Easter Term
[2010] UKSC 20
On appeal from: [2009] EWCA Civ 835

JUDGMENT

R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) *v* Wolverhampton City Council and another (Respondents)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Collins

JUDGMENT GIVEN ON

12 May 2010

Heard on 1 and 2 February 2010

Appellant
Christopher Lockhart-Mummery QC
Eian Caws
Charles Banner
(Instructed by CMS Cameron McKenna LLP)

1st Respondent
Neil King QC

Guy Williams

(Instructed by Wragge & Co LLP)

2nd Respondent
Christopher Katkowski QC
Scott Lyness
(Instructed by Ashurst LLP)

LORD COLLINS:

Introduction

1. This appeal is about compulsory acquisition of private property by local authorities under the Town and Country Planning Act 1990 ("the 1990 Act") in connection with the development or re-development of land. It raises for the first time, in the context of compulsory acquisition, a number of controversial issues which have arisen in the context of planning permission, including these: how far a local authority may go in finding a solution to problems caused by the deterioration of listed buildings; to what extent a local authority may take into account off-site benefits offered by a developer; and what offers (if any) made by a developer infringe the principle or policy that planning permissions may not be bought or sold.

2. The Raglan Street site is a semi-derelict site situated immediately to the west of, and just outside, the Wolverhampton Ring Road, which encircles the Wolverhampton City Centre retail, business and leisure core. Sainsbury's Supermarkets Ltd ("Sainsbury's") owns or controls 86% of the site and Tesco Stores Ltd ("Tesco") controls most of the remainder. Sainsbury's and Tesco each wish to develop the Raglan Street site. Outline planning permission has been granted to Tesco, and the local authority has resolved to grant outline planning permission to Sainsbury's.

3. Tesco controls a site in the Wolverhampton City Centre known as the Royal Hospital site, which is about 850 metres away from the Raglan Street site on the other side of the City Centre. The Royal Hospital site is a large site with a number of listed buildings which are in poor condition. It has been an objective of Wolverhampton City Council ("the Council") over several years to secure the regeneration of the Royal Hospital site. Tesco's position has been that it was not financially viable to develop the Royal Hospital site in accordance with the Council's planning requirements and its space requirements on the site for the Primary Care Trust. It offered to link its scheme for the Raglan Street site with the re-development of the Royal Hospital site and said that this would amount to a subsidy at least equal to the loss it would sustain in carrying out the Royal Hospital site development.

4. The Council accepted that the Royal Hospital site would not be attractive to developers if it were restricted to the Council's scheme. Even on optimistic assumptions, there did not appear to be a level of profit available which would

make the site an attractive proposition when weighed against the risks. Development was unlikely to take place for the foreseeable future unless Tesco's proposals were brought forward through a cross-subsidy from the Raglan Street site.

5. In January 2008 the Council approved in principle the making of a compulsory purchase order ("CPO") under section 226(1)(a) of the 1990 Act in respect of the land owned by Sainsbury's at the Raglan Street site to facilitate a development of the site by Tesco. In resolving to make the CPO, the Council took into account Tesco's commitment to develop the Royal Hospital site (and indeed passed a resolution which indicated that one of the purposes of the CPO was to facilitate the carrying out of the Royal Hospital site development).

6. Sainsbury's wishes to develop the Raglan Street site and claims that it is illegitimate for the Council, in resolving to make a CPO of the Sainsbury's land on the Raglan Street site, to have regard to the regeneration of the Royal Hospital site to which Tesco will be committed if it is able to develop the Raglan Street site. Elias J dismissed the claim by Sainsbury's for judicial review of the Council's decision, and the Court of Appeal dismissed an appeal in a judgment of Sullivan LJ, with whom Ward and Mummery LJJ agreed: [2009] EWCA Civ 835.

Compulsory purchase

7. Section 226 of the 1990 Act (as amended) provides:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area –
>
> (a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land, or
> (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
>
> (1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects –
>
> (a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;
(c) the promotion or improvement of the environmental well-being of their area."

8. CPOs made by a local authority under section 226 must be confirmed by the Secretary of State. If the owner of the land which is the subject of a CPO objects to the order, the Secretary of State will appoint an independent inspector to conduct a public inquiry. The inspector's report and recommendation will be considered by the Secretary of State when a decision whether or not to confirm the CPO is taken. Where land has been acquired by a local authority for planning purposes, the authority may dispose of the land to secure the best use of that or other land, or to secure the construction of buildings needed for the proper planning of the area: section 233 (1).

9. Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, *Expropriation, Public Purpose and the Constitution*, in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC*, (1998) ed Forsyth and Hare, 91.

10. In *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 Lord Denning MR said:

> "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands …"

and Watkins LJ said (at 211-212):

> "The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal

> principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

11. Recently, in the High Court of Australia, French CJ said (in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, at [40], [42], [43]):

> "Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights.
>
> …
>
> The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …
>
> The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights …"

The facts

12. It was originally envisaged by Tesco that the Royal Hospital site would be a suitable location for a scheme which made provision for a superstore whilst retaining and restoring much of the fabric of the former Royal Hospital buildings.

13. In January 2001, Sainsbury's applied for outline planning permission to redevelop the Raglan Street site for a mixed-use development comprising retail uses, residential, leisure, parking and associated highway and access works. The application was called in by the Secretary of State and, following a public inquiry, planning permission was granted on November 12, 2002.

14. In early 2005 Sainsbury's informed the Council that it no longer intended to develop the Raglan Street site, because it had agreed to sell its interests in the Raglan Street site to Tesco, which was developing a revised scheme. Sale documentation was agreed and engrossments circulated for execution. In addition, Tesco acquired interests in the Raglan Street site owned by third parties.

15. On June 28, 2005 the Council's Cabinet (Resources) Panel reported on the proposed Tesco scheme, and said that the grant of permission would be linked to obligations relating to the Royal Hospital site. The Panel approved in principle the use of compulsory purchase powers to assemble the Raglan Street site should the need arise. This was on the then understanding that the interests of Sainsbury's would be transferred to Tesco by agreement and that any CPO would be required only to acquire minor interests within the site.

16. On November 3, 2005 Tesco entered into a conditional sale agreement with the Council, which provided for the sale of the Council's interest in the Raglan Street site to Tesco and for the Council to use its compulsory purchase powers, if necessary, to facilitate the acquisition of outstanding interests in the site. The agreement also imposed an obligation on Tesco to carry out and complete works of demolition and repairs at the Royal Hospital site before the commencement of works at the Raglan Street site. This agreement was replaced in July 2009 by a conditional agreement for lease.

17. Following exchange of the agreement with the Council and its acquisition of third party interests in the Raglan Street site, Tesco sought an exchange of its agreement with Sainsbury's. This did not happen because Sainsbury's decided that it did in fact wish to redevelop the Raglan Street site, and to submit a fresh planning application for re-development of the site.

18. In accordance with its obligations in the agreement with the Council, Tesco submitted planning applications to the Council for the development of both the Royal Hospital site (in April 2006) and the Raglan Street site (in July 2006). In October 2006, Sainsbury's submitted a planning application for a new scheme for re-development of the Raglan Street site**.** Both applications for the re-development of the Raglan Street site proposed a supermarket with parking and a petrol filling station, private flats, sheltered housing and small commercial units. The main differences between the schemes were that the Tesco supermarket was more than 50% larger than Sainsbury's, and the Sainsbury's scheme proposed retail warehouses and a leisure centre. Outline planning permission was recommended for both schemes.

19. On December 6, 2006 the Council's Cabinet noted that Tesco and Sainsbury's were unable to agree on how the site should be developed and resolved to approve in principle the use of CPO powers in relation to the Raglan Street site if necessary, subject to a further report to Cabinet setting out all relevant factors including the criteria for selecting the preferred re-development scheme.

20. Each of the applications by Sainsbury's and Tesco for development of the Raglan Street site came before the Council's Planning Committee on March 13, 2007 when it was resolved to grant both applications subject to various requirements. In the report to Committee concerning the application by Tesco, the Case Officer said:

> "Initially Tesco indicated that they wished the development of the Royal Hospital site to be linked to the grant of permission for the development of Raglan Street. However, when their agents were asked how such a linkage could legitimately be made, they were unable to make a suggestion. There is therefore no such linkage for Committee to consider."

21. Tesco's application for planning permission for development of the Raglan Street site was therefore considered without reference to the benefits of re-development of the Royal Hospital site. Planning permission for the Tesco proposal at the Raglan Street site was granted on July 22, 2009, which was also the date of a new conditional agreement for lease between the Council and Tesco replacing the conditional agreement for sale of November 3, 2005. The agreement gives the Council an option to purchase Tesco's interest in the Royal Hospital building. One of the terms is that, once certain works have been carried out by Tesco, then Tesco will make a balancing payment to the Council which is to be used solely in connection with the completion of the Royal Hospital building works: Sch. 1.

22. On June 27, 2007, in order to decide whose land to acquire compulsorily to facilitate the development of the Raglan Street site, the Council's Cabinet resolved to invite both Sainsbury's and Tesco to demonstrate the extent to which their respective development proposals met the Council's objectives for the Raglan Street area. It also resolved that Sainsbury's and Tesco be advised that the Council's preferred outcome remained that the parties would negotiate with each other to resolve the impasse.

23. On January 30, 2008 a report was presented to the Council's Cabinet which, having set out the statutory background and relevant advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, stated:

> "The remaining sections of this report consider the two Schemes against the legal and policy tests set out in the Act and the Circular and compare them with each other. There is no doubt that both the Tesco and Sainsbury's schemes would fulfil the statutory purpose of 'facilitating the carrying out of development, re-development or improvement on or in relation to the land.' "

24. The report noted that both schemes for the Raglan Street site were acceptable in planning terms. The report went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco. Tesco was no longer seeking planning permission for a retail store on the site. The Council had promoted a proposal by Tesco for a mixed use development comprising housing, offices, primary care centre and administrative offices, retail, financial services and professional offices and food and drink uses, together with associated parking. It would provide accommodation for a Primary Care Centre and offices for the Primary Care Trust.

25. The report said that Tesco's position was that a Royal Hospital site development in accordance with the Council's aspirations was not viable and that the return to a developer in a scheme according with the Council's aspirations (including 20% affordable housing content) would involve a substantial loss, which would mainly be caused by the refurbishment of the listed building element for the Primary Care Trust. The scheme would be viable only through a cross-subsidy from the development of the Raglan Street site.

26. The report went on to say that whilst there was disagreement between Tesco and Sainsbury's about the viability of the Royal Hospital site development, it was clear that Tesco was unlikely to carry out its scheme unless it was selected as the operator of the store at Raglan Street and were thus able to cross-subsidise the Royal Hospital site development.

27. The report concluded:

> “ both Schemes would bring appreciable planning benefits and would promote and improve the economic, social and environmental well-being of the City. However, the Tesco Scheme enjoys a decisive advantage in that it will enable the development of the RHS to be brought forward in a manner that is consistent with the Council’s planning objectives for that site. Making a CPO for the Tesco Scheme will therefore result in a significantly greater contribution to the economic, social and environmental well-being of the Council’s area than would making a CPO for the Sainsbury’s Scheme. On this basis, and subject to the satisfactory resolution of the matters identified in the Recommendations set out at the beginning of this report, there is a compelling case in the public interest to make a CPO to enable the Tesco Scheme to proceed”.

28. In accordance with the recommendation made in the report, the Council’s Cabinet resolved to approve the principle of the making of a CPO of land owned by Sainsbury’s to facilitate the carrying out of (i) Tesco’s development proposals for the Raglan Street site and (ii) a mixed use retail, office and residential development of the Royal Hospital site, subject to, amongst other matters, Tesco producing satisfactory evidence of a commitment to the carrying out of the development of the Royal Hospital site before consideration be given to a resolution to authorise the making of the CPO. The Cabinet decision of January 30, 2008 was referred to the Council’s Scrutiny Board and on February 19, 2008 the Board resolved that the report be received and noted.

The issues

29. In the absence of agreement between Sainsbury’s and Tesco, the only way in which the Raglan Street site can come forward for re-development is through the exercise of compulsory purchase powers. Section 226(1)(a) provides that the local authority has power to acquire compulsorily any land in its area if it thinks “that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land.” A local authority may use its powers of compulsory purchase to assemble a site for development by a preferred developer: *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* [2006] UKHL 50, 2007 SC (HL) 33, at [6]. It is common ground that the compulsory acquisition of the outstanding interests in the Raglan Street site would facilitate the carrying out of development, re-development or improvement on the land under either the Tesco scheme or the Sainsbury’s scheme such that the test in section 226(1)(a) is met.

30. So also it is common ground that both schemes of re-development on the Raglan Street site would promote and improve the economic, social and environmental well-being of the city and therefore satisfy the requirement in section 226(1A) that a local authority must not exercise the power unless it thinks that "the development, re-development or improvement is likely to contribute to the achievement" of the well-being objects set out in the subsection. It is also agreed that the re-development of the Royal Hospital site as proposed would bring well-being benefits to the Council's area, but Sainsbury's says that, contrary to the approach of the Court of Appeal, those well-being objects are not within section 226(1A), because they do not flow from the proposed re-development of the Raglan Street site.

31. The issues on this appeal are these:

(1) Whether, on a proper construction of section 226(1A), the Council was entitled to take into account, in discharging its duty under that subsection, a commitment by the developer of a site part of which was to be the subject of a CPO to secure (by way of cross-subsidy) the development, re-development or improvement of another (unconnected) site and so achieve further well-being benefits for the area.

(2) Whether the Council was entitled, in deciding whether and how to exercise its powers under section 226(1)(a), to take into account such a commitment by a developer.

32. On the first issue, relating to the interpretation and application of section 226(1A), the Court of Appeal, differing from Elias J, found in favour of the Council and Tesco. On the second issue, relating to section 226(1)(a), Elias J found in favour of the Council and Tesco, but the Court of Appeal did not find it necessary to decide the point because of its conclusion on section 226(1A).

The judgments of Elias J and the Court of Appeal

Section 226(1A)

33. Elias J decided that, contrary to the argument of the Council and Tesco, on a proper construction of section 226(1A), the Royal Hospital site benefits did not fall within its ambit. They would have been well-being benefits in relation to a CPO of that site, but in order to fall within section 226(1A) in relation to the development of the Raglan Street site, the benefits must flow from the development of the Raglan Street site alone, since that was the site covered by the

CPO. The fact that a link between the two developments could be achieved by an agreement under section 106 of the 1990 Act did not entitle the Council to treat what were in reality well-being benefits resulting from development of the Royal Hospital site as if they were generated by development of the Raglan Street site.

34. The Court of Appeal held that the Council was entitled to take the Royal Hospital site benefits into account because they fell within section 226(1A). Whilst section 226(1)(a) focused the local authority's attention on what was proposed to take place on the CPO site itself and required the authority to be satisfied that the CPO would facilitate the re-development of the CPO site, section 226(1A) required it to look beyond the benefits that would accrue on the CPO site and to consider whether and to what extent the re-development of the CPO site would bring well-being benefits to a wider area. If the carrying out of the re-development of a CPO site was likely to act as a catalyst for the development or re-development of some other site or sites, then such catalytic effects were capable of falling within the scope of section 226(1A).

35. The financial viability of a proposed re-development scheme would be a highly material factor, and the proposed re-development of a CPO site might have to be cross-subsidised. It would be surprising if the potential financial implications of redeveloping the CPO site, including the possibility of cross-subsidy as a result of facilitating its re-development, were immaterial for the purposes of any consideration of the extent to which the carrying out of the re-development would be likely to contribute to wider "well-being" benefits.

36. The possibility of one development cross-subsidising another highly desirable development was capable of being a material consideration in the determination of a planning application under section 70(2) of the 1990 Act: *R v Westminster City Council*, *ex parte Monahan* [1990] 1 QB 87. The proposed cross-subsidy was a material consideration in the light of the Council's obligation under section 226(1A) to take wider, off-site "well-being" benefits into account and in the light of the significance of financial viability and economic well-being in the CPO context.

Section 226(1)(a)

37. Elias J held that for the purposes of section 226(1)(a), when choosing between two developments either of which would in principle be facilitated by a CPO, the Council was entitled to have regard to all the benefits which would flow from the development when determining in whose favour the CPO should be exercised, including any off-site benefits achieved by means of an agreement linking the development of the Raglan Street site to development of the Royal

Hospital site. The Court of Appeal decided that it was not necessary to rule on the alternative submission by the Council and Tesco that the Royal Hospital site benefits were material considerations under section 226(1)(a) in any event.

The CPO context

38. There is no doubt that where a body has a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose: *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1964] AC 1088, at 1118, per Lord Evershed. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43, Lord Cranworth LC said that persons authorised to take the land of others "cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers." In *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193, 199 the High Court of Australia said that the statutory power to acquire land for a public purpose could not be used to "advance or achieve some more remote public purpose, however laudable." See also *Campbell v Municipal Council of Sydney* [1925] AC 338, 443 (PC).

39. So also the familiar rules on the judicial control of the exercise of legislative powers apply in the CPO context as elsewhere: see e.g., among many others, *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (Megaw J); *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (CA) (as explained in *de Rothschild v Secretary of State for Transport* (1988) 57 P & CR 330); *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117 (Laws J).

40. Nor can it be doubted that off-site benefits may be taken into account in making a CPO. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* [2006] UKHL 50, 2007 SC (HL) 33 was a decision on the Scottish compulsory purchase provisions in the Town and Country Planning (Scotland) Act 1997, which are similar to, but not identical with, the equivalent provisions in the 1990 Act. Section 191 provided in substance that where land is acquired or appropriated by a planning authority for planning purposes, the authority might dispose of such land to any person to secure the best use of the land, and that the land could not be disposed of otherwise than at the best price or on the best terms that could reasonably be obtained. The property in question was in a run-down part of Bath Street and Buchanan Street, Glasgow. Proposals for re-development of the site by the developer contained a strong element of planning gain. The issue was whether the planning authority, exercising its compulsory purchase powers to redevelop a site, had acted ultra vires by entering into a back-to-back agreement with the developer in which the Council had agreed to transfer the land to the

developer in return for the developer indemnifying the Council for the money expended in assembling the site and making it available. In effect the developer was to be put in the same position as if it had itself exercised the power of compulsory acquisition: [14]. It was held that the words "best terms" permitted disposal for a consideration which was not the "best price", and so terms that would produce planning benefits and gains of value to the authority could be taken into account as well as terms resulting in cash benefits. It was accepted that the local authority could use its powers to assemble the site for development by a preferred developer: [6]. Lord Hope (at [39]) and Lord Brown (at [70]) also accepted that account could be taken by a planning authority of the wider, off-site planning gains which would result from the exercise of its compulsory purchase powers. But these were benefits directly related to the site, and directly flowing from the development, and the decision does not help in the solution of the present appeal.

Other contexts

41. All parties, especially Sainsbury's, relied on authorities relating to planning applications, and in particular on those relating to the extent to which conditions attached to a planning permission must relate to the development; and the extent to which off-site benefits (whether under a section 106 agreement or not) are "other material considerations" to which the authority must have regard under section 70(2) of the 1990 Act in deciding whether to grant or refuse planning permission (or to impose conditions). In the Court of Appeal Sullivan LJ did not think that a "read-across" from the limitations on the exercise of the section 70(2) power was appropriate in the context of section 226.

42. In summary, Sainsbury's position was (a) the cases on the legitimate scope of planning conditions were relevant, from which it followed that the only off-site benefits which could be taken into account were those which fairly and reasonably related to the development in relation to which the CPO power was being exercised, that is the Raglan Street development; (b) the cases on section 70(2) also proceeded on the basis that there had to be a connection between the benefits and the permitted development; (c) a potential cross-subsidy was relevant only where there was a composite development. The position of the Council and Tesco was that the Court of Appeal was right to say that there should not be a read-across from the planning permission cases to CPO cases, but in any event the authorities showed that financial considerations, including off-site benefits through cross-subsidies, were relevant, and were essentially a matter for evaluation by the planning authority.

43. It is necessary to note, at the outset, the relevant legal differences between this case and the cases in which similar questions have previously arisen. The first

is that there is a difference between the exercise of powers of compulsory acquisition and the exercise of powers to control development and grant planning permission, which is rooted in the deep-seated respect for private property reflected in the decisions cited above. The second is that both compulsory acquisition and planning control are solely creatures of statute, and that while the provisions which are relevant on this appeal are contained in one statute, the 1990 Act, the statutory provisions are different. The relevant provisions of section 226 have been set out above, and it is only necessary to repeat that section 226(1)(a) gives the local authority power to acquire compulsorily if "the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land" and does not contain, by contrast with section 70(2) on planning applications, any express reference to the authority having regard to "any other material considerations." Nevertheless the policies underlying planning permission and acquisition for development purposes are similar, and considerable assistance can be obtained from the learning in the case law on planning permissions.

"Fairly and reasonably relate" and "material considerations"

44. In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (reversed on other grounds [1960] AC 260) Lord Denning said (at 572) in relation to what is now section 70(1)(a) of the 1990 Act: "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development." Pyx Granite had the right to quarry in two areas of the Malvern Hills. The company required permission to break fresh surface on one of the sites. Conditions attached to the planning permission relating to such matters as the times when machinery for crushing the stone could be used and the control of dust emissions were held valid. The facts do not appear fully in the judgments, but it seems that the equipment was on the part of the land under the control of the company which was not the land in respect of which the application for permission related, but they could properly be regarded (for the purposes of the Town and Country Planning Act 1947, section 14) as "expedient … in connection with" the permitted development. Lord Denning said (at 574): "It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away."

45. Lord Denning's formula that "the conditions must be fairly and reasonably related to the development" was approved in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599 (Viscount Dilhorne), 607 (Lord Fraser), 618 (Lord Scarman), 627 (Lord Lane). Viscount Dilhorne said (at 599): "It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning

authority could have imposed them …" As Lord Hoffmann said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772, as a general statement this formulation has never been challenged. See e.g. *Grampian Regional Council v Secretary of State for Scotland*, 1984 SC (HL) 58, at 66. In the *Newbury* case itself it was held that the Secretary of State was entitled to come to the conclusion that a condition imposed by a local authority requiring the removal of existing substantial buildings was not sufficiently related to a temporary change of use for which permission was granted.

46. The effect of the adoption of the *Pyx Granite/Newbury* formula was to put severe limits on the powers of planning authorities: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772-3. Conditions requiring off-site roadway benefits were held to be unreasonable in, for example, *Hall & Co Ltd v Shoreham-by-Sea UDC* [1964] 1 WLR 240 (ancillary road condition held to be *Wednesbury* unreasonable); *Bradford Metropolitan City Council v Secretary of State for the Environment* (1986) 53 P & CR 55 (where it was suggested that it would make no difference if they were included in a section 106 agreement); *cf. Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255 (not legitimate to refuse a planning application because it did not contain provisions for the increase of the proportion of car-parking space subject to public control: the absence of a benefit not a reason for refusing planning permission where the benefit could not have been lawfully secured by means of a condition).

47. Section 70(2) of the 1990 Act provides that in dealing with an application for planning permission, the local planning authority "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

48. There are two decisions of the Court of Appeal, and a decision of the House of Lords, which have a bearing on the questions on this appeal: *R v Westminster City Council, ex parte Monahan* [1990] 1 QB 87 (CA); *R v Plymouth City Council, ex parte Plymouth and South Devon Co-operative Society* (1993) 67 P & CR 78 (CA); *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL). They deal with one or more of the following questions: the extent to which financial considerations are "material considerations" in planning decisions; what connection (if any) is required between the development site and off-site benefits for the purpose of material considerations; and the respective roles of the planning authorities and the courts in determining what considerations are relevant and what connection with off-site benefits is necessary.

49. *R v Westminster City Council, ex parte Monahan* and *R v Plymouth City Council, ex parte Plymouth and South Devon Co-operative Society* are both cases in which Lord Denning's "fairly and reasonably relate" formula in relation to

conditions was extended to, or discussed in connection with, the issue of material considerations under section 70(2). In that context the decisions have been superseded by the decision in the *Tesco* case, but they contain valuable discussion by some distinguished members of the Court of Appeal on questions of some relevance to the determination of this appeal.

50. In *Monahan* Lord Denning's formula was discussed in a case involving enabling development, i.e. development which is contrary to established planning policy, but which is occasionally permitted because it brings public benefits which have been demonstrated clearly to outweigh the harm that would be caused. The decision also discusses the question of the extent to which the provision of off-site benefits by the developer may be material. In *Plymouth* one of the issues was the extent to which off-site planning benefits promised by a section 106 agreement were material considerations.

R v Westminster City Council, ex parte Monahan

51. In *R v Westminster City Council, ex parte Monahan* [1990] 1 QB 87 the Royal Opera House, Covent Garden Ltd, applied for planning permission and listed building consents to carry out a re-development, the central objective of which was to extend and improve the Opera House by reconstruction and modernisation to bring it up to international standards, and to develop the surrounding area consistently with that project. Parts of the site were proposed to be used for the erection of office accommodation, which would be a departure from the development plan. The planning authority granted permission for the whole proposed development on the basis that the desirable improvements to the Opera House could not be financed unless the offices were permitted. The applicants sought judicial review of that decision on the ground, inter alia, that the fact that a desirable part of a proposed development would not be financially viable unless permission were given for the other part was not capable of being a "material consideration" for the purposes of what is now section 70(2) of the 1990 Act in granting planning permission for the development as a whole.

52. It was held that financial considerations which fairly and reasonably related to the development were capable of being material considerations which could be taken into account in reaching that determination; and that the local planning authority had been entitled, in deciding to grant planning permission for the erection of the offices, to balance the fact that the improvements to the Opera House would not be financially viable if the permission for the offices were not granted against the fact that the office development was contrary to the development plan.

53. On this appeal Sainsbury's accepts that in the context of section 70(2) the possibility of one development cross-subsidising another desirable development is capable, in limited circumstances, of being a material consideration, and that *Monahan* is such a case, where both developments formed part of one composite development. The Council and Tesco say that *Monahan* supports their position because the Court of Appeal held the consequence of the financial viability of the proposed opera house development to be a relevant factor in the planning authority's determination.

54. Kerr LJ's reasoning was essentially this: (1) in composite or related developments (related in the sense that they can and should properly be considered in combination) the realisation of the main objective may depend on the financial implications or consequences of others; (2) provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation; (3) financial considerations may be treated as material in appropriate cases: *Brighton Borough Council v Secretary of State for Environment* (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806. He concluded (at 117) by agreeing with Webster J's conclusion at first instance. Webster J had said:

> "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and to the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal."

55. The "fairly and reasonably related to the development" formula was applied by Kerr LJ (at 111), and Staughton LJ (at 122) (who also agreed that there was a composite or related development).

56. There was some discussion in the *Monahan* decision of the limits of what could be taken into consideration, by reference to two hypothetical examples. The first example (which Kerr LJ said was an extreme example) was the case of the

development of an undesirable office block in Victoria which was said to be necessary to generate the finance for a desirable development in Covent Garden. Kerr LJ said that a combination of this nature would be unlikely to be properly entertained as a single planning application or as an application for one composite development, and that such a case would involve considerations of fact and degree rather than of principle: at 117. Nicholls LJ dealt with this point by saying (at 121):

> "I am not persuaded by this reductio ad absurdum argument. Circumstances vary so widely that it may be unsatisfactory and unwise to attempt to state a formula which is intended to provide a definitive answer in all types of case. All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites, in Russell Street and elsewhere, and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme. It was open to the authority to treat the consequence, for the opera house works, of granting or withholding permission for offices as a material consideration in considering the part of the application which related to offices."

57. The second hypothetical example, the swimming pool at the other end of the city, was dealt with by Staughton LJ (at 122):

> "The other extreme arises from the axiom of Lloyd LJ in *Bradford City Metropolitan Council v Secretary of State for the Environment* [1986] 1 EGLR 199, 202G that planning permission cannot be bought and sold. Suppose that a developer wished to erect an office building at one end of the town A, and offered to build a swimming-pool at the other end B. It would in my view be wrong for the planning authority to regard the swimming-pool as a material consideration, or to impose a condition that it should be built. That case seems to me little different from the developer who offers the planning authority a cheque so that it can build the swimming-pool for itself - provided he has permission for his office development. …

> Where then is the line to be drawn between those extremes? In my judgment the answer lies in the speech of Viscount Dilhorne in *Newbury District Council v. Secretary of State for the Environment* [1981] AC 578, 599, which Kerr LJ has quoted. Conditions imposed must 'fairly and reasonably relate to the development permitted,' if they are to be valid. So must considerations, if they are to be material."

58. The ratio of the decision in *Monahan* is that where there are composite or related developments (related in the sense that they can and should properly be considered in combination), the local authority may balance the desirable financial consequences for one part of the scheme against the undesirable aspects of another part. In *R v Plymouth City Council, ex parte Plymouth and South Devon Co-operative Society* (1993) 67 P & CR 78, at 88, Hoffmann LJ observed that the *Monahan* decision concerned what was treated as a single composite development, and held that there was a sufficient nexus between the office development and the Opera House improvements to entitle the planning authority to say that the desirability of the latter fairly and reasonably related to the former, because of (1) the financial dependency of the one part of the development on the other and (2) their physical proximity.

59. The *Monahan* decision demonstrates, if demonstration were necessary, that financial considerations may be relevant in planning decisions. In *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 (cited on this point with approval by Kerr LJ in *Monahan* at 116) Woolf J accepted that the consequences of the financial viability or lack of financial viability of a development were a potentially relevant factor: the true question was not whether a development would be viable but what the planning consequences would be if it were not viable: see at 807. See also *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411, 425, per Forbes J (for further proceedings see [1977] QB 411; [1979] AC 144).

R v Plymouth City Council, ex parte Plymouth and South Devon Co-operative Society Ltd

60. The restrictive approach of the courts to conditions was one of the factors which led planning authorities to rely on planning obligations in attempting to secure planning gain. This led directly to the question whether planning authorities were entitled to treat benefits secured by way of a planning obligation as a material consideration in deciding whether to grant planning permission.

61. In *R v Plymouth City Council, ex parte Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78 it was held that the planning authority could (against the opposition of the Co-op) take into account offers by Tesco and Sainsbury's to enter into section 106 agreements providing for substantial off-site benefits. The off-site benefits included an offer by Sainsbury's of a payment of £1 million for infrastructure which would enable a separate site to be made available for industrial use, and an offer by Tesco of a park and ride facility on another site. The Co-op's position was that a consideration was only material to the question of whether to grant planning permission, if it was necessary to the grant of permission, *i.e.* overcame some objection to the proposed development which would otherwise mean that permission could not be granted. It was held that although the benefits had to be planning benefits and fairly and reasonably relate to the development, they did not have to be necessary.

62. This is a decision in which there was a connection between the development and the off-site benefits. All members of the court (Russell, Evans and Hoffmann LJJ) accepted (at 82, 84, 87-88) that the off-site benefits related to the superstore development applications. The offer of £1 million by Sainsbury's for infrastructure would help to compensate for the reduction in the pool of resources for employment land. The park and ride facility offered by Tesco would counteract the increase in traffic caused by the superstore development: at 82-83; 90-91.

Tesco Stores Ltd v Secretary of State for the Environment

63. But, although it has not been expressly over-ruled and the result would be the same today, the reasoning of the *Plymouth* decision can no longer stand, based as it was on the "fairly and reasonably related to the development" test: see at pp. 81-82, 87, 89-90. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 there were rival plans for the development of superstores on different sites in Witney, Oxfordshire, by Tesco and Sainsbury's (in conjunction with Tarmac). At an inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, the inspector approved the proposal for a link road and rejected that for a town centre superstore. Tesco offered to provide full funding for the link road. The Secretary of State allowed the Sainsbury's/Tarmac appeal, and dismissed Tesco's application: the funding offer was not fairly and reasonably related in scale to the development; although there was a tenuous relationship between the funding of the link road and the proposed foodstore because of a slight worsening of traffic conditions (a 10% increase) the link was not needed. But if it were to be taken into account, then because of the tenuous nature of the connection, the partial contribution was too limited to affect the ultimate decision.

64. The House of Lords confirmed that the Secretary of State had fulfilled his duty by taking the offer into account but according it very little weight. It was held that a planning obligation offered under section 106 of the 1990 Act by a developer was a material consideration for the purposes of section 70(2) of the Act if it was relevant to the development; and that the weight to be given to such an obligation was a matter entirely within the discretion of the decision maker. Tesco's offer to fund the link road was sufficiently related to the proposed development to constitute a material consideration under section 70(2). For the purposes of this appeal, the importance of this decision is the light it throws on the nature of the necessary link between the development and the off-site benefit.

65. The House of Lords held that the *Pyx Granite/Newbury* test for planning conditions was not applicable in the context of the question whether section 106 obligations were material considerations under section 70(2). Lord Keith of Kinkel said (at 764, 770):

> "Sir Thomas Bingham MR in the course of his judgment in this case said that 'material' in [section 70(2)] meant 'relevant,' and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense …
>
> …
>
> An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not *de minimis*, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision maker and in exercising that discretion he is entitled to have regard to his established policy."

66. All members of the appellate committee agreed with Lord Keith's opinion, and the ratio of the decision is that for the purposes of section 70(2) any benefit whose connection with the development is more than de minimis will be a material consideration, but that the weight to be given to any particular material consideration is entirely a matter for the decision-maker.

67. It has often been said that planning permissions should not be bought or sold: see *Bradford Metropolitan City Council v Secretary of State for the Environment* (1986) 53 P & CR 55, 64, per Lloyd LJ (on which see *Plymouth* at 84, per Evans LJ; *Monahan* at 122, per Staughton LJ; *Tesco*, at 765, per Lord Keith of Kinkel, and 782, per Lord Hoffmann); and accepted as a matter of policy in ODPM Circular 05/2005, *Planning Obligations*, para B6 (reflecting its predecessors): "The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms…"

68. Responding to the point that the approach in the *Plymouth* decision leads to the prospect of the sale and purchase of planning permissions, Lord Hoffmann contrasted cases in which there was a "sufficient connection" between the development and a planning obligations and those in which they were "quite unconnected." He said (at 782):

> "This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *R v. Plymouth City Council, Ex parte Plymouth and South Devon Co-operative Society Ltd*, 67 P & CR 78, was such a case, leading to concern among academic writers and Steyn LJ in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term 'auction' rather than 'competition' to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in

> such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits. …"

Conclusions

69. There is no doubt that in the light of the report of January 30, 2008, the Council had purportedly resolved in principle to make the CPO for the purpose of facilitating both the development of the Raglan Street site and that of the Royal Hospital site. That would be sufficient to vitiate the resolution. But Elias J and the Court Appeal accepted that there would be no point in quashing the resolution on that ground alone, since a more felicitously worded resolution could be passed if the benefits to be derived from the development of the Royal Hospital site were relevant under section 226(1)(a) or section 226(1A).

70. What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Monahan* about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.

71. Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather than a fanciful or remote, connection

between the off-site benefits and the development for which the compulsory acquisition is made.

72. What is the connection in the present case? The expression "cross-subsidy" has been much used by Tesco and the Council. The expression bears a special meaning in this case. Its most common use is in the competition field, where it usually connotes improper allocation of costs in different product or geographic markets, which may result in predatory pricing or other anti-competitive activity. Here all it means is that Tesco says that (a) the Council's requirements for the Royal Hospital site have the result that Tesco cannot develop it profitably; and (b) Tesco will undertake its development if it can develop the Raglan Street site. Tesco says that the consequence of (a) and (b) is that the Raglan Street site development will "cross-subsidise" the Royal Hospital site development. But the only connections between the proposed Raglan Street site and Royal Hospital site developments are that (a) Tesco says that it will develop the latter if it can develop the former; (b) it has contractually agreed to perform building works on the Royal Hospital site if it acquires the Raglan Street site. The commercial effect will be that the deficiency on the Royal Hospital site will be made up, or "cross-subsidised," by the Raglan Street site development. Nothing in the papers before the Court suggests that this will be done by any direct subvention from the income or capital proceeds of the Raglan Street site, but this would not in any event make a difference. It is entirely a matter for Tesco how it funds any loss from, or presents any lower return from, the Royal Hospital site. This is only a connection in the sense that either (a) the Council is being tempted to facilitate one development because it wants another development; or (b) Tesco is being tempted to undertake one uncommercial development in order to obtain the development it wants.

73. The crucial question is whether that is a connection which the Council is entitled to take into consideration under section 226(1)(a) or section 226(1A). To take the latter first, Elias J was right to hold that section 226(1A) was not the crucial provision for the purposes of this case. It does not answer the prior question of what matters can be taken into consideration.

74. The power of compulsory acquisition must be capable of being exercised under section 226(1)(a) before the limitation in section 226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the Council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, re-development or improvement of another (unconnected) site and so achieve further well-being benefits for the area. The Council was entitled to come to the view for the purposes of section 226(1A) that the Raglan Street site development would contribute to well-being in its area, but not on the basis of the benefits which would derive from

the Royal Hospital site development. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.

75. But that matters little since the crucial question is whether the Council was entitled to take it into account under section 226(1)(a). There can be no doubt that, even if there is no express reference in section 226(1)(a) to the local authority taking into account material considerations (by contrast with section 70(2)), only relevant matters may be taken into account. For the reasons given above, the claimed financial connection between the two sites was not such as to amount to a relevant matter. It is true, as Sullivan LJ said (at [34]), that the financial viability of a proposed re-development scheme would be a highly material factor, and that a proposed re-development of a CPO site might have to be cross-subsidised. But Sullivan LJ was wrong to conclude that it followed that a cross-subsidy *from* a CPO site to another site was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant connection.

76. Nor do I consider, despite the views of Lord Phillips and Lord Hope to the contrary, that a different result on this appeal is required by the fact that Sainsbury's and Tesco were in competition for the site, and that the Council is proposing to dispose of the land to Tesco under section 233. They accept that the Council was not entitled to take the benefits from the Royal Hospital site development into account in making the CPO, but consider that the opportunity for re-development of the Royal Hospital site would be a relevant matter to be taken into account by the Council in exercising the power of disposal to Tesco under section 233.

77. First, as a matter of principle it is impossible to put into separate compartments the exercise by the Council of its power of compulsory purchase of Sainsbury's property, and the exercise of the Council's power to dispose of Sainsbury's property to Tesco, and then to conclude that the Royal Hospital site development may not be taken into account for the former, but can be taken into account for the latter. It is wrong for the Council to deprive Sainsbury's of its property because the Council will derive from disposal of that property benefits wholly unconnected with the acquisition of the property.

78. Second, although it is plain that the power of compulsory purchase may be used to assemble a site for a preferred developer, there is nothing in *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* [2006] UKHL 50, 2007 SC (HL) 33 which supports the proposition that unconnected benefits may be taken into account by a local authority in deciding whether property should be compulsorily acquired for the purpose of disposing of it to a preferred

developer. The background to the appeal was a competition between developers for the right to develop a run-down part of Buchanan Street, Glasgow. Two developers in particular were keen to develop the site, Atlas Investments and Standard Commercial, each of which owned part of the site. The Council, when inviting all the owners and occupiers of the land on the site to submit proposals for re-development, said that successful submissions should seek a mix of activities and functions which would bring added activity to the area outside normal retailing hours, and encouraged applicants to allocate a budget to the cost of integrating public art into the development and include improvements to the relevant areas of adjoining streets, and so contribute to the transformation of Glasgow City Centre. Those were the wider planning gain benefits to which Lord Hope referred in his opinion: [39]. Similarly Lord Brown (at [70]) referred to the Council's desire to obtain economic and social benefits for Glasgow. But it is clear from Lord Hope's opinion in that decision, as he accepts in his judgment on this appeal, that the benefits which the developers were invited to confer were related to the site, and the immediately adjoining area. There is nothing in the decision to support the conclusion that in this case the promise to develop the Royal Hospital site would have been a material consideration in a disposal under section 233.

79. I would therefore allow the appeal, and make an order declaring that the opportunity for re-development of the Royal Hospital site is not a lawful consideration in deciding whether to make a CPO in relation to the Raglan Street site.

LORD WALKER

80. In agreement with Lady Hale, Lord Mance and Lord Collins, I would allow this appeal. I agree with the reasons set out in the full judgment of Lord Collins, supported by the shorter judgments of Lady Hale and Lord Mance. But in view of the difference of opinion within the Court I will try to summarise my reasons in my own words.

81. This appeal is concerned with compulsory acquisition of land *for planning purposes* (that being the general ambit of both paragraphs (a) and (b) in section 226(1) of the Town and Country Planning Act 1990 – "the 1990 Act"). The land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential. Economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive. To the authorities mentioned by Lord Collins in paras 9 to 11 of his judgment might be added the famous split of the United States

Supreme Court in *Kelo v City of New London*, *Connecticut* 545 US 469 (2005), discussed in Gray & Gray, Elements of Land Law, 5th Edition (2009) paras 11.2.6 and 11.2.7. The case of *Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 mentioned by Lord Collins was also in substance largely a "private to private" acquisition, although the local authority used a declaration of trust to give the acquisition a better appearance.

82. Where a local authority is considering exercising powers of compulsory purchase for planning purposes, planning considerations must be central to the decision-making process. The public purse is to be protected against improvidence, but the local authority should not be exercising its powers in order to make a commercial profit. In *Standard Commercial Property Securities Ltd v Glasgow City Council* 2007 SC (HL) 33, Lord Brown, at para 75, described that proposition as "deeply unattractive." Section 233 of the 1990 Act differs from its Scottish counterpart in that subsection (3) expressly contemplates a disposal "for a consideration less than the best that can reasonably be obtained," though only with the consent of the Secretary of State. But both in Scotland and in England a "back-to-back" arrangement (under which the local authority makes neither a commercial loss nor a commercial gain from its participation, using section 226 powers, in a scheme of comprehensive urban redevelopment) is standard practice. The dominant aim is betterment in planning terms.

83. That to my mind is why the issue of what would be material considerations for the purposes of deciding an application for planning permission is also relevant to a decision to exercise powers of compulsory acquisition under section 226. The quality of the proposed redevelopment of the site is of crucial importance. Its larger impact on the authority's area is also an essential element in the decision-making process, because of section 226 (1A). In common with all the members of the Court I consider that section 226(1A) has the effect of imposing an extra requirement which is a necessary but not a sufficient condition for the exercise of powers under 226(1). Section 226(1A) does not qualify, still less act as a substitute for, the requirements of the preceding subsection.

84. But the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for. As Lord Collins says in his conclusions at para 71 of his judgment, a real (rather than a fanciful or remote) connection must be shown between any off-site benefits and the proposed redevelopment for which a compulsory purchase order is proposed.

85. Lord Brown has posed a rhetorical question in para 182 of his judgment. After referring to the *Standard Commercial* case he has commented,

> "it is surely implicit in that decision – and indeed in the respective legislative requirements in both England and Scotland in effect to get what I called 'the best overall deal available' – that, by the same token as a cash bidding match would have been possible, so too would have been an offer of other benefits, however extraneous. Why ever not?"

With great respect to Lord Brown I think that he has answered his own question in the passage of his speech in *Standard Commercial* at para 75:

> "I find deeply unattractive the proposition that, almost inevitably at the expense of some beneficial aspect of the development scheme, the authority should be seeking to make a profit out of the exercise of its statutory powers of acquisition."

86. A cash bidding match, or the exaction of extraneous benefits, has superficial attractions as a tie-breaker, especially if there are two contenders, both with very deep pockets, like Tesco and Sainsbury. The merits of their respective schemes are closely matched, as appears from the summary in para 11 of the officers' recommendation document dated 30 January 2008. It is true that the Tesco scheme is said in the summary to offer more jobs, but the Sainsbury scheme might create an unspecified number of extra jobs through re-use or development of its St George's Parade site (para 6.6). The Tesco scheme would be delivered "by a well resourced operator" but the detailed consideration of delivery (para 7) ranked the two contenders as equally capable. Tesco's only apparently decisive advantage was (para 11.3) the offer of cross-funding for the RHS development.

87. Since their proposals are such that there is little, if anything, to choose between them in planning terms, why should not the local authority look to some substantial extraneous benefit which one contender offers, rather than having to make the difficult choice of a winner between contenders whose proposals are equally satisfactory on planning grounds? The answer is simply that it is not the right way for a local authority to make a decision as to the exercise of its powers of compulsory purchase, any more than it could choose a new chief executive, from a short list of apparently equally well qualified candidates, by holding a closed auction for the office. As Lord Keith said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770,

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission."

88. The fact that an exercise of powers of compulsory acquisition and a "back to back" disposal to a developer are prearranged is unobjectionable (see Lord Rodger in *Standard Commercial* at para 53). But that does not mean that the proper consideration of the exercise of powers of compulsory acquisition under section 226 of the 1990 Act can be telescoped into the exercise of powers of disposal under section 233. On this point I am in full agreement with the judgment of Lady Hale.

89. For these reasons I would allow this appeal and make the declaration proposed by Lord Collins.

LADY HALE

90. I agree that this appeal should be allowed, for the reasons given by Lord Collins, together with the further reasons given by Lord Walker and Lord Mance. Lord Phillips and Lord Hope also agree with the reasoning of Lord Collins, on the points upon which he differs from Lord Brown, but they disagree in the result. As I understand it, they consider that the extraneous benefit offered by Tesco, although it would not normally be a relevant consideration in the compulsory purchase decision, would be a relevant consideration when the Council came to dispose of the land under section 233(1) of the Town and Country Planning Act 1990. Accordingly, as in practice the decisions may be taken simultaneously, that consideration can be read back into the decision compulsorily to purchase the Sainsbury land under section 226(1).

91. For the reasons given by Lord Mance, I find it difficult to accept that proposition. It puts the cart before the horse. The council have nothing to dispose of unless they have acquired the land, whether voluntarily or compulsorily. They can only acquire the land compulsorily under section 226(1)(a) "if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". The matters to be taken into account in making that decision have to be relevant to that purpose.

92. I agree, as Lord Mance puts it at para 98 of his judgment, that the considerations admissible in relation to compulsory purchase are “no wider” than those admissible in relation to the grant of planning permission. Although the grant of planning permission is a “useful analogy”, it is a different exercise. The considerations material to that exercise are also material, but in a rather different way, to the compulsory purchase decision. Thus, under the former version of section 226(1) (quoted by Lord Phillips at para 121 of his judgment), the considerations which would be material to the grant of planning permission for development on the land were also material to whether the land was “suitable for development”. That was a *sine qua non* for compulsory purchase to “secure” development. This seems obvious. It cannot be proper to deprive a person compulsorily of his land in order to secure something which will not be allowed to take place. Under the new version of section 226(1), the permissibility of *some* development (together with a reasonable prospect of its actually taking place) should be a *sine qua non* for compulsory acquisition in order to “facilitate” it. The question does not arise in this case, because we are agreed that the extraneous benefit to the Royal Hospital site would not be relevant to the grant of planning permission for this site, any more than it is relevant to the compulsory purchase decision.

93. Acquiring the whole of the Raglan Street site *would* facilitate the development of *that* site (although it is worth noting that Sainsbury have so much of the site that they could carry out a development, albeit a less satisfactory one, without further compulsory acquisition). Persuading Tesco to carry out a wholly unrelated development upon another site elsewhere in the city, desirable though that may be for the City and people of Wolverhampton, does nothing to facilitate the development of the Raglan Street site. Rather, it is the other way round.

94. It is difficult to understand why the fact that Sainsbury also wish to develop the Raglan Street site should make any difference. If it would not be permissible to take into account the extraneous benefit when deciding compulsorily to purchase land from an unwilling owner who did *not* himself wish to develop it, it seems even less permissible to take it into account as against an unwilling owner who *does*. In the former situation, a development which would not otherwise take place would be facilitated; in the latter, it would not be facilitated because the development would take place in any event. (I might comment that Sainsbury would probably never have found themselves in this mess if they had not twice changed their mind about whether to develop this site.)

95. The case of *Standard Commercial Property Securities Ltd v Glasgow City Council* [2006] UKHL 50, 2007 SC (HL) 33 is entirely consistent with this view. A council can agree to assemble a site for development, using their compulsory purchase powers if necessary, and to sell it to their chosen developer. It makes sense, but it is not essential, to conduct the two exercises in tandem. But the

considerations relevant to the selection of the developer in that case were all relevant to the development of that site. The selection criteria adopted (and carefully graded) by the council were all directly related to the quality of the development of the site and the feasibility of the would-be developers' carrying it out (see Lord Hope, at para 22). There were no subsidiary planning obligations involved, still less any wholly extraneous benefits offered. In any event, the battle was not about the selection criteria, but about whether the proposed terms of disposal were the best obtainable and there was no evidence that they were not. Even if it were permissible to take a wholly extraneous benefit into account when deciding to whom to sell the land, it does not follow that it is permissible to take that benefit into account when deciding compulsorily to deprive a person of their land.

96. Finally, I agree that section 226(1A) operates as a limitation on the power defined by section 226(1)(a). It is therefore necessary first to consider whether the acquisition will facilitate the development of the land; and only if it will do that, to consider whether the development itself will contribute to the promotion or improvement of the economic, social or environmental well-being of the area.

LORD MANCE

97. I consider that this appeal should be allowed. I agree with the reasons given by Lord Collins, supplemented by those given by Lord Walker and Lady Hale, and wish to add only a few comments on one aspect, relating to the basis upon which Lord Phillips and Lord Hope (and Lord Brown in an alternative) come in their judgments to an opposite result.

98. Like Lord Phillips (paras 134-135), I agree with Lord Collins's conclusion that a planning authority, when considering a planning application, is only entitled to take into account a planning obligation which the applicant offers if that obligation has some connection with the relevant development, apart from the fact of its offer. I also consider that there is a useful analogy between the grant of planning permission and the exercise of a power of compulsory purchase under section 226(1)(a) of the Town and Country Planning Act 1990, and that the considerations admissible in relation to the latter power are, in the respect mentioned in the previous sentence, no wider than those admissible in relation to the former.

99. In this case, the (decisive) attraction of Tesco's proposal in respect of the Raglan Street site consisted of Tesco's offer to use the profits to subsidise the wholly unconnected development by it of the Royal Hospital site, elsewhere in Wolverhampton, which the City Council wished to see take place. Lord Phillips accepts in para 138, for reasons which I have summarised in the previous paragraph, that, had Sainsbury been here "simply an owner who was unwilling to sell his land", it would not have been legitimate for Wolverhampton City Council to take this attraction into account in deciding to exercise its powers of compulsory purchase to facilitate Tesco's scheme in respect of the Raglan Street site. Likewise, he accepts (para 140) that, if Sainsbury and Tesco had been seeking in competition with each other to develop a site in the ownership of a third party, then, too, it would not been admissible for the City Council to decide compulsorily to purchase the third party site because of the attraction of Tesco's offer to develop a wholly unconnected site.

100. However, Lord Phillips and Lord Hope consider that it makes all the difference that, in this case, Sainsbury and Tesco were in competition for the same site (in fact owned or controlled as to 86% by the former and 14% by the latter). I cannot accept that distinction. On its logic, it should make no difference if Sainsbury owned and wanted itself to develop the whole Raglan Street site: Tesco, if it wanted to develop that site, could, by offering to devote part of the profits to the Royal Hospital project, still legitimately induce the City Council compulsorily to purchase Sainsbury's property in order to sell it to Tesco for the Raglan Street development. Lord Phillips's reference (para 147) to "the fact that the compulsory purchase of land owned by one or the other is involved" as "really peripheral" in a case where there are rival developers goes far towards accepting this conclusion. Alternatively, if some way of avoiding this conclusion exists, the logic must still be that Tesco, by acquiring only one house on the proposed Raglan Street site, could alter fundamentally the considerations admissible in relation to a decision whether compulsorily to purchase Sainsbury's property, rather than Tesco's, in order to facilitate the development of the Raglan Street site. In either case, I do not think it right to describe as "motivated by commercial rivalry" (para 147) the wish of a landowner in Sainsbury's position to develop its own land - or its wish to have any decision to compulsorily purchase its land for the benefit of some other developer made by reference to factors having at least some connection with its land.

101. The error in my view lies in divorcing the exercise of the power of compulsory purchase from the property to which it relates. Two different exercises of that power are here in issue relating to two different pieces of land. When a planning authority exercises compulsory purchase powers to promote a particular development, it does this in relation to specific property and only so far as necessary. In the present case, if Sainsbury's scheme is preferred on its admissible planning merits, then only Tesco's property will be compulsorily purchased, and

vice versa. The Council's first decision is therefore which development it prefers, and that will determine whose property is compulsorily purchased. The Council's decision which development it prefers must be taken having regard to considerations which are admissible in the context of the development for which property is to be compulsorily purchased. Thus, when deciding whether compulsorily to purchase Sainsbury's property, it was not admissible to have regard to Tesco's offer relating to the unconnected development of the Royal Hospital site. If the Raglan Street site had already been in Council ownership, and there were two interested developers, the Council could of course take into account under section 233 any inducement offered by either - whether in terms of price or some unconnected benefit (such as an undertaking to develop the Royal Hospital site) – as Lord Hope says in para 155. But that is for the very reason that the only relevant decision would then relate to the disposal of the Council's own property. Where the Council is deciding whether compulsorily to purchase third party property under section 226(1)(a), the interests of the third party mean that the Council must have regard only to considerations which are admissible in the context of the development for which such property is required.

102. *Standard Commercial Property Securities Ltd v Glasgow City Council* [2006] UKHL 50; 2007 SC (HL) 33, to which Lord Phillips and Lord Hope refer, does not in my view support the conclusion which they reach. It was a case where the Glasgow City Council took its decision which development to prefer on grounds which related scrupulously to the merits of the proposed development, without reference to unconnected factors: see e.g. paras 21 to 23, per Lord Hope, para 50, per Lord Rodger and para 73, per Lord Brown. There was, as Lord Hope notes in para 155 in his present judgment, a strong element of planning gain involved in the potential development. But it was planning gain related to the development, not to some entirely unconnected development, so that the case has no analogy with the present.

103. The issue before the House arose because all potential developers were required to provide an indemnity for Glasgow City Council's costs in effecting the compulsory purchase: paras. 22, 50 and 73; and it was this feature which the losing developer criticised. There was some discussion of the possibility that the rival developers might have been invited to enter a bidding match in terms of the price to be paid: para. 41, per Lord Hope, para. 62, per Lord Rodger and paras. 72-73, per Lord Brown. In paras. 41 and 72, Lord Hope and Lord Brown both expressed their difficulty in understanding how such a bidding match would work.

104. At most, one might read into the discussion in *Standard Commercial Property* a tacit assumption that such a bidding match might have been permissible if possible, but that does not make the case authority on a point which was evidently not argued in that case, any more than it was in fact argued on the present appeal. The focus in *Standard Commercial Property* was on whether the

terms on which the Glasgow City Council was proposing to dispose of the property, once compulsorily acquired, met the requirements of s.191(3) of the Town and Country Planning (Scotland) Act 1997. S.191(1) provided that that any land acquired and held for planning purposes could be disposed of to such person, in such manner and subject to such conditions as might appear expedient to secure purposes mentioned in s.191(2), viz the best use of that or other land, etc. S.191(3) provided that any land so disposed of should only be disposed of "at the best price or on the best terms that can reasonably be obtained". The requirements of s.191(1) and (2) on the one hand and of s.191(3) on the other were, as Lord Hope said at para. 34 "separate and distinct". The issue before the House was, as Lord Hope made clear throughout paras. 31-42, simply whether the proposed terms of disposal fell within s.191(3).

105. It is material to think about the consequences if *Standard Commercial Property* were to be treated as any sort of authority that a planning authority may, when deciding whether compulsorily to acquire property belonging to one landowner (A), have regard to the price offered for the land by potential developer (B). There would seem to be no logical reason to limit these consequences to situations where (A) and (B) are in competition, or to situations where the potential development extends beyond (A)'s property and includes some property already owned by (B). If, in any situation, (B) were to offer to re-purchase (A)'s property from the planning authority on terms giving the planning authority a profit, once the planning authority acquired it by compulsory purchase from (A), why would that be illegitimate? Yet (A) would have little or no means of countering such an inducement. (A) could not offer any corresponding profit in respect of land which it already owned. And it could not be legitimate for (A) to offer the local authority a share in the profit it hoped to make from developing its own land, in order to induce the local authority to refrain from compulsorily purchasing its land for the benefit of (B). That would amount to buying a local authority's exercise of its discretion. It might be suggested that if, as here, (B) owned some land which it was desired to include in an overall development, then (A) might counter (B)'s offer in respect of (A)'s land, by offering the planning authority a profit on the re-sale of (B)'s land, if it were compulsorily to acquire that land rather than (A)'s. Apart from the evident inappropriateness of any such bidding war, (B)'s relevant land-holding might (as here) be much smaller in area, and, unless it is supposed that (A) could legitimately offer a ludicrously high price for (B)'s land, the financial attraction for the planning authority of (A)'s offer could not match that of (B)'s. So far, I have spoken only in terms of a bidding match relating to the price to be paid by the developer for the property to be compulsorily purchased. That was the only situation to which any discussion at all was addressed in *Standard Commercial Property*. The present case concerns the further question whether a proposed developer could influence the exercise by a planning authority of a discretion (viz. whose property compulsorily to purchase and for the benefit of which of two potential developers) by offering some benefit wholly unconnected with any property the subject of the proposed development. In this context, it seems to me

even clearer that *Standard Commercial Property* cannot lend support to Tesco's case on this appeal.

106. For these reasons, I do not regard *Standard Commercial Property* as justifying a conclusion that, as soon as rival developers are competing to develop a single site, part owned by each, considerations become material which would be immaterial if the whole site had been owned by one of them or by a third party. If the discussion in the judgments in that case lends any support to Tesco's case, the point did not arise for decision and was not argued there, any more than it was on the appeal in the present case. As a matter of principle, in my opinion, there is no basis on which the fact that Sainsbury and Tesco were, in a broad sense, rival developers in respect of the same overall site, can or should alter fundamentally the considerations admissible when the City Council came to consider which development it should prefer, and which property it should, therefore, compulsorily acquire to facilitate such development. Any such decision fell to be made by reference, and only by reference, to considerations having some connection with the proposed development, and not by reference to any entirely unconnected inducement which might be held out by one of the rival developers. Like Lord Collins, Lord Walker and Lady Hale, I would therefore allow Sainsbury's appeal.

LORD PHILLIPS

Introduction

107. The facts of this appeal are set out in detail in the judgment of Lord Collins. In essence they are simple. The issue that they raise is not. As every shopper knows Sainsbury and Tesco are rivals. Each owns a chain of supermarkets. Each is anxious to open a supermarket on a site at Wolverhampton ("the Site"). To this end Sainsbury has acquired 86% of the site and Tesco has acquired 14%. These figures ignore, as shall I for it has no materiality, the fact that Wolverhampton City Council ("the Council") owns a very small part of the Site. Sainsbury and Tesco have each prepared a development plan for the Site. The plans are very similar. Tesco has obtained planning permission for its plan and Sainsbury is in a position to do the same. The Council is anxious that one or other development plan should be implemented, for it will be likely to contribute to the well-being of the area. The problem is that neither of the rivals is prepared to give way, and in so doing to sell its portion of the Site to the other.

108. To resolve this impasse the Council is prepared to use its powers of compulsory purchase to buy the land of one of the rivals and sell it to the other.

Those powers are conferred by the following sections of the Town and Country Planning Act 1990 (“the Act”).

“226. – Compulsory acquisition of land for development and other planning purposes.

(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area —

(a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land or;

(b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects –

(a) the promotion or improvement of the economic well-being of their area;

(b) the promotion or improvement of the social well-being of their area;

(c) the promotion or improvement of the environmental well-being of their area.

233. – Disposal by local authorities of land held for planning purposes.

(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order –

> (a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or
>
> (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority.

. . .

(3) The consent of the Secretary of State is … required where the disposal is to be for a consideration less than the best that can reasonably be obtained …"

109. It is common ground, and rightly so, that the statutory requirements of section 226 are satisfied, so that the Council has statutory power compulsorily to purchase the land owned by either of the rivals. There is little, if anything, to choose between the rival development plans. The Council has, however, decided to prefer Tesco. Its intention is compulsorily to purchase Sainsbury's land and to sell this to Tesco. Its reason for this decision is as follows. Tesco own another site in Wolverhampton, the Royal Hospital site ("RHS"). This is run down and crying out for regeneration. The Council wishes Tesco to redevelop this in a way which Tesco contends is uneconomic. Tesco has, however, agreed to enter into an obligation to redevelop the RHS in accordance with the Council's wishes provided only that the Council prefers Tesco in the competition for the development of the Site. This obligation has been described as involving a "cross-subsidy" of the RHS redevelopment from the Site development. The Council has regarded this obligation as decisive in preferring Tesco to Sainsbury in the competition for the development of the Site.

110. The issue raised by this appeal is whether Tesco's undertaking to develop the RHS in accordance with the Council's wishes is a matter to which the Council can properly have regard when deciding upon a scheme for developing the Site that involves the compulsory purchase of Sainsbury's land.

RHS redevelopment

111. The RHS is about half a mile away from the Site, on the other side of the city centre. When Tesco applied for planning permission for the development of the Site, it sought initially to link this with the redevelopment of the RHS. It was,

however, unable to demonstrate any connection between the two, and ultimately accepted that there was no linkage for the Planning Committee to consider. The reality is that there is no connection between the development of the Site and the RHS development other than Tesco's agreement to proceed with the latter if granted the former.

The "cross-subsidy"

112. I am puzzled by the nature of the so-called "cross-subsidy". Under what is commonly described as a "back-to-back agreement" Tesco has agreed to indemnify the Council in relation to the cost to the Council of compulsorily purchasing Sainsbury's 86% of the Site. Tesco has further agreed to re-develop the RHS at what Tesco contends will be a commercial loss. Tesco states that it will be able to afford this because of the cross-subsidy that will be available if it is permitted to develop the Site. It is thus implicit that Tesco anticipates that development of the Site will result in an economic benefit that will enable it to entertain a loss-making venture. That economic benefit should, however, be reflected in the price that Tesco, as a willing buyer, would be prepared to pay to Sainsbury, as a willing seller, if Sainsbury's land were to be sold directly to Tesco in an open market transaction. That, as I understand the position, is precisely the amount to which Sainsbury will be entitled from the Council as compensation for the compulsory acquisition of their land – see *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 1 WLR 1304, at paras 17 and 18. If Tesco has to pay the Council this amount under the back-to-back agreement it is not easy to see how there will remain to Tesco any surplus economic benefit to fund a loss-making venture at the RHS. Be this as it may, that is precisely what Tesco has agreed to do. Accordingly I approach this appeal on the basis that the compulsory purchase of Sainsbury's land will procure for the Council the benefit, not merely of the development of the Site, but of the re-development of the RHS under the obligation that Tesco has agreed to assume. I shall describe this, by way of shorthand, as "the RHS benefit".

An analysis of the issues

113. The basic issue raised by this appeal is whether the RHS benefit is a legitimate, or material, consideration to which the Council can have regard when deciding whether to acquire Sainsbury's land by compulsory purchase in the particular context of the competition that exists between Sainsbury and Tesco for this development. This basic issue subdivides into two separate questions:

i) Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury was not competing for the development?

ii) Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco?

If the first question is answered in the affirmative, the second question must necessarily also be answered in the affirmative. A negative answer to the first question will not, however, necessarily require a negative answer to the second.

Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury was not competing for the Development.

114. The statutory power of compulsory purchase can only lawfully be used for the purpose for which the power has been conferred. In *Galloway v London Corpn* (1866) LR 1 HL 34 at p. 43 Lord Cranworth LC said:

> "The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers."

115. Section 226(1)(a) and 226(1A) confers the power compulsorily to purchase land, but to justify the exercise of that power the council must be able to show that this is clearly in the public interest:

> "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament *and the public interest decisively so demands"* (my emphasis), per Lord Denning MR in *Prest v Secretary of State for Wales* (1982) 81 LGR 193 at p. 198.

In this case it is common ground that the requirements of section 226 are satisfied and that if (i) there was no competing scheme and (ii) Tesco was not prepared to provide the RHS benefit, the public interest would none the less justify the

compulsory purchase of Sainsbury's land in order to enable Tesco to carry out the development. If, however, this were not the case, would the offer by Tesco of the RHS benefit be a material consideration to which the council could have regard when deciding whether the exercise of their power of compulsory purchase was justified?

The ambit of section 226(1A).

116. Section 226(1A) of the Act sets out preconditions to the exercise of the power of compulsory purchase. The development facilitated by the compulsory purchase must be likely to contribute to the improvement of the economic, social or environmental well-being of the area. The Court of Appeal held that because the compulsory purchase of Sainsbury's land would result in the RHS benefit which, in its turn, would contribute to the economic, social or well-being of the area, this, of itself, satisfied section 226(1A). It necessarily followed that the RHS benefit was a material consideration to which the council could have regard when considering the compulsory purchase of Sainsbury's land.

117. This finding differed from that of Elias J at first instance. I consider that Elias J was correct and the Court of Appeal wrong. The reasoning of the Court of Appeal appears from the following passages of the only reasoned judgment, which was delivered by Sullivan LJ:

> "26. Though convoluted, subsection 226(1A) is expressed in deliberately broad terms: 'likely to contribute to the achievement of…[the well-being]…objects'. It is not prescriptive as to the manner in which the carrying out of redevelopment upon a CPO site might make a contribution to such wider benefits. Mr Lockhart-Mummery accepted that one of the more obvious ways in which the carrying out of redevelopment on a CPO site might, at least in principle, be capable of bringing economic/social/environmental benefits to a wider area would be if the redevelopment was likely to act as the catalyst for the development or redevelopment of some other site or sites within the authority's area.
>
> 27. Such a catalytic effect might be direct, e.g. because redeveloping the CPO site would be likely to enable the occupier of another, run-down site in the authority's area to relocate onto the CPO site, thus enabling the run-down site to be redeveloped. Or it might be indirect, e.g. because the increased attractiveness after redevelopment of a hitherto run-

> down CPO site was likely to make other sites in the area more attractive for development or redevelopment. It was common ground that such catalytic effects were capable of falling within the scope of section 226(1A).
>
> 28. In the present case the Report makes it plain that the Defendant was satisfied that facilitating the carrying out of the Interested Party's scheme for the redevelopment of the RSS would, by reason of the proposed cross-subsidy, act as the catalyst for the redevelopment of the RHS site in a manner which would contribute to the economic social and environmental well-being of its area….
>
> 29. In my judgment subsection 226(1A) is concerned with all of the consequences that are likely to flow from the process of the carrying out of redevelopment on the CPO site, and these are not confined to what might be described as the impact of there being new 'bricks and mortar' on the redeveloped site. Thus, disturbance during the redevelopment process and the need to relocate existing occupiers on the one hand, and the job opportunities that would be created during the carrying out of the redevelopment on the other, would both be capable of being relevant (the one negative, the other positive) for the purposes of section 226(1A)."

118. In these passages Sullivan LJ equates "the development" in section 226 (1A) with "the process of the carrying out of redevelopment". I think that this is questionable. He describes the Site development as acting "as a catalyst" for the RHS redevelopment, by reason of the cross-subsidy. This is a misuse of language. Section 226(1A) focuses primarily, if not exclusively, on whether the development will be likely to enhance the economic, social or environmental well-being of the area once it is completed. The subsection cannot be satisfied by an agreement by a developer to fund a second development that has no physical, geographical or other connection with the development that the compulsory purchase is designed to facilitate.

119. This conclusion gives effect to the natural meaning of the language of section 226(1A). In the Court of Appeal Mr Lockhart-Mummery QC for Sainsbury submitted that the same conclusion should be reached by applying, by analogy, decisions on what constitute "material considerations" in the context of planning applications. Sullivan LJ held that these decisions could not be so applied, at least directly, and Mr King QC for the Council and Mr Katkowski QC for Tesco have supported his approach. Both Lord Brown and Lord Collins have relied on

decisions in relation to planning applications in reaching their conclusions, albeit that they have differed as to their effect. Is the analogy between compulsory purchase and planning permission in the present context a fair one?

The analogy between compulsory purchase and planning permission.

120. I agree with Lord Brown and Lord Collins that it is appropriate in this case to draw an analogy, when considering whether the RHS benefit is a material consideration, with certain decisions relating to the grant of planning permission. The issue in this case is whether it is legitimate, when considering the benefits that will flow from a development that is the object of compulsory purchase, to have regard to a particular benefit offered by the developer. The relevant planning cases deal with the question of when it is legitimate, when considering a planning application, to have regard to benefits offered by the developer. Each case raises the question of what can legitimately be considered when assessing how the public interest is affected by the development of land. The analogy is obvious. There is a further point.

121. Section 226 of the Act was amended by the Planning and Compulsory Purchase Act 2004, which inserted subsection (1A). In its previous form it included, by section 226(2)(c), a requirement that a local authority, when considering whether land was suitable for development, redevelopment or improvement, should have regard to "any other considerations which would be material for the purpose of determining an application for planning permission for development on the land". While this provision was deleted by the 2004 Act it none the less illustrates the fact that the test of materiality in relation to planning permission can also be relevant in the context of compulsory purchase.

122. The planning obligation offered by Tesco in the present case is the RHS benefit. Could that have constituted a material consideration on Tesco's application for planning permission, notwithstanding that it had no other connection with the proposed development of the Site?

Considerations that are material to the grant of planning permission

123. The history of planning permission shows an ambivalence on the part of the legislature, the executive and the judiciary in respect of the extent to which it is legitimate for a local authority to exact planning gain from a developer as a condition of the grant of planning permission. Lord Hoffmann traced this history in some detail at pp. 771 to 777 of his speech in *Tesco Stores Ltd v Secretary of*

State for the Environment [1995] 1 WLR 759. I shall attempt a rather shorter summary, at least in relation to the earlier part of the history.

124. At the beginning of the 20th Century, apart from some public health legislation, there were no planning controls over the use that an individual could make of his own land. A comprehensive system of planning control over the use of land was first introduced by the Town and Country Planning Act 1947. Since then there have been a series of legislative changes seeking, *inter alia,* to balance the private rights of owners of land against the public interest in the control of the environment, culminating with the Planning Act 2008, which allows for a new Community Infrastructure Levy. A particular problem has been the extent to which it is legitimate to require developers to take responsibility for the "off-site" consequences of their developments.

125. For present purposes, the most significant provision in force is section 70 of the Town and Country Planning Act 1990. This provides:

> "**70. – Determination of applications: general considerations.**
>
> (1) Where an application is made to a local planning authority for planning permission –
>
> (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> (2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

126. Some of the relevant authorities deal with the criteria of the "material considerations" to which subsection (2) requires the local authority to have regard. Others relate to the scope of the power to impose conditions. In relation to each of these, the following observations of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 at p. 572 are relevant:

> "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Hoffmann observed in *Tesco* at p. 772 "As a general statement, this formulation has never been challenged".

127. A decision that is particularly relevant in relation to "material considerations" is *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. The facts of that case have been set out and analysed by Lord Collins at paras 51 to 59 of his judgment. In short the Court of Appeal held that it was a material consideration, when considering a composite development, that one part of it, which was undesirable having regard to relevant planning considerations, would provide a necessary cross-subsidy for the development of the other part, which was highly desirable. Lord Collins in his analysis at para 58, identifies the fact that the case concerned "composite or related developments" as a relevant part of the Court of Appeal's reasoning. At para 70 he identifies the need for such a connection or relationship as being a requirement of law. Lord Brown, in para 176 of his judgment, disagrees. He comments that it was expressly recognised that no discernable legal principle would have supported the need for such a connection.

128. I align myself with Lord Collins' analysis. The passage from the judgment of Nicholls LJ, quoted by Lord Brown and Lord Collins at paras 169 and 56 of their respective judgments, and the passage from the judgment of Staughton LJ quoted by Lord Collins at para 57, demonstrate that each of those judges saw the need for a relationship between the undesirable and the desirable developments other than the simple fact that the one would subsidise the other. The suggestion by Kerr LJ that the significance of the distance between developments involved "considerations of fact and degree rather than of principle" does not withstand analysis. If the distance matters, then the reason why it matters must be a matter of principle. The relevant principle appears to me to be that a cross-subsidy between two developments cannot be considered unless there is some independent reason for considering the two developments together.

129. Whether that is a rational principle is another matter. If it is acceptable that an undesirable development should be permitted in order to subsidise a desirable development it is not easy to see why there should be an inflexible requirement that one should be in proximity to, or have some other nexus with, the other.

130. A close nexus between the subject matter of a planning condition and the development in relation to which it is imposed has been required by the courts. Lord Hoffmann in *Tesco* at p. 772 referred to the triple requirement for a valid planning condition laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578:

i) It must be for a planning purpose and not for any ulterior one;

ii) It must fairly and reasonably relate to the permitted development;

iii) It must not be *Wednesbury* unreasonable: [1948] 1 KB 233.

Lord Hoffmann went on to refer to the *Shoreham* case [1964] 1 WLR 240 as illustrating the very strict way that the courts gave effect to these requirements, so that conditions requiring contribution to the "external costs" generated by a development were not permitted. As Lord Hoffmann explained, this gave rise to the introduction of "planning agreements", which were replaced in their turn by "planning obligations".

131. Section 106 of the Act provides:

> "**Planning Obligations.**
>
> (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3) –
>
> > (a) restricting the development or use of the land in any specified way;
> >
> > (b) requiring specified operations or activities to be carried out in, on, under or over the land;
> >
> > (c) requiring the land to be used in any specified way; or
> >
> > (d) requiring a sum or sums to be paid to the authority."

This section is in very general terms and, in particular, no express restriction or qualification is placed on the undertaking to pay money to the authority. In these

circumstances two separate questions arise. The first is whether, and if so what, implicit restrictions exist as to the nature of planning obligations that can lawfully be incurred. The second is the extent to which planning obligations that have been undertaken are material considerations to which the authority must have regard under section 70 of the Act. There are two relevant decisions that relate to the latter question.

132. The first is *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78. Lord Brown has set out the facts of this case at para 170 of his judgment. The issue was whether generous planning obligations ("benefits") offered by Tesco and Sainsbury, there as here rival applicants for a development, were material considerations to which the planning authority could have regard, notwithstanding that they went well beyond anything that the authority would have been able properly to require by way of planning conditions as being "necessary". The Court of Appeal applied the *Newbury* triple requirement, but held that there was no requirement that the benefits should be necessary, albeit that they had, fairly and reasonably, to relate to the development. As to that requirement, this was satisfied in the case of financial contributions to works off-site designed to accommodate demands generated by the development.

133. In that case Lord Hoffmann remarked at p. 90:

> "Materiality is an entirely different matter, because there is a public interest in not allowing planning permissions to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development."

He was subsequently in *Tesco* at p. 778 to say that the parallel between the *Newbury* triple requirement and the materiality of planning obligations was "by no means exact".

134. This brings me to the *Tesco* case, which is the most important decision in the context of this appeal. Once again the material facts have been summarised by Lord Brown and Lord Collins at paras 173 and 63-66 of their respective judgments. What *Tesco* established was that the second test in *Newbury* does not apply to planning obligations. These, to constitute material considerations, do not have "fairly and reasonably" to relate to the relevant development. It is enough if they have a connection to it that is not *de minimis.* The requirement for such a connection none the less remains. Lord Brown has concluded at para 174 of his judgment that this connection is satisfied by an offer to cross-subsidise another development that is otherwise unconnected with the development for which planning permission is sought. He comments that such an offer could not sensibly

be regarded as "an attempt to buy planning permission", a phrase he takes from the judgment of Lord Keith at p. 770. Lord Brown differs from Lord Collins, who concludes at para 70 that the authorities, and *Tesco* in particular, establish that there "must be a real connection" between benefits undertaken by a planning obligation and the development to which the planning application relates.

135. Here I align myself once again with Lord Collins. Lord Brown's conclusions are at odds with the passage in Lord Keith's judgment from which he has borrowed a phrase. The full passage reads:

> "An offered planning obligation which has nothing to do with the proposed development, *apart from the fact that it is offered by the developer,* will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission" (Emphasis mine).

All members of the Committee agreed with the judgment of Lord Keith.

136. Lord Brown has quoted a passage from the judgment of Lord Hoffmann at p. 779C-D in which he says that section 106 does not require that the planning obligation should relate to any particular development, and Lord Keith made a similar observation at p. 769B. These observations related, however, to the legality, not the materiality, of planning obligations.

137. My conclusion in relation to the effect of the authorities is as follows. When considering the merits of an application for planning permission for a development it is material for the planning authority to consider the impact on the community and the environment of every aspect of the development and of any benefits that have some relevance to that impact that is not *de minimis* that the developer is prepared to provide. An offer of benefits that have no relation to or connection with the development is not material, for it is no more than an attempt to buy planning permission, which is objectionable in principle. Tesco was right, on its application for planning permission, to drop any attempt to link the development of the Site with the RHS development.

138. These principles can properly be applied, by analogy, to a simple case where a local authority is considering whether the public interest justifies the compulsory purchase of land for the purpose of facilitating a development. The development itself must be justified in the public interest and it would be wrong in principle for the local authority to be influenced by the offer by the chosen developer to provide some collateral benefit that has no connection of any kind

with the development in question. Thus if, in this case, Sainsbury was not a rival seeking to develop the Site but simply an owner who was unwilling to sell his land, it would not be right to treat Tesco's offer of the RHS benefit as a consideration that was material to the decision of whether or not to purchase Sainsbury's land.

Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco?

139. The principle that permits a planning authority to have regard to planning gain that has some connection with a proposed development, but not to planning gain that has no such connection, is not entirely rational. It becomes less rational in a situation where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both. That was believed to be the position in *Plymouth*, although ultimately planning permission was granted to both the rivals, being once again Sainsbury and Tesco. In *Plymouth* each of the rivals was anxious to be permitted to build a supermarket. In competing for planning permission each offered to embellish its development with an array of expensive "add-ons", described by Lord Brown at para 170 of his judgment. These no doubt enhanced the attraction of each of the rival schemes from the viewpoint of the public and the local authority. But the possibility must exist that the cost of these embellishments might have been spent to better advantage in providing alternative planning gain in the local authority's area that had no connection with the proposed development. The reality is that the rivals were, to use a description adopted by Lord Hoffmann in *Tesco,* competing for the development as in an auction. If an auction is to be permissible there might be something to be said for permitting the local authority to identify, for consideration by the rival bidders, its most urgent planning needs, whether or not connected with the development. I make this observation only by way of a stepping stone to considering the more complicated issue raised by the facts of this case.

140. The Council's decision involves the exercise of two statutory powers. The first is the power of compulsory purchase conferred by section 226 of the Act. The second is the power to sell the land compulsorily purchased, which is conferred by section 233. The purposes of the sale of the land described in section 233 differ from the purposes of the purchase described in section 226. Had the Site been in the ownership of a third party who was unwilling to sell it, and had Tesco and Sainsbury been competing to develop it, the Council would have had two separate decisions to make. First whether compulsorily to purchase the land. Secondly to which of the two rivals to sell it for the purpose of the development. The law that I have analysed suggests that, when making the first decision under section 226, the Council would have been bound to disregard benefits that might be obtainable from either of the developers that were unconnected to the development. But in

choosing to which of the two rivals to sell the land for development under section 233 the Council would have been entitled, and perhaps bound, to negotiate the best deal available. The terms of section 233 would seem wide enough to have permitted the Council to treat as material Tesco's offer to throw into the bargain the RHS benefit.

141. These conclusions receive some support from *Standard Commercial Property Securities Ltd v Glasgow City Council* [2006] UKHL 50; 2007 SC (HL) 33. Lord Collins has set out some of the complicated facts of this case at para 40 of his judgment. That case had these features in common with the present. Glasgow City Council wished to develop a run down area of the city, parts of which were owned by rival developers. The Council had decided compulsorily to purchase the entire Site and to sell it on back-to-back terms to one of the rival developers. The other developer challenged the deal on the basis that back-to-back terms did not represent the best deal. This the Council were bound to achieve under section 191 of the Scottish Act, which closely resembles section 233 of the Act. Lord Collins rightly remarks that there was in that case no offer of benefits unconnected to the development, but I do not think that this robs it of all relevance. Of significance is that in that case, as in this, the council first decided in principle that the facts justified the use of its powers of compulsory purchase, before turning to choose between the rival developers. It is also significant that the House of Lords held that, at the stage of choosing the developer, the Council was not simply concerned with achieving the object of the compulsory purchase, but was also entitled to have regard to purely commercial considerations. Lord Hope described the position as follows at para 34:

> "… section 191 seeks to do two things. On the one hand it seeks to regulate those aspects of the transaction which are intended to secure the purposes set out in subsection (2). These purposes are to secure the best use of the land and the proper planning of the area. On the other it seeks in addition to protect the public purse in the manner indicated by subsection (3). These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority. It is to the best commercial terms for the disposal of the land, not to what is best designed to achieve the overall planning purpose, that the authority must direct its attention at this stage. But the words 'best terms' permit disposal for a consideration which is not the 'best price'. So terms that will produce planning benefits and gains of value to the authority

can be taken into account as well as terms resulting in cash benefits."

142. I can summarise the position as follows. (1) In deciding whether to exercise its powers of compulsory purchase for the purpose of development the Council is not permitted to have regard to unconnected benefit that it may derive from the carrying out of the development, but: (2) in deciding who shall carry out the development and, thus, to whom the land will be sold for that purpose, the Council is entitled, and perhaps bound, to have regard to unconnected benefit offered by the developer. The problem is how to have regard to these principles in a case such as the present where the rival developers each owns part of the Site needed for the development.

143. I have concluded that the proper approach should be as follows. The Council should first decide, in the case of each of the rivals, whether compulsory purchase of his land would be approved to enable the development to proceed, disregarding any unconnected benefit that might accrue and on the premise that he was simply an unwilling seller rather than a rival developer. In the result of an affirmative answer being given in each case, the Council should then decide which developer to prefer having regard to all considerations material to that choice, including the amount of the Site already owned by each developer and any benefits offered by either developer, whether or not connected to the development. The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently objectionable.

144. In the present case this is what the Council did. The Council was not influenced by the RHS benefit when deciding in principle to use its power of compulsory purchase. In deciding to purchase whatever land was necessary for the development of the Site the Council had regard only to the proper objects of compulsory purchase. The choice of developers necessarily also determined which land would be compulsorily purchased, but the decision had already been taken to purchase whatever land would be necessary having regard to the choice of developer.

145. To summarise, the RHS benefit was not a consideration that was material to the decision to use the power of compulsory purchase, but it was very material to the decision which developer to select, and this in its turn determined whose land was to be compulsorily purchased. In these circumstances I have reached the conclusion that the RHS benefit was a consideration that was material to the decision that determined simultaneously the developer and the land to be purchased. It cannot be said that the decision compulsorily to purchase Sainsbury's land was influenced by a consideration that was not material.

146. The decision that I have reached at laborious length was felicitously stated by Elias J in a single paragraph and I propose to conclude my judgment by quoting this:

> "In my judgment when deciding which development should receive their support, the Council could have regard to all the benefits accruing from the proposed development, including any off site benefits achieved by way of a section 106 agreement. It seems to me that there are really two stages in the process. First, can a CPO lawfully be made in favour of a particular development? That must be determined by focusing solely on the benefits flowing from the development itself and the RHS benefits could not be taken into account at that stage. Second, if the power can lawfully be exercised, but there is more than one potential party in whose favour it could be exercised, to which development should the Council lend its support? At that stage I can see no reason why the Council should not have regard to its wider interests. It has established that there is in principle a proper basis in law for interfering with the rights of either of two (or more) owners of land on the site by compulsorily purchasing their interests; I see no reason why it should not select which landowner should be so affected by considering the overall benefits to the Council which the respective developments would provide."

147. The reality in this case is that the real issue is which developer should be preferred by the Council, which is in the position of being able to choose between the two. The fact that the compulsory purchase of land owned by one or the other is involved is really peripheral. Each purchased its land in the hope of being able to use it for the purpose of the development. Each shares the intention that its land should be used for the development. In resisting the compulsory purchase of its land each is motivated by commercial rivalry, not by any objection to the land being used for the proposed development. It would be unfortunate if the rigid application by analogy or principles of planning law were to rob the local community of the additional benefit of the redevelopment of the RHS. I have not found it necessary to reach such a result.

148. For these reasons I would dismiss this appeal.

LORD HOPE

149. Reduced to its essentials, this case is about two decisions that the Council took to facilitate the development at Raglan Street. The first was whether they should exercise their powers of compulsory acquisition to enable the development. The second was as to the choice of developer. The first decision was taken in the exercise of the powers conferred on the Council by section 226 of the Town and Country Planning Act 1990, as amended. The second, as Lord Phillips has said (see para 140, above), was about the exercise of two statutory powers. I put it in this way, as I think Lord Phillips does too, simply to indicate the context in which each of these powers was being exercised. The cart and the horse – if I may adopt Lady Hale's analogy (see para 91) – go together, like a horse and carriage, at this stage of the exercise.

150. The site was not in the sole ownership, or under the sole control, of either developer. They were in competition with each other for its development, so the exercise of compulsory powers to acquire the interest in the land vested in one or other of them was inevitable. Just as inevitable is the fact that the purpose of the exercise of those powers was to enable the Council to dispose of the interest that was to be acquired to the preferred developer. Section 226 is concerned with the acquisition of the interest in the land, not its disposal. The power to dispose of land that has been acquired or appropriated is set out in section 233 of the 1990 Act.

151. The compulsory acquisition of land can only be permitted if it is within the powers of the statute. Great care must be taken to see that those powers are not resorted to unless the statute permits this and that the acquisition is necessary for the purpose that the statute contemplates. The issue on this part of the case is whether the Council were entitled to take into account, in discharging their duty under section 226(1A) to consider the well-being benefits for the area, Tesco's commitment to secure by way of cross-subsidy the development of the Royal Hospital site. For the reasons that Lord Phillips and Lord Collins give, I would hold that they were not entitled to do so. Section 226(1)(a) provides that the authority have power to acquire land compulsorily if they think that it will facilitate the carrying out of development, re-development or improvement on or in relation to the land. The reference to "the land" in this paragraph is to the land which is to be the subject of the compulsory purchase order. Section 226(1A) places a limitation on the exercise of the power under section 226(1)(a). These two provisions must be read together. The contribution by the development, re-development or improvement that section 226(1A) refers to must be on the land that the authority is proposing to acquire compulsorily.

152. The situation in this case is that there was no physical connection of any kind between the two sites. Development of the Royal Hospital site could not contribute anything to the carrying out of development on the Raglan Street site in any real sense at all. They were not part of the same land. There is no doubt that the development of the Royal Hospital site would bring well-being benefits to the Council's area of the kind that section 226(1A) refers to. But to fall within that subsection they had to be benefits that flowed from the Raglan Street development, not anywhere else. It follows that the Council were not entitled to conclude that the work which Tesco were willing to undertake on the Royal Hospital site would contribute to the well-being of the area resulting from its development of the site at Raglan Street for the purposes of section 226(1A).

153. At first sight that might seem to be the end of the case. The report which was presented to the Council's Cabinet on 30 January 2008 stated that the Tesco and Sainsbury's schemes for the Raglan Street site would both fulfil the purpose referred to in section 226(1)(a). Addressing itself to the choice that had to be made between the two schemes, it went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco and to refer to the decisive advantage which Tesco enjoyed over Sainsbury's if the development of that site was taken into account. It concluded by recommending that there was a compelling case in the public interest to make a compulsory purchase order to enable the Tesco scheme to go ahead. As regards the exercise of the power to acquire the land compulsorily, if looked at in isolation, this was to stray into forbidden territory.

154. In my opinion however it would be unrealistic to stop there. The legality of the use of compulsory powers to enable the Raglan Street development to proceed has not been called into question. As the report said, both schemes satisfied the requirements of section 226(1)(a), and it has never been doubted that the carrying out of either of them on that site would contribute to the achievement of the well-being of the area. If the land had been in the ownership of a third party, there would have been no need to say more. The reason why the report went further was the Council had to make a choice between the two developers. Although the report did not say so in terms, it is plain that the assumption on which it was proceeding was that, having acquired the land, the Council would dispose of it to the preferred developer. The surrounding circumstances show that it was never the Council's intention to develop the land themselves or to retain it in their ownership. This part of the report was as much concerned with the exercise of the power to dispose of the land as with the exercise of the power to acquire it.

155. The power of disposal under section 233 confers a wide discretion on the local authority. They may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient to secure the best use of that or other land or the proper planning of their area. Like section 191 of the Town and Country Planning (Scotland) Act 1997 which is in very similar terms, that is its primary objective: see *Standard Commercial Property Securities Ltd v Glasgow City Council* 2007 SC (HL) 33, para 32. It was held in that case that the council, when considering whether to use compulsory powers in conjunction with a sale of the land under a back-to-back agreement to the preferred developer, were entitled to have regard to the wider benefits that were expected to flow from the contribution that the preferred developer would make to the redevelopment, the proposals for which were to contain a strong element of planning gain. There was to be a requirement to include improvements to other areas of the urban block within which the site to be acquired compulsorily was situated: see paras 38, 39. The value of the planning gain was something that the council was entitled to take into account in its assessment of whether the disposal was achieved on the best commercial terms.

156. The focus in that case was on the terms on which the council proposed to make the assembled site available to the preferred developer. Its facts differ from those in the present case, so I am not to be taken as suggesting that it provides direct authority for the view which I take here. But it does illustrate the extent of the power of disposal that is conferred by this section on the local authority, and it shows how the authority may legitimately have regard to the way the land will be disposed of before it decides to acquire it compulsorily: taking them both together, like the horse and carriage to which I referred earlier. The council decided to use its compulsory powers to purchase the site with a view to its disposal by means of a back-to-back agreement to achieve the development. The site was part of an urban block within which properties owned by the first petitioners and the second respondents were situated. Each had their own interests and their own agendas which were in competition with each other and, as in this case, their proposals had to be evaluated. The preferred developer was expected to achieve a scheme that would enhance the wider area within which the site itself was situated. Regard was to be had to benefits which it would provide that were extraneous to the site itself, and extraneous too to each of the properties that were to be acquired compulsorily. Among other things, it was to commit itself to supporting an order for regulating traffic on adjacent streets and to provide details of a financial commitment to the area's environmental enhancement. The whole thing was seen as a single package. The acquisition of the properties and their disposal to a developer who would achieve these benefits were each part of the same exercise: for a more complete account of the facts, see 2005 SLT 144, paras 1-16.

157. I would take from that case the proposition that it is legitimate for the acquiring and disposing authority which has to choose between competing proposals for development to have regard to planning benefits that lie outside the perimeter of the site itself. It has not been suggested that it would have been an improper use of the section 233 power for the Council to take account of Tesco's commitment to develop the Royal Hospital site in the assessment as to whether a disposal of the land to Tesco was preferable to disposing of it to Sainsbury's. I can see no reason why that should be so if the land was already in the Council's ownership and they were faced with a competition between two or more developers who had no interest in the land at all.

158. It was not possible in this case for the Council to take these two decisions separately, each without reference to the other. The choice as to whose land to acquire was inevitably linked to the choice of the developer to whom the land was to be disposed of when it was acquired. Section 226 does not concern itself with choices of that kind. To say that it prohibits them would be to read a limitation into the section which is not there. It would unduly inhibit the exercise of the power of compulsory acquisition in a case such as this, where a site that is in need of development is in divided ownership, the owners are in competition with each other for its development and there are sound planning reasons beyond those that section 226(1A) refers to for regarding the proposal of one developer as preferable to that of the other. I would not regard the opportunity that this particular situation gives for achieving planning gain in the wider public interest as transgressing the rule that the power of compulsory purchase can only be used for the purpose for which the power has been conferred. The contrary view risks making it impossible for projects for urban renewal which can only be achieved by using compulsory powers to assemble the site for redevelopment to include measures for improvements in the public interest which lie outside the site's perimeter. As Lord Phillips says (see para 147), it would be unfortunate if a rigid application of the compulsory purchase principles to proposals of that kind were to rob the community of such benefits.

159. For these reasons, and those of Lord Phillips with which I agree and in respectful agreement too with what Elias J said at first instance [2009] EWHC 134 (Admin), para 38, I would dismiss the appeal.

LORD BROWN

160. Are a local planning authority, when deciding how to exercise their compulsory purchase powers, precluded in all circumstances, as a matter of law, from taking into account public planning benefits (however substantial and obvious) which would result, not directly from the development to be facilitated by the proposed land acquisition, but rather from a contractual obligation attaching to that development? That, crucially, is the issue arising on this appeal.

161. Take the facts of this very case, already fully recounted in the judgment of Lord Collins, but which may conveniently and sufficiently be summarised as follows. Two rival supermarket chains, Sainsbury's and Tesco, each own part of a site which is ripe for development ("the Site"). Each wishes to develop the Site as a supermarket and each has (or is about to obtain) planning permission for such development. There is really nothing to choose between their respective proposals. Neither is willing to sell its share of the Site to the other. In these circumstances it is agreed by all that the local planning authority ("Wolverhampton") must inevitably exercise their compulsory purchase powers under section 226 of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act"). The question then becomes: who should be chosen to carry out the development of the Site and whose land, therefore, should be compulsorily acquired for the purpose? Should Sainsbury's land be acquired so that Tesco may develop the Site or vice versa? The issue more particularly arising is whether, in deciding to choose Tesco as the developer, Wolverhampton acted unlawfully in taking into account Tesco's commitment, if chosen, to redevelop the Royal Hospital site, another site in Wolverhampton's area some half a mile away ("the RHS"), redevelopment which Wolverhampton are anxious to promote but which Tesco would not be prepared to undertake save by way of cross-subsidy?

162. It so happens that one of the two rival chains (Sainsbury's) owns 86% of the site, the other (Tesco) 14%. But it is not suggested that this disparity between their respective interests affects the question of law at issue. The same question would arise even if each owned exactly half the site. Plainly the disparity is itself a material consideration and one, indeed, which ultimately could prove decisive in Sainsbury's favour. For present purposes, however, as Mr Lockhart-Mummery QC for Sainsbury's expressly acknowledged, it can be ignored.

163. Section 226 of the 1990 Act provides so far as material:

> "226(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area –

> (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land; . . .
>
> (1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects –
>
> (a) the promotion or improvement of the economic well-being of their area;
>
> (b) the promotion or improvement of the social well-being of their area;
>
> (c) the promotion or improvement of the environmental well-being of their area."

164. For present purposes the effect of those provisions in combination can be summarised quite simply as follows:

> A local authority can (subject to confirmation by the Secretary of State) compulsorily acquire land if they think, first, that this will facilitate its development (section 226 (1)(a)) and, secondly, that this development is likely to contribute to the economic and/or social and/or environmental well-being of their area (section 226(1A)).

165. In the present case it seems to me self-evident that both of these pre-conditions are fully satisfied in respect of each proposed development scheme so that Wolverhampton have a discretion to make whichever CPO they regard to be appropriate, whether of Sainsbury's land or of Tesco's land. The question, I repeat, is whether, in choosing whose land to acquire, Wolverhampton can take into account the additional benefit to their area which would result from Tesco's commitment, if they are enabled to develop the Site, also to develop the RHS.

166. It was the Court of Appeal's conclusion below that Wolverhampton were indeed legally entitled to take account of the proposed cross-subsidy which would enable (and commit) Tesco to redevelop the RHS and that this entitlement arose directly under section 226(1A). This subsection, the Court of Appeal held (para

33), imposes on local planning authorities an express obligation to have regard to such "off-site, or 'external' benefits". Elias J at first instance had held to the contrary (para 35) that, to fall within section 226(1A), well-being benefits had to be generated by the development of the Site itself, not by some contractually linked external development. In the only reasoned judgment in the Court of Appeal, Sullivan LJ (at paras 42 and 44) agreed with Elias J that, "to fall within section 226(1A) the benefit in question must flow from the re-development of [the Site]. However . . . [t]he likelihood of the re-development of a CPO site leading, whether because of cross-subsidy or for any other reason, to the development or re-development of other sites in the authority's area is precisely the kind of wider benefit that subsection (1A) requires the authority to consider". "[Section 226 (1A)] ensures that wider 'well-being' benefits are not ignored, but are always treated as material considerations . . ."

167. I have to say that on this particular issue, in common with the majority of this Court, I prefer Elias J's view to that of the Court of Appeal. That, however, does not seem to me the real issue in the case. Section 226(1A), I repeat, does no more than specify a precondition (additional to that in section 226(1)(a)) which has to be satisfied before any power of compulsory acquisition can be exercised. No one doubts that it was satisfied here. Wolverhampton accordingly had a discretion under the section. The critical question then arising is whether the further public benefit which Tesco was offering was or was not a material consideration which Wolverhampton could take into account when deciding how to exercise that discretion. Elias J held that it was. The Court of Appeal, having concluded (wrongly as I believe) that this further benefit had to be regarded as material by virtue of section 226(1A), chose not to deal with the question whether the benefit would in any event have been a material consideration, section 226(1A) apart. As to this Sullivan LJ merely observed that section 226(1A) "does not purport to cut down the considerations that are capable of being material under subsection 226(1)(a)". And that at least must be right: to stipulate, as section 226(1A) does, that the authority must not exercise their compulsory purchase powers unless they think that the development itself is likely to contribute to the well-being of their area (whether because it will act as a catalyst for other development or provide employment or stimulate other beneficial activity in the area or whatever else) is by no means to stipulate that, the condition being satisfied, this exhausts all the considerations to which the authority can have regard and they must shut their mind to all other possible external benefits which the exercise of their compulsory purchase powers would bring.

168. In addressing the question whether such external benefits are capable of being material considerations in the exercise of compulsory purchase powers under section 226(1)(a), it seems to me helpful to begin by examining what the position would be in the broadly analogous situation of a planning authority considering rival applications for planning permission. Suppose that the competition between

the rival supermarket chains was not, as here, as to which should be preferred as developers of a single site by reference to the exercise of the authority's powers of compulsory purchase, but rather as to which should be granted planning permission assuming that each owned a suitable site but there was room in the area only for one supermarket – the very situation which arose in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (between, as it happens, the same competing developers as here). Would an offer such as that made here by Tesco to develop the RHS (probably by way of a planning obligation under section 106 of the 1990 Act) be a "material consideration" within the meaning of section 70(2) of the 1990 Act? If it would, then it is difficult to see why it should not be material also for section 226 (1)(a) purposes. If, on the other hand, it would not, then the Court would need to be persuaded that wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications.

169. Before going to the House of Lords decision in *Tesco* itself it is instructive to take note of two earlier Court of Appeal authorities – *R v Westminster City Council ex parte Monahan* [1990] 1 QB 87 ("*Monahan*") and *R v Plymouth City Council ex parte Plymouth and South Devon Cooperative Society Ltd* (1993) 67 P & CR 78 ("*Plymouth*") – the essential backdrop to the speeches in *Tesco.* Lord Collins having dealt with these at some length, I content myself with the briefest summary of each. *Monahan* was the Royal Opera House case in which the planning authority were held entitled to have granted permission for an office development notwithstanding that it involved a major departure from the development plan because that would cross-subsidise the refurbishment of the listed opera house. Nicholls LJ recorded (p.121) that counsel for the planning authority (Mr Sullivan QC) "frankly accepted that he could discern no legal principle which distinguished between (a) what happens within one building, (b) what happens on two adjoining sites and (c) what happens on two sites which are miles away from each other" but continued:

> "All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites . . . and the proposed improvements to the Opera House as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme."

As to what the position would have been had the proposed office block been in Victoria, Kerr LJ similarly suggested that "all such cases would . . . .involve considerations of fact and degree rather than of principle."

170. *Plymouth* (like *Tesco* which followed it) involved competitive planning applications by Sainsbury's and Tesco, the Council's original intention having been to allow one store only to be built. Each company was therefore invited to say why it should be preferred and both were told that the Council would take into account any community benefits offered (provided they were "justifiable in land-use planning terms" – the Council's published policy). Sainsbury's offer included the construction of a tourist information centre on the site, an art gallery display facility, a work of art in the car park, a bird-watching hide overlooking the river, an £800,000 contribution to the establishment of a park and ride facility in the neighbourhood, and up to £1 million for infrastructure works to make a different site suitable for industrial use. Tesco offered financial contribution to a crèche, a wildlife habitat, a water sculpture, and in addition it offered to sell the Council a site for a park and ride facility. Both offers were by way of section 106 agreements. In the event, both applications were granted, doubtless to the satisfaction of Sainsbury's and Tesco but not that of the Co-operative Society who promptly challenged both planning permissions on the ground that the Council had taken into account immaterial considerations.

171. The Co-operative Society argued that not merely must a community benefit offered under a section 106 agreement satisfy the three tests laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (following *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554) by which the legality of a section 70 condition is to be judged – namely (i) that it has a planning purpose, (ii) that it fairly and reasonably relates to the permitted development and (iii) that it is not *Wednesbury* unreasonable – but it must also be necessary in the sense of overcoming what would otherwise have been a planning objection to the development. In the leading judgment rejecting this argument and stating that "the only question is whether [the section 106 agreement] fairly and reasonably related to the development", Hoffmann LJ said (90) that the only benefits which gave pause for thought were the two substantial sums offered by Sainsbury's as a contribution to work to be done away from the site. The park and ride facility, however, would tend to reduce both traffic heading for the store and use of Sainsbury's own car park by people not actually shopping there. As for the £1 million offer, this "was not simply to pay the council £1 million. It was to contribute up to £1 million to the actual cost of infrastructure works undertaken by the council within a period of two years at a specific site." (91).

172. As we shall shortly see, the supposed requirement that section 106 offers, like imposed section 70 conditions, have to "fairly and reasonably relate to the permitted development" (a requirement held satisfied in *Plymouth*) did not survive the decision of the House of Lords in *Tesco* to which I now come.

173. *Tesco* (like *Plymouth* at the initial stage) concerned rival applications by Sainsbury's and Tesco to develop their respective sites (Sainsbury's in conjunction with Tarmac), there being room in Witney for one store only. Notwithstanding that Tesco's application included an offer of £6.6 million to fund in its entirety a new link road, the Secretary of State (who had to decide which of the two proposals to allow) chose to grant Sainsbury's application. Tesco appealed on the ground that the Secretary of State had failed to take account of a material consideration, namely their £6.6 million offer. Albeit the appeal failed, it did so not on the basis that the offer was an immaterial consideration but rather because, although material, the Secretary of State had been entitled to give it little or no weight and to prefer Sainsbury's proposal because the Secretary of State thought its site "marginally more suitable" (Lord Hoffmann, 783). The following features of *Tesco* seem to me of particular importance:

(1) The £6.6 million offer was held to be a material consideration notwithstanding that the Secretary of State shared his inspector's view that the relationship between the proposed new development and the funding of the link road was "tenuous" (the development being likely to result only in "slight worsening of traffic conditions").

(2) The only reasoned speeches were given by Lord Keith of Kinkel (with whom the other members of Committee agreed) and Lord Hoffmann. Both of them recognised that, contrary to the Court of Appeal's assumption in *Plymouth*, the second *Newbury* test has no application to section 106 agreements. As Lord Hoffmann observed (779C-D):

> "[S]ection 70(2) does not apply to planning obligations. The *vires* of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v Epping Forest District Council* [1994] 1 WLR 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable."

Nevertheless, for a planning obligation to be a material consideration which can legitimately be taken into account in granting planning permission, it has to have "some connection with the proposed development which is not *de minimis*" (Lord Keith, 770B); it cannot be "quite unconnected with the proposed development" (Lord Hoffmann, 782D).

(3) Were it otherwise, said Lord Keith (770A), "it could be regarded only as an attempt to buy planning permission". Lord Hoffmann put it rather differently (782D-E). The metaphor of "bargain and sale", he suggested, although "vivid":

> "is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits."

(4) In *Tesco* itself, Lord Hoffmann then observed (782G-H), the Secretary of State had in substance accepted the argument that Tesco's "offer to pay for the whole road was wholly disproportionate and it would be quite unfair if [Sainsbury's] was disadvantaged because it was unwilling to match this offer." That, said Lord Hoffmann, "is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers." However, Lord Hoffmann continued (783A-C), so too was Tesco's argument (that only if they offered the whole cost of the link road would it be constructed) a perfectly respectable one. Importantly, he then said this:

> "[T]he choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts."

(5) Lord Hoffmann had earlier (780F-G) emphasised the distinction to be made between materiality and weight:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process."

174. Let me in the light of those authorities return to the question I posed at para 168: would an offer such as Tesco made to Wolverhampton, had it been made in a planning context have been, as a matter of law, a material consideration? To my mind the correct answer to that question should be yes, although plainly the weight (if any) to be given to it would be entirely for the planning authority. And the reason the answer should be yes is quite simply because such an offer could not sensibly have been regarded as "an attempt to buy planning permission" (Lord Keith); on the contrary, it would in my view have had "a sufficient connection" with the proposed development (Lord Hoffmann), "not *de minimis*" (Lord Keith).

175. The proposition that planning consent cannot be bought or sold, although stated nearly a quarter of a century ago to be "axiomatic" (by Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1987) 53 P & CR 55, 64), needs to be understood for what it is, essentially a prohibition against the grant of a planning permission for what would otherwise be unacceptable development induced by the offer of some entirely unrelated benefit. What it is *not* is a prohibition against, for example, the grant of permission for a development which is contrary to local planning policy on the basis that it needs to be economically viable to ensure that the site does not remain derelict – see *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806, where, indeed, Woolf J held that no Secretary of State could reasonably have regarded the economic factor in that case as irrelevant. Nor, of course, did the principle prevent office development being permitted in *Monahan* essentially because the proposed refurbishment of the Opera House was financially dependant upon it.

176. *Monahan*, it must be noted, is *not* authority for the proposition that, but for the development there "forming part of one composite development project", the

office building would not have been permitted. As was expressly recognised, no discernible legal principle would have supported such a view. In any event *Monahan* is not binding on this Court. That aside, *Tesco* later established that offers such as that in *Monahan* to refurbish the Opera House do not have to "fairly and reasonably relate to the permitted development" (as at the time of *Monahan* would have been supposed). Had Tesco in the present case offered (uneconomically) to redevelop the RHS to the benefit of the public in consideration of some planning advantage elsewhere in Wolverhampton's area, it is difficult to see why Wolverhampton would have been legally obliged to refuse.

177. Still less does the principle prevent rival developers, in competitive situations such as arose in *Plymouth* and *Tesco*, seeking to outbid each other as to the external benefits their proposals would bring with them – as both those cases amply demonstrate. It is surely one thing to say that you cannot buy a planning permission (itself, as I have sought to show, only in a narrow sense an absolute principle); quite another to say that in deciding as between two competing developers, each of whose proposals is entirely acceptable on planning grounds, you must completely ignore other planning benefits on offer in your area.

178. Let it be assumed, however, contrary to my view but as I understand every other member of this Court to have concluded, that, had the present issue arisen in the context of rival applications for planning permission, Tesco's offered redevelopment of the RHS would have had to be characterised as a wholly unconnected planning benefit and so not a material consideration under section 70. That majority view, as Lord Phillips himself points out at paragraph 139, is "not entirely rational" even in a non-competitive planning context; "less rational" still "where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both".

179. Is that approach nonetheless to apply equally in the present context or, as I contemplated at paragraph 168, is the position that "wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications"?

180. The Court of Appeal thought that the case for regarding Tesco's RHS offer as a material consideration was stronger in the CPO context than had it been made in a planning context. They thought this, first, because of the wide (to my mind over-wide) construction they put upon section 226(1A) itself (para 33); secondly, because they regarded financial viability as yet more important in the CPO context than in the planning context (paras 34-40); and, thirdly, because, whereas planning authorities (subject only to the Secretary of State's call-in powers) are free to grant any planning permissions they wish, CPOs must be confirmed by the Secretary of State (who can therefore prevent any misuse of the local authority's compulsory

acquisition powers) (para 41). Whilst I have difficulty with that reasoning, I nevertheless agree with Lord Phillips and Lord Hope that, even assuming that Tesco's RHS offer would not have been a material consideration had Wolverhampton been determining a planning application, it was nonetheless material in the context of the decisions the Council were in fact required to take here. These were, first, whether Wolverhampton should compulsorily acquire land to facilitate the development of the Site (for which both rival developers had the requisite planning permission) and, if so, second, whose land should be acquired – should it be Tesco's land to enable Sainsburys to develop the Site or vice versa (ie who should be the preferred developer)?

181. I understand all of us to agree that Wolverhampton were amply entitled to exercise their section 226 power of compulsory acquisition here: as I noted at paras 164 and 165 above, self-evidently both the section 226(1)(a) and the section 226(1A) conditions were satisfied and the development of the Site was only going to take place if Wolverhampton did indeed exercise this power. As Lord Hope observes, however, this power could not be exercised until Wolverhampton had also decided the second question before them: which of the two developers to choose. There seems to me no basis in authority or reason for holding that in reaching this second decision Wolverhampton were required to ignore the off-site benefit (unconnected though I am now assuming it to be) on offer from Tesco. I would on the contrary hold it to be a material consideration for the purposes of deciding which of the rival developers to prefer and whose land, therefore, should be the subject of compulsory purchase under section 226. That is precisely what was held at first instance here and I can but echo Lord Phillips' plaudits for the passage in Elias J's judgment which he quotes in full at paragraph 146.

182. It is essentially on this basis, rather than by reference to Wolverhampton's power of disposal of acquired land under section 233, that for my part I would hold Tesco's offer to have been a material consideration (even assuming that it would not have been so in the planning context). I think it difficult for Tesco to invoke section 233 here. True, section 233 would to my mind plainly entitle a planning authority to have regard to an off-site benefit such as Tesco offered here in deciding how to exercise their section 233 power. (Although, as Lady Hale and Lord Mance point out, no wholly extraneous benefits were offered or considered in *Standard Commercial Property Securities Ltd v Glasgow City Council* [2007] SC (HL) 33, it is surely implicit in that decision – and, indeed, in the respective legislative requirements in both England and Scotland in effect to get what I called there (para 68) "the best overall deal available" – that, by the same token as a cash bidding match would have been possible, so too would have been an offer of other benefits, however extraneous. Why ever not? I do not regard this as inconsistent with what I said at paragraph 75 of my judgment in *Standard Commercial* – quoted by Lord Walker at para 85: my quarrel there was with the disappointed developer's submission that the planning authority should itself have initiated a

bidding war. It is quite another thing to say that they are precluded by law from accepting offers of money or other extraneous benefits when they come to dispose of a compulsorily acquired development site.)

183. My difficulty with section 233, however, is, as Lady Hale points out, that it puts the cart before the horse. Unless and until the Secretary of State confirms a section 226 compulsory purchase order, the local authority has no land to dispose of. I do not see the Council here, therefore, as entitled to have regard to their section 233 powers when exercising their section 226 powers. I would be concerned also that on this approach the Council might be statutorily *obliged* to accept Tesco's offer in order to obtain "the best overall deal available" – instead of merely being required to regard it as a material consideration, it being a matter for the Council (and, in subsequent confirmation proceedings, the Secretary of State) to give it such weight, if any, as they thought right. (Indeed, as I observed earlier (at para 162), it might be that the Secretary of State, unlike Wolverhampton, will regard Sainsbury's substantial larger interest in the site as the determining factor here – rather as the Secretary of State in the *Tesco* case, thought it only fair to Sainsbury's to give no weight to Tesco's "wholly disproportionate" £6.6m offer to fund the link road (see para 173(4) above). That, however, in this case as in that, would be entirely a matter for the planning authorities, not for this Court.)

184. All that said, I do not regard section 233 as central to either Lord Phillips' or Lord Hope's reasoning in this case. Still less did it colour Elias J's approach; indeed, section 233 finds no mention whatever in his judgment.

185. Really what it all comes to is this. It is irrational and unsatisfactory that (in the view of the majority) Tesco's offer here would have had to be ignored in a competitive planning context. It is quite unnecessary and (as Lord Phillips and Lord Hope observe) would be unfortunate if this irrationality were carried over into the compulsory purchase context within which the present issue arises.

186. In the result I would answer the question I posed in paragraph 160: no, not even if the benefits are wholly unconnected with the proposed development, and dismiss this appeal. As indicated, I would do so essentially for the reasons given by Elias J at first instance rather than those given by the Court of Appeal.