



19 June 2013

## PRESS SUMMARY

**Cusack (Respondent) v London Borough of Harrow (Appellant) [2013] UKSC 40**

*On appeal from [2011] EWCA Civ 1514*

**JUSTICES: Lord Neuberger (President), Lord Mance, Lord Sumption, Lord Carnwath, Lord Hughes**

### BACKGROUND TO THE APPEAL

This case concerns the circumstances in which a highway authority is required to pay compensation for the erection of barriers preventing a property owner accessing a public highway from his or her property.

Mr Cusack is a solicitor who has practised from a property on a main road in Harrow since 1969. The property was originally built as a dwelling and had a garden at the front adjoining a footpath which runs alongside the road. In 1973, Mr Cusack obtained temporary planning permission to use the ground floor of the property as offices until August 1976. That use of the property continued and is now to be regarded as lawful (by virtue of section 191(2) of the Town and Country Planning Act 1990). At an unknown date, the garden at the front of the property was turned into a forecourt for use as a car park for members of staff and clients. In order to enter and leave the forecourt, cars are required to cross the footpath.

In January 2009, Harrow London Borough Council, the relevant highway authority, informed Mr Cusack that the movement of vehicles across the footpath was a danger to pedestrians and other motorists. Mr Cusack was told that the council intended to erect barriers in front of his property and several neighbouring properties in order to prevent cars driving over the footpath.

Mr Cusack began proceedings seeking an injunction restraining the council from erecting the barriers. A county court judge refused to grant the injunction, holding that the council had power to erect the barriers under section 80 of the Highways Act 1980, which permits a highway authority in certain circumstances to erect and maintain fences or posts for the purpose of preventing access to a public highway. The Court of Appeal held that section 80 was not applicable because the council had power to erect the barriers under section 66(2) of the 1980 Act, which empowers a highway authority to erect and maintain walls, rails, fences etc. if necessary for the purpose of safeguarding persons using the highway and (unlike section 80) would require compensation to be paid to Mr Cusack. The council appealed to the Supreme Court. Mr Cusack accepts that the council has power to erect the barriers, but maintains that appropriate compensation must be paid. No barriers have yet been erected in front of Mr Cusack's property.

### JUDGMENT

The Supreme Court unanimously allows the council's appeal. Lord Carnwath gives the leading judgment.

### REASONS FOR THE JUDGMENT

- The owner of a property adjoining a highway has a common law right of access to the highway, without restriction, from any part of his or her property. However, that right has been greatly limited by statutory provisions and there is no general right to compensation when action is taken to restrict a property owner's right of access to an adjoining highway [4].

- Canons of statutory construction, including the principle that a specific statutory provision excludes the application of an inconsistent and more general statutory provision, have a valuable role to play as guidelines embodying logic or common sense [57,60]. However, the distinction between general and specific statutory provisions is of no assistance in this case because neither section 66(2) nor section 80 of the 1980 Act can be regarded as more specific or less general than the other. The power conferred by section 66(2) must be used for a specific purpose (safeguarding persons using the highway) but, unlike section 80, it is not confined to preventing access to a highway [12, 61].
- The 1980 Act is a consolidating statute and is the result of a complex history extending over more than 130 years. It contains a variety of overlapping and sometimes inconsistent powers [19, 64].
- The council is entitled to rely on the clear wording of section 80 in order to erect barriers in front of Mr Cusack’s property. It does not matter that the council could use section 66(2) to achieve the same objective. However, a highway authority’s use of section 80 could be challenged if, for example, it circumvented the specific prohibitions of the use of the power conferred by section 66(2) [27].
- The Human Rights Act 1998 does not preclude the council from relying on section 80 because it involves no breach of Mr Cusack’s right to peaceful enjoyment of his property under article 1 of the First Protocol to the ECHR (“A1P1”):
  - The erection of barriers in front of Mr Cusack’s property would be a control of the use of property, not a deprivation of property [37, 66].
  - This case concerns land development and town planning, in relation to which the state enjoys a wide margin of appreciation [44].
  - The issue of the proportionality of the interference with Mr Cusack’s rights under A1P1 requires a broad judgment as to where a fair balance lies between competing general and individual interests; the issue is not merely whether the council has abused its powers. Although there is no general right to compensation under A1P1, the absence of compensation is relevant to the proportionality of any interference with the rights guaranteed by A1P1 [42 44].
  - There has been no challenge by Mr Cusack to the compatibility of section 80 with A1P1 as such. The mere fact that another statutory route is available to the council and that it requires the payment of compensation to Mr Cusack does not itself lead to the conclusion that the council’s reliance on section 80 is disproportionate. There is no general rule under A1P1 that, where the state seeks to control the use of property and could do so under two different provisions which have different consequences in terms of compensation, it is obliged to use the provision which carries some (or greater) compensation [45, 69].
  - A use of property that is immune from planning enforcement measures, and is therefore to be regarded as lawful under section 191(2) of the Town and Country Planning Act 1990, is not to be treated for all purposes as being the subject of a deemed planning permission. Mr Cusack’s use of the vehicular access to his property via the footpath is, therefore, different from the use of a means of access that is authorised by planning permission (and which, by virtue of section 80(3)(c), could not be obstructed by the use of the power conferred by section 80) [49, 68].

*References in square brackets are to paragraphs in the judgment*

**NOTE** This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)