Dennis Rye, Colin Frederick Henson & J B Trustees Ltd, Trustees of Dennis Rye Pension Fund v. Sheffield City Council & Colin Frederick Henson & Dennis Rye (The Trustees of the Dennis Rye 1992 Grandchildren Settlement Fund) v Sheffield City Council [1997] ADR.L.R. 07/31

Court of Appeal before The Master of the Rolls (Lord Woolf), Morrit LJ, Pill LJ. 31st July, 1997

JUDGMENT LORD WOOLF, MR:

1. This appeal raises yet again issues as to the relationship between public and private law proceedings. It illustrates the fact that, despite the hopes to the contrary, a very substantial volume of the resources of the parties and the courts are still being consumed to little or no purpose over largely tactical issues as to whether the correct procedure has been adopted. This appeal is the third court and the fourth hearing to consider the issue in the present proceedings. I have little doubt that the amount of the costs already incurred far exceeds the sum in issue in the proceedings but the parties and the courts have yet to turn their attention to the merits of the dispute.

2. The appeal involves two separate actions raising identical issues. One is in respect of nine houses in relation to which the claim is for £67,147.28 and the other is in relation to three houses in respect of which the claim is for £31,846.77.

3. The claims against the Council are for sums which it is alleged are due by way of improvement grants for work done on the houses by the plaintiffs following the service of a repair note requiring work to be carried out to render the premises fit for human habitation under Section 189 of the Housing Act 1985.

4. The appeal follows two judgments of Mance J, the first dated the 6th December 1995 and the second dated the 5th September 1996 on applications by the Council to strike out the plaintiff's claims under Order 18, r19 RSC and the inherent jurisdiction of the court. The grounds of the applications were that the proceedings disclosed no reasonable cause of action and are an abuse of the process of the court. The Council's argument in support of the applications is that if the plaintiffs have any grounds of complaint, (which the Council does not accept) then the only appropriate procedure is an application for judicial review and not an ordinary action.

5. The judgments of Mance J were in relation to an appeal from the decision of District Judge Lambert who struck out the claims. Mance J in his first judgment held that a local authority's refusal to pay improvement grants under the Housing Act 1989 was capable in appropriate circumstances of giving rise to private law rights which could be enforced by a writ action. Part of the reasoning of the judge for coming to this conclusion is summed up in this passage of his judgment:
   "the application for and approval of a grant does, in my judgment, establish a one - to - one relationship which do have some contractual echoes. The local authority was thereby committing itself to pay the house or property owner upon the execution to its satisfaction of the specified works .....

   A property owner has in these circumstances, in my judgment, a legitimate expectation arising from a relationship established by the grant application and its approval that the grant moneys will be paid if the work is duly executed within the specified period ".

6. However the judge was of the view that the statements of claim failed on their face to demonstrate any real claim and stood over the final determination to enable the plaintiffs to amend their pleadings to make additional allegations. When the matter came back before him again, Mance J gave his second judgment. He dismissed the application to strike out save in regard to subsidiary allegations based upon an alleged estoppel. There is no cross appeal in relation to the last mentioned part of the judge's decision.

The Legislation

7. The relevant statutory provisions play a significant role in determining the outcome of this appeal. The Housing Act 1985 enables a repair notice to be served by a local housing authority. So far as relevant it states :
   "Section 189(1) ... Where the local housing authority are satisfied that a dwellinghouse... is unfit for human habitation... they shall serve a repair notice on the person having control of the dwellinghouse.
   (2) A repair notice under this Section shall -
   (a) Require the person on whom it is served to execute the works identified in the notice (which may be works of repair or improvement or both) and to begin those works not later than such reasonable date, being not earlier

than the 28th day after the notice is served as is specified in the notice and to complete those works within such reasonable time as is specified ...

(4) The notice becomes operative, if no appeal is brought, within the expiration of 21 days from the date of the service of the notice and is final and conclusive as to matters which could have been raised on an appeal."

8. The Local Government and Housing Act 1989 contains the provisions dealing with the payment of grants by the local housing authorities. Normally, where a repair notice has been served under Section 189 (1) of the Housing Act 1985 then Section 113 of the 1989 Act requires a grant to be paid. This is subject to the relevant provisions of the Housing Act 1989 which are as follows:

"S101 (1) In accordance with this Part, grants are payable by local housing authorities towards the costs of works required-

(a) For the improvement or repair of dwellings ...

102 (1) No grant shall be paid unless an application for it is made to the local housing authority concerned in accordance with the provisions of this Part and is approved by them.

(2) An application for a grant shall be in writing and shall specify the premises to which it relates and contain ...

(a) Particulars of the works in respect of which a grant is sought (in this Part referred to "the relevant works").

(b) Unless the local housing authority otherwise direct in any particular case, at least two estimates from different contractors of the cost of carrying out the relevant works.

(c) Particulars of any preliminary or ancillary service charges in respect of the cost of which the grant is also sought ; and

(d) Such other particulars as may be prescribed.

113(1) Subject to Section 112(3) and subsection (3) below, a local housing authority shall approve an application falling within Section 110 (1) above (in this section referred to as "a landlords application" if completion of the relevant works is necessary to comply with the notice or notices under one or more of the following provisions -

(a) Section 189 of the Housing Act 1985 (repair notice requiring works to render premises fit for human habitation).

(3) If, in the case of a landlord's application ... the local housing authority consider that the relevant works include works ("the additional works") in addition to those necessary to comply with a notice under section 189...they shall treat the application -

a. as an application to which this section applied in so far as it relates to works other than the additional works and

b. as an application to which Section 115 below applies in so far as it relates to additional works.

115 - (1) Subject to the preceding provisions of this Part, a local housing authority may approve an application for a grant, other than a common parts grant, in any case where -

a) the relevant works go beyond or are other than those which will cause the dwelling to be fit for human habitation but

b) the authority are satisfied that the relevant works are necessary for one or more of the purposes set out in subsection (3) below.

(6) Subject to the preceding provisions of this Part, a local housing authority may approve an application falling within section 110(1) above (in this Section referred to as "landlord's application") if -

A the relevant works are for the purpose of rendering the dwelling or house to which the application relates fit for human habitation...and...the authority are satisfied that the relevant works are necessary for the purpose concerned.

S.116 - (1) A local housing authority shall, by notice in writing, notify an applicant for a grant as soon as reasonably practicable, and, in any event, not later than six months after the date of the application concerned, whether the application is approved or refused.

s.117 - (1) Where the local housing authority have approved an application for a grant, they shall pay the grant, subject to subsection (3) below and to sections 133 and 134 below.

(2) The grant may be paid

A in whole after completion of the eligible works, or

B in part by instalments as the works progress and the balance after completion of the works

(3) The payment of a grant, or part of a grant, is conditional upon -

a the eligible works or corresponding part of the works being executed to the satisfaction of the authority; and

b the authority being provided with an acceptable invoice, demand or receipt for payment for the works and any preliminary or ancillary services and charges in respect of which the grant or part of the grant is to be paid."

(4) For the purposes of subsection (3) above an invoice, demand or receipt is acceptable if it satisfies the authority and is not given by the applicant or a member of his family.

s.118 - (1) In approving an application for a grant, a local housing authority may require as a condition of the grant that the eligible works are carried out in accordance with such specification as they determine.

(2) Subject to subsection (3) below, it is a condition of the grant that the eligible works are carried out within 12 months from the date of approval of the application concerned.

(3) The authority may, if they think fit, extend the period of 12 months referred to in subsection (2) above and may, in particular, do so where they are satisfied that the eligible works cannot be, or could not have been reasonably foreseen at the time the application was made.

s.134 - (1) Where an application for a grant has been approved by the local housing authority, subsection (2) below applies in any case where-

a the eligible works are not completed to the satisfaction of the authority within the period specified under subsection (2) of section 118 above, or such extended period as they may allow under subsection (3) of that section;...

(2) Where this subsection applies, the authority may -

a refuse to pay the grant or any further instalment of grant which remains to be paid; or

b make a reduction in the grant which, in a case falling within subsection (1)(b) above, is to be a reduction proportionate to the reduction in the estimated expense; and may demand repayment by the applicant forthwith, in whole or part, of the grant or any instalment of the grant paid, together with interest at such reasonable rate as the authority may determine from the date of payment until repayment."

The Issues

9. The statutory provisions I have cited make it clear that the legislation contains a statutory code for the approval of grants. The rule is designed to give to the person entitled to the benefit of the grant a right to payment of the grant on compliance with the conditions contained in the legislation. When this has happened the authority has no justification for refusing payment. In this situation I can see no reason why the landlord cannot bring an ordinary action to recover the amount of the grant which is unpaid as an ordinary debt. Notwithstanding the statutory code, it would be disproportionate to seek a remedy, of say, mandamus or a declaration by way of judicial review to enforce payment. Any suggestion that there had been any abuse of process involved in bringing an ordinary action in the High Court or County Court would be totally misconceived. Judicial review was not intended to be used for debt collecting.

10. In the present cases, however, there is a dispute as to whether the conditions have been fulfilled and in particular the Council contends that the works have not been completed to its satisfaction as required, inter alia, by section 117 (3), of the 1989 Act. At any trial of the actions one of the principal issues is likely to be whether the Council was entitled to withhold its satisfaction.

11. Having examined the statutory provisions, I regard it as clear that in general when performing its role in relation to the making of grants the authority is performing public functions which do not give rise to private rights. This is so, even when, as here, improvement notices have been served so that the making of a grant is mandatory (section 113(1)). Even in this situation the refusal to approve an application for a grant gives rise to no right to damages and in the ordinary way the appropriate procedure will be judicial review.

12. Mance J., in his first judgment, made an admirable analysis of many of the numerous authorities which now exist on this subject. Having done so, he came to the conclusion that the issues in the present actions were sufficiently similar to those in the leading case of ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 A.C.624 for him to decide that the action should be allowed to proceed. Lord Lowry's speech in *Roy* is well known and Mance J having explained its relevance so clearly I do not consider that any purpose would be served in my trying to repeat the exercise. I will content myself by saying, that as in *Roy*, I would regard this as being a case where the Plaintiffs relationship with a public body whether statutory or contractual would confer on him conditional rights to payment so that the bringing of ordinary actions to enforce those rights was not in itself an abuse of process.

13. In coming to that conclusion I do not feel it is necessary to go quite so far as to regard the requirement that the authority should be satisfied as being in all situations no more than in Mance J.'s words *"a matter of objective factual and technical assessment"* (first judgement page 23D/E.). This in my view will usually, but not always, be the situation. I do accept there will be room in some cases for the authority to exercise a limited degree of judgment so that the standard which the Council is entitled to insist on before it is satisfied is not always objective. Usually the work to be carried out will need to be detailed because of the requirements of section 101 for particulars and estimates to be given prior to an application being approved. There may also be a specification (see section 118(1)). If, then the work is carried out In accordance with what would be an implied standard, of in a good and workmanlike manner or in accordance with any specified standard, that will be the end of any ground for dissatisfaction on the part of the Council. There may on the other hand, at least theoretically, be a situation where there is no express or implied standard to which the work is to be carried out. In such a situation the Council will be entitled to set the standard and as long as they do not set a totally unreasonable requirement the work will need to be done to that standard. The standard will be only subject to a ***Wednesbury*** challenge.

14. What, in my view, is more important when considering what is the correct procedure to adopt, is that in both situations any challenge to an authority's refusal to express satisfaction will depend on an examination of issues largely of fact which are more appropriately examined in the course of ordinary proceedings than on an application for judicial review. So far as the present actions are concerned there is no reason to think that when the quality of the work is examined against the particulars and estimates provided and any relevant specification, taking into account the actions of the Council's inspectors, the question of whether the Council could lawfully withhold its satisfaction will be resolved by a determination of the factual position. This is the class of issue, which if it cannot be resolved by mediation, is ideally resolved by a court with the assistance of a report from a surveyor jointly instructed by both parties. Such an approach would be infinitely more in the interests of the tax payers of the authority, the landlord and the courts than an application for judicial review.

15. Notwithstanding Mance J's judgment the Council says that to proceed other than by judicial review on the authorities is an abuse of process. I am afraid I cannot agree though I understand why on Mr Underwood's approach to the authorities he submits this must be the result. He contends that the plaintiff even if the Council had expressed satisfaction would not have a cause of action and could not bring a private law action. *Roy* he submits should be confined to cases where arguably a plaintiff had private law rights and if Lord Lowry goes further his comments are obiter and should not be followed.

16. For his approach Mr. Underwood relies strongly on the recent decision of the House of Lords of ***O'Rourke v Camden LBC*** [1997] 3 W LR 86 (in which he was counsel for the authority). I, however, do not regard Lord Hoffmann's speech in that case as providing him with any support. In ***O' Rourke*** it was held that Housing Act 1985 provisions as to the homeless gave rise to no private rights which would enable a private law action for damages or an injunction to be brought. In coming to this conclusion Lord Hoffmann (who gave the only reasoned speech) disapproved of Lord Bridge's reasoning in his speech in ***Cock's v Thanet D.C.*** [1983] 2 AC 92. Lord Bridge had suggested there could be such a private law right which gave rise to a right to damages which only came into existence after a decision had been reached by the authority that the right existed. Lord Hoffmann categorised this view as *"anomalous"*.(p93). Lord Hoffmann was not dealing with a situation involving a claim for the recovery of a sum of money which would unquestionably be due under a statute if certain conditions had or should be taken to have been met.

17. As Lord Hoffmann came to the conclusion that there were no private law rights at stake he did not consider the consequences of his approach on a situation where there are private law rights which would come into existence if, but only if, a statutory decision of a public body was first impugned. However his general approach suggests that the House of Lords has moved on from ***Cocks,*** which undesirably could cause the parties having to incur the expense of two sets of proceedings, a result which is directly opposite to that which Order 53 was intended to achieve. In the light of the decision in ***O'Rourke*** a private right which only comes into existence in the circumstances the House of Lords imagined they were dealing with in *Cocks* is in the future going to be a rare animal indeed. The more usual situation will be that considered by the Lords in *Roy* where it can be appropriate to bring private law proceedings.

18. Well where does that leave ***O'Reilly v Mackman*** [1983] 2 AC 237 and what can be done to stop this constant unprofitable litigation over the divide between public and private law proceedings? What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly*. This guidance involves recognising:

    i. *That remedies for protecting both private and public rights can be given in both private law proceedings and on an application for judicial review.*

    ii. *That judicial review provides in the interest of the public protection for public bodies which are not available in private law proceedings (namely the requirement of leave and the protection against delay). The proceedings will be heard by a High Court judge and will be managed by the Crown Office which has the necessary experience of public law proceedings to ensure that questions, such as expedition, are dealt with in a manner which is appropriate.*

    iii. *That for these reasons it is a GENERAL RULE that it is contrary to public policy "and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of Order 53 for the protection of such authorities".*

19. Having established the foundation of the general rule it seems to me that there will be a reduction in the difficulties which are apparently being *experienced* at present by practitioners and the courts, if it is remembered that:

    1. If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary *for purely procedural reasons* to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue) If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.

    2. If a case is brought by an ordinary action and there is an application to strike out the case, the court should, at least if it is unclear whether the case should have been brought by judicial review, ask itself whether, if the case had been brought by judicial review when the action was commenced, it is clear leave would have been granted. If it would, then that is at least an indication that there has been no harm to the interests judicial review is designed to protect. In addition the court should consider by which procedure the case could be appropriately tried. If the answer is that an ordinary action is equally or more appropriate than an application for judicial review that again should be an indication the action should not be struck out.

    3. Finally, in cases where it is unclear whether proceedings have been correctly brought by an ordinary action it should be remembered that after consulting the Crown Office a case can always be transferred to the Crown Office List as an alternative to being struck out.

20. In ***O'Reilly,*** Lord Diplock anticipated that the exceptions to the general rule which he pronounced would be worked out on case by case basis (at p285). To an extent that has happened but despite the efforts the

courts have made to clarify the situation (see for example, Laws J's judgement in ***British Steel v Customs and Excise Commissioners*** *[* 1996] 1 AER 1002 at 1012/3) the issue as to which procedure should be adopted has become increasingly complex and technical. It was for this reason that Lord Slynn advocated a more flexible approach in ***Mercury Communications Ltd v Director General of Telecommunications*** [1966] 1 WLR 48 at p57. In this case Mr McLaren Q. C. submitted the court should take this opportunity to reduce *"the complexity surrounding the situation"*. This I am afraid it is not possible to achieve in the framework of a judgment on a single appeal. I hope, however, that the far from comprehensive pragmatic suggestions made above will be of some assistance. They do involve not only considering the technical questions of the distinctions between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse. Here it is important to remember that there does not have to be an application to strike out even if it is considered that the wrong procedure has been adopted. Often the interests of justice and the parties will be better served by getting on with the action. Certainly there should be no appeal unless there is some practical reason for doing so.

21. If this approach is adopted in this case it is obvious that the issues can be more conveniently dealt with in an ordinary action than on an application for judicial review. The case is one in which it could be said leave would be given apart from the question of delay. As to delay I found wholly unconvincing the suggestion which was made that in the circumstances of this case that the Council could be embarrassed from an accounting point of view if entitlement to payment of grants was delayed from one year to another. It is not suggested that the Council has large number of cases in which it is being challenged in relation to the non payment of grant. The issues are likely to be mainly ones of fact. The primary remedy which is being sought is the payment of a sum of money which requires a remedy which is not available on an application for judicial review. The case is not one which requires the special expertise of a Crown Office judge. It could more conveniently be heard in Sheffield.

22. If I had doubt as to what should be the outcome of this appeal without taking into account these practical considerations then they put the position beyond doubt. I would dismiss this appeal.

LORD JUSTICE MORRITT: I agree.

LORD JUSTICE PILL:

23. The plaintiffs claim a declaration that they carried out the relevant works of renovation and repair in accordance with the defendants' specifications as varied or amended and that the defendants have unreasonably refused to express satisfaction with the work. Money claims are made in the sums of £67,147.28 and £31,846.77. I agree with Lord Woolf MR that the bringing of these claims by ordinary actions is not an abuse of process.

24. Lord Woolf MR has set out in his judgment the statutory code for the making and payment of grants. In the application for a grant, particulars of the works in respect of which a grant is sought shall be set out with at least two estimates from different contractors of the cost of carrying out the works and particulars of any preliminary or ancillary service charges (s 101 of the 1989 Act). The local housing authority are under a duty to approve certain categories of application (s 112 and s 113 of the Act) and have a discretion whether to approve applications in any case where the relevant works go beyond or are other than those which will cause the dwelling to be fit for human habitation but the authority are satisfied that the relevant works are necessary for one or more of the purposes set out in s 115(3) of the Act. Those purposes are:

"(a) to put the dwelling or building in reasonable repair;

(b) to provide the dwelling by the conversion of a house or other building;

(c) to provide adequate thermal insulation;

(d) to provide adequate facilities for space heating;

(e) to provide satisfactory internal arrangements;

(f) to ensure that the dwelling or building complies with such requirements with respect to construction or physical condition as may for the time being be specified by the Secretary of State for the purposes of this section; and

(g) to ensure that there is compliance with such requirements with respect to the provision or condition of services and amenities to or within the dwelling or building as may for the time being be so specified."

25. Under s 118(1) the authority may require as a condition of the grant that the eligible works are carried out in accordance with such specification as they determine. Under s 117(3)(a) the payment of a grant is conditional on *"the eligible works or the corresponding part of the works being executed to the satisfaction of the authority"*. Subject to that and other provisions, the authority *"shall pay the grant"*. Under s 134(2) the authority may in certain circumstances *"demand repayment by the applicant forthwith, in whole or part, of the grant or any instalment of the grant paid, together with interest at such reasonable rate as the authority may determine from the date of payment until repayment"*.

26. In their defences, the defendants contend that the plaintiffs have failed to complete the works in accordance with the defendants' specification (s 118(1)), that the plaintiffs have failed to complete the works in time (s 118(2)) and that the works have not been completed to the satisfaction of the defendants (s 117(3)). The disputes, not uncommon in building contracts, are as to whether the work was done in accordance with specification, was done in time and was of appropriate quality. Applying the tests expressed by Lord Lowry in ***Roy* v *Kensington and Chelsea FPC*** [1992] AC 624, I see every reason why the claim should proceed by an ordinary action. The plaintiffs have the statutory right to remuneration in accordance with the statutory provisions which right dominates the proceedings. An order for payment of money could not be granted on judicial review. The type of claim may involve disputed issues of fact and, since individual rights are claimed, there should not be need for leave or a special time limit, nor should the relief be discretionary.

27. In *Roy*, a general practitioner commenced an action against his family practitioner committee seeking payment of part of his basic practice allowance withheld following the committee's decision that he had failed to devote a substantial amount of time to general practice as required by the appropriate regulations. Lord Bridge stated, at p 630 D to G: *"I do not think the issue in the appeal turns on whether the doctor provides services pursuant to a contract with the family practitioner committee. I doubt if he does and am content to assume that there is no contract. Nevertheless, the terms which govern the obligations of the doctor on the one hand, as to the services he is to provide, and of the family practitioner committee on the other hand, as to the payments which it is required to make to the doctor, are all prescribed in the relevant legislation and it seems to me that the statutory terms are just as effective as they would be if they were contractual to confer upon the doctor an enforceable right in private law to receive the remuneration to which the terms entitle him. It must follow, in my view, that in any case of dispute the doctor is entitled to claim and recover in an action commenced by writ the amount of remuneration which he is able to prove as being due to him. Whatever remuneration he is entitled to under the statement is remuneration he has duly earned by the services he has rendered. The circumstance that the quantum of that remuneration, in the case of a particular dispute, is affected by a discretionary decision made by the committee cannot deny the doctor his private law right of recovery or subject him to the constraints which the necessity to seek judicial review would impose upon that right."*

28. In present circumstances, a refusal to approve an application for a grant gives rise to no right to damages. Discretions are also involved, for example s 115 (discretionary approval) and s 118 (determining a specification). However, once an application is approved a duty to pay it arises upon compliance by the applicant with the statutory requirements and the duty is in my view enforceable by an ordinary money claim. The repayment to the authority contemplated in s 134(2) would be enforced in the same way. As Mance J put it: *"The relationship is established in respect of a specific property or properties, and specifically defined works. It is a one-to-one relationship which would in another context quite readily be expressed in contractual terms. Whether works have been completed in accordance with the specification, and in the time specified, is a matter of objective, factual and technical assessment."*

29. Section 117(1) of the Act provides that the authority "shall pay the grant" but it has to be recognised that by virtue of s 117(3)(a), the obligation is conditional on the works being executed *"to the satisfaction of the authority"*. The question arises as to the extent of the discretion open to them on what appears to be a subjective test. Mance J stated: *"It is true, as I have emphasised, that the legislation here, as also in various contexts in relation to the original decision whether or not to approve a grant application, specifies that the authority be 'satisfied,' here as to the due execution of the works. But once a grant application has been made and approved, the authority's role in satisfying itself as to the due execution of works is one which it should perform and should be able to perform on an objective, factual and technical basis. It is not a decision into which policy or public considerations*

enter. No doubt there is a public interest and duty to see that grant is not paid in respect of works which have not, on an objective, factual and technical basis, been completed within the specified time, and so to protect the authority's purse, but that is merely the reason for requiring satisfaction."

30. It may be argued that the s 117(3)(a) discretion is a broad one and, subject to unreasonableness in the ***Wednesbury*** sense, the authority may set their own standards as to whether the works have been executed and as to the quality of the work. Clearly, the authority have a duty to protect the money of taxpayers and to make a judgment as to whether the works are complete and satisfactory. The provisions are intended to make that clear but the nature of the discretion must be considered in the particular statutory context.

31. In ***R* v *Tower Hamlets LBC ex p Chetnik*** **[**1988] AC 858, the House of Lords considered the discretion granted to local authorities under s 9(1) of the General Rate Act 1967 to refund money paid in respect of rates. Lord Bridge stated at p 877D, and notwithstanding what appeared to be a general discretion, that "*Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law ¼"*. Lord Bridge stated at p 873G:
"Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose."

32. In the present context, I cannot read the requirement of satisfaction in s 117(3)(a) as serving the purpose of conferring a general power on the authority to set their own standards. Access to the courts is on any view possible under the provisions of the 1989 Act. If a claim for payment of grant is made under s 117(1), and there is disagreement as to whether the statutory conditions are satisfied, it is for the court to determine whether the specification is met, whether the work is done in time and whether it is of an appropriate standard. The statute prescribes the particulars to be given with an application in much the same way as would an invitation to tender and the authority may lay down a specification. Moreover, upon a discretionary application, the authority may have regard to the purposes in s 115(3) which includes words such as *"reasonable"*, *"adequate"*, *"satisfactory"*, and *"requirements specified by the Secretary of State"*. The scheme contemplates, upon the making of a grant and execution of the works, and as between the authority and the grantee, an objective assessment of performance. Some claims by grantees will be debt collecting exercises but I do not regard the right of access to the courts as one appropriate only to a debt-collecting exercise.

33. These claims are made *"in respect of a specific property or properties, and specifically defined works"*. That being so, and in the statutory context, the satisfaction must be expressed if, on objective appraisal, the conditions have been met. The provisions of the statute appear to me to contemplate a court being able to determine whether, for the purposes of s 117, s 118(3) and s 134(1)(a), the work is of an appropriate standard and within time. Upon analysis as in ***Chetnik*****,** these particular discretions can only validly be exercised upon an objective appraisal of the points at issue. The authority can only be legally dissatisfied, in this context, upon evidence that the work viewed objectively was unsatisfactory. While considerable importance should of course be attached to the evidence of the authority's expert witness upon the relevant issues, this is not a situation in which his opinion is challengeable at the hearing only if it is ***Wednesbury*** unreasonable, that is, *"verging on an absurdity"* (Lord Brightman in ***R* v *Hillingdon LBC ex p Puhlhofer*** [1986] AC 484 at 518). Whether the works have been carried out in accordance with the authority's specification (s 118(1)) is also susceptible to objective assessment. It will of course be desirable if disputes such as this one can be resolved by mediation or with the assistance of a surveyor jointly instructed, as Lord Woolf MR contemplates in his judgment, but that aim would not be encouraged by the introduction of the ***Wednesbury*** test into the task to be performed.

I too would dismiss this appeal.

ORDER: Appeal dismissed with costs. Leave to Appeal to House of Lords refused.

MR A UNDERWOOD and MISS L GIOVANETTI (Instructed by) appeared on behalf of the Appellant.

MR I MCLAREN QC and MR T CRANFIELD (Instructed by) appeared on behalf of the Respondent