of law for the authority not to have regard to its existence"; and finally *R. v. Brent London Borough Council, ex p. Gunning and Others* in which Hodgson J. himself followed and adopted Woolf J.'s formulation.

While these authorities refer to the particular consideration as being fundamental, none of them adopts Mr. Sullivan's formulation. I agree with Hodgson J. that Mr. Sullivan's submission is a conflation of *Wednesbury* principles and that it is not justified by authority. Attractively, as always, though it was presented, I would reject it.

However, I also do not with respect adopt Hodgson J.'s division of the issue into two parts. He divided the issue which has to be considered by the court as follows, first, has the decision maker failed to take into account a relevant consideration, at which stage the importance of the consideration does not arise, and secondly, was the consideration so important that it ought not to have been ignored in deciding whether the court would interfere? In my opinion, with great respect to the learned judge, this is an oversophisticated analysis. The relative importance of the matter which has not been taken into account, is an aspect, and a very major aspect, of the question "was that consideration relevant?" or "should the decision maker have taken it into account?" I venture to suggest that from the authorities generally, and particularly those to which I have referred, one can deduce the following principles:

1. The expressions used in the authorities that the decision maker has failed to take into account a matter which is relevant, which is the formulation for instance in Forbes J.'s judgment in *Seddon Properties* , or that he has failed to take into consideration matters which he ought to take into account, which was the way that Lord Greene put it in *Wednesbury* and Lord Denning in *Ashbridge Investments* , have the same meaning.

2. The decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision making process. By the verb "might," I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.

3. If a matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus it is not a matter which the decision maker ought to take into account.

4. As Hodgson J. said, there is clearly a distinction between matters ***353** which a decision maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question. I refer back to the *Creed N.Z.* case.

5. If the validity of the decision is challenged on the ground that the decision maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision maker should have taken into account.

6. If the judge concludes that the matter was "fundamental to the decision," or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid.

> 7. (Though it does not arise in the circumstances of this case). Even if the judge has concluded that he could hold that the decision is invalid, in exceptional circumstances he is entitled nevertheless, in the exercise of his discretion, not to grant any relief.

I turn to apply these principles here. Did the Secretary of State in confirming the compulsory purchase order fail to take into account a consideration he should have taken into account? In relation to the (fortunately unusual) facts of this case, that depends upon two subsidiary questions. (1) Was the matter one which was raised as being relevant to his decision? In other words, was it before him at all before he reached his decision? (2) If so, might it have made a difference to his decision? Most of the argument, as on the facts, has related to the first of those questions.

Clearly at the inquiry stage this issue was simply not drawn to the inspector's attention at all. As I have said, the letter containing the undertaking was not put in and Bolton's reasons for withdrawing, particularly the importance of the short timescale for filling the site, were not explained to him. It is right that I should say that I regard that as a mistake on Bolton's part. It is no doubt being wise after the event to say so and perhaps the authority takes the same view itself now.

One then comes to consider Mr. McGregor's account of the telephone calls he made to officers of the department as set out in paragraph 22 of his affidavit. That paragraph, which I will not re-read, does not state in terms what he actually said. It is indirect speech.

> I pointed out the significance of the consultation paper to him … I spoke to Mr Webb … to explain the applicant's concern and to clarify with him aspects of the consultation paper.

Mr. Sullivan submitted that since what Bolton were asking the Secretary of State to do was now in effect to receive from them an objection to the confirmation of the compulsory purchase order which they had not hitherto put forward because of their agreement with the authority, they ought to have followed up the telephone calls with a letter to the department and that their failure to do so means that the Secretary of State was excused from taking account of the material, whatever it was exactly, to which Mr. McGregor referred. To put it another way, Mr. Sullivan says that if they ***354** had written a letter we could all have seen it and known exactly what it was that Mr. McGregor on behalf of Bolton was saying.

Again, for my part it would, I think, have been much better if a letter had been written. What effect it would have had one cannot say, but clearly it would have been difficult for it totally to be disregarded. But although I at first was minded to the view that the somewhat elliptical passages in Mr. McGregor's affidavit in the paragraph to which I have just referred, might not be sufficient to make it clear that he had drawn to the attention of the various officers of the department the nature of Bolton's objection and made it clear what their objection thus was, Mr. Keane reminded us of the earlier passages in the affidavit of which I have read paragraphs 12 to 14 inclusive. When Mr. McGregor says “I pointed out the significance of the consultation paper to him” and so on, Mr. Keane submits, Mr. McGregor must and can only be taken as meaning that he said to the various officers that which he has said in the earlier paragraphs of his affidavit, in substance if not in detail.

This was the matter over which I had most anxiety, but I have concluded that I accept Mr. Keane's submission in this respect. I do so the more readily because Mr. Keane had the opportunity to put this matter before Hodgson J. There was no counter-

evidence from an officer of the department before the learned judge. They had of course Mr. McGregor's affidavit. They did not seek to controvert it in any way. There was simply no evidence on behalf of the department, and no attempt to introduce fresh evidence in front of the judge when they heard the way Mr. Keane was putting it, and as I have said the department is not an appellant in this court.

I therefore for my part am prepared to accept that it was made clear to those officers what the objection that Bolton were now putting forward and which resulted from the change of circumstances which they feared the Green Paper would bring about, truly was. As to the second issue, that is to say, might that have made a difference to the Secretary of State's decision, if this matter had been communicated to whoever the decision maker truly was—and it appears that it never did in fact reach him or certainly there is no clarity as to whether it did—then it in my view follows that it might well have made a difference to his decision. In the sense in which I have used that phrase, there was a real possibility that it would have made a difference to his decision.

Although therefore I have not found myself able to agree with the formulation of the proper test which Hodgson J. adopted, applying the test I have propounded, the same result follows and I would therefore dismiss the appeal.

McCowan L.J.

I agree.

Sir Roualeyn Cumming-Bruce.

I agree.

Representation

Solicitors— Gouldens ; Sharpe Pritchard , London agents for J.W.G. McGregor, Borough Solicitor, Metropolitan Borough of Bolton.

Appeal dismissed with costs. Application for leave to appeal to the House of Lords refused. ***355**

Footnotes

1 *[1965] 1 W.L.R. 1320* at p. 1326.
2 *[1984] I.C.R. 800* at p. 808.
3 *(1977) 34 P. & C.R. 124* at p. 132.
4 *(1981) 1 N.Z.L.R. 172* at p. 182.
5 *[1948] 1 K.B. 223* at p. 228.
6 *[1977] A.C. 1014* at p. 1065.
7 *[1984] I.C.R. 800* at p. 808.

