

Land known as Bull Field Redetermination – Addendum Report

Appendix H - “The status and legal effect of a quashed appeal decision in planning law” by James Maurici QC and Miriam Seitler J.P.L. 2018, 5, 492-506

**Weston
Homes**



The status and legal effect of a quashed appeal decision in planning law

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Cases cited

R. (on the application of West Lancashire BC) v Secretary of State for Communities and Local Government [2017] EWHC 3451 (Admin); [2017] 7 WLUK 47 (QBD (Admin))
Kingswood DC v Secretary of State for the Environment (1989) 57 P. & C.R. 153; [1987] 7 WLUK 181 (QBD)
St Albans City and District Council v Secretary of State for Communities and Local Government [2015] EWHC 655 (Admin); [2015] 3 WLUK 410 (QBD (Admin))
Arun DC v Secretary of State for Communities and Local Government [2013] EWHC 190 (Admin); [2013] J.P.L. 1011; [2013] 1 WLUK 488 (QBD (Admin))
Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government [2012] EWCA Civ 1198; [2013] 1 P. & C.R. 6; [2012] 7 WLUK 673 (CA (Civ Div))

Legislation cited

Town and Country Planning Act 1990 (c.8) s.288, s.289
Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625)
Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 (SI 2002/2685)

*J.P.L. 492 Introduction

The following scenario is a familiar one: following a hard fought planning appeal ending in a loss you challenge the decision of the Inspector or Secretary of State in the High Court and succeed. The appeal decision is quashed under the [Town and Country Planning Act 1990](#) ("the TCPA 1990") s.288. The appeal then falls to be re-determined. But what is the status of the quashed decision on the re-determination? The question might seem an obvious one, warranting a simple answer, but the legal position is far from straightforward. The case law on the point is in conflict; there is no simple answer.

There are two possible answers:

- (1) the previous decision having been quashed is treated as if it had not been made and is something that cannot be had regard to at all in any respect; accordingly, the re-determination is undertaken entirely de novo; or
- (2) the previous appeal decision may be had regard to, and may be a material consideration on the re-determination, in so far as it contains findings and reasoning that were nothing to do with the ground or grounds of challenge that led to the subsequent quashing of the appeal decision.

The conflicting case law is examined below but there is an interesting oddity that should be noted at the outset. The first case that we are aware of that considered the issue is *Kingswood DC v Secretary of State for the Environment*¹ where Mr Graham Eyre QC, sitting as a Deputy Judge, accepted the submissions made by Mr Holgate (as he then was, and appearing as counsel for the Secretary of State) that the answer was (1) above. Yet in the recent decision of the High Court in *St Albans CC and DC v Secretary of State for Communities and Local Government*,² Holgate J (as he now is) indicated *obiter* that he preferred the alternative analysis in (2). Who then is correct: Mr Holgate the advocate or Holgate J?

Not only is the case law conflicting on the point, but the position may vary depending on the nature and circumstances of the original appeal decision that has been quashed. This article explores that question, first addressing the statutory position, secondly, the position under procedural regulations and thirdly, the case law. Finally, the authors offer a concluding view with reference to the recent decision in *R. (on the application of West Lancashire BC) v Secretary of State for Communities and Local Government*. *J.P.L. 493³

Statutory position

Much of the focus of this article is on decisions made on planning appeals brought under the *TCPA 1990 s.78*. Whether such an appeal decision is made by the Inspector or, on a recovered appeal, by the Secretary of State such a decision is challenged under the *TCPA 1990 s.288*.

Pursuant to the *TCPA 1990 s.284(1)* and (3)(b) “any decision on an appeal under *section 78*” may only be challenged under the *TCPA 1990 s.288*. An order or action of the Secretary of State can be challenged by way of application. If an application under *s.288* is successful, the effect, prescribed by statute, is described in *s.288(5)(b)*:

”[the High Court] if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, *may quash that order or action.*”(emphasis added)

The same provision applies in respect of:

- decisions made by the Secretary of State on call-in applications: see *s.284(3)(a)* referring to “any decision on an application referred to the Secretary of State or the Welsh Ministers under *section 77*”; and
- ”any decision to grant planning permission under *paragraph (a) of section 177(1)* or to discharge a condition or limitation under *paragraph (b) of that section*”—that is to say a decision of an Inspector or the Secretary of State to grant or modify a planning permission on an appeal against an enforcement notice.

The statutory power to quash in *s.288* applications can be contrasted to the powers open to the court in a *s.289* appeal—those relating to a decision in proceedings on an appeal under the *TCPA 1990 Pt VII* against an enforcement notice. Appeals under *s.289* are governed by procedural rules for appeals found in the *Civil Procedure Rules*.⁴ In this regard, Practice Direction 52D para.26.1(15) provides:

”Where the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court.”

The effect of a successful s.288 application is thus the quashing of the order or action. That is the only remedy, which under the TCPA 1990 the court may give,⁵ albeit it is not required to give. In contrast the effect of a successful s.289 appeal is that the matter is remitted to the Secretary of State for rehearing and determination in accordance with the opinion of the court. The latter may provide more scope for flexibility than under s.288 in relation to the issues under discussion.

Procedural regulations for re-determinations

In contrast to under statute, the position under procedural regulations is more homogenous. Across the board, the procedural regulations provide for the re-opening of the inquiry (or other appeal process) as the Secretary of State thinks fit. Re-opening of the inquiry suggests that the decision does not necessarily need to be made de novo, as if the previous decision had never existed. The following examples are illustrative.

For an inspector's decision on inquiry, the [Town and Country Planning Appeals \(Determination by Inspectors\) \(Inquiries Procedure\) \(England\) Rules 2000](#),⁶ r.20 provides: **J.P.L. 494*

- (1) "Where a decision of an inspector on an appeal in respect of which an inquiry has been held is quashed in proceedings before any court, the Secretary of State—
 - (a) shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further representations are invited for the purposes of his further consideration of the appeal; and
 - (b) shall afford to those persons the opportunity of making written representations to him in respect of those matters or of asking for the re-opening of the inquiry; and
 - (c) may, as he thinks fit, cause the inquiry to be re-opened (whether by the same or a different inspector), and if he does so [paragraphs \(2\) to \(7\) of rule 10](#) shall apply as if the references to an inquiry were references to a re-opened inquiry.
- (2) Those persons making representations or asking for the inquiry to be re-opened under paragraph (1)(b) shall ensure that such representations or requests are received by the Secretary of State within 3 weeks of the date of the written statement sent under paragraph (1)(a)."

For recovered appeals and call-in applications, where an inquiry has been held, the [Town and Country Planning \(Inquiries Procedure\) \(England\) Rules 2000](#) r.19 applies:

- (1) "Where a decision of the Secretary of State on an application or appeal in respect of which an inquiry has been held is quashed in proceedings before any court, the Secretary of State—
 - (a) shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further representations are invited for the purposes of his further consideration of the application or appeal;
 - (b) shall afford to those persons the opportunity of making written representations to him in respect of those matters or of asking for the re-opening of the inquiry; and
 - (c) may, as he thinks fit, cause the inquiry to be re-opened (whether by the same or a different inspector) and if he does so [paragraphs \(3\) to \(8\) of the rule 10](#) shall apply as if the references to an inquiry were references to a re-opened inquiry.
- (2) Those persons making representations or asking for the inquiry to be re-opened under paragraph (1)(b) shall ensure that such representations or requests are received by the Secretary of State within 3 weeks of the date of the written statement sent under paragraph (1)(a)."

For enforcement appeals held by an inspector at inquiry, the [Town and Country Planning \(Enforcement\) \(Determination by Inspectors\) \(Inquiries Procedure\) \(England\) Rules 2002](#) r.21 applies:

- (1) "Where a decision of an inspector on an appeal for which an inquiry has been held is remitted by any court to the Secretary of State for rehearing and redetermination, the Secretary of State—
 - (a) shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters on which further representations are invited in order for him to consider the appeal further;
 - (b) shall give those persons the opportunity of making written representations to him about those matters or asking for the re-opening of the inquiry; and
 - (c) may, as he thinks fit, cause the inquiry to be re-opened (whether by the same or a different inspector)

and if he does so paragraphs (2) to (8) of rule 9 shall apply as if the references to an inquiry were references to a re-opened inquiry. *J.P.L. 495

(2) Those persons making representations or asking for the inquiry to be re-opened under paragraph (1)(b) shall send such representations or requests to the Secretary of State within 3 weeks of the date of the written statement sent under paragraph (1)(a).”

See also almost identical provisions in the [Town and Country Planning \(Enforcement\) \(Inquiries Procedure\) \(England\) Rules 2002 r.22](#); [Town and Country Planning \(Enforcement\) \(Hearings Procedure\) \(England\) Rules 2002 r.17](#); [Town and Country Planning \(Hearings Procedure\) \(England\) Rules 2000 r.17](#).⁸

Case law

As mentioned above, the case law on the effect of a quashed decision is conflicting. On the one hand, there is authority to support the simple proposition that if a decision is successfully challenged under s.288, or settled by consent order, that decision no longer has any remaining legal effect. A quashed decision is a nullity and has no status in law.

The starting point is the case of *Kingswood* (above). In that case, the proposed development was a change of use from 11 flats to a single dwelling and the conversion of an existing coach-house to a single dwelling including a 12-car garage, all in the Green Belt. The local planning authority challenged the grant of planning permission by an inspector (by way of written representations) by the [Town and Country Planning Act 1971 s.245](#) (the precursor to s.288). The grant was challenged on multiple bases and the Secretary of State agreed to submit to judgment on two of those grounds relating to the imposition of a particular condition. The decision was quashed on the basis of those two grounds.

Mr Graham Eyre QC (sitting as a Deputy High Court Judge) said at [156]–[157] that the case:

”... raises in a stark manner the question as to what is the effect or the result of a court quashing a decision by reference to certain specific identified grounds in a notice of motion whereas the court takes no action in relation to the remainder.

Mr Burrell, on behalf of the applicants, expresses some anxiety that if the court restricts itself to the matters raised in grounds 9 and 10 of the notice of motion, it might put him in a position where he was unable to raise or re-emphasise matters relating to the green belt issue which is the issue with which his authority is primarily concerned, At the outset he indicated to me that he wished to argue the other grounds so as to ensure that the whole matter was considered by the Secretary of State.

Mr Holgate has come to the assistance of the court yet again. He has told me what the practice of the Secretary of State is in these matters, The Secretary of State’s practice is to deal with the matter de novo, and in addition, in this case, in order to allay Mr Burreu’s fears, the Secretary of State, through counsel, gave an undertaking that the matter in this case would be considered de novo, in any event and would inevitably involve, as a potential issue, the green belt policy considerations.

Notwithstanding that undertaking, all three counsel indicated to me that there appeared to be inconsistencies in the various authorities where this or a similar point has been considered, Indeed, there may be inconsistencies in a particular judgment, which it is contended should ready be resolved, As the matter has been raised, and I am invited to resolve it, I will attempt that task. Accordingly, I heard most helpful argument upon the point, and I was taken to the relevant authorities.”

After reviewing the case law, he concluded, at [162]:

”At the end of the day I am firmly of the view that the Secretary of State has to start again de novo with a clean sheet. In that clean sheet situation he is under the obligation to have regard to the development plan and other material considerations, and indeed he is obliged by virtue of the statutory *J.P.L. 496 provisions to have regard to matters that may be material considerations which have arisen since the date when the matter was originally considered.”

However, that principle was not applied in the subsequent decision of *Land and Development Ltd v First Secretary of State*.⁹ This involved a s.288 application following a Secretary of State decision that had rejected the recommendation of the inspector to grant permission on appeal. The proposed development was a residential and commercial development partly in an old courthouse. The appeal had been heard by an inspector (the first inspector) who refused permission. However, that

decision was ultimately quashed by consent as a result of the first inspector failing to correctly take into account housing need. On redetermination the Secretary of State recovered the appeal. The Secretary of State's alleged error was described as follows, at [21]:

"The first inspector, whose decision had been quashed because of his treatment of housing supply issues, had formed the view that the visual impact was unsatisfactory. The second inspector took a different view. The Secretary of State in his judgment agreed with the first inspector and said so. Mr Manley submits that in doing so he had regard to an immaterial consideration, namely the judgment of the first inspector."

The question for the court was whether the Secretary of State was entitled to consider the first inspector's view on visual impact, despite the fact that the first inspector's decision had been quashed, albeit for an unrelated error. HH Judge Rich QC sitting as a Deputy High Court Judge decided:

22. "It is right, in my judgment, that the decision of an inspector which is quashed is of no effect. That is why upon a remitted question being the subject of a renewed reopened inquiry, except by agreement the parties start again with a clean sheet. *But it does not mean that that which an inspector has previously decided after evidence, after having a view and after applying his planning judgment, is not at least potentially a material consideration. The weight to be given to such other judgment is a matter for the decision-maker on any reopened inquiry.* But it is, if it is a matter of planning judgment in identical circumstances, in my judgment at least desirable to explain why the second judgment differs from the first. It is at least convenient for the parties to be able to start at the second inquiry from the stage that had been reached at the first, so that any attempt to alter the basis of judgment at least has regard to the earlier judgment; and that indeed is the course which was followed by this appellant in this appeal in at least one and I think at least two separate matters.

23. I do not say that the report of the first inspector is necessarily in whole something to which a second inspector must have regard, still less is a matter which he must follow even if it concerns matters which are not impugned in the decision quashing the decision of the earlier inspector. Materiality is always a matter of judgment. But that it is a matter which may be taken into account if the decision-maker thinks that it is material seems to me to be self-evident."(emphasis added)

It is difficult to reconcile *Land and Development Ltd* with *Kingswood*. Both concern s.288 applications (or the precursor to s.288) and both concern a previous inspector's decision that has been quashed. *Kingswood* does not appear to have been cited in *Land and Development Ltd*.

The point next arose in *Vallis v Secretary of State for Communities and Local Government*.¹⁰ This concerned the upholding of an enforcement notice and the refusal of planning permission for a reconstructed **J.P.L. 497* barn.¹¹ There had been an earlier decision by an Inspector (Ms McFarlane) allowing the appeal and granting planning permission. This was quashed by consent and remitted for redetermination. The basis for quashing was that the first inspector had not said in express terms that the matters identified in paras 38–43 of her decision letter were "very special circumstances", as required by PPG2. The second inspector appointed was a Dr Morden. He reached a diametrically opposed view to the earlier Inspector and dismissed the appeal. Coulson J at [26] referred to the well-established principles that govern the materiality of previous appeal decisions¹² but noted that counsel for the Secretary of State said that this could not apply to a case like that before him, where the first inspector's decision letter has been agreed to be unlawful. The judge said:

"That is a reasonable point, but only to the extent that it relates to a matter connected with the unlawfulness of the first decision. In other words, if the first inspector decided a particular issue in such a way that his or her decision on that point was unlawful, the second inspector would be justified in dealing with that issue entirely afresh, without making any reference to the previous unlawful decision on that issue. If, on the other hand, the first inspector provided clear and cogent reasons for a conclusion on a specific issue, which explanation was nothing whatsoever to do with the subsequent unlawfulness of the decision, then the principles that I have outlined above must apply. In other words, the mere fact that the first inspector's decision was quashed as being unlawful should not, without more, render the whole decision irrelevant to the second inspector. Moreover I note that, in accordance with this approach, Dr Morden did not ignore Ms McFarlane's decision; on the contrary, he expressly dealt (even if in brief terms) with some of the key elements of Ms McFarlane's Decision Letter (see paragraph 19 above)."

The point arose again in *Arun DC v Secretary of State for Communities and Local Government*¹³ before HH Judge Seys-Llewellyn QC (sitting as a Deputy High Court Judge). The proposed development was for 39 dwellings. The application was refused and the appeal was unsuccessful. The appeal had proceeded on the assumption that the South Eastern Plan ("SEP") had been revoked by the Secretary of State. The decision of the Secretary of State to revoke the SEP was later quashed on judicial review, having the consequence that on appeal of the application the SEP should have been considered. The Secretary of State conceded that the refusal on appeal should be quashed and the matter was remitted for reconsideration. On reconsideration by a second inspector, permission was granted. It was that permission that was challenged under s.288 in this case. The question for the court was put by the learned Deputy Judge as follows at [5]:

"The first question is, if the decision of the Inspector on appeal expresses findings or conclusions but the decision is quashed on judicial review, is it an error of law for the second Inspector who deals with the remitted appeal to make no reference to the findings and conclusions of the first Inspector? More fully, if the decision of the first Inspector on appeal expresses findings or conclusions on one of the two issues which are of central importance to the decision by the second Inspector, but the first decision has been quashed on judicial review, is it an error of law to make no reference to that finding or conclusion of the first Inspector and/or not to give reasons for arriving at different findings or conclusions?"

Rejecting the authority's submissions, the learned Deputy Judge reasoned as follows: **J.P.L. 498*

15 "The claimant contends that the first Inspector's conclusion were a material consideration. First, I consider that this is wrong in law. In *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] A.C. 295* in the House of Lords, Lord Diplock said this at 365, letters E-H: 'Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such a challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed.' And this: 'It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings.' Here, it seems to me, equally so. The decision on appeal of the first Inspector had not been quashed as to certain grounds only, but had been quashed in its entirety. The parties did not compromise the appeal under section 288 from the first Inspector's decision upon the basis that a part of it should stand, nor was there agreement before the second Inspector that any of the grounds or findings of the first Inspector should stand. I would have considered this in itself an answer to the challenge.

16 However, I turn to a second thread developed by Miss Williams. It is this: that it was inherent in the importance of the considerations the subject matter of the conclusions and findings of the first Inspector that the second Inspector should have paid attention to it. In my judgment, the statutory framework is that the role of the new Inspector is one of redetermination, not one of review. The second Inspector was correct in the statement of her role at paragraph 4 of her decision letter, which I have read above. I respectfully consider further that it would lead to potential confusion and complexity for Inspectors on remitted appeals if as a preliminary step they have to consider which part or parts of a quashed decision might or might not be capable of being revived as a material consideration in its own right. As a minor, but perhaps relevant, consideration any different approach might, as Mrs Townsend submits for the interested party, at least in some cases inhibit sensible settlement of a challenge, since a party might rather see a claim through for decision on appeal under section 288 if case findings which it had challenged in that very claim [as the interested party had sought to do here] were to be taken as having survived the quashing.

17 A third strand developed by Miss Williams is this: that the approach of the second Inspector is, however, inconsistent with the fundamental principle that previous decisions should not be ignored. The claimant argues that the reasons of the first Inspector are site specific and cannot be assumed to have changed within a period of less than a year until the hearing of the second appeal, and claims to rely upon the principle of consistency. This is what might **J.P.L. 499* be called the North Wiltshire principle, namely, from Mann LJ in *North Wiltshire DC v Secretary of State for the Environment [1992] 65 P. & C.R. 137*: 'One important reason why previous decision are capable of being material is that like cases should be dealt with in a like manner so that there is a consistency in the appellate process.' Miss Williams for the claimant refers me to the statement of that principle in *Fox Strategic Land and*

Property Ltd v Secretary of State for Communities and Local Government [2012] EWHC 444 (Admin), where at [37] HH Judge Gilbert QC stated this: ‘Mr Warren submitted that a decision maker was entitled to regard another decision as material, but then give it no weight. In my judgement that is to misunderstand the purpose of the passages in North Wiltshire cited above. The rationale of the principle is that, if a decision is to be reached which is not ad idem with the approach followed in another, then the importance of achieving consistency and of the maintenance of confidence in the development control system require that reasons are given for departures from conclusions reached in another decision. I would refer to this passage from *Dunster* at [23] per Lloyd LJ (emphasis added) “Mr Mead’s last sentence in paragraph 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons.”’ In my judgment, that case was one wholly different from the present case, in that it concerned different sites and the previous appeal decision, (the *Richborough* appeal), still stood. In the present case, the previous decision has been quashed in its entirety. Accordingly, the principle in *Hoffmann La Roche* applies.”

In addressing the case of *Land and Development Ltd*, the Deputy Judge distinguished it as follows, at [18]:

”First, these observations are obiter (see [4], [13] and [14] of the judgment). Second, it is unclear whether or what authorities were cited and there is no reference to the principle in *Hoffmann La Roche*. Third, if I might put it respectfully, there is ground to suspect that the matters the subject of this obiter observation were not argued before the learned judge since he expressed the view that ‘materiality is always a matter of judgment’, which strongly suggests that he was not aided by reference to matters of basic principle. Also, it involved the rather different position of a call-in inquiry, where the Secretary of State was merely having regard to an earlier Inspector’s report rather than a decision. I respectfully draw no persuasive assistance for the claimant from it.”

However, there is a further example of how the case law does not all lean in one direction. In the recent case of *St Albans CC and DC v Secretary of State for Communities and Local Government*,¹⁴ Holgate J favoured an alternative analysis at [127]:

127 “Likewise, I will not decide the argument raised by the Secretary of State and by Helioslough that the effect of the High Court’s quashing order on 22 January 2015 in Veolia’s challenge **J.P.L. 500* was to render the Veolia decision of no legal effect from the outset for any purpose and thus prevent the Council from pursuing Ground 2 (applying *Boddington v British Transport Police* [1999] 2 A.C. 143 at 155C). If it had been necessary for me to decide the point, I doubt whether I would have accepted it on the argument I heard.

128 First, the *Boddington* principle is not absolute (see e.g. *R. (Shoesmith) v Ofsted* [2011] P.T.S.R. 1459). Second, there is authority to the effect that when a planning decision by the Secretary of State or an Inspector is quashed, it does not follow that reliance cannot be placed upon any part of that decision at all. For example, it may be possible to have regard to parts of the decision which are not tainted or affected by the legal grounds upon which the quashing was based (see e.g. *Vallis v Secretary of State for Communities and Local Government* [2012] EWHC 578 (Admin) at [14] and [27]). Third, the decisions of the High Court and the Court of Appeal in *Fox Strategic Land and Property Ltd v Secretary of State* [2013] 1 P. & C.R. 6 proceeded on the basis that when the decision in *Fox*’s case was re-determined as a result of a quashing order, that part of the decision in the *Richborough* appeal relating to the spatial vision for Sandbach would be taken into account, notwithstanding that the *Richborough* decision had already been quashed on other grounds. Mr Whale accepted this, but merely added that the *Boddington* point had not been argued in *Fox*. That response suggested that the Secretary of State has not thought through the implications for other cases of the ‘knock out blow’ he seeks to deliver in the present case, and therefore the matter should await full argument and citation of relevant authorities in a case where a decision on the issue is necessary. Fourth, the Secretary of State should reconsider his argument in the light of regulation 19 of the *Town and County Planning Act (Inquiries Procedure) (England) Rules 2000* (SI 2000/1624) and parallel rules for decisions by Inspectors. These rules proceed on the basis that when an appeal has to be redetermined following a quashing, there is no legal principle requiring the whole decision to be treated as if it had never existed, so as to make it necessary for all of the merits of the appeal to be redetermined.”

It is important to note that these observations are clearly obiter and without the benefit of full argument. Moreover, neither

the *Kingswood* nor *Arun* cases appear to have been cited.

As to the qualification to the *Boddington* principle found in *R. (on the application of Shoemith) v Ofsted*,¹⁵ the latter case is authority for the following qualification only:

119 “It seems to me that there is an area, admittedly ill-defined but left open by Lord Steyn in the *Boddington case* [1999] 2 A.C. 143 and Lord Phillips PSC in the *Mossell case* [2010] UKPC 1 in which the act of a public authority which is done in good faith on the reasonably assumed legal validity of the act of another public authority, is not ipso facto vitiated by a later finding that the earlier act of the other public authority was unlawful.”

Whereas the issue in *Shoemith* was the validity of a second act which had relied, in good faith, on the validity of an earlier public authority act and which at the time relied on had not been quashed (albeit it may have been under challenge), the subject of this article is different. When a decision maker such as an inspector or Secretary of State considers a planning appeal and knows that a previous Inspector’s or Secretary of State decision has been quashed, the question of whether that quashed decision should be taken into account is a wholly different issue. There can be no question of reliance in good faith on the validity of that decision or report.

As to *Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government*,¹⁶ this concerned an application for 280 dwellings on agricultural land at Sandbach in Cheshire. The local *J.P.L. 501 planning authority had refused permission and on appeal the Secretary of State had agreed with its inspector’s report dismissing the appeal. A s.288 challenge succeeded before HH Judge Gilbert QC (sitting as a Deputy High Court Judge) and was then appealed to the Court of Appeal. The challenge had been based on the failure of the Secretary of State to take into account his earlier decision in respect of a proposal for 269 dwellings on a nearby site known as the *Richborough* appeal. The *Richborough* appeal was dismissed by the Secretary of State following an inspector’s report. That refusal was then challenged in the High Court and quashed by consent. Crucially, at the time of consideration by the Secretary of State, the *Richborough* appeal, although the subject of challenge, had not yet been quashed. Pill LJ giving the judgment of the court explained:

33 “Mr Warren argues that, whatever the grounds, if the decision is quashed it is quashed, but that in my judgment is to take too simplistic a view of the situation. One has to look forward. As the judge indicated, the Secretary of State is going to redetermine *Richborough*; he has indicated on what matters he wishes to hear submissions. There do not include consideration of the spatial vision issue. Clearly the Secretary of State is not minded to depart from the earlier approach, and his starting point on the redetermination at *Richborough* will be the favourable view of spatial vision taken on the earlier occasion. As to *Fox*, the respondents will seek to rely, if they have the opportunity to do so, on the favourable findings on spatial vision for the Sandbach area which the Secretary of State made in the *Richborough* decision. That in my judgment illustrates the unfairness of the position in which the Secretary of State’s approach has put the respondents.

34 There should have been an analysis of the relevance of the *Richborough* decision to the *Fox* decision and a consideration of what the implications of favourable findings in *Richborough* were for the *Fox* appeal. If the Secretary of State was minded to depart from the spatial findings in *Richborough*, at least an explanation was required of why he proposed to do so. Rather than provide that, he simply relied on the existence of the High Court challenge which, upon analysis, does not begin to deal with the key question of inconsistency and also does not provide a justification for failing to address the question of inconsistency.

35 In my judgment the judge was correct to reach the conclusion he did on this issue. It was unlawful to ignore the implications of the *Richborough* decision when making the *Fox* decision. The inconsistencies against which the North Wiltshire principles guard were present in this case and have led to an unlawful decision by the Secretary of State which I too would quash.”

It is important to note that the authorities of *Hoffman La Roche*, *Boddington*, *Kingswood* and *Arun DC* were not, it appears, cited to the court in this decision. It is likely that this is a consequence of the fact that the *Richborough* appeal decision had not in fact been quashed yet; the issue in that case was a different one and concerned the status of a decision that was under challenge rather than one that had been successfully challenged and quashed. It is also relevant to note that the *Richborough* appeal had been a decision of the Secretary of State, therefore even if/when that had been quashed, only that decision would have been quashed rather than the inspector’s report.

This leads to an important observation in Secretary of State determined cases. The challenge in a s.288 claim is to the Secretary of State's decision, not the Inspector's Report: see the [TCPA 1990 s.284\(3\)\(b\)](#). The quashing under s.288 is of the "order or action" (see [s.288\(5\)\(b\)](#))—these words were substituted by the [Criminal Justice and Courts Act 2015 Sch.16 para.4\(6\)\(b\)](#) (as from 26 October 2015). The heading to s.288 though remains "Proceedings for questioning the validity of other orders, decisions and directions" and similarly [s.284](#) is headed "Validity of development plans and certain orders, decisions and directions". *[J.P.L. 502](#)

For that reason, a distinction can be drawn between a quashed inspector's decision and a quashed Secretary of State decision. The latter allows for the conceptual possibility of the inspector's report retaining some legal validity because the inspector's report is distinct from the Secretary of State's decision and has not itself been impugned—it is not the action that is being quashed—that is the Secretary of State's decision. The former does not allow for such scope: on an inspector's decision, once the inspector's decision has been quashed there is nothing remaining that could have legal validity. In this respect it is worthwhile noting that the situation in *St Albans* was of the latter kind: only the Secretary of State's decision had been quashed, not the Inspector's report.

In *Butterworth v Secretary of State for Communities and Local Government*,¹⁷ Lindblom J (as he then was) considered the *Arun* case and noted that "the circumstances there—an appeal decision quashed by the court and the appeal re-determined with a different result—are not analogous to cases in which the decision-maker is obliged to consider the principle of consistency" e.g. the *North Wiltshire* line of cases. The learned judge expressed no disagreement with *Arun* in so far as it deals with quashed decisions.

R. (on the application of West Lancashire BC) v Secretary of State for Communities and Local Government

This s.288 challenge concerned an application for outline planning permission for 100 dwellings and detailed planning permission for 50 dwellings at a greenfield site in Lancashire. The application was refused by the local planning authority and allowed by an inspector on appeal. The local planning authority challenged the inspector's decision by way of s.288. The Secretary of State consented to a quashing order, but Wainhomes, the developer, defended the challenge.

It was common ground in the High Court that the inspector on appeal had made a material error in calculating the housing land supply figure by omitting two relevant sites. The inspector calculated the figure at 4.2 years, which he indicated showed a "significant" shortfall against the requirement for a 5-year supply when it should have been 4.6 years. It was also argued he had made another error but for which the supply would have been 4.8 years. Wainhomes sought to argue that regardless of whether the inspector thought the housing land supply figure was 4.2 years or 4.6 or 4.8 years the outcome would have been the same (a *Simplex*¹⁸ argument).

This submission relied upon a decision by the inspector in another appeal in respect of an adjacent site ("the *Redrow* appeal"). In that appeal, heard at a conjoined inquiry with the appeal the subject of the s.288 challenge, but in respect of which the decision letter had been issued later, the same inspector had correctly calculated the housing land supply figure and proceeded on the basis of 4.8 years (he had been alerted to his error in the other appeal decision by the s.288 proceedings having been brought). He had concluded that this was nonetheless a "significant" shortfall but refused the *Redrow* appeal on other grounds unrelated to housing supply issues. That decision was ultimately quashed by consent order. The issue therefore arose whether Wainhomes were entitled to rely on the *Redrow* appeal decision, it having been quashed, to demonstrate that the outcome in the subject appeal would have been the same regardless of the error in housing land supply, e.g. the Inspector would still have seen a "significant" shortfall and so granted permission even if the supply was 4.8 not 4.2. Wainhomes relied on the fact that the quashing of the *Redrow* appeal was not in any way on grounds related to the conclusions on housing land supply.

The case law referred to above was cited to HH Judge Pelling QC (sitting as a Deputy High Court Judge). The Deputy Judge agreed that there are practical difficulties with relying on quashed decisions, at [29]: *[J.P.L. 503](#)

"There are practical difficulties in adopting the course for which Mr Tucker contends, being those identified in paragraph 19 of Judge Seys-Llewellyn's judgment namely:

‘... the role of the new Inspector is one of redetermination, not one of review. The second Inspector was correct in the statement of her role at paragraph 4 of her decision letter, which I have read above. I respectfully consider further that it would lead to potential confusion and complexity for Inspectors on remitted appeals if as a preliminary step they have to consider which part or parts of a quashed decision might or might not be capable of being revived as a material consideration in its own right.’

I respectfully agree with that analysis and would add this - that is likely to be even more the case where a third party is seeking to rely upon a quashed decision arrived at in relation to an appeal which it was not party and relating to land which is not the subject of its own application.

30 The point concerning quashing on limited grounds was considered in *Kingswood v Secretary of State for the Secretary of State Environment 57 P. & C.R. 153*, where in the context of a subsequent appeal between the same parties, in respect of the same application, following the quashing of an earlier ministerial appeal decision the deputy judge held that the Secretary of State had to start again with a clean sheet notwithstanding the limited basis on which the earlier decision had been quashed.

31 In my judgment, the reasons for such an approach are obvious and were in essence those identified by Judge Seys-Llewellyn in *Arun DC* (ante). If it were otherwise then the enormous amounts of time would be taken up and costs expended in attempting to discern what elements of the quashed decision were impacted by the quashing decision and which were not. In some cases at least, there could be legitimate disagreement about the issue, thereby generating the possibility of further review proceedings and onward appeals which would be in relation to collateral issues. This is not merely a time and cost issue for the parties but, at least potentially, is also a public resource issue for the public at large as well.”

Referring to *St Albans*, and regarding Holgate J’s comments as strictly obiter, he explained at [33]:

”It is necessary to put *St Albans* in context. That was a case which was concerned with an attempt by a party to a previously quashed decision to rely upon the content of the previously quashed decision. In my judgment, the regulations which Holgate J refers to are rules which govern how a subsequent appeal is to be governed following the quashing of an initial decision in relation to that appeal. In that context what the regulations are concerned with is the evidence which is to be adduced in order that the appeal process can be completed following the quashing process. It is difficult to see how these rules could have any direct application in relation to an appeal such as this, where one of the parties is seeking to rely upon a quashed decision in relation to a third party application not concerning the land the subject of the relevant application.”

The learned Deputy Judge found little assistance in the judgments in *Vallis* and *Fox*, stating:

”The approach adopted in *Vallis* is inconsistent with that which had been adopted in *Kingswood*, which was not cited and with *Arun* which does not appear to have been cited either. Similarly, *Fox v Secretary of State [2013] 1 P. & C.R. 6* does not provide a definitive answer because the authorities on which the judge had taken a different view in *Arun* were not cited to the court and because the decision relied upon in *Fox* was under challenge but had not been quashed. Thus, this is an area of planning law which has been left in some confusion because of the conflicting approaches by first instance judges in many cases where those first instance judges had not had the or any of the relevant authorities cited to them. *J.P.L. 504 “

He concluded in favour of the local planning authority, that no reliance could be placed on the quashed *Redrow* appeal.

The practical reality of a re-determination

In practice, on re-determination, the appeal will usually be heard by a different inspector. The Planning Appeals Procedural Guide (reissued 26 January 2018) provides as follows:

L.12 “What happens if a challenge is successful?”

L.12.1 If a challenge is successful the appeal or costs decision will be returned to the Planning Inspectorate for re-determination. We will give all High Court re-determination cases priority status, and they will normally be dealt with quickly, though without prejudicing any party. We will usually appoint a different Inspector to re-determine planning or listed building consent appeals. Arrangements for redetermination of costs decisions may differ, particularly where the related appeal decision has been upheld.

L.12.2 The appeal will usually be decided by either further written representations or an inquiry. We will rarely arrange a hearing even if the original appeal was dealt with this way. We consider that a hearing

decision that has been examined in the formal setting of the High Court would normally need to be re-determined under the formal inquiry procedure, in order to allow a full examination of the legal issues raised. However, where all parties agree that a hearing would be appropriate we will take this into account when determining the procedure for the re-determined appeal.

L.12.3 Where the appeal was originally dealt with by written representations, we would normally re-determine it by means of further written representations. However, where there has been a material change in circumstances, we may consider this is no longer the most appropriate procedure; having regard to the criteria (please see Annexe K).

L.12.4 Where the appeal was originally dealt with by an inquiry, it will probably be re-opened. Where there have been significant changes in circumstances (e.g. new legislation or local or national policies) since the original inquiry or hearing the Inspector would normally allow further evidence to address these.”

The approach taken by PINS in practice follows the *Arun* approach. This is illustrated by the letter PINS sent out in respect of the re-opened inquiry into the appeals the subject of the High Court’s decision in the *West Lancashire* case and which said:

”We have decided that the appeal will proceed by way of an inquiry. This is because the appeal must be considered afresh and from first principles before a different Inspector. The new Inspector is not bound to follow his/her predecessors’ findings and conclusions, and will come to his/her own view on the presented evidence.”

This is also borne out as being the approach taken elsewhere, thus in *Cornell v Wiltshire Council*¹⁹ the Inspector noted:

11 “The appellant contends, with reference to *Arun DC v Secretary of State for Communities and Local Government; Green Lodge Homes LLP [2013] EWHC 190 (Admin)* that it would be an error in law for me to have regard to the former decision on the current appeal which was quashed in the High Court. The council notes that just one ground of challenge was *J.P.L. 505 successful 3—and that *Arun* concerned whether a second inspector should rather than could have regard to a quashed decision.²⁰ Either way, I am not bound by the former decision. It was made in different circumstances and quashed in its entirety. I have had regard to all evidence submitted in relation to this appeal, including submissions to the 2012 Inquiry, insofar as they were available to me and still relevant—but I have attached no weight to the quashed decision.”

Conclusions

In light of the above statutory, procedural and case law position, we would suggest the following as a summary of the law:

- a distinction can be drawn between the effect of a successful s.288 application and a s.289 appeal. The former results in the quashing of the impugned decision or act whereas the latter does not;
- the procedural regulations leave the position open, apparently allowing for a flexible, case-sensitive approach to how evidence is heard on remittance after a successful s.288 or s.289 challenge. This is important because whatever the effect of quashing is on the previous decision, the evidence provided previously is not quashed. It remains and can be relied on again albeit it may well need updating;
- although the case law on the effect of a successful s.288 application is conflicting, the better view is that once a decision is quashed it has no remaining legal effect. This is because:
 - it is strongly supported by public law principles as set out in cases such as *Boddington* and *Hoffmann La Roche* and any qualification to those principles in cases such as *Shoemith* is immaterial to the issue in hand;
 - the alternative approach whereby only those parts of a decision which led to the quashing are to be disregarded has undesirable consequences including:
 - claimants are likely to reject offers to consent on only one of their grounds and will seek to fight on other grounds in order to avoid parts of appeal decisions they disagree with still carrying weight on any re-determination (i.e. the issue that arose in *Kingswood*²¹); and
 - difficult arguments on the re-determined appeal about exactly which parts of the

quashed appeal decision are affected by the grounds on which it was quashed and which were unaffected;

- it also has the weight of authority behind it where the precise point has been argued and the judge has had the benefit of the full range of authorities;
- a distinction can be drawn between the effect of quashing of an inspector's decision and a Secretary of State decision. The quashing of a Secretary of State decision does not (necessarily) impugn the legal status of the inspector's report. In this scenario, it may be possible to say that the inspector's report remains legally valid. On the other hand, if an inspector's decision is quashed, there is no remaining legally valid status in his/her decision and that decision is a legal nullity;
- in practice, on redetermination the matter is usually heard by a different inspector who will form a view de novo, without consideration of the previous inspector's decision. If **J.P.L. 506* circumstances have changed further evidence can be heard. The redetermination will usually be held by inquiry if the matter had originally been heard by inquiry.

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Footnotes

- 1 *Kingswood DC v Secretary of State for the Environment (1989) 57 P. & C.R. 153; [1988] J.P.L. 248.*
- 2 *St Albans CC and DC v Secretary of State for Communities and Local Government [2015] EWHC 655 (Admin).*
- 3 *R. (on the application of West Lancashire BC) v Secretary of State for Communities and Local Government [2017] EWHC 3451 (Admin).*
- 4 Civil Procedure Rules 1998 (SI 1998/3132).
- 5 There are some cases suggesting that a declaration can be granted: see the discussion in the judgment of Lindblom LJ in *Secretary of State for Communities and Local Government v South Gloucestershire Council [2016] EWCA Civ 74* at [32]-[36].
- 6 Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 (SI 2000/1625).
- 7 Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002 (SI 2002/2684).
- 8 Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626).
- 9 *Land and Development Ltd v First Secretary of State [2003] EWHC 2200 (Admin).*
- 10 *Vallis v Secretary of State for Communities and Local Government [2012] EWHC 578 (Admin).*
- 11 *Vallis v Secretary of State for Communities and Local Government [2012] EWHC 578 (Admin)* at [1] refers to

the claims having been brought under ss.288 and 289 but it is difficult to see how this was a s.288 claim given that the enforcement notice was upheld and planning permission not granted.

- 12 e.g. *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P. & C.R. 137 and *Dunster Properties Ltd v First Secretary of State* [2007] EWCA Civ 236; [2007] J.P.L. 1464.
- 13 *Arun DC v Secretary of State for Communities and Local Government* [2013] EWHC 190 (Admin); [2013] J.P.L. 1011.
- 14 *St Albans CC and DC v Secretary of State for Communities and Local Government* [2015] EWHC 655 (Admin).
- 15 *R. (on the application of Shoemith) v Ofsted* [2011] EWCA Civ 642; [2011] P.T.S.R. 1459.
- 16 *Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198.
- 17 *Butterworth v Secretary of State for Communities and Local Government* [2015] EWHC 108 (Admin).
- 18 *Simplex GE (Holdings) v Secretary of State for the Environment* [2017] P.T.S.R. 1041; (1989) 57 P. & C.R. 306; [1988] J.P.L. 809.
- 19 *Cornell v Wiltshire Council* [2014] P.A.D. 10.
- 20 That submission as to what *Arun DC v Secretary of State for Communities and Local Government* [2013] EWHC 190 (Admin); [2013] J.P.L. 1011 was about is plainly wrong.
- 21 See also J. Maurici, “Consent orders in section 288 and 289 proceedings” [2010] J.P.L. 1217–1236.