



Neutral Citation Number: [2026] EWCA Civ 247

Case No: CA-2025-002648

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
PLANNING COURT
Tim Smith (sitting as a Deputy High Court Judge)
AC-2024-LON-003215

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2026

Before :

THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE ELISABETH LAING

and

LORD JUSTICE HOLGATE

Between :

AMIN DHARMESHKUMAR

Appellant

- and -

**(1) SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT**
(2) LONDON BOROUGH OF BRENT

Respondents

Daniel Stedman Jones (instructed by **Setfords Solicitors London**) for the **Appellant**
Ned Westaway and Charles Forrest (instructed by **Government Legal Department**) for the
First Respondent

The Second Respondent did not attend and was not represented.

Hearing date : 3 February 2026

Approved Judgment

This judgment was handed down remotely at 2pm on 10 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Pursuant to para. 6.1 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, the Court certifies that this decision may be cited as an authority

Lord Justice Holgate :

Introduction

1. Under s.289 of the Town and Country Planning Act 1990 (“TCPA 1990”) an appeal may be made to the High Court, with the permission of that court, against a decision of the Secretary of State for Housing, Communities and Local Government (“SSHCLG”) or a Planning Inspector on an appeal against an enforcement notice dealing with a breach of planning control. Such an appeal may be brought by a person interested in the relevant land or by the local planning authority (“LPA”) which served the notice. Under s.289(6) a further appeal may be made to the Court of Appeal with the permission of either the High Court or the Court of Appeal.
2. The issue before us is whether an appeal to the Court of Appeal from a decision of the High Court under s.289 is a “first appeal” or a “second appeal” for the purposes of s.55 of the Access to Justice Act 1999 (“AJA 1999”) and CPR 52.6 and 52.7. If it is a first appeal, permission may be granted by either the High Court or the Court of Appeal, where the court considers that appeal to have a real prospect of success or “there is some other compelling reason for the appeal to be heard”. If it is a second appeal, permission may only be given by the Court of Appeal and the test for the grant of permission is stricter. The Court of Appeal must be satisfied that the appeal has a real prospect of success and raises an important point of principle or practice; alternatively, that there is some other compelling reason for the Court of Appeal to hear the appeal.
3. Some of the legislation discussed below refers to “leave to appeal”, whereas other enactments refer to “permission to appeal”. For convenience, I will use the more contemporary term, “permission to appeal” which also appears in the Civil Procedure Rules.
4. The appellant, Mr Amin Dharmeshkumar, is the owner of a building in Wembley that was formerly used as offices. He obtained planning approvals from the LPA and second respondent, the London Borough of Brent (“LBB”), to enable him to convert the building to residential use. In November 2019 he began to carry out the works. The appellant sought from LBB approvals for amendments to the scheme which they either refused or did not determine. The appellant completed the conversion to twelve flats which were occupied on 19 April 2023.
5. On 7 August 2023 LBB served an enforcement notice alleging a breach of planning control by making a material change in the use of the building to twelve flats without the necessary planning permission. The appellant appealed against that notice to the first respondent, the SSHCLG, on a number of grounds, including that he had the necessary planning approvals and so no breach of planning control had occurred.
6. On 23 and 24 April 2024 the enforcement notice appeal was heard by a Planning Inspector. On 2 October 2024 he issued his decision letter dismissing the main grounds of appeal. The Inspector decided that the development had involved a breach of planning control because it had not been carried out in accordance with approved details and the appellant had failed to obtain planning permission for the changes to the scheme

as built. The Inspector also made a partial award of costs in the appellant's favour against LBB in a second decision letter.

7. Under s.289(6) of the TCPA 1990, the appellant obtained permission to appeal to the High Court against the Inspector's decisions on both the enforcement notice appeal and the application for costs. On 10 July 2025 the appeals came before Mr Tim Smith sitting as a Deputy High Court Judge. In his judgment handed down on 3 October 2025 the judge dismissed both appeals.
8. The appellant then sought to appeal against both parts of the judge's decision. He did not ask the judge to grant permission to appeal. He asks this court to do so. On 10 December 2025, Lewison LJ adjourned the appellant's application for permission to appeal to an oral hearing solely for the determination of a preliminary issue, namely the test which the Court of Appeal should apply when deciding whether to grant permission to appeal under s.289(6) of the TCPA 1990 to itself. He also directed that once the court determines that issue, the application for permission to appeal should be determined on the papers by a single Lord or Lady Justice.

Statutory Framework

Planning legislation

9. Enforcement of planning control is dealt with in Part VII of the TCPA 1990. A LPA may issue and serve an enforcement notice where they consider that a "breach of planning control" has taken place and that it is expedient to take this step (s.174). A breach of planning control refers to either the carrying out of development without the required planning permission or a failure to comply with any condition or limitation subject to which planning permission has been granted (s.171A). An enforcement notice must specify the breach of planning control and the steps which the LPA require to be taken or the activities which must cease in order to *inter alia* remedy that breach or any injury to amenity (s.173(1) and (2)).
10. A person with an interest in land may appeal against the notice to the Secretary of State under s.174(1) on any of the grounds listed in s.174(2). For example, under s.174(2)(a) an appellant may contend that the Secretary of State should grant planning permission for the matters stated in the enforcement notice to constitute a breach of planning control, or that the relevant condition or limitation should be discharged. Similarly, s.177(1) provides that on an appeal the Secretary of State may *inter alia* grant planning permission for the development enforced against.
11. An appeal under s.174 must be made before the date on which the enforcement notice states that it will take effect (s.174(3)), otherwise the Secretary of State has no jurisdiction to entertain an appeal. Where an appeal is brought in time, s.175(4) provides that the enforcement notice is of no effect pending "the final determination" or withdrawal of the appeal, subject to any order to the contrary made by the High Court or the Court of Appeal under s.289(4A).
12. Section 289 of the TCPA 1990 provides for an appeal to the High Court on a point of law against the decision of the Secretary of State or an Inspector on an enforcement notice appeal. Section 289 provides so far as is material:

“(1) Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court.

(2)...;

(2A)...;

(3) At any stage of the proceedings on any such appeal as is mentioned in subsection (1), the Secretary of State may state any question of law arising in the course of the proceedings in the form of a special case for the decision of the High Court.

(4) A decision of the High Court on a case stated by virtue of subsection (3) shall be deemed to be a judgment of the court within the meaning of section 16 of the Supreme Court Act 1981 (jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the High Court).

(4A) In proceedings brought by virtue of this section in respect of an enforcement notice, the High Court or, as the case may be, the Court of Appeal may, on such terms if any as the Court thinks fit (which may include terms requiring the local planning authority to give an undertaking as to damages or any other matter), order that the notice shall have effect, or have effect to such extent as may be specified in the order, pending the final determination of those proceedings and any re-hearing and determination by the Secretary of State.

(4B)

(5) In relation to any proceedings in the High Court or the Court of Appeal brought by virtue of this section the power to make rules of court shall include power to make rules—

(a) prescribing the powers of the High Court or the Court of Appeal with respect to the remitting of the matter with the opinion or direction of the court for re-hearing and determination by the Secretary of State or the Welsh Ministers; and

(b) providing for the Secretary of State or the Welsh Ministers, either generally or in such circumstances as may be prescribed by the rules, to be treated as a party to any such

proceedings and to be entitled to appear and to be heard accordingly.

(5A) Rules of court may also provide for the High Court or, as the case may be, the Court of Appeal to give directions as to the exercise, until such proceedings in respect of an enforcement notice are finally concluded and any re-hearing and determination by the Secretary of State has taken place, of any other powers in respect of the matters to which such a notice relates.

(6) No proceedings in the High Court shall be brought by virtue of this section except with the leave of that Court and no appeal to the Court of Appeal shall be so brought except with the leave of the Court of Appeal or of the High Court.

(7) ”

13. Six points should be noted about s.289.
14. First, an appeal to the High Court is confined to points of law and therefore is akin to judicial review, or to statutory review under s.288 of the TCPA 1990, as regards the grounds of appeal or the grounds of challenge which may be raised (*R (Walsall Metropolitan Borough Council) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 370; [2013] JPL 1183 at [20]). The same would also be true for the alternative procedure of an appeal by way of case stated (although it appears that this procedure has never been used).
15. Second, if an appeal under s.289 is successful, the High Court does not decide how the appeal under s.174 should be determined. Although the court may not quash a decision of the Secretary of State or a Planning Inspector, it will remit the matter to the Secretary of State for re-hearing and re-determination in accordance with the opinion of the court (s.289(5)(a) of the TCA 1990, PD 54D para. 6.14 and *R (Leeds City Council) v First Secretary of State* [2004] EWHC 2477 (Admin)). This form of relief is analogous to that granted where a claim for statutory review under s.288 of the TCPA 1990 or judicial review is successful. Although the court will quash the decision impugned, it will not remake the decision itself. Instead the application or appeal remains with the Secretary of State to be redetermined by him in accordance with the court's judgment.
16. Third, since the introduction by Part II of the Caravan Sites and Control of Development Act 1960 of a right of appeal to a Minister (in place of an appeal to a magistrates' court), it has been possible to appeal against the Minister's decision to the High Court and from there to the Court of Appeal. But an appeal to the Court of Appeal could only be brought with permission (from either the High Court or the Court of Appeal), even before that became a general requirement for appeals to this court (s.34(4) of the 1960 Act, s.180(5) of the Town and Country Planning Act 1962 and s.246(4) of the Town and Country Planning Act 1971 and s.289(6) of the TCPA 1990 as originally enacted).
17. Fourth, an additional requirement to obtain permission to appeal to the High Court was introduced when s.289(6) was amended by s.6(5) of the Planning and Compensation Act 1991. That change was made in response to the concern identified by Robert

Carnwath QC (as he then was) at paras. 6.1 to 6.3 of his report to the Department of Environment, “Enforcing Planning Control” that landowners were making meritless appeals so that an enforcement notice would be suspended by s.175(4) of the TCPA 1990 until the final determination of an appeal.

18. Fifth, the 1991 Act also inserted s.289(4A) into the TCPA 1990, empowering the court to order that an enforcement notice has effect pending the final determination of an appeal, including a redetermination following a successful appeal to the court under s.289.
19. Sixth, in *R v Kuxhaus* [1988] QB 631 the Court of Appeal decided that, for the purposes of the forerunner of s.175(4) of the TCPA 1990, an appeal under s.174 against an enforcement notice is not finally determined while proceedings under s.289 are on foot. One possible outcome of an appeal under s.289 is that it will be allowed and the Secretary of State’s decision remitted for re-hearing and re-determination (s.289(5) and CPR PD 54D para.6.13). Thus, s.174 and s.289 do not give rise to separate rights of appeal, each of which is self-contained. A section 289 appeal is “a possible integral part” of, a stage in the s.174 appeal, potentially final but not necessarily so ([1988] QB 642E-643B)¹.
20. Thus, the provisions in Part VII of the TCPA 1990, read together with s.289, represent a detailed, largely self-contained code comprising specific provisions for dealing with enforcement notices and appeals against such notices.

Legislation on appeals in the courts

21. Section 16(1) of the Senior Courts Act 1981 states that “subject as otherwise provided by this or any other Act, ... the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court”.
22. Section 54 of the AJA 1999 enables rules of court to be made requiring permission to be obtained to exercise a right of appeal to civil courts from the County Court to the Court of Appeal:

“54.— Permission to appeal

(1) Rules of court may provide that any right of appeal to—

- (a) the county court,
- (aa) the family court,
- (b) the High Court, or
- (c) the Court of Appeal,

¹ The Court of Appeal certified as a point of law of general public importance the issue whether s.175(4) includes appeals to appellate courts under s.289, but it does not appear that the House of Lords heard an appeal in *Kuxhaus*.

may be exercised only with permission.

- (2) This section does not apply to a right of appeal in a criminal cause or matter.
- (3) For the purposes of subsection (1) rules of court may make provision as to—
 - (a) the classes of case in which a right of appeal may be exercised only with permission
 - (b) the court or courts which may give permission for the purposes of this section,
 - (c) any considerations to be taken into account in deciding whether permission should be given, and
 - (d) any requirements to be satisfied before permission may be given,

and may make different provision for different circumstances.

- (4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court).
- (5) For the purposes of this section a right to make an application to have a case stated for the opinion of the High Court constitutes a right of appeal.
- (6) ”

23. Following on from the report by Sir Geoffrey Bowman in 1997 “Review of the Court of Appeal (Civil Division)”, Parliament enacted s.55 to restrict the making of “second appeals” to the Court of Appeal:

“55.— Second appeals

- (1) Where an appeal is made to the county court, the family court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—
 - (a) the appeal would raise an important point of principle or practice, or

(b) there is some other compelling reason for the Court of Appeal to hear it.

(2) This section does not apply in relation to an appeal in a criminal cause or matter.”

24. CPR Part 52 and its Practice Directions bring together a number of rules for appeals to the County Court, High Court and Court of Appeal (CPR 52.1(1)). CPR 52.3 identifies certain general cases where permission to appeal must be obtained.
25. Section 54 of the AJA 1999 enabled rules of court to be made laying down requirements for the grant of permission. This is dealt with in part by CPR 52.6:

“**52.6** —

(1) Except where rule 52.3B, rule 52.7 or rule 52.7A applies, permission to appeal may be given only where—

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason for the appeal to be heard.

(2) An order giving permission under this rule or under rule 52.7 may—

(a) limit the issues to be heard; and

(b) be made subject to conditions.

(Rule 3.1(3) also provides that the court may make an order subject to conditions.)

(Rule 25.29 provides for the court to order security for costs of an appeal)”

26. CPR 52.6 expressly states that it does not apply where CPR 52.3B or 52.7A (appeals to the Supreme Court) or CPR 52.7 (second appeals to the Court of Appeal) apply.
27. CPR 52.7 provides:

“**Permission to appeal test – second appeals**

52.7 —

(1) Permission is required from the Court of Appeal for any appeal to that court from a decision of the County Court, the family court or the High Court which was itself made on appeal, or a decision of the Upper Tribunal which was made on appeal from a decision of the First-tier Tribunal on a point

of law where the Upper Tribunal has refused permission to appeal to the Court of Appeal.

- (2) The Court of Appeal will not give permission unless it considers that—
- (a) the appeal would—
 - (i) have a real prospect of success; and
 - (ii) raise an important point of principle or practice;
or
 - (b) there is some other compelling reason for the Court of Appeal to hear it.”

Although the heading to CPR 52.7 does not refer to the Court of Appeal, it is clear from the rule itself that the second appeals test laid down only applies to second appeals to the Court of Appeal. CPR 52.7 does not apply, for example, to a second appeal to the High Court, for which the test in CPR 52.6 should be applied, despite the reference in the heading of that rule to “first appeals”.

A summary of the parties’ submissions

28. The appellant was represented by Mr Daniel Stedman Jones and the SSHCLG by Mr Ned Westaway and Mr Charles Forrest. I am grateful to them for their helpful submissions.
29. The appellant submits that the Court of Appeal should apply the test in CPR 52.6 to an application for permission to appeal to this court under s.289 of the TCPA 1990. Section 289 creates a *specific* provision conferring a right of appeal on a point of law against a decision on an enforcement notice appeal, where permission to appeal to the High Court may *only* be granted by that court (*Binning Property Corporation Limited v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 250; [2019] J.P.L 844). However, the permission required for an appeal under s.289 to the Court of Appeal may be granted either by the High Court *or* by the Court of Appeal. By contrast, s.55 of the AJA 1999 is a *general* provision which applies to a range of appeals to the Court of Appeal, but the requisite permission to appeal may only be granted by that Court (and not the High Court). The AJA 1999 repeals certain specific provisions similar in nature to s.289 of the TCPA 1990, but not others, including s.289 itself. Furthermore, s.55, a general provision, has not impliedly repealed the specific provision in the second part of s.289(6) which deals with appeals to the Court of Appeal. Section 55 has not removed the power of the High Court to grant permission to appeal to the Court of Appeal, nor has it imposed the second appeals test.
30. The appellant submits that because s.55 of the AJA 1999 does not apply to s.289 appeals to the Court of Appeal, it follows that the second appeals test in CPR 52.7 does not apply. Where CPR 52.7 does not apply, the only test for the grant of permission is that contained in CPR 52.6, the first appeals test.

31. Given that permission to appeal to the Court of Appeal can be obtained from either the High Court or the Court of Appeal, it would be absurd for the latter to apply a different and more stringent test for permission than the former.
32. The appellant submits that the issue of which test should be applied has already been settled by principles laid down in *Smith International Inc v Specialised Petroleum Services Group Limited* [2005] EWCA Civ 1357; [2006] 1 WLR 252. He also relies upon the reasoning in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* [2001] QB 388 and *Miaris v Secretary of State for Communities and Local Government* [2015] EWHC 2094 (Admin); [2015] 1 WLR 4333.
33. The SSHCLG accepts that neither s.55 of the AJA 1999 nor CPR 52.7 deprives the High Court of jurisdiction to grant permission to appeal to the Court of Appeal under s.289(6) of the TCPA 1990. However, that still leaves open the question as to which test the Court of Appeal should apply when deciding whether to grant such permission. The SSHCLG submits that the Court should apply the second appeals test, alternatively at least “heightened scrutiny”.
34. Mr Westaway also said that the SSHCLG does not contend that the primary legislation and CPR should be read together so as to require the permission of the Court of Appeal as well as the High Court for the bringing of an appeal to the Court of Appeal.
35. Mr Westaway advanced two alternative submissions on behalf of SSHCLG. First, he submitted that by virtue of CPR 52.7, and not s.55(1) of the AJA 1999, the Court of Appeal must apply the second appeals test when deciding whether to grant permission to appeal to that Court under s.289(6) of the TCPA 1990. Although the effect of s.55(1) is that, where it applies, only the Court of Appeal can grant permission for an appeal to be brought to that court, Mr Westaway suggested that CPR 52.7 can require the second appeal test to be applied by the Court of Appeal even where the High Court also has jurisdiction to grant permission to appeal. The fact that CPR 52.7 does not address the position of the High Court should not prevent that rule from being applied to the Court of Appeal. In support of this line of argument, Mr Westaway submits that the language of CPR 52.7 is broadly cast and “includes second appeals where the first appeal was from any tribunal or other body or person” relying on *Clark (Inspector of Taxes) v Perks* [2001] 1 WLR 17 at [13]. Although the effect of CPR 52.1(4) is that Part 52 is subject to s.289(6), that does not mean that the court should treat Part 52 as being of no application (*E I Dupont de Nemours & Co. v S.T. Dupont* [2003] EWCA Civ 1368; [2006] 1 WLR 2293). Section 289(6) is also cast in broad terms and does not prescribe any test for permission. It is therefore open to the court to apply the criteria in CPR 52.7.
36. Mr Westaway’s second argument is that the Court of Appeal has a discretion to adopt a test which it considers appropriate for deciding whether to grant permission for a second appeal. He relies upon *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663 and *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734; [2002] 3 All ER 279).
37. Mr Westaway seeks to draw a parallel with *Cart*. There the Supreme Court adopted the second appeals criterion for determining whether permission should be granted to apply for judicial review in the High Court of a refusal by the Upper Tribunal to grant permission for an appeal to itself.

38. In *Cooke* Hale LJ (as she then was) said that although s.55 of the AJA 1999 did not apply to an appeal to the Court of Appeal from a social security commissioner, a robust approach should be taken to the “real prospect of success” criterion [17]. This was a highly specialised area of the law in which appeals were dealt with by a two-tier structure of legally qualified, expert tribunals [15]. Although it was important that that structure was linked to the court system to maintain adherence to general principles of law, the courts should approach such cases with an appropriate degree of caution. The commissioners could be better placed to understand technical issues, how a provision sat within complex legislation and social security principles and to arrive at a purposive construction of the legislation [16]. Hale LJ suggested that these considerations might apply to appeal routes from other tribunals such as the then Lands Tribunal.

Discussion

The legal context

39. It is plain that s.289(6) of the TCPA 1990 provides for permission to appeal to the Court of Appeal to be obtained *either* from the High Court or the Court of Appeal. It is equally plain that an appeal to the Court of Appeal falling within s.55(1) of the AJA 1999 can only be brought with the permission of the Court of Appeal itself, not of the High Court or of another court. That head-on conflict between these two provisions can only be resolved by one or other of two responses: either the two provisions apply in combination or one provision must apply instead of the other.
40. The SSHCLG does not advance either of those responses. In particular, Mr Westaway accepts that s.55(1) of the AJA 1999 did not remove the jurisdiction of the High Court under s.289(6) of the TCPA 1990 to grant permission to appeal to the Court of Appeal, whether expressly or by implied repeal. I consider that he was correct to adopt that position. Nevertheless, it is necessary to review the case law addressing the relationship between s.55(1) and provisions similar to s.289(6) as an important part of the context for considering the submissions upon which the SSHCLG does rely.
41. The first of those two potential responses to the problem was addressed in *Smith*, where this Court had to consider the relationship between s.97(3) of the Patents Act 1977 and s.55(1) of the AJA 1999. Section 97(3) allowed certain appeals to be made from the Patents Court to the Court of Appeal but only with the permission of the Patents Court *or* the Court of Appeal. Accordingly, s.97(3) did not differ materially from s.289(6) of the TCPA 1990 for the purposes of the issue we are considering.
42. At [16] the Court of Appeal rejected the submission that s.55 superimposed on s.97(3) an additional requirement to obtain permission to appeal from the Court of Appeal, even where the Patents Court had already granted permission to appeal. That would effectively deprive the Patents Court of the power conferred by s.97(3) to grant permission to appeal to the Court of Appeal as a freestanding and sufficient permission in itself, without the appellant needing to obtain any further permission from the Court of Appeal. The same reasoning applies to the relationship between s.289(6) of the TCPA 1990 and s.55 of the AJA 1999. Section 55 cannot apply in combination with s.289(6).
43. What then of the second response to the problem? Did the AJA 1999 expressly or impliedly repeal that part of s.289(6) which allows permission to appeal to the Court of

Appeal to be granted either by that court or the High Court? If there was no such repeal, then it follows that either court can grant permission for an appeal to the Court of Appeal under s.289(6) and that such an appeal does not fall within s.55(1) of the AJA 1999.

44. The AJA 1999 did not *expressly* repeal s.289(6) of the TCPA 1990, so the issue comes down to whether it *impliedly* repealed that provision.
45. Given the high standards of parliamentary draftsmanship in modern times, there is a general and strong presumption against the implied repeal of an earlier statutory provision by a later one (*H v Lord Advocate* [2012] UKSC 24; [2013] 1 AC 413 at [30]). It is presumed that the earlier enactment overrides the later one in the absence of sufficiently clear words to the contrary. That presumption is even stronger where the later provision is of a general nature and covers a situation for which the earlier provision has specifically provided (Bennion, Bailey and Norbury on Statutory Interpretation (8th edition) sections 8.9 and 21.4).
46. In *Henry Boot* the Court of Appeal considered s.69 of the Arbitration Act 1996. Section 69(1) provides that, unless it is excluded in an agreement, a party to an arbitration may appeal to the High Court or County Court from an arbitral award, if all parties should agree, or that court grants permission, to the bringing of that appeal (s.69(2)). Section 69(8) provides that no further appeal shall lie from the decision of the High Court or County Court without the permission of that court, which can only be given if it considers that the issue raised is one of general importance or one which for some other reason should be considered by the Court of Appeal.
47. *Henry Boot* decided that a refusal by the High Court or County Court to grant permission for a further appeal to the Court of Appeal under s.69(8) was final. It was not a “judgment or order” falling within s.16 of the Senior Courts Act 1981 which could be appealed to the Court of Appeal, applying the principle in *Lane v Esdaile* [1891] AC 210 (see [2001] QB at pp 392A-394D and see also s.18(1)(g) of the 1981 Act).
48. Further argument then took place on the relationship between s.55 and s.69(8). The applicants seeking permission to appeal submitted that an appeal under s.69 of the 1996 Act from an arbitration award was “an appeal to a County Court or the High Court in relation to that matter” falling within the language of s.55(1) of the AJA 1999. On that basis, they then submitted that the High Court judge’s refusal of permission to appeal to the Court of Appeal was a “decision in relation to that matter” for the purposes of s.55(1), which could be the subject of an appeal to the Court of Appeal under that provision, notwithstanding s.69(8) of the Arbitration Act 1996. The applicants submitted, as they needed to, that s.55(1) had impliedly repealed s.69(8). But, of course, if that were correct only the Court of Appeal could give permission to appeal under s.55(1) ([2001] QB at p.397G-p398D).
49. Waller LJ (with whom Swinton Thomas LJ agreed) decided that the AJA 1999 had not expressly repealed s.69(8) of the 1996 Act. Neither that provision nor s.18(1)(g) of the Senior Courts Act 1981 was included in the list of repeals in Sched.15 to the AJA 1999. Waller LJ contrasted that position with the express repeal in Sched.15 of that part of s.375(2) of the Insolvency Act 1986 which required the permission of a judge of the High Court or the Court of Appeal for a further appeal from the High Court to the Court of Appeal. That focused repeal enabled the second appeal provision in s.55(1) of the

AJA 1999, including the stricter “second appeal” test, to apply to the appeal route in s.375(2) of the 1986 Act ([2001] QB 400H-401D).

50. Waller LJ also contrasted that express repeal of part of s.375(2) of the 1986 Act with provisions in 10 other statutes (including s.289(6) of the TCPA 1990), which provided for permission to appeal to the Court of Appeal to be granted either by that court or by the lower court. and which had not been modified or repealed by the AJA 1999 ([2001] QB at p.401D-G). The Court concluded that s.55(1) of the AJA 1999 should not be construed as having impliedly repealed s.69(8) of the Arbitration Act 1996. Where Parliament had intended to repeal a provision because it was inconsistent with s.55(1) of the AJA 1999, it had done so expressly. However, it had left s.69(8) of the 1996 Act and s.18(1)(g) of the Senior Courts Act 1981 untouched ([2001] QB at p.403 A-B).
51. *Smith* addressed the issue whether s.55(1) impliedly repealed a provision similar to s.289(6) of the TCPA 1990, namely s.97(3) of the Patents Act 1977 (see [42] above). Both enactments provide for permission to appeal to the Court of Appeal to be granted either by this court or by the court immediately below, namely the High Court or the Patents Court. Under both provisions the lower court acts as an appellate court from a specialist jurisdiction, the High Court on appeal from a Planning Inspector (or the Secretary of State) and the Patents Court on appeal from a decision of a comptroller.
52. In *Smith* the Court of Appeal said at [13] that Parliament had made specific provision for patent appeals to go to the Patents Court and from there to the Court of Appeal, subject to obtaining the permission of either Court. The effect of applying s.55(1) would be to cancel or render meaningless the express power of the Patents Court to grant permission to appeal to the Court of Appeal. But it is difficult to imply a legislative intention to repeal a specific earlier enactment by a later enactment of a general nature [14].
53. The Court then decided that the *express* repeal by Sched.15 to the AJA 1999 of “a similar particular provision”, namely s.42(3) of the Courts and Legal Services Act 1990, and its replacement by s.55(1) of the AJA 1999, made it impossible to treat other similar provisions which had not been expressly repealed, as having been impliedly repealed by s.55(1). Section 42(3) provided for an appeal to the Court of Appeal from a decision of the High Court on appeal from the Conveyancing Appeals Tribunal, subject to the permission of either the Court of Appeal or the High Court. There would have been no need for an express repeal of s.42(3) of the 1990 Act by Sched.15 if s.55(1) had by implication repealed the High Court’s power in s.42(3) to grant permission to appeal and other like powers (see [15]).
54. Applying the principles on implied repeal in *Henry Boot* [2001] QB 388 at pp.401H-403D, the Court concluded that s.97(3) of the 1977 Act was a specific procedure laid down by Parliament for patent appeals under a particular Act, and that that provision had not been repealed by the general words of s.55(1) of the AJA 1999 [19].
55. In my judgment, the reasoning in *Henry Boot* and in *Smith* applies to s.289(6) of the TCPA 1990. Section 289 forms part of a specific, detailed and relatively self-contained code dealing with appeals against enforcement notices and appeals to the High Court and above. Section 55(1) of the AJA 1999 did not impliedly repeal the second part of s.289(6) so as to remove the High Court’s power to grant permission to appeal to the Court of Appeal. Section 55(1) does not apply to decisions by the High Court or Court

of Appeal on whether to grant permission to appeal to the Court of Appeal under s.289(6).

56. The two changes made by s.55(1), namely that permission for certain appeals to the Court of Appeal (a) may only be granted by that court and (b) if it considers that the second appeals test is satisfied, are bound up together and cannot be severed. Given that s.55(1) does not apply to an application for permission to appeal to the Court of Appeal under s.289(6), it follows that s.55(1) does not apply the second appeals test to decisions on whether to grant such permission.
57. In *Miaris* Mr John Howell KC (sitting as a Deputy High Court Judge), in a very careful and clear analysis, had previously reached essentially the same conclusions about the relationship between s.289(6) of the TCPA 1990 and s.55(1) of the AJA 1999.

The Secretary of State's first argument

58. I turn to consider the SSHCLG's first argument (see [35] above) in the context of this well-established jurisprudence. Mr Westaway submits that although s.55(1) does not apply to an application for permission to appeal to the Court of Appeal under s.289(6) of the TCPA 1990, the first part of CPR 52.7 does so apply. The rule refers to "any appeal to [the Court of Appeal] from a decision of the County Court, the family court, or the High Court which was itself made on appeal". He submits that that language is broadly cast and he relies upon *Clark* at [13].
59. I cannot accept this argument for a number of reasons.
60. First, the language of the first part of CPR 52.7(1), together with 52.7(2) reflects the language of s.55(1) for second appeals from the High Court, family court or County Court acting in an appellate capacity. The operative parts of s.55(1) and CPR 52.7 are essentially the same. They both require that decisions on whether to grant permission for second appeals falling within s.55(1) be taken solely by the Court of Appeal and that the second appeals test be met. There is nothing in CPR 52.7 to indicate that it treats "second appeals" as including appeals from appellate decisions by courts which fall outside the scope of s.55(1). The reasoning in *Henry Boot*, *Smith* and *Miaris* applies equally to CPR 52.7. The SSHCLG did not advance any argument that the CPR had had the effect of impliedly repealing the power conferred by s.289(6) on the High Court to grant permission to appeal to the Court of Appeal.
61. Second, *Clark* at [13] expressly dealt with only s.55(1) of the AJA 1999, not the CPR. The Court of Appeal stated that appeals to a County Court or the High Court falling *within the meaning of s.55(1)* included an appeal to the High Court on a point of law under s.11 of the Tribunals and Inquiries Act 1992 from certain specified tribunals and "any other appeal to the High Court or a county court from any tribunal or other body or person". It is upon those quoted words that Mr Westaway seeks to build his argument. But the judgment at [15] went on to state that an appeal to the Court of Appeal from the High Court or a County Court in any such case should be treated as a second appeal for the purposes of s.55(1) *and* CPR 52.13 (the then equivalent of CPR 52.7). The Court did not consider the effect of CPR 52.13 in isolation from s.55(1). In particular, it did not suggest that the ambit of CPR 52.13 was broader than s.55(1). Accordingly, *Clark* lends no support to the first of Mr Westaway's arguments.

62. Third, and in any event, this Court has subsequently held that the language of *Clark* at [13] upon which Mr Westaway relied is too broad. In *Smith* the Court of Appeal said that that language was correct in so far as it covered permission to appeal provisions in earlier legislation which were repealed or amended by the AJA 1999 (see s.106 and Sched.15). But it is incorrect in so far as it covers permission to appeal provisions inconsistent with s 55(1) of the AJA 1999 which have not been repealed or amended by that statute (*Smith* at [24]-[26]). As I have set out above, when it enacted the AJA 1999, Parliament made explicit choices as to whether certain pre-existing permission to appeal provisions would be repealed and replaced by s.55(1) (see in particular Sched.15). Paragraph [13] of *Clark* cannot be read as overriding or diluting that important aspect of the statutory scheme. The broad language used in *Clark* no longer remains correct in the light of subsequent decisions of this court.
63. Fourth, following the AJA 1999, Parliament has continued to make specific choices as to which appeals from tribunals to the Court of Appeal should be subject explicitly to the second appeals test. The Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) restructured a large part of the tribunal system into the First-tier Tribunal and the Upper Tribunal, together with their constituent chambers. With permission, an appeal on a point of law may be made from the First-tier Tribunal to the Upper Tribunal (s.11). A further appeal on a point of law may be made from the Upper Tribunal to the Court of Appeal under s.13, subject to obtaining permission from the Upper Tribunal or, where permission has been refused by that tribunal, the Court of Appeal (s.13(4) and (5)).
64. The language of s.55(1) does not cover the appeal route from the Upper Tribunal to the Court of Appeal under s.13 of the 2007 Act. But s.13(6) authorises the making of an order to require a “second appeals” test to be applied by the Upper Tribunal *and* the Court of Appeal when deciding whether to grant permission to appeal to the Court of Appeal. The relevant rule is contained in art.2 of The Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No.2834) (“the 2008 Order”):
- “2. Permission to appeal to the Court of Appeal in England and Wales or leave to appeal to the Court of Appeal in Northern Ireland shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that—
- (a) the proposed appeal would raise some important point of principle or practice; or
- (b) there is some other compelling reason for the relevant appellate court to hear the appeal.”
65. Thus, the first part of CPR 52.7(1) addresses appeals from the County Court, Family Court or High Court and, when read together with 52.7(2), effectively replicates s.55(1) of the AJA 1999. The second part of CPR 52.7(1), read together with 52.7(2) replicates

art.2 of the 2008 Order (apart from the requirement that the Upper Tribunal should also apply the second appeals test²).

66. Article 2 of the 2008 Order demonstrates that where Parliament has considered that, outside s.55(1), a second appeals test should be applied when deciding whether to grant permission to appeal to the Court of Appeal, it has said so explicitly. Looking at the matter overall, it is plain that CPR 52.7 does not go beyond the parameters set by s.55(1) of the AJA 1999 and art.2 of the 2008 Order.

67. Fifth, CPR 52.1(4) states:

“This Part is subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal.”

Accordingly, as Mr Westaway accepted, CPR 52 is subject to a specific provision such as s. 289(6) of the TCPA 1990 and, I would add, s.69(8) of the Arbitration Act 1996, s.97(3) of the Patents Act 1977 and other similar provisions which have not been repealed by the AJA 1999.

68. Sixth, Mr Westaway submits that CPR 52.1(4) does not have the effect that all parts of CPR 52 are to be ignored. Instead, the relevant parts of the CPR are subject to the relevant parts of the enactment in question (see e.g. *E I Dupont de Nemours* at [99]). Obviously that is correct as a generality and as far as it goes. But how does it apply here? Mr Westaway says that s. 289(6) does not prescribe any test for the grant of permission. Accordingly, the court should turn to the tests in CPR 52.6 and CPR 52.7 and decide which set of criteria is more appropriate for dealing with s. 289(6) applications for permission to appeal to the Court of Appeal.

69. There are at least three flaws in this line of argument. First, the CPR do not allow a court to decide which set of criteria it considers to be “more appropriate” as between CPR 52.6 and CPR 52.7. It is plain from the opening words of 52.6 that that provision, including the standard test for deciding whether to grant permission to appeal, applies unless CPR 52.3B, 52.7 or 52.7A apply. If a case falls within one of those three rules then that rule applies. If not, then 52.6 applies. The CPR does not allow a court to choose between the two tests for the grant of permission to appeal by reference to appropriateness or some other criterion not contained in the rules. The second flaw is that the SSHCLG’s analysis is incomplete. True enough, s 289(6) of the TCPA 1990 does not specify any test for the grant of permission. But that also applies to other provisions which require permission for a further appeal to the Court of Appeal to be granted by that court or the court below. Section 55(1) does not apply and the second appeal test, bound up with the requirement that only the Court of Appeal should determine applications for permission, does not apply either. Third, CPR 52.7 reflects the requirements of s.55(1). To treat CPR 52.7 as being capable of applying to an appeal route to which s.55(1) does not apply, is inconsistent with the statutory framework of the AJA 1999 and with the case law in this Court which has determined how that part

² CPR 2.1 states that the CPR apply to proceedings in the County Court, High Court, and Civil Division of the Court of Appeal. Article 2 of the 2008 Order lays down the test to be applied by the Upper Tribunal.

of the statutory scheme operates. It is inconsistent with the choices made by Parliament as to which second appeal routes are subject to s.55(1) and which are not.

The Secretary of State's second argument

70. The second argument is that the court should exercise its discretion by adopting a test for the grant of permission to appeal to the Court of Appeal specifically for s.289(6) cases, namely the same test as appears in CPR 52.7 ([36] above).
71. In my judgment the approach and reasoning of the Supreme Court in *Cart* does not provide any support for this argument or any real assistance to the court in resolving the issues raised by this case.
72. *Cart* was concerned with refusals by the Upper Tribunal to grant permission to appeal on a point of law under s. 11 of the 2007 Act from the First-tier Tribunal to the Upper Tribunal. Section 13(8)(c) excluded such decisions from the right of appeal under s.13 from the Upper Tribunal to the Court of Appeal. But it was accepted that the 2007 Act did not oust judicial review by the High Court of a decision by the Upper Tribunal to refuse permission to appeal to itself under s.11[37]. The issue was what test should be applied when deciding, initially in the High Court, whether to grant permission to apply for judicial review.
73. The Supreme Court was concerned that errors of law should not be perpetuated within a specialist tribunal system, but it was also concerned about the risk that too much of the High Court's resources could be consumed through unrestricted access to judicial review in such cases. In addition, the Court accepted that the "enhanced tribunal structure" under the 2007 Act merited "a more restrained approach". Accordingly, the Court adopted the second-tier appeals test in art.2 of the 2008 Order as a rational and proportionate restriction upon the availability of judicial review in the High Court of a refusal by the Upper Tribunal to grant permission to appeal to itself. That test would allow the Court of Appeal to consider, for example, an important issue of principle or practice capable of affecting similar cases, which might be numerous in some jurisdictions ([57], [89]-[90], [100], [104], [123] and [130]-[131]).
74. In *Cart* there was no alternative remedy to judicial review for dealing with significant errors of law, such as those affecting the operation of a statutory regime or the tribunal system. At the same time unrestricted access to judicial review was not justified and had to be limited. The position under s.289(6) is very different. Parliament has provided adequate remedies. No one suggests otherwise. This case is not concerned with the provision of judicial review as a remedy in addition to rights of appeal, or the constraints that should be placed upon that additional remedy.
75. Parliament has provided a right of appeal on a point of law first to the High Court and then to the Court of Appeal subject to a permission filter. An appellant has to show an error of law by the Planning Inspector (or Secretary of State). A relevant error of law could also be made by a High Court judge when dealing with those issues. But Parliament has not restricted proceedings under s.289(6) to errors of law which, for example, raise "an important point of principle", whether at the High Court stage or in the Court of Appeal. The point of law may only be of concern to the owner of the land in question, the LPA or local residents. The SSHCLG has not put forward a proper

argument, or pointed to any evidence, as to why the second appeals test *needs* to be applied to appeals to the Court of Appeal under s.289(6).

76. I do not think that the analogy which Mr Westaway sought to draw with *Cooke* assists. Instead, it is necessary to consider the statutory regime for the resolution in the courts of legal issues in planning cases. Section 288 of the TCPA 1990 is a much better analogue than the social security tribunal system which operated before the 2007 Act.
77. An application for statutory review under s.288 of a decision taken by an Inspector or the Secretary of State on, for example, a planning appeal under s.78, involves a challenge on public law grounds to a decision by a specialist. It is handled in the High Court by the Planning Court, a specialist list with specialist judges (CPR 53.22). Principles of planning law are essentially the same for both types of proceeding. The public law principles applied in a s.288 application are similar to, if not the same as, those applied in judicial review. The remedies available where a s.288 application is successful are similar to the remedies available in a judicial review (although the latter has a broader menu). An appeal to the Court of Appeal from a decision of a High Court judge on a statutory review under s.288 is treated as a first appeal, not a second appeal subject to CPR 52.7. This is consistent with the treatment of an appeal from the High Court in judicial review as a first appeal.
78. As I have previously explained, proceedings under s.289, although in name and form an appeal, share many, if not most, of the fundamental characteristics of an application under s.288 for statutory review, including the public law principles applicable and the nature of the remedies available. The SSHCLG has not demonstrated why CPR 52.6 and 52.7 should be applied differently in an appeal from the High Court to the Court of Appeal when dealing with proceedings under s.289 as compared with proceedings under s.288.
79. For the reasons set out above, I also reject the SSHCLG's fallback submission that a different approach should be taken to s.289 appeals to the Court of Appeal based on what was referred to as "robustness" or "heightened scrutiny".

Conclusion

80. For these reasons, I conclude that the correct test to be applied by the High Court or the Court of Appeal when deciding whether to grant permission to bring an appeal to the Court of Appeal under s.289(6) of the TCPA 1990 is that laid down in CPR 52.6, not CPR 52.7.

Lady Justice Elisabeth Laing

81. I agree.

The President of the Family Division

82. I also agree.