Neutral Citation Number: [2022] EWHC 2806 (Admin)

Case No: CO/1836/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2022

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

BUILD HOLLYWOOD LIMITED	**Appellant**
- and -	
LONDON BOROUGH OF HACKNEY	**Respondent**

- -
- -

Charles Merrett (instructed by **Albertson Solicitors Limited**) for the **Appellant**
Edmund Robb (instructed by **London Borough of Hackney**) for the **Respondent**

Hearing date: 1 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mrs Justice Steyn DBE :

A. Introduction

1. The appellant, Build Hollywood Ltd, appeals by case stated against the decision of District Judge Susan Holdham, sitting at Stratford Magistrates' Court, to dismiss the appellant's appeal against a removal notice ('the Notice') issued by the respondent, the London Borough of Hackney, pursuant to s.225A of the Town and Country Planning Act 1990 ('the 1990 Act') on 4 March 2021.

2. By the Notice, the respondent required the removal, within a period of four months, of various advertisements and their associated fixtures and fittings from two areas of a property known as The Tram Depot, 38-40 Upper Clapton Road, London E5 8BQ ('the Property'). There were two advertisement displays to which the Notice applied: (i) a high-level advertisement display on the flank wall of the main building within the Property; and (ii) three wooden advertising hoardings which are at street level, attached to a brick wall of the Property which faces onto Upper Clapton Road ('the low-level advertisements'). The appeal relates only to the low-level advertisements which protruded over (or "*oversailed*") the pavement of Upper Clapton Road by about 20cm.

3. The respondent alleged that the low-level advertisements contravened the provisions of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 ('the 2007 Regulations'). For the low-level advertisements not to be in contravention of the 2007 Regulations the appellant needed to show that they benefitted from deemed consent, it being common ground that there was no express consent. The District Judge held that the low-level advertisements did not have deemed consent because (even if they would otherwise have had deemed consent under Class 13 of Schedule 3 to the 2007 Regulations, an issue she did not need to decide) they contravened the "*standard conditions*" referred to in Regulation 6 of the 2007 Regulations, specifically condition 1.

4. Standard Condition 1 states:

> "No advertisement is to be displayed without the permission of the owner of the site or any other person with an interest in the site entitled to grant permission."

The District Judge found that Transport for London (TfL), the Highways Authority at this location,

> "were 'the owner of the site or any other person with an interest in the site entitled to grant permission' and the appellant had not shown that it had the permission of TfL to display an advertisement which over sailed the pavement. The evidence showed that at the time of the removal notice there was no s.177 licence. However, the burden was upon the appellant to show there was permission at that time; it was not for the respondent to disprove it."

5. The questions stated by the District Judge for the opinion of the High Court are:

> "1. Was I correct to find that Transport for London had an interest in the site?
>
> 2. Was I correct to find that the appellant had breached standard condition 1 of Schedule 2 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 by failing to show that it had a licence from Transport for London?"

B. The legal framework

Advertising

6. Under s. 225A of the 1990 Act, a removal notice can be issued against "*any display structure*" which is used for the display of advertisements in contravention of regulations under s. 220. The relevant regulations made under s. 220 are the 2007 Regulations which are a "*self-contained code for the control of advertisements*" (*R (JC Decaux UK Ltd) v Wandsworth LBC* [2009] EWHC 129 (Admin) [24]).

7. The right of appeal against a removal notice is contained in s. 225B of the 1990 Act. One ground of appeal available is that the display structure subject to the removal notice is not used for the display of advertisements in contravention of the 2007 Regulations (s. 225B(1)(a)).

8. Under reg. 4 of the 2007 Regulations, an advertisement cannot be displayed unless it either benefits from express or deemed consent. As I have said, the issue in this appeal was whether the low-level advertisements benefitted from *deemed* consent. Regulation 6 of the 2007 Regulations concerns deemed consent. It provides:

> "(1) Subject to regulations 7 and 8, and in the case of an area of special control also to regulation 21, consent is granted for the display of an advertisement of any class specified in Part 1 of Schedule 3, subject to—
>
> (a) the standard conditions; and
>
> (b) in the case of any class other than Class 12, the conditions and limitations specified in that Part in relation to that class.
>
> (2) Part 2 of Schedule 3 applies for the interpretation of that Schedule."

9. It can be seen that to benefit from deemed consent an advertisement must meet (i) the standard conditions (reg. 6(1)(a)) and (ii) (aside from Class 12) the conditions and limitations specified for that Class in Part 1 (reg. 6(1)(b)).

10. The standard conditions are provided in Schedule 2 to the 2007 Regulations. It is a breach of standard condition 1 to display an advertisement "*without the permission of the owner of the site or any other person with an interest in the site entitled to grant permission*".

11. In the 2007 Regulations, the word "*site*" is defined in reg. 2:

> "'site' means any land or building, other than an advertisement, on which an advertisement is displayed";

12. Class 13, contained in Schedule 3 to the 2007 Regulations, provides that:

> "An advertisement displayed on a site that has been used continually for the preceding ten years for the display of advertisements without express consent."

13. Under the sub-heading "conditions and limitations", 13(1) provides:

> "An advertisement does not fall within this description if, during the relevant 10-year period, there has been either a material increase in the extent to which the site has been used for the display of advertisements or a material alteration in the manner in which it has been so used."

Section 177 Highways Act 1980

14. Section 177(1) of the Highways Act 1980 provides:

> "(1) No person shall—
>
> (a) except in the exercise of statutory powers, construct a building over any part of a highway maintainable at the public expense (whether it is intended to span the highway or not), or alter a building so constructed, without a licence granted under this section by the highway authority for that highway or otherwise than in accordance with the terms and conditions of a licence so granted;
>
> (b) use a building so constructed or altered in pursuance of a licence so granted otherwise than in accordance with the terms and conditions thereof:
>
> and any person who contravenes any provision of this subsection is guilty of an offence and liable to a fine not exceeding level 5 on the standard scale; and if the offence is continued after conviction, he is guilty of a further offence and liable to a fine not exceeding £50 for each day on which the offence is so continued."

15. Section 177(1) applies only where the building is over a highway maintainable at public expense. Not every public highway is a highway maintainable at the public expense. Highway authorities are under a duty to record highways maintainable at public expense: s.36(6) of the Highways Act 1980.

16. Section 177(2) of the Highways Act 1980 provides:

> "Subject to subsections (3) and (4) below, a licence under this section may contain such terms and conditions, including terms

> and conditions with respect to the construction (including the headway over the highway), maintenance, lighting and use of the building, as the highway authority think fit; and, any such term or condition is binding on the successor in title to every owner, and every lessee and occupier, of the building."

17. Section 177(7) provides:

> "Where a person has constructed or altered a building for the construction, or, as the case may be, alteration, of which a licence is required by this section without such a licence or otherwise than in accordance with the terms and conditions of the licence, the highway authority may by notice served on the licensee or the owner of the building require him to demolish the building within such time as may be specified in the notice or, as the case may be, to make such alterations therein and within such time as may be so specified." (Emphasis added.)

C. The Case Stated

18. The District Judge noted:

> "10. The respondent council's case was that Transport for London (TfL) who were acting as the Highway Authority at this location had an interest in the site as the low level advertisements protruded over the public highway and the advertisements were changed and the hoarding maintained on the public highway.
>
> 11. The respondent submitted that the interest in the site which TfL had by virtue of the oversailing of the public highway related to the exercise of statutory powers, including s. 177 (1) of the Highways Act [the terms of which she set out].
>
> 12. The respondent council had measured the low-level advertisements and found that that they protruded or 'oversailed' the public highway, by up to 0.211 m, and that no licence had been granted by Transport for London (TfL), under s.177 Highways Act 1980, for the incursion of the low level advertisements over the public highway.
>
> 13. The appellant's measurement of the oversail was slightly less: 0.17 m. It was expressly accepted by the end of the case by the appellant that the display was a building for the purposes of s177.
>
> 14. The appellant raised a number of points both in the original skeleton argument and throughout the hearing which were then abandoned or no longer relied upon.

15. By the conclusion of the hearing, the appellant's points in relation to the low-level advertisements appeared to be

i) The oversail was de minimis. It was approximately 20 cms. It caused no difficulty to passing pedestrians. There was not a high volume of traffic along the pavement.

ii) There was an abuse of process because the local authority was forcing TfL to ask for a licence from the appellant. The local authority was denying TfL the opportunity of coming to a view one way or another and exercising its process as it thought appropriate.

iii) There was no evidence that TfL required a licence until the matter was raised by the respondent. This action was described as a 'ruse' on part of the respondent and 'Putin-esque'. The respondent was forcing TfL to get involved when TfL had no desire to do so.

iv) The respondent was acting contrary to its own policy by not engaging with the appellant to resolve the issue before issuing a removal notice.

The appellant also made the further points

i) The respondent could have asked appellant to get licence from TfL and not served a removal notice.

ii) The respondent was being secretive or at least, not open with the appellant. The removal notice was served in March 2021 and there was correspondence between the respondent and TfL questioning whether a licence had been granted in October 2021. The first the appellant knew of the correspondence with TfL was when the statement of Lorraine Murphy, a planning enforcement officer, was served in December 2021.

iii) Before the hearing, the appellant had applied for a licence from TfL. On the second day of the hearing I was told that the appellant had received an email from TfL saying that it was likely that the application for the s.177 licence would be granted.

16. It was not explicitly argued on behalf of the appellant that 'the land oversailed by an advertisement panel was not the site for the purposes of the standard conditions and that no permission was required from TfL for the display, rather that the site was the land or building to which the advertisement panel was attached'. It was said that TfL as the highways authority had no interest in the site. Otherwise, the arguments which were raised are set out above."

19. The District judge gave judgment on 8 March 2022 and made the following findings:

> "18. I found that TfL were 'the owner of the site or any other person with an interest in the site entitled to grant' and the appellant had not shown that it had the permission of TfL to display an advertisement which over sailed the pavement. The evidence showed that at the time of the removal notice there was no s.177 licence. However, the burden was upon the appellant to show there was permission at that time; it was not for the respondent to disprove it.
>
> 19. I found that there was no 'de minimis' rule. I was concerned initially that an oversail of a millimetre could be said to be an oversail and thus a breach of the standard condition 1. However, it seemed to me that the remedy that the appellant would have is to judicially review the local authority to say that to serve a removal notice in those circumstances would be 'Wednesbury' unreasonable or an incorrect exercise of their discretion.
>
> 20. Consequently I found that the appellant had breached condition 1 of the standard conditions at the time of the removal notice and thus the removal notice in respect of the low level display was valid as the 2007 regulations had been contravened and the appeal against the removal notice failed.
>
> 21. Because of these findings I did not need to consider the further issue of deemed consent, although I thought it unlikely there was deemed consent in March 2021, I had no need to consider this and made no finding in respect of deemed consent." (Emphasis added)

D. The parties' submissions

20. In summary, the appellant submits:

i) The "*site*" for the purposes of condition 1 was the Property (or perhaps part of it). The "*site*" did not encompass any part of Upper Clapton Road.

ii) TfL was not the "*owner*" of the "*site*" for the purposes of standard condition 1. Nor was TfL a "*person with an interest in the site*" for the purposes of standard condition 1 because:

a) TfL was not a person who was entitled to grant permission for an advertisement to be displayed. Even if TfL had the power to grant a licence under s.177 of the Highways Act 1980, that was a power to licence the construction or alteration of a building over a highway, not a power to grant permission for the display of an advertisement.

b) Alternatively, the appellant contends that s.177 does not apply to a pre-existing, unlicensed, building over a highway maintainable at public

expense, unless an alteration is made to it. And so it does not apply to the low-level advertisements (which it is accepted are a "building" for the purposes of s.177 of the Highways Act 1980, in accordance with the definition in s.336 of the 1990 Act).

c) In any event, it was not shown that s.177 of the Highways Act 1980 applied because there was no evidence, and the District Judge made no finding, that Upper Clapton Road was a "*highway maintainable at the public expense*".

21. The focus of the first part of the appellant's submissions is on the word "*site*" in Standard Condition 1. The appellant contends that the question the District Judge was obliged to ask in considering whether TfL had "*an interest in the site*" was whether Upper Clapton Road was "*any land or building ... on which an advertisement is displayed*" (reg. 2 of the 2007 Regulations). Accordingly, the District Judge could only find that the appellant required permission from TfL if Upper Clapton Road was land (or a building) on which the low-level advertisements were displayed. The appellant contends that the District Judge failed to apply this approach. She made no reference in the Case Stated to the definition of "*site*" in regulation 2 and erroneously concluded that "*the site*" *included* Upper Clapton Road based on the mere fact that the low-level advertisements oversailed Upper Clapton Road. The appellant suggests it is significant that the District Judge made no finding that the low-level advertisement displays had any physical connection with Upper Clapton Road.

22. The appellant relies on *R (JC Decaux UK Ltd) v Wandsworth LBC* [2009] EWHC 129 (Admin) in support of the proposition that land which is merely oversailed by an advertisement is not part of the site on which an advertisement is displayed, nor is land which is simply used to access an advertisement part of the site on which an advertisement is displayed.

23. The *JC Decaux* case was decided in the context of an argument as to whether Class 13 deemed consent had been extinguished by reason of a breach of the conditions attaching to that Class, specifically, that during the relevant 10-year period there has not been "*either a material increase in the extent to which the site has been used for the display of advertisements or a material alteration in the manner in which it has been so used*".

24. Blake J decided that the change which occurred when an advertisement hoarding was affixed to the ground within a school playground, by a supporting steel structure, having previously been affixed to a wall at no.151 from which it overhung the playground (at no.149) without being physically connected to it, constituted a material increase in the extent of the use of the site, and a material alteration in the manner in which the site was used for the display of advertisements. Consequently, there had been a breach of conditions attaching to Class 13, thereby extinguishing any deemed consent which may have accrued over the passage of time for the advertisement displays.

25. The appellant company (JC Decaux) had argued that there had not been any material increase in the extent of the use of the site, since "*the site*" had always included the playground. Blake J held:

> "43. … By reference to the definition section in the regulations, "site" means land or building. A playground in this context is not a building, and in my judgment, in the context of the advertisement regulations, the land of the playground is not being used for the display of advertisements merely because advertisements overhang the land to the marginal extent described earlier some 6 to 9 metres up.
>
> 44. Moreover, the fact that the owner of the land is willing for the advertiser to access his land in order to service it does not mean that the land being used for access is being used for a display." (Emphasis added.)

26. The appellant contends that it was central to the decision in *JC Decaux* that there was no physical connection between the advertisement and the playground. Blake J stated at paragraph 46 that:

> "Looking at the matter as a whole, in the light of the guidance obtained from the regulation, I therefore conclude that this was not the same site in the terms of Class 13. In my judgment, the playground was not being used for the display of an advertisement in 2006; it was being used to access such a display, and its owners merely permitted the advertisement on the flank wall to overhang its air space. The display had no physical connection with 149. That conclusion is decisive against the application of the deemed consent under Class 13. But in case I am wrong on that conclusion, I go on to consider the second issue, which is material variation."

27. The appellant refers to paragraph 19 of the Case Stated where the District Judge stated her finding that there is no *de minimis* rule. The appellant contends that this shows the District Judge's approach was to find that any land which is oversailed by an advertisement is part of the site, without giving any consideration to whether that land was in fact used for the display of advertisements. That is an approach which is shown by *JC Decaux* to be wrong. Moreover, the appellant submits that it is not arguable that Upper Clapton Road (which is land, not a building) is land on which the low level advertisements were displayed, given that the advertisements oversailed but were not physically connected to Upper Clapton Road. The appellant acknowledged that TfL would potentially have a remedy in trespass in respect of the low-level advertisements, as the law of trespass treats exclusion from air space and the surface of the land the same (*Anchor Brewhouse Developments Ltd v Berkley House* (1988) Const LJ 4(1) 29-39), but such a common law remedy does not show TfL was a person with an interest in the site for the purposes of Standard Condition 1.

28. Therefore, the appellant submits that the District Judge erred in concluding that TfL had an interest in the site. TfL's permission to display the advertisements was not required, and so the low level advertisements were not displayed in breach of standard condition 1.

29. The appellant's alternative submissions focus on the words "*entitled to grant permission*" in Standard Condition 1, considered together with s.177 of the Highways

Act 1980. The appellant submits that the permission which the person must be entitled to grant, in order to be regarded as a person with an interest in the site, is permission to display an advertisement on the site. Whereas s.177 is part of a different scheme, separate from the self-contained code for the control of advertisements, and it is concerned with works not the display of advertisements. This can be seen from the title of the section ("*Restriction on construction of buildings over highways*") and the terms of the section which show the grant of a licence under s. 177(1)(a) is solely confined to either the construction or alteration of a building over a public highway and reference to "*use*" in s. 177(1)(b) is itself confined to use in contravention of a licence.

30. It follows, the appellant submits, that even if TfL would have had a power to grant a licence under s.177 of the Highways Act 1980 in respect of the construction or alteration of the advertisements over Upper Clapton Road, that does not constitute an entitlement to grant permission to display the advertisements within the meaning of Standard Condition 1. There is no necessary connection between permission to display an advertisement and a licence for construction or alteration under s. 177 of the Highways Act 1980.

31. In any event, the appellant submits that it was not shown that s.177 of the Highways Act 1980 applied. Before the appellant began using the site to display the low-level advertisements, it had been used for the display of such advertisements by JC Decaux (paragraph 1 of the Case Stated). The "*building*" had already been constructed before the appellant came to the site and so, absent any works to alter the building, the appellant was at no point required to apply for a licence under s. 177 of the Highways Act 1980. In addition, the District Judge failed to consider whether Upper Clapton Road was a highway maintainable at the public expense. The District Judge made no finding as to whether Upper Clapton Road was recorded in the Highway Authority's list of streets maintainable at the public expense kept under s. 36 of the Highway Act 1980.

32. If, for any of these reasons, s.177 did not apply, then TfL was not a person with an interest entitled to grant permission, and the lack of a licence under s.177 was not evidence of a breach of Standard Condition 1.

33. In relation to the appellant's first point (para above), the respondent submits that Blake J's conclusion in the *JC Decaux* case that the playground had not previously formed part of "*the site*" for the display of advertisements was informed by the fact that the advertisement in question was placed (prior to the construction at ground level of the supporting steel structure), "*some 6 to 9 metres up*" above the ground on the flank wall of a neighbouring property. It does not follow that a building which is suspended above land, rather than physically connected to it, can never be regarded as being "*on*" and part of the site. What constitutes a site is a question of fact: *JC Decaux*, [31]. In this case, the three low-level advertisements are at "*street level*", not "*some 6 to 9 metres up*".

34. In any event, even if the appellant's first point is accepted, TfL had an "*interest in the site*" within the meaning of Standard Condition 1 in circumstances where:

    i) the low-level advertisements constitute "*buildings*";

ii) these "*buildings*" overhang the public highway;

iii) TfL is the highway authority for the relevant public highway;

iv) TfL has the power to grant or withhold a licence for such "*buildings*" under the provisions of s. 177(1) of the Highways Act 1980; and

v) TfL retains the right under s. 177(2) of the Highways Act 1980 to govern the continued operation and use of the "*buildings*".

35. The appellant does not dispute points (i), (ii) and (iii). The burden of proving that there has been no breach of the 2007 Regulations in any appeal against the Notice under s. 225B of the 1990 Act, falls upon the appellant. The respondent demonstrated that no licence had been granted by the responsible highway authority for buildings which overhang the public highway. The appellant failed to show – and indeed has at no point claimed - that any licence had been granted by TfL, under s.177 or any other statutory power, for the low-level advertisements. As the District Judge recorded in the Case Stated, the appellant made an application for a s.177 licence to be granted by TfL in respect of the low-level advertisements *afte*r the Notice was issued, and during the course of the current appeal against the Notice.

36. In relation to the appellant's second and third points (para above), the respondent contends that s.177 licences are not merely concerned with the construction or alteration of a building. Section 177(1)(b) is expressly concerned with ongoing use of a building and s.177(2) specifies how this ongoing control degree of control may be exercised by the highway authority through the inclusion of terms and conditions. Had the appellant applied for a s.177 licence from TfL, conditions would have been required in order to govern matters such as the on-going maintenance, repair, alteration and eventual removal of the low-level advertisements, not least because any access which would be needed to carry out this work by the appellant or its contractors would need to take place across and over the public highway. The power to impose such terms and conditions, including as to the "*use of the building*" constitutes an "*entitlement to grant permission*" for the purposes of Standard Condition 1.

37. In relation to the appellant's final point (para above) the respondent submits that the issue of whether Upper Clapton Road is a highway which is maintainable at the public expense has never been raised prior to the filing of the appellant's skeleton argument in the appeal before this court. Specifically, it was not raised in any of the documentation setting out the original grounds of appeal against the Notice; the appellant's witness statements or its skeleton argument for the original appeal; oral submissions before the District Judge in the course of the two day hearing; and nor was it raised in any of the correspondence with the District Judge leading to the Case Stated appeal.

38. Consequently, the respondent has filed a Respondent's Notice to address this point. The respondent submits that if the appellant had raised the point before the District Judge it would have been swiftly dealt with by the respondent or TfL. Upper Clapton Road is a main thoroughfare in East London. That is the reason why the road has been adopted by TfL and taken out of the local authority's control. It is not only a public highway; it is a highway which is maintainable at the public expense, and it is

recorded as such by the respondent according to its duty to keep lists of highways which are maintainable at the public expense under the provisions of s. 36(6) of the 1980 Act.

39. The respondent submits the District Judge was correct to find that the appellant breached standard condition 1 of the 2007 Regulations through its failure to obtain a licence from TfL under s. 177 of the 1980 Act.

E. Analysis and decision

40. In relation to the question what constitutes "*the site*", in principle, I agree with the respondent's submission at paragraph above. The fact that a building is suspended in air over land with which it has no physical connection may mean, as was the position in the *JC Decaux* case, that the building is not part of the site together with the land over which it hangs. But what constitutes the site is a question of fact. It does not follow from the *JC Decaux* case that lack of physical connection will *necessarily* mean that, for example, a building suspended mere centimetres above the land, in the path of any person seeking to walk across that land, cannot be regarded as part of the same site as the land.

41. However, the District Judge did not make any finding that the "*site*" encompassed any part of Upper Clapton Road. Accordingly, I approach the issues on the basis that the appellant is right to say that the "*site*" for the purposes of condition 1 was the Property (or part of it), including the low-level advertisements attached to it, but it did not encompass any part of Upper Clapton Road. TfL was not the owner of any part of the site. The real issue, as the District Judge recognised, was whether TfL was a person with an interest in the site within the meaning of Standard Condition 1.

42. I accept the appellant's submission that the permission with which Standard Condition 1 is concerned is permission to display an advertisement on the site. However, that encompasses a person who has the power to grant or refuse permission to use the site in that way, even if, were that person to give permission, some further permission to display an advertisement would still be required. The position in respect of a person with an interest is the same as for the owner of the site whose grant of permission to come onto their land and place an advertising hoarding there is necessary, but may not be the only permission required to enable the advertisement to be displayed.

43. In my judgment, the appellant's proposition that even if the highway authority has the power to grant a s.177 licence in respect of the low-level advertisements, and to impose terms and conditions, that would not constitute an entitlement to grant permission for the purposes of Standard Condition 1 is misconceived. If the s.177 power applies, then the highway authority would have the power to grant (or refuse) a licence (which is a form of permission) to construct, alter or use the low-level advertisements, and to impose terms and conditions, including in respect of their removal. Standard Condition 1 is obviously intended, in my view, to encompass a person who has such a power.

44. The question then is whether TfL did have the power under s.177 of the Highways Act 1980 to grant a licence in respect of the low-level advertisements. The appellant suggests that it did not because they had already been constructed and the appellant

has not altered them. The respondent does not accept that is the true factual position. But there are no findings of fact in the Case Stated about the removal and reconstruction of the low-level advertisements, so I shall presume in addressing this issue that the appellant has not constructed or altered the low-level advertisements.

45. In my judgment, the appellant's argument erroneously focuses on the circumstances in which a person commits an offence contrary to s.177 of the Highways Act 1980, rather than the scope of the power to grant a licence implicitly given to the highway authority by that provision.

46. I accept the appellant's proposition that a person only contravenes s.177 if they (a) construct a building over any part of a highway maintainable at the public expense without a licence, (b) alter such a building without a licence, (c) alter such a building otherwise than in accordance with the terms of a licence, or (d) use such a building in respect of which a licence has been granted otherwise than in accordance with the terms of the licence. It is common ground that there was no licence granted and so (c) and (d) are inapplicable. If, in fact, the appellant did not construct or alter the low-level advertisements, then they have not committed an offence contrary to s.177(1).

47. But the important question for the purposes of this case is not whether the appellant contravened s.177(1). The contravention alleged is of Standard Condition 1. The key question is whether TfL had a power to grant a licence in respect of the low-level advertisements. If TfL had such a power, and the appellant failed to obtain a licence (or otherwise obtain permission from TfL), then the low-level advertisements were displayed in contravention of Standard Condition 1. Following the service of the Notice, the appellant in fact applied for a s.177 licence. On the appellant's case, TfL has no power to grant it.

48. For the appellant's submission to succeed, the highway authority's power under s.177 to licence, and impose terms and conditions on, the use of a building constructed over any part of a highway maintainable at the public expense, would have to be construed as falling away if ownership of a constructed building passes to a person who makes no alteration to it. The effect of s.177(7) is that the highway authority has the power to serve a notice on the owner of the building (here, the low-level advertisements) requiring its demolition or alteration. In my view, having regard to the purpose of the provision and reading it in context, it is clear that the highway authority also has a continuing power to grant a licence (subject to terms and conditions) in respect of a building over a highway maintainable at public expense that has been constructed without a licence.

49. The evidence before the District Judge showed that Upper Clapton Road was a public highway. It was implicit in the respondent's reliance on s.177 of the Highways Act 1980 that the respondent was asserting that the road was a highway maintainable at public expense. The appellant did not question or seek to refute that implicit assertion at any stage during the proceedings before the District Judge, or even in the context of obtaining a case stated for the opinion of this court. In these circumstances, I do not consider that it is open to the appellant to raise this factual issue now. In any event, it is evident that Upper Clapton Road is in fact duly recorded as a highway maintainable at public expense. The appeal on this ground must inevitably fail. It is clear, in my view, that TfL had the power to grant a licence, and impose terms and conditions, in respect of the display of the low-level advertisements.

F. Conclusion

50. For the reasons I have given, the answers to both the questions stated for the opinion of the High Court are 'yes'. The District Judge's conclusion that TfL was a "*person with an interest*" within the meaning of Standard Condition 1 (contained in paragraph 1 of Schedule 2 of the 2007 Regulations) was correct. As the appellant failed to show that it had a s.177 licence or any other permission from TfL to display the low-level advertisements, it follows that the District Judge's conclusion that the appellant had breached Standard Condition 1 was also correct.