a

Jennings Motors Ltd v Secretary of State for the Environment and another

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, OLIVER AND WATKINS LJJ
b 30 OCTOBER, 2, 27 NOVEMBER 1981

Town and country planning – Development – Material change of use – Planning unit – Determination of what constitutes appropriate unit – New chapter in planning history – Extinction of existing use rights – Industrial site having existing use rights for repair and maintenance of vehicles – Old workshop on site replaced by new workshop without planning c *permission – Workshop covering only small portion of site – Whether new workshop a new planning unit starting with nil use – Whether new chapter in planning history commencing – Whether new workshop falling within existing use right attaching to whole site.*

Since 1962 the occupiers had used a half-acre site for the repair and maintenance of vehicles and the sale and hire of cars. In 1975 they demolished an existing garage d workshop on part of the site and without obtaining planning permission erected a new building in its place. The new building occupied about 6% of the site and was used for substantially the same purposes as the demolished building. The local planning authority did not take enforcement proceedings for the removal of the building but instead served an enforcement notice on the occupiers requiring them to discontinue use of the new building, on the grounds that the use of the new building without the grant of e permission amounted to a material change of use and was a breach of planning control. The occupiers appealed to the Secretary of State for the Environment, who upheld the enforcement notice on the grounds that, when the new building was erected, it was to be considered as a new planning unit which had no actual, established or permitted use, so that a new planning history commenced starting with a nil use and the use to which it was put thereafter necessarily involved a material change of use from nil use which, if f it was done without planning permission, amounted to a breach of planning control, despite the fact that the new building was used for the same purposes as the building it replaced. The occupiers appealed to the Divisional Court, which upheld the Secretary of State's decision. The occupiers appealed to the Court of Appeal, contending that the Secretary of State had been wrong to consider the use of the building alone and that the correct test was whether the use of the new building effected a material change in the use of the site as a whole. The occupiers submitted that the site as a whole had an established g use right for the purposes for which the new building was being used and that therefore there had been no material change of use.

Held – The appeal would be allowed for the following reasons—

(1) (Per Lord Denning MR) A new building which replaced an old building did not create a new planning unit which started with a nil use. The new building could open h a new chapter in the planning history, thus bringing to an end previous existing use rights, but only if there was such a radical change in the nature of the buildings on the site or the uses to which they were put that the change amounted to a fresh start in the character of the site. Where, however, that was not the case the existing use rights continued. Having regard to the size of the building in relation to the site as a whole, there had not been any change in the planning history and therefore the existing use j rights attaching to the site as a whole extended to the new building (see p 476 *a* to *c* and *e f*, post).

(2) (Per Oliver and Watkins LJJ) The replacement of an old building by a new building on materially the same part of the site did not necessarily create a new planning unit starting with a nil use or commence a new planning history in relation to it, since whether there was a change in the planning status of the site caused by the new building which had the effect of extinguishing existing use rights and creating a new planning

unit was a question of fact and degree in every case. Since the Secretary of State had held that the new building was in itself sufficient to create a new planning unit, he had misdirected himself (see p 478 *f* to *j*, p 480 *e f j* and p 481 *b*, post).

Per Lord Denning MR. The theory that a new building creates a new planning unit starting with a nil use should be discarded. The better view is that, if a radical change occurs in the nature of the buildings on the site or the uses to which they are put, a new chapter in the planning history is opened in respect of it (see p 476 *c d*, post).

Per Oliver and Watkins LJJ. The difference between the expressions 'new planning unit' and 'change in the planning history' is largely semantic. Because the expression 'new planning unit' is hallowed by long usage it should be retained and used to include the concept of a change in the planning history (see p 477 *f* and p 479 *j* to p 480 *a* and *j* to p 481 *b*, post); dictum of Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER at 244–245 approved.

Notes

For development by a material change of use, see 37 Halsbury's Laws (3rd edn) 259, para 366, and for cases on the subject, see 45 Digest (Repl) 328–334, *14–30*.

Cases referred to in judgments

Aston v Secretary of State for the Environment (9 April 1973, unreported), DC.

Burdle v Secretary of State for the Environment [1972] 3 All ER 240, [1972] 1 WLR 1207, DC, Digest (Cont Vol D) 918, *30x*.

Gray v Minister of Housing and Local Government (1969) 68 LGR 15, CA, Digest (Cont Vol C) 963, *30r*.

Hilliard v Secretary of State for the Environment (1978) 37 P & CR 129, CA, Digest (Cont Vol E) 592, *30a(iii)*.

Joyce Shopfitters Ltd v Secretary of State for the Environment [1976] JPL 236.

Leighton and Newman Car Sales v Secretary of State for the Environment (1976) 32 P & CR 1, CA.

Newbury DC v Secretary of State for the Environment [1980] 1 All ER 731, [1981] AC 578, [1980] 2 WLR 379, HL.

Petticoat Lane Rentals Ltd v Secretary of State for the Environment [1971] 2 All ER 793, [1971] 1 WLR 1112, DC, Digest (Cont Vol D) 932, *119a*.

Prossor v Minister of Housing and Local Government (1968) 67 LGR 109, DC, Digest (Cont Vol C) 971, *61b*.

Appeal

Jennings Motors Ltd (the occupiers) appealed against the decision of the Divisional Court of the Queen's Bench Division (Donaldson LJ and Bristow J) on 22 April 1980 dismissing an appeal by way of motion for an order that a decision of the Secretary of State for the Environment made on 6 July 1978 be quashed and the case remitted to the Secretary of State for rehearing. By his decision the Secretary of State refused to follow the recommendation of a planning inspector and upheld an enforcement notice dated 12 August 1976 served on the occupiers by the New Forest District Council requiring the occupiers to discontinue the use of a building on a site at Whinfield Road, Dibden Purlieu for the purpose of workshops for the repair, servicing and maintenance of motor vehicles. The occupiers appealed against the notice and, following an inquiry, the inspector in his report found, inter alia: (1) the appeal premises were in a predominantly residential area and were surrounded with dwellings; (2) the premises were used for the repair and maintenance of vehicles, the sale of cars and the hire of self-drive cars and comprised a building used as a commercial vehicle repair workshop, a range of buildings comprising a car showroom, offices and store and a vehicle repair workshop (which was the building the subject of the enforcement notice) and open areas where vehicles were displayed for sale, parked and stored; (3) in 1966 it was decided on appeal that the premises had an established use for the servicing and repair of motor vehicles; (4) the building subject to the enforcement notice was a new building which was erected without planning permission in 1975; (5) much of the new building was on land where

there were previously buildings used by the end of 1963 for parking, garaging and storage of vehicles and to a minimal extent for vehicle repairing and servicing and by 1975 to a greater extent for vehicle repairing and servicing; and (6) the council would be likely to permit the retention of the new building for use as a lock-up garage. The inspector recommended: 'The planning unit is the whole of the appeal premises and as they have an established use for the servicing and repair of motor vehicles that use can lawfully be carried on anywhere within the premises. This includes land within the buildings formerly on the land on which now stands the new building. Therefore although the use enforced against is carried on within a new building which has been erected without planning permission, as that land has an established use for that purpose and the notice is directed against the use, the appeal succeeds...' The occupiers' grounds of appeal against the decision of the Divisional Court were, inter alia, that (1) the Divisional Court was wrong in law in holding that when the new building was erected on part of the appeal site a new planning history commenced in respect of the new building, and the building on completion had no established use and could not form part of the planning unit unless and until planning permission was granted for its retention and use for a particular purpose and (2) the Divisional Court was wrong in law in not holding that the Secretary of State should have considered whether there had been a material change in the use of the appeal site as a whole by reason of the use of the new building on part of the appeal site for the repair, servicing and maintenance of motor vehicles, as alleged in the enforcement notice. The facts are set out in the judgment of Lord Denning MR.

Michael J Burrell for the appellants.
Simon D Brown for the respondent.
The council was not represented.

Cur adv vult

27 November. The following judgments were read.

LORD DENNING MR. The village has an attractive name, Dibden Purlieu. It goes back to the times of the Norman French. It is a mile or so inland from Southampton Water on the west side, near the New Forest. Some part of it has been developed in recent years for residential purposes. It is designated in the Hythe town map, Hampshire, for residential use. But in the midst of this residential area there is an industrial site. It only takes up about half an acre all told. It has been used for the last 20 years for commercial purposes in connection with motor vehicles. It is a mixed use in connection with the repair, servicing and maintenance of vehicles. There is a garage workshop in one corner. It takes up one-twelfth of the site. There is a showroom and office in another. It takes up one-thirteenth of the site. No question arises about those. But then there is a new building. It only occupies about one-seventeenth of the site of half an acre. It is about 55 feet long, 23 feet wide and 10 feet high. The rest of the site is for access and parking motor vehicles.

It is that new building which is in question. Previously there was a garage workshop there. The occupiers had applied in 1975 for permission to pull it down and put up the new building. It was refused. They never got permission for it. But, in spite of the refusal of permission, the occupiers completed the building. The local authority did not take enforcement proceedings in respect of the building because 'it was considered that the new building was more satisfactory in appearance than those it had replaced'. Nevertheless, the local authority resolved that enforcement proceedings should be taken to secure the discontinuance of the use.

Now the point of law that arises is this. The whole of the half-acre site is being used for a 'mixed' use for which it has been used for the last 20 years, since 1962. The new building is being used for one of those mixed uses, namely the repair and servicing of motor vehicles. It is not suggested that there has been a change in the 'mix' of use on the site as a whole. Nor is any charge made in the enforcement notice that there has been a

change owing to the 'intensification' of use. The enforcement notice related only to the new building (coloured pink on a plan). It was dated 12 August 1976, and was in these terms:

> '... It appears to the Council that after the 31st day of December, 1963, there has been a breach of planning control in that the said land has been developed by the making of a material change in the use of the buildings coloured pink on the attached plan situate thereon to a use for the purpose of workshops for the repair, servicing and maintenance of motor vehicles without the grant of permission ... Now therefore ... the Council hereby require you within two months ... to discontinue the use of the buildings coloured pink on the attached plan for the purpose of workshops for the repair, servicing and maintenance of motor vehicles.'

The minister upheld the enforcement notice. In his decision letter of 6 June 1978 he said:

> '... in the light of the judgment in the case of Petticoat Lane Rentals Ltd v Secretary of State ([1971] 2 All ER 793, [1971] 1 WLR 1112) it is considered that when the new building referred to in the appeal was erected, a new planning history commenced in respect of it and the building on completion had no actual, established or permitted use ... the issue before the Secretary of State is the continued use of the building for the repair, servicing and maintenance of motor vehicles and it is considered that this must involve a material change of use from no use, and that there has therefore been a breach of planning control as alleged in the notice....'

The Divisional Court upheld the minister. They did so reluctantly as they thought they were bound by *Aston v Secretary of State for the Environment* (9 April 1973, unreported). The occupiers appeal to this court.

We have been referred to all the cases. They disclose two theories. The one is the theory of the 'new planning unit'. The other is the theory of the 'new chapter in planning history'. I will consider each theory separately.

The new planning unit

According to this theory, when a man applies for permission to erect a new building, either where none existed before or to replace an old building, he creates a 'new planning unit'. He can use it for any purpose specified in the permission, or, if no purpose is specified, for the purpose for which it was designed to be used (see s 33(2) of the Town and Country Planning Act 1971) subject to any conditions contained in the permission. If he erects a new building without any permission at all, he starts with a nil use, and must get permission for any use. Once he erects that new building, he cannot fall back on previous existing use rights. This theory was stated by Lord Widgery CJ in *Petticoat Lane Rentals Ltd v Secretary of State for the Environment.* In that case the new building covered the whole site. Lord Widgery CJ said ([1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117):

> '... one gets in my judgment an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use ...'

In the later case of *Aston v Secretary of State for the Environment* Lord Widgery CJ applied it to a case where the new building covered only *part* of the site, just about half the site. He said:

> '... where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it; you start with a new planning unit which has no permitted planning use except those derived from the planning permission, if any, and from s 33(2) of the Town and

> Country Planning Act 1971, which allows such a building in many instances to be
> a used for the purpose for which it was designed.'

That theory was accepted by Lord Fraser in *Newbury DC v Secretary of State for the Environment* (1980] 1 All ER 731 at 744, [1981] AC 578 at 606 in the House of Lords, when he said:

> 'The only circumstances in which existing use rights are lost by accepting and
> b implementing a later planning permission are... when a new planning unit comes into existence...'

This theory has been extended by some observations in the House of Lords to a case where a man applies to change the use of a building so as to make it available for occupation for several families. If he acts on the permission and makes the change (by putting in internal partitions and doors) then he creates a 'new planning unit'. He must
c abide by any conditions inserted in the permission. He cannot fall back on previous existing use rights: see the *Newbury DC* case [1980] 1 All ER 731 at 745, 753, [1981] AC 578 at 607, 618 by Lord Fraser and Lord Scarman.

A new chapter in planning history

d According to this theory, when a man applies for permission to erect or alter a building, or to make a change in the use of land, in such circumstances as to effect a radical alteration in the nature or use of the site, then it may be interpreted as the opening of a 'new chapter in the planning history'. If he then acts on the permission, and erects or alters the building or changes the use of the land, he must abide by the conditions on which the permission was given. He cannot afterwards revert to any previous existing use rights. This theory was stated clearly by Lord Parker CJ in *Prossor*
e *v Minister of Housing and Local Government* (1968) 67 LGR 109. In that case a garage proprietor applied for planning permission to erect a new building on *part* of the site to replace an existing repair shop. He was granted permission on the condition that no retail sales were to take place in the new building. The garage proprietor afterwards claimed that he had existing use rights for selling motor cars. Lord Parker CJ said (at
f 113):

> '... assuming ... that there was at all material times prior to April 1964 an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh
> g on April 4, 1964, with the grant of this permission, a permission which was taken up and used...'

This theory was restated by Lord Lane in the *Newbury DC* case [1980] 1 All ER 731 at 760, [1981] AC 578 at 626:

> 'The holder of planning permission will not be allowed to rely on any existing use
> h rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site to an end and to start a new one.'

The difference in the two theories

In many cases the two theories give the same result. Thus in the *Newbury DC* case there was no new building at all. The two hangars remained the same throughout. So there was no 'new planning unit'. Equally the use of those hangars remained
j substantially the same throughout for storage purposes. So there was no 'new chapter of planning history'. Lord Lane said ([1980] 1 All ER 731 at 761, [1981] AC 578 at 626):

> 'The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended.'

But in some cases the two theories give different results. Thus, where an old building is pulled down and a new one put in its place, there is no 'new planning unit'. But the change of use may be so radical that the new use to which the building is put may open a 'new chapter in planning history'. That is what happened in *Prossor's* case. The new use was for a repair shop and stores. The existing use (on which the occupier relied) was for the display of secondhand cars for sale. The repair shop was so radical a change that it opened a 'new chapter in planning history'.

In the *Aston* case, and in our present case, the two theories give different results. In each case there was a new building on part of the site, and thus a 'new planning unit'. But in neither case did the new use open a 'new chapter in the planning history'. I think that the *Aston* case was wrongly decided, so also the decision of the Divisional Court in this case which followed it.

Result

In the light of experience, I think we should discard the theory of the 'new planning unit'. In future it should no longer be thought that a new building creates a 'new planning unit' which starts with a 'nil use'. Certainly not when it is just the replacement of an old building. The better theory is the opening of a 'new chapter in planning history'. This may take place when there is a radical change in the nature of the buildings on the site or the uses to which they are put, so radical that it can be looked on as a fresh start altogether in the character of the site. If there is such a change and the occupier applies for permission and gets it subject to conditions, and acts on that permission, he cannot afterwards revert to any previous existing use rights.

Conclusion

Before us counsel for the respondent pleaded for guidance. He told us that those in the ministry were much perplexed as to the right principle to adopt. He submitted that the right theory was the 'new chapter in the planning history'. I agree with him. Applied to this case, I think there was no change in the planning history at all. There is one whole site of half an acre with existing use rights. All that has been done is to erect a new building in place of an old one, on a little portion of the site. The occupiers are entitled to the use of those rights inside the new building. I would allow the appeal accordingly.

OLIVER LJ. The Divisional Court held that it was bound by the decision in *Aston v Secretary of State for the Environment* (9 April 1973, unreported) to find that where, either with or without permission, a building has been erected on land previously unbuilt on, that building is, from the time of its erection, a new planning unit so that the building owner is unable, where the question in issue is whether or not there has been a material change of use, to pray in aid the pre-existing user of the land on which the building stands.

It is, I think, impossible to escape from the conclusion that that is what *Aston v Secretary of State* decided. The pith of the matter is contained in the following passage from the judgment of Lord Widgery CJ:

> '... the principle which one derives from the authorities and applies to the present case is that, where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it; you start with a new planning unit which has no permitted planning use except those derived from the planning permission, if any, and from s 33(2) of the Town and Country Planning Act 1971, which allows such a building in many instances to be used for the purpose for which it was designed.'

The principle there expressed is enunciated as a universal one, and the short question raised by the present appeal is: is it right? Inevitably this involves some review of the relevant authorities from which the universal principle is said to stem.

The first of these is *Prossor v Minister of Housing and Local Government* (1968) 67 LGR

109. There there had been for some years an established existing use as a petrol filling station and motor repair shop. A planning permission was granted for the erection of a new building and the replacement of an existing repair shop and stores. It is not clear how far the new building covered the whole of the site, but, having regard to its size and shape and the nature of the user, I infer that it covered part only. It was, however, granted subject to a condition relating to the whole site that it should not be used for retail sales other than sales of spare parts and the redevelopment took place pursuant to that permission. An enforcement notice to prevent the user of the forecourt for the sale of secondhand cars was upheld by the Divisional Court and on one analysis of the decision (subsequently suggested in *Gray v Minister of Housing and Local Government* (1969) 68 LGR 15) the basis for this was, in effect, an estoppel arising from the acceptance of the permission with the condition attached and the subsequent implementation of it. If that was indeed the ground of the decision (and the judgment of Lord Parker CJ does not make it entirely clear that it was) it is now clear from *Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578 that it cannot be sustained as a correct decision on that ground. But the way in which it was put by Lord Parker CJ was this (67 LGR 109 at 113):

> '... by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ...'

I draw attention to this because it is consistent with counsel for the respondent's submission on the present appeal that what the court is concerned with is not so much 'a new planning unit' (an expression which, he suggests, may be misleading) but simply with the question whether an event or a concatenation of events has taken place which can, as a matter of *fact*, be said to have opened a new chapter in the planning history. That is a question of intention and degree. The expression 'planning unit' (which nowhere appears in the legislation) is, however, one which is now hallowed by usage and is, I think, a convenient phrase for identifying, in cases where the question is whether there has been a material change of use, both the area whose planning history requires to be studied for that purpose and, in an appropriate case, the starting point of that history. The concept of the creation of a new 'planning unit' by the opening of a new planning history, not so expressed in *Prossor*'s case, emerges in the judgments of the Divisional Court in *Petticoat Lane Rentals Ltd v Secretary of State for the Environment* [1971] 2 All ER 793, [1971] 1 WLR 1112. The history of the land with which that case was concerned had started with the use of the land as an open site on which a market was held. A building was then erected over the whole site pursuant to a planning permission which designated the use as an office, warehousing, supermarket, car parking and loading area (to be used for market trading on Sundays). The question was whether the existing use of the site for weekday markets prior to the erection of the building survived that event. The Divisional Court held unanimously that it did not. There was some discussion in the judgment of Widgery LJ of the ratio of *Prossor*'s case, but he found it unnecessary to express any conclusion and was content to say that the principle clearly applied 'where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land' (see [1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117). It seems, however, that when he spoke of 'the principle of *Prossor*'s case' he must have had in mind the reference in the judgment of Lord Parker CJ to the fresh beginning of the planning history, for he went on to say ([1971] 2 All ER 793 at 796, [1971] 1 WLR 1112 at 1117):

> 'Where that happens ... one gets in my judgment an entirely new planning unit created by the new building. The land as such is merged in that building and a new planning unit with no planning history is achieved. The new planning unit, the new building, starts with a nil use, that is to say immediately after it was completed

it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, that use is a use which can be restrained by planning control.'

It is thus clear that what brought about the result described by Widgery LJ was not the acceptance of the planning permission, which was arguably inconsistent with the prior existing use, but the mere erection of the building, and it would follow that the same result must ensue even if there were, as in the instant case, no planning permission at all. Bridge J and Lord Parker CJ agreed, but reserved the question of what the result would be where (as here) the building was on part only of a site having a prior existing use as a whole. The concept here, therefore, is that of the creation of a new and different unit by the physical alteration of the land to an extent enabling it to be treated as if it were a new creation different and divorced from the land which was there before. Thus Bridge J referred to the 'disappearance' of the land to which the existing user was attached (see [1971] 2 All ER 793 at 797, [1971] 1 WLR 1112 at 1118).

A similar concept is to be found in *Leighton and Newman Car Sales Ltd v Secretary of State for the Environment* (1976) 32 P & CR 1, where there had been a pre-existing garage business on a site forming part of the relevant land, a business which included the sale of cars. The site, together with two adjoining sites, was redeveloped entirely as a petrol filling station under a permission which contained a condition restricting the use of certain car parking space to the parking of vehicles of the occupiers and users and prohibiting the sale or display for sale of vehicles on the forecourt. The Secretary of State's dismissal of the tenant's appeal against an enforcement notice was attacked, inter alia, on the ground that the inspector's report had not included a relevant matter, namely the existing use of the garage site before the redevelopment. This court upheld the dismissal by a Divisional Court of an appeal from the Secretary of State. In the judgment of the court, delivered by Browne LJ, there is this passage (at 10):

> 'Further, Nos. 271 to 275 were not merely a different "planning unit" from the old No. 271; they were a completely new and different physical unit to which we think the previous use of No. 271 was irrelevant.'

In my judgment this is the essence of the matter. Where there has been a total change in the physical nature of the premises, it is easy to infer (indeed, the inference may be irresistible) that reliance on any prior user is being abandoned and a new planning history is to begin. Such an inference may equally be drawn, and may equally be irresistible, where there is no change or a less radical change in the physical nature of the site but a change in what I may call its planning status which is inconsistent with the preservation of a prior existing use; for instance its subdivision into smaller units of occupation or its incorporation into a larger single unit.

Whether the alteration is of such a character as to produce this result is, I think, in every case, a question of fact and degree.

How, then, does the matter stand when, as in the instant case, what has occurred is that there has been some physical alteration to part only of an occupation site, for instance by the erection on it of a new building, the alteration of an existing building or an application for and grant of a planning permission subject to conditions inconsistent with the prior user? This may pose very difficult problems in the interpretation of the facts, particularly where, as here, there is a mixed site or where a particular use has been intensified as a result of the change. But these are problems only of fact and degree, not of principle, and they are not insoluble.

There are, so far as the industry of counsel has been able to discover, only two reported cases (the *Aston* decision is, as I have said, unreported) which relate to the problems created in the field of change of user by the erection of a new building on part only of the site. The first is *Joyce Shopfitters Ltd v Secretary of State for the Environment* [1976] JPL 236, a decision of the Divisional Court. The report is a very sketchy one, but what seems to have occurred there was that a building on the site was used partly for the manufacture of fencing and garden furniture and partly for car repairs and car breaking. The

remainder of the site, which included two cottages, had been used for purposes ancillary to those purposes. The site owners, without planning permission, built an extension to the main building and demolished the cottages. Two enforcement notices were served, one requiring the removal of the extension and one requiring the discontinuance of the user of the site for the purposes of a joinery and shopfitting business, a business which the Secretary of State found was not a change of use because it was merely a change from one industrial use to another within s 22(2)(*f*) of the Town and Country Planning Act 1971. He declined to grant permission for the retention of the extension to which the first enforcement notice related, but he upheld the second enforcement notice relating to change of use in respect of the site of the extension and (on the ground that there was a separate planning unit with a nil user) in respect of the site of the cottages. The Divisional Court remitted the matter for reconsideration on the basis that, so far as the site of the extension was concerned, there was an existing use which had not been extinguished by the erection of the extension, and so far as the site of the cottages was concerned the planning unit to be considered was the site as a whole.

It is not easy from the very brief report to get any very clear idea of the court's reasoning, but the case is consistent, indeed really only consistent, with the view that the court did not consider that the changes which had taken place in the site as a result of the extension and the demolition were of a sufficiently radical nature to justify the inference that in either case there was the abandonment of the existing industrial user and the commencement of a new planning history. The case is thus entirely consistent with what has been said above and inconsistent with the view that the mere erection of a building constitutes a new planning unit. The second case is that of *Hilliard v Secretary of State for the Environment* (1978) 37 P & CR 129. Here an area of farm land had existing use rights for agricultural purposes with ancillary storage and wholesale distribution of both indigenous and non-indigenous produce. The owner applied for and was granted a planning permission to erect a building, the permission having attached to it a condition that it should only be used for the storage of agricultural produce and farm implements in conjunction with the use of the farm for agricultural purposes. The building subsequently came to be used for the wholesale distribution of fruit and vegetables and the local authority, instead of serving an enforcement notice to enforce the condition, served a notice requiring the discontinuance of material change of user on the footing that there had been an intensification of user amounting to an unauthorised change of user. This court, on appeal from the Divisional Court's upholding of the Secretary of State's decision to uphold the enforcement notice, reversed the decision and remitted the matter to the Secretary of State on the footing that the evidence had been directed entirely to the intensification of the user of the building when it should have been directed to the intensification of the user of the farm as a whole. The case is not, I think, of very much assistance in the context of the present inquiry, because, ex concessis, the planning unit there was the farm as a whole and it was to the whole of that unit (as is, indeed, the case here) that the enforcement notice was directed. The case therefore turned entirely on whether the evidence could be said to have established a change of user by intensification of the farm as a whole. It has, however, this relevance, that, as counsel for the appellants points out, a building erected on part only of the land was not there treated as, ipso facto, creating a new planning unit, and indeed the decision of the court is only consistent with their view that it had not done so. Presumably it did not do so because the alteration of the unit was not such, as a matter of fact and degree, as to justify the inference that the existing user was being abandoned and a new and different planning unit created.

Speaking for myself, I have some sympathy with counsel for the respondent's suggestion that 'planning unit' has become perhaps a slightly confusing expression, combining, as it does, concepts both of geography and history. It is used in the temporal sense of a separate and distinct period of planning history with its own beginning and end relating to a given area of land, and it is used to distinguish and isolate the geographical area of land the history of which, for a given purpose, has to be studied. Nevertheless it is, I think, a convenient phrase, and there is an extremely helpful general

test contained in the judgment of Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244–245, [1972] 1 WLR 1207 at 1212–1213.

The historical content of the term is well brought out in the speeches of Lord Scarman and Lord Lane in *Newbury DC v Secretary of State for the Environment.* Lord Scarman said ([1980] 1 All ER 731 at 753, [1981] AC 578 at 617–618):

> 'Clearly it will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist [and he gave an example]. There is in such a case a wholly new departure, a new chapter of planning history.'

Lord Lane is to the same effect. He said ([1980] 1 All ER 731 at 760–761, [1981] AC 578 at 626):

> 'We were asked by counsel for the Secretary of State to say that the principle [ie the principle of the *Petticoat Lane* decision] can only apply where the permission granted is to build or rebuild or the like and can never apply to cases where the permission is simply to change the use. I do not consider that any such limitation would be proper. It is not the reason for the break in planning history which is important. It is the existence of the break itself, whatever the reasons may have been . . . In the present case there is no such break in the history. The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit.'

Coming back, then, to the *Aston* case, in my judgment the principle there stated by Lord Widgery CJ is, if I may say so respectfully, too widely expressed. In my view the authorities show not that a new building, per se, has to be equated with a new planning unit but that it is one of the factors (it may in many cases be a conclusive factor) to be taken into account in considering whether there has taken place in relation to the particular land under consideration a change of so radical a nature as to constitute a 'break in the planning history' or a 'new planning unit' (the expressions are used interchangeably). As counsel for the appellants points out, the building in the *Aston* case was, as a matter of fact, pretty much on all fours with that in the *Petticoat Lane* case, for it replaced an earlier building, destroyed eight years before, which had covered rather less than half the available area, and, it itself covered 90% of the available area. There is, therefore, no ground for thinking that the case was wrongly decided on the facts. But the stated ground for the decision was, in my judgment, too widely expressed.

In the instant case, the local authority could perfectly well have exerted their planning control over the site by serving an enforcement notice for the removal of the building, and then, if it was the user and not the building that they objected to, granting a planning permission subject to a condition as to user. They could have done that at any time within four years from 1975, but they chose not to do so. In serving an enforcement notice to discontinue the use of the building they necessarily opened up a consideration of the question whether the circumstances, including the erection of the building without permission and any intensification of user, led to the inference of the creation of a new planning unit. It is not for this court now to decide that question, and I content myself with observing only that the buildings concerned were merely a replacement for already existing buildings on the site. I am, however, clearly of the view that, in considering himself bound by the *Petticoat Lane* decision to hold that the erection of the new buildings per se constituted a new planning unit and that he was thus constrained to depart from his inspector's recommendation, the Secretary of State misdirected himself. This, I think, would clearly have been the view of Donaldson LJ if he had not felt himself bound by the *Aston* decision, a disability from which this court is relieved. I would allow the appeal.

It follows from what I have said above that in my view the difference between a new planning unit and a change in the planning history is largely a semantic one. The former

expression is, as I have said, hallowed by long usage, and I for my part think it would be a pity to discard it so long as the concepts which it embraces (which include a change in the planning history) continue to be clearly appreciated.

WATKINS LJ (read by Oliver LJ). I have had the advantage of reading the judgment of Oliver LJ, with which I entirely agree. The Secretary of State, we were told, seeks guidance on the use of the expressions 'planning unit' and 'a change in planning history'. It is my firm opinion that the use of the former should be preserved and the guidance provided by Bridge J in *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244–245, [1972] 1 WLR 1207 at 1212–1213 on its application, which obviously involves a study of the history of the use of the land in question, followed.

Appeal allowed. Matter remitted to Secretary of State together with opinion of the court for hearing and determination.

Solicitors: *Malkin Cullis & Sumption*, agents for *Lamport Bassitt & Hiscock*, Southampton (for the appellants); *Treasury Solicitor.*

Diana Procter Barrister.

Marina Shipping Ltd v Laughton and another

COURT OF APPEAL, CIVIL DIVISION
LAWTON, BRIGHTMAN AND OLIVER LJJ
8, 9, 10, 11 DECEMBER 1981

Trade dispute – Acts done in contemplation or furtherance of trade dispute – In contemplation or furtherance of – Secondary action in furtherance of dispute – Validity of secondary action – Contract for supply of services between employer who is party to dispute and employer to whom secondary action relates – Vessel let on time charter by owners to charterers – Charterers engaging shipping agents to arrange harbour services with port authority – Vessel blacked while in port – Port authority's employees taking secondary action to prevent vessel leaving port – Whether contract for supply of services between owners and port authority – Whether secondary action by port authority's employees actionable in tort – Employment Act 1980, s 17(3)(6).

The plaintiffs were the registered owners of a cargo vessel sailing under a flag of convenience which was chartered to a Belgian company for a period of six months under a time charter made on 28 July 1981. On 3 November the vessel loaded a cargo at Panama for delivery in Hull and Hamburg. In the course of the voyage to Hull the charterers' agents requested a firm of shipping agents in Hull to arrange with the port authority at Hull for a berth. When the vessel was two days out of Hull the shipping agents finalised arrangements with the port authority for the reception of the vessel and also arranged for pilot services. The shipping agents were well known to the port authority who did not inquire on whose behalf they were acting. After the vessel docked on 23 November some of the crew members complained to the International Transport Workers' Federation (the ITF) about their conditions of service and pay. Two officials of the ITF investigated the complaints and demanded that the owners of the vessel pay the crew ITF rates appropriate for Europe and also pay the crew back pay from the time they signed their articles. When the owners refused those demands the ITF decided to 'black' the vessel and advised appropriate affiliated unions of the blacking including the National Union of Railwaymen (the NUR) whose members refused to operate lock gates thereby preventing the vessel from leaving port. The refusal of the NUR members to operate the