

a **Thrasyvoulou v Secretary of State for the
Environment and another**
**Oliver and others v Secretary of State for the
Environment and another**

b HOUSE OF LORDS
LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK, LORD GRIFFITHS, LORD JAUNCEY OF
TULLICHETTLE AND LORD LOWRY
24, 25, 26, 30 OCTOBER, 14 DECEMBER 1989

c *Town and country planning – Appeal – Issue estoppel – Appeal against planning decision – Appeal against enforcement notice – Whether issue estoppel applies to appeals against planning decisions or enforcement notices – Town and Country Planning Act 1971, s 88.*

In two separate cases the question arose whether the principle of issue estoppel applied to planning decisions.

d In the first case, the respondent owned a number of properties which were used to provide temporary accommodation for homeless people. In 1982 an inspector appointed by the Secretary of State held on an appeal by the respondent under s 88^a of the Town and Country Planning Act 1971 against enforcement notices alleging a material change of use to use as a hotel or use as a hostel that the use of the properties was correctly characterised as hotel use, not as hostel use, and that on that basis the enforcement notices were ineffective because the hotel use had been carried on since 1960. In 1985 the local planning authority served enforcement notices on the respondent in respect of, inter alia, the properties which had been the subject of the 1982 appeal alleging a material change of use without permission to use as a hostel. In fact there had been no change in the actual use of the properties since 1982. The respondent appealed against the notices and at an inquiry the inspector found that the properties were being used as hostels and upheld the notices. On appeal the inspector's decision was upheld by the judge. The respondent appealed to the Court of Appeal, which allowed his appeal on the ground that the circumstances gave rise to an issue estoppel which prevented the council from alleging in the 1985 proceedings that the properties were used as hostels when their use had been held in the 1982 proceedings to be as hotels. The Secretary of State appealed to the House of Lords.

e In the second case, the local planning authority served an enforcement notice on the respondents in 1982 relating to a trailer standing on their land alleging breach of planning control. The respondents appealed against the notice on the ground that the use of the trailer was part of the use of the land as a whole as a transport and storage

a Section 88, so far as material, provides:

h '(1) A person having an interest in the land to which an enforcement notice relates may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

i (2) An appeal may be brought on any of the following grounds—(a) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged; (b) that the matters alleged in the notice do not constitute a breach of planning control; (c) that the breach of planning control alleged in the notice has not taken place; (d) in the case of a notice which, by virtue of section 87(4) of this Act, may be issued only within the period of four years from the date of the breach of planning control to which the notice relates, that that period had elapsed at the date when the notice was issued; (e) in the case of a notice not falling within paragraph (d) of this subsection, that the breach of planning control alleged by the notice occurred before the beginning of 1964 . . .'

depot, which was a use of the land established before 1964 and therefore not subject to enforcement proceedings. The inspector accepted the respondents' contention and resolved the appeal in their favour. In 1986 the local planning authority served an enforcement notice on the respondents alleging a material change of use without permission to use for the purposes of a business of merchants, importers, repackers and distributors of goods. In fact there had been no material change in the character of the use between the dates of the two enforcement notices. On an appeal against the notice the inspector found that there had been a material change in the character of the site as a whole since 1963 and accordingly planning permission was required for the site. The respondents appealed to the High Court. The judge held that he was bound by the decision of the Court of Appeal in the first case and concluded that an estoppel arose which was fatal to the 1986 enforcement notice. The local planning authority appealed direct to the House of Lords, contending that no relevant issue estoppel arose from the first inspector's decision because it concerned only part of the site and only a use for storage purposes.

Held – Where a statute created a specific jurisdiction for the determination of an issue which established the existence of a legal right, there was a presumption that the principle of *res judicata* applied to give finality to that determination unless an intention to exclude that principle could properly be inferred as a matter of construction of the relevant statutory provisions. Applying that principle to planning decisions, a cause of action estoppel arose whenever a determination of a ground decided in favour of an appellant on an appeal against one enforcement notice could be relied on in an appeal against a second enforcement notice in the same terms and directed against the same alleged development as the first notice. Accordingly, a determination in favour of an appellant of an appeal against an enforcement notice under s 88(2)(b) to (e) of the 1971 Act that an existing building or use of land was either permitted or beyond the reach of enforcement proceedings gave rise to an estoppel *per rem judicatam*. Since that was the case in the first appeal the Secretary of State's appeal in that case would be dismissed. In the second appeal, since the first inspector's decision involved by necessary implication a finding that the use in fact being made of the site at the date of the first enforcement notice was an established use and since there had been no material change in the character of the use between the dates of the two enforcement notices, the local authority were estopped from asserting that there had been any material change between 1963 and 1982 which expressly contradicted a finding made by the first inspector which was not merely incidental or ancillary to his decision but was the essential foundation for his conclusion that no breach of planning control was involved in the use made of the structure which was the subject of the first notice. It followed therefore that the local planning authority's appeal in the second appeal would be dismissed (see p 71 *a b*, p 74 *e*, p 75 *d e*, p 76 *b c* and p 77 *b to h*, post).

Per curiam. A decision to grant planning permission for development creates the rights which such a grant confers, but a decision to withhold planning permission resolves no issue of legal right whatever, being no more than a decision that in the existing circumstances and in the light of existing planning policies the development in question is not one which it would be an appropriate to permit. Accordingly, such a decision cannot give rise to an estoppel *per rem judicatam* (see p 72 *b c* and p 77 *f to h*, post).

Decision of the Court of Appeal [1988] 2 All ER 781 affirmed.

Notes

For appeals against planning decisions and enforcement notices, see 46 Halsbury's Laws (4th edn) paras 162–165, and for cases on the subject, see 47(1) Digest (Reissue) 125–126, 139–145, 460–465, 501–525.

For issue estoppel, see 16 Halsbury's Laws (4th edn) para 1530, and for cases on the subject, see 21 Digest (Reissue) 56–64, 374–403.

For the Town and Country Planning Act 1971, s 88, see 46 Halsbury's Statutes (4th edn) 355.

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Cases referred to in opinions

Maritime Electric Co Ltd v General Dairies [1937] 1 All ER 748, [1937] AC 610, PC.

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1959] 3 All ER 1, [1960] AC 260, [1959] 3 WLR 346, HL.

b *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1961] 2 All ER 46, [1962] 1 QB 416, [1961] WLR 806, DC.

Square Meals Frozen Foods Ltd v Dunstable BC [1974] 1 All ER 441, [1974] 1 WLR 59, CA.

Thoday v Thoday [1964] 1 All ER 341, [1964] P 181, [1964] 2 WLR 371, CA.

Wakefield Corp v Cooke [1904] AC 31, [1900-3] All ER Rep 791, HL.

c *Young v Secretary of State for the Environment* [1983] 2 All ER 1105, [1983] 2 AC 662, [1983] 3 WLR 382, HL.

Appeals

Thrasyvoulou v Secretary of State for the Environment and anor

The Secretary of State for the Environment appealed with leave of the Court of Appeal against the decision of that court (Parker, Ralph Gibson LJ and Caulfield J) ([1988] 2 All ER 781, [1988] QB 809) on 28 January 1988 allowing in part an appeal by the first respondent, Aristophanes Thrasyvoulou, against the decision of McCowan J on 25 November 1986 dismissing his appeal against the decision of the Secretary of State dismissing his appeals against enforcement notices served on him by the second respondent. Hackney London Borough Council, as local planning authority, in respect of properties at 13, 15 and 25 Wilberforce Road, London N4, and his appeal against the terms on which the council had granted planning permission in respect of the property at 11 Wilberforce Road. The facts are set out in the opinion of Lord Bridge.

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Oliver and ors v Secretary of State for the Environment and anor

Havering London Borough Council appealed direct to the House of Lords pursuant to a certificate granted under s 12(1) and (3)(b) of the Administration of Justice Act 1969 and leave of the Appeal Committee of the House of Lords granted on 21 June 1988 against the decision of Mr Malcolm Spence QC sitting as a deputy judge of the High Court in the Queen's Bench Division hearing the Crown Office list on 19 April 1988 and order dated 28 April 1988 whereby he allowed an appeal by the second respondents, Anthony Cyril Oliver, Elsie May Oliver and Oliver of Hornchurch Ltd (the Olivers), under s 246 of the Town and Country Planning Act 1971 against the decision of an inspector appointed by the first respondent, the Secretary of State for the Environment, to determine an appeal under s 88 of the 1971 Act against an enforcement notice issued by the council and remitted the matter to the Secretary of State for rehearing and determination. The judge had certified that a point of law of general public importance was involved, namely whether the concept of issue estoppel should apply in planning law and so as to preclude an inspector appointed by the Secretary of State from determining an appeal under s 88(2)(e) of the 1971 Act in accordance with the provisions of that Act. The facts are set out in the opinion of Lord Bridge.

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The two appeals were heard together.

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John Laws and *Duncan Ouseley* for the Secretary of State.

Michael Rich QC and *Joseph Harper* for Thrasyvoulou.

William Glover QC and *Gregory Stone* for Havering council.

Jeremy M Sullivan QC and *Brian Ash* for the Olivers.

Their Lordship took time for consideration.

14 December. The following opinions were delivered.

LORD BRIDGE OF HARWICH. My Lords, these two appeals raise the question whether a decision of the Secretary of State allowing an appeal against an enforcement notice on one of the grounds in paras (b) to (e) of s 88(2) of the Town and Country Planning Act 1971, as amended by the Local Government and Planning (Amendment) Act 1981, is capable of giving rise to an estoppel per rem judicatam or to an issue estoppel.

The first appeal rises from the service by the Hackney London Borough Council as local planning authority on the respondent, Aristophanes Thrasyvoulou, in February 1985 of enforcement notices alleging in respect of each of four properties, 11, 13, 15 and 25 Wilberforce Road, London N4, a breach of planning control by making a material change of use to use as a hostel for homeless families without the grant of planning permission required in that behalf. Mr Thrasyvoulou appealed to the Secretary of State in each case on the ground, inter alia, that the breach of planning control alleged in the notice had not taken place. The appeals were dismissed by the inspector appointed by the Secretary of State to determine them. An appeal against his decision to the High Court under s 246 of the 1971 Act was dismissed by McCowan J. The Court of Appeal (Parker, Ralph Gibson LJJ and Caulfield J) ([1988] 2 All ER 781, [1988] QB 809) allowed Mr Thrasyvoulou's appeal and remitted the cases of the four enforcement notices for rehearing and determination in the light of the opinion of the court that the inspector was in the circumstances obliged to allow the appeals to the Secretary of State and quash the enforcement notices. The Secretary of State now appeals to your Lordships' House by leave of the Court of Appeal.

The facts in this case relating to 13 and 15 Wilberforce Road are straightforward. The local planning authority had previously served two enforcement notices in respect of each of these properties in October 1981 which alleged alternatively a breach of planning control by making a material change of use to use as a hotel or to use as a hostel. On appeal to the Secretary of State the inspector appointed to determine the appeal found that the use was correctly characterised as hotel use, not as hostel use, and that the hotel use had been carried on since 1960. He therefore quashed the hostel notices on the ground that the breach of planning control alleged in the notice had not taken place and the hotel notices on the ground that the breach of planning control alleged in the hotel notices had occurred before 1964. At the hearing of the appeals against the 1985 notices it was common ground that there had been no change in the use of the properties since service of the 1981 notices. The Court of Appeal held that in these circumstances an issue estoppel arose which prevented the council on the appeals against the 1985 notices from contending that the use of either property was as a hostel (which was assumed to be materially different from use as a hotel) and that the inspector had erred in failing to give effect to this estoppel and in making a finding on the evidence and argument before him that the use was as a hostel which contradicted the finding made by the inspector who determined the appeals against the 1981 notices that the use was as a hotel. The facts relating to 11 and 25 Wilberforce Road are more complex but, since it is common ground that if the doctrine of res judicata and issue estoppel applies to determinations by the Secretary of State of appeals under s 88 the Court of Appeal was correct in holding that an issue estoppel arose sufficient to defeat the 1985 enforcement notices in relation to these properties also, it is unnecessary for me to go into them.

The second appeal arises from the service by Havering London Borough Council as local planning authority on the respondents, Mr and Mrs Oliver and Olivers of Hornchurch Ltd (the Olivers) of an enforcement notice in January 1986 alleging a breach of planning control by making a material change of use of land at the rear of 13 to 19 The Avenue, Hornchurch, to the use described in the notice without the grant of planning permission required in that behalf. The Olivers appealed against the notice to the Secretary of State on the ground, inter alia, that the breach of planning control occurred before 1964. The inspector appointed to determine the appeal dismissed it. The

- Olivers appealed to the High Court under s 246. The appeal was heard by Mr Malcolm Spence QC, sitting as a deputy judge of the High Court, who rightly held that he was bound to follow the decision of the Court of Appeal in the *Thrasivoulou* case as to the application of the doctrine of issue estoppel and concluded in the light of the planning history that an estoppel arose which was fatal to the 1986 enforcement notice. He ordered that the matter be remitted to the Secretary of State with the opinion of the court for rehearing and determination, but he granted the necessary certificate under s 12(1) of the Administration of Justice Act 1969 to enable an appeal against his decision to be brought direct to your Lordships' House and leave to appeal was granted by the House.

- In this case it is the local planning authority who appeal. They join with the Secretary of State in contending that the doctrine of *res judicata* and issue estoppel has no application in law to the determination by the Secretary of State of an appeal against an enforcement notice under s 88, but they contend in the alternative that, if the doctrine applies, no case giving rise to a relevant issue estoppel arises on the facts. This subsidiary issue depends on the details of the relevant planning history which it will be convenient to examine after considering the issue of principle which is common to both appeals.

- Before turning to the arguments on the issue of principle it is appropriate to refer briefly to the salient features embodied in the statutory code for the enforcement of planning control in the 1971 Act, as amended by the 1981 Act. Under Pt III of the Act planning permission is required for development, which consists in the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. If development is carried out without the requisite planning permission or if any conditions or limitations subject to which planning permission was granted have not been complied with there is a breach of planning control: see s 87(2). Under s 87(1) the local planning authority may, where it appears to them that there has been a breach of planning control, serve an enforcement notice requiring the breach to be remedied. The notice is required to specify the matters alleged to constitute a breach of planning control. Appeal lies against an enforcement notice to the Secretary of State under s 88 on any of the grounds specified in s 88(2). For brevity I omit consideration of breaches consisting of failure to comply with conditions or limitations and consider only the grounds appropriate where the enforcement notice alleges development without the requisite planning permission. Ground (a) is that planning permission ought to be granted for the development to which the notice relates. Ground (b) is that the matters alleged in the notice do not constitute a breach of planning control. Ground (c) is that the breach of planning control alleged in the notice has not taken place. Ground (d) applies to notices alleging development by carrying out building etc operations which can only be enforced against within four years of the development taking place. Ground (d) is therefore established if the breach of planning control occurred more than four years before the issue of the enforcement notice. Ground (e) applies to development consisting of making a material change of use of land which can only be enforced against if the change of use was made since 1963. Ground (e) is therefore established if the change of use occurred before the beginning of 1964. The remaining grounds (f) to (h) relate to subsidiary issues which may arise as to the service of the enforcement notice, the steps required to be taken to remedy the breach of planning control alleged and the time for taking those steps, and these grounds have no relevance for present purposes.

- An issue on ground (a) arises in every appeal against an enforcement notice, since by s 88B(3) there is deemed to be an application for planning permission for the development to which the notice relates. In determining whether to allow an appeal on that ground the Secretary of State will decide as a matter of policy and in the exercise of discretion whether planning permission should be granted and in relation to ground (a) no question of legal right arises. By contrast the question whether any of the grounds (b) to (e) on which the appellant relies have been established will be answered by applying the relevant rules of planning law to the facts found and the answer will determine in each

case an important matter of legal right. This may be simply illustrated by examples. Thus, if an issue is raised on appeal against a notice on ground (b) whether or not a building operation to which the notice relates was within the terms of planning permission granted either on an express application or by the terms of a development order, a decision of that issue to allow the appeal on ground (b) will determine the status of the building in question as having been lawfully erected. If an issue is raised on appeal against a notice on ground (c) whether a change from one to use to another to which the notice relates was a material change, a decision to allow an appeal on ground (c) will again determine the status of the existing use of the land as lawful. So also under grounds (d) and (e) a decision that a building operation was carried out more than four years before the issue of the enforcement notice or that a use of land was commenced before 1964 will have the like consequence in determining the status of the building or the use respectively as immune to enforcement proceedings. The main issue in the appeals is simply whether these determinations are final and conclusive in their effect, as the respondents contend, or whether it is open to the local planning authority in fresh enforcement proceedings to ask the Secretary of State to determine these issues in a contrary sense, whether in the light of new evidence or otherwise.

An enforcement notice does not take effect until the final determination of the proceedings on any appeal against it, including proceedings on appeal to the High Court under s 246 of the 1971 Act. Once a notice has taken effect following the final determination of the appeal there is no doubt as to its final and conclusive effect in relation to all issues of right determined by the appeal. By s 243(1)(a) the validity of an enforcement notice may not be questioned in any proceedings whatsoever on any of the grounds on which an appeal under s 88 may be brought. If the steps required to be taken by the notice are not taken, this attracts penal sanctions and after those steps have been taken the notice remains effective to render unlawful and to attach penal sanctions to any resumption of a use discontinued or reinstatement of a building demolished in compliance with the notice.

The arguments advanced by counsel for the Secretary of State and counsel for Havering council in support of the proposition that no estoppel per rem judicatam or issue estoppel can arise from the determination of an appeal against an enforcement notice whereby the notice is quashed on any of the grounds set out in s 88(2) may, I hope, be fairly summarised in terms of three broad submissions. The first submission is that in the performance of its statutory duties or in the exercise of its statutory powers a statutory body cannot be fettered by any estoppel whatsoever. The second submission is that the 1971 Act provides a complete and self-contained statutory code governing the enforcement of planning control and that there is no room, as a matter of construction of that code, for the introduction of rules or doctrines applicable in the field of private law to litigation between citizens. The third submission is that the remedy available for the protection of the owner or occupier of land against abuse of enforcement proceedings by the service of repeated enforcement notices directed against the same development must be sought by a judicial review of the decision of the local planning authority to issue the enforcement notice of which complaint is made, not by appeal to the Secretary of State against it.

It is well established that a statutory body cannot by contract fetter its own freedom to perform its statutory duties or exercise its statutory powers and by parity of reasoning it has been held that no such fetter can arise from an estoppel by representation: see *Maritime Electric Co Ltd v General Dairies Ltd* [1937] 1 All ER 748, [1937] AC 610 and *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1961] 2 All ER 46, [1962] 1 QB 416. But the rationale which underlies the doctrine of res judicata is so different from that which underlies the doctrine of estoppel by representation that I do not think these authorities have any relevance for present purposes.

The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such

- fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that, where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude
- a** that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

This approach is, I believe, fully supported by the decision of this House in *Wakefield Corp v Cooke* [1904] AC 31, [1900–3] All ER Rep 791. In that case a local Act gave the local authority power to carry out private street works in a private street and to recover the expenses from the frontagers, but the frontagers had the right to object to the

- c** proposed works on the ground, *inter alia*, that the street was a highway repairable by the inhabitants at large. The relevant sections of the local Act corresponded to s 6, 7 and 8 of the Private Street Works Act 1892. Under those provisions objections to proposed works were to be heard and determined by justices. In 1898 the justices held on objection by some frontagers to certain works proposed to be carried out that the street in question
- d** was highway repairable by the inhabitants at large. In 1901 the local authority made proposals to carry out works in the same street and other frontagers objected. The justices upheld the objection on the ground that the matter was *res judicata* by reason of the earlier decision and their view was upheld by your Lordships' House. The Earl of Halsbury LC said ([1904] AC 31 at 35–36, [1900–3] All ER Rep 791 at 793–794):

- e** 'So that, instead of being, as it is under the Public Health Act [1875], something removed from the jurisdiction of the justices . . . in this Act the very question whether or not a particular road is or is not a highway repairable by the parish is remitted to that tribunal, and remitted to that tribunal for the purpose of determination. My Lords, for my own part I am wholly unable to see anything more in the nature of a judgment in *rem* than that . . . If there is no appeal, it is a final adjudication and determination. If there is an appeal, I presume from what has
- f** happened the question was in this case determined adversely to those who are at present the appellants against the judgment of the Court of Appeal. In any case it appears to me that this question has been finally and absolutely determined . . .'

Lord Robertson said ([1904] AC 31 at 38–39, [1900–3] All ER Rep 791 at 795):

- g** 'The question is truly whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a substantive issue, in *rem*, or merely as a medium *concludendi* of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue, properly raised, is good against all concerned. There is nothing contrary to principle and much convenience in a local tribunal being authorized to adjudicate
- h** on a local matter with full notice to all concerned; and the question is merely whether in this instance that has been provided by the Legislature. On the whole, I have come to think that it has, and that the appeal therefore fails.'

Lord Lindley said:

- i** 'It appears to me that the question turns on the fact which occurs in this case . . . namely, the fact that the question raised for the purpose of being decided in accordance with the Act and the question which was decided in accordance with the Act was whether Sludge Lane was a street repairable by the inhabitants at large or not.'

Much of the argument against allowing a plea of *res judicata* or issue estoppel founded on the determination of an appeal against an enforcement notice under s 88(2)

of the 1971 Act rested on the proposition that such a determination is characterised as a 'planning decision' and emphasis was placed on the rights of members of the public to be heard. Counsel for the Secretary of State submitted that no distinction could be drawn between a decision on ground (a) of s 88(2) to grant or withhold planning permission for the development the subject of an enforcement notice and a decision of any issue arising under grounds (b) to (e). If an estoppel arises in the one case, he submits, it must equally arise in the other. I cannot accept this submission. A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is no more than a decision that in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such a decision cannot give rise to an estoppel per rem judicatum. I also think that there is a significant distinction between the issue raised by an appeal under ground (a) and the issues raised by any of grounds (b) to (e) in that members of the public have the right to attend any public inquiry and to be heard as objectors against the grant of planning permission, but can have no locus standi as objectors, although they may be heard as witnesses of fact, in relation to the issues raised on grounds (b) to (e).

The distinction between the issue whether planning permission should be granted for development the subject of an enforcement notice and any issue arising as to the legal status of the alleged development which is the subject matter of the notice was more immediately apparent in the original statute which introduced the modern planning code, the Town and Country Planning Act 1947, because under that Act the issues fell for determination by different tribunals. Section 23(3) proviso (a) of the 1947 Act enacted that if, following the service of an enforcement notice, application was made for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice related the notice should not take effect until that application was finally determined. In practice this invariably led to an appeal to the minister. But s 23(4) enabled any person aggrieved by an enforcement notice to appeal against it to a court of summary jurisdiction and provided that on any such appeal the court—

'(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof . . . shall quash the notice to which the appeal relates . . .'

Section 23(5) gave a further appeal from the decision of the court of summary jurisdiction to quarter sessions. The language of s 23(4) of the 1947 Act, although not in such wide terms as the language of s 88(2) grounds (b) to (e) of the 1971 Act, nevertheless gave the court jurisdiction to determine the same essential issues of legal right which arise in relation to a building required to be demolished or a use required to be discontinued by an enforcement notice, viz was the building or use permitted or alternatively established so as to be beyond the reach of enforcement procedure by reason of the lapse of time (four years in all cases under the 1947 Act) since the development took place?

Alongside the statutory procedures it was also possible to bring actions in the High Court for declarations to determine the status in planning law of proposed developments or of existing buildings or land uses. In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1, [1960] AC 260 the House rejected the proposition that the availability of a specific statutory jurisdiction under the 1947 Act for the determination of an issue as to the legality of a proposed development had the effect of depriving the High Court of jurisdiction to determine the selfsame issue in proceedings claiming a declaration. The particular issue resolved by the *Pyx Granite* case related to the statutory procedure under s 17 of the 1947 Act for the determination of questions whether any proposed operations on land or change in the use of land would constitute or involve development and, if so, would require planning permission having regard to the

- provisions of the development order, and it was the availability of the statutory procedure which the House held not to exclude the High Court's parallel declaratory jurisdiction.
- a** But it is implicit in the rationale of the decision that the High Court equally had jurisdiction to entertain proceedings for declarations as to the legality or immunity from enforcement procedure of any existing building or use of land raising parallel issues to those which could be raised, following service of an enforcement notice, by appeal against the notice to justices under s 23(4) of the 1947 Act. A declaration obtained in such
- b** proceedings must clearly have been effective to establish the legality or immunity from enforcement proceedings of the building or use of land in question as *res judicata*.

The law as explained in the two foregoing paragraphs continued in force until 1960. But the multiplicity of jurisdictions proved a great inconvenience in practice, and Parliament enacted provisions to abolish it by s 33 of the Caravan Sites and Control of Development Act 1960. That section is the antecedent of s 88 of the 1971 consolidating

c Act, combining the dichotomy of jurisdictions under s 23(3) and (4) of the 1947 Act in a unified jurisdiction by way of appeal to the minister against an enforcement notice. It also contained in s 33(8) the antecedent of s 243 of the 1971 Act, providing that the validity of an enforcement notice shall not be questioned except by way of such an appeal.

- The effect of this latter provision was put to the test in *Square Meals Frozen Foods Ltd v Dunstable BC* [1974] 1 All ER 441, [1974] 1 WLR 59. In that case the owners of a warehouse had planning permission to use it as a 'wholesale warehouse or repository for any purpose'. They wished to use it for selling packages of frozen food to the public on a cash and carry basis. The local planning authority warned them that such a use would not be use as a warehouse, and would involve enforcement proceedings. The owners sought a declaration in the High Court that the proposed use did not require planning
- d** permission, being within the ambit of the permission already granted. Shortly after instituting the proceedings the owners commenced the use of the premises for the cash and carry business. The local planning authority thereupon served an enforcement notice and applied to the court to stay the High Court proceedings seeking a declaration. The Court of Appeal held, affirming the stay granted by the judge, that s 243(1)(a) operated
- e** as a bar not only to proceedings started after the service of an enforcement notice but also to proceedings started before the service of such notice in which the validity of the notice would inevitably be questioned.
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In the light of this decision it can be seen that the effect of the changes made by s 33 of the 1960 Act was to substitute for the jurisdiction under s 23(4) of the 1947 Act and for the jurisdiction of the High Court in proceedings for a declaration directed to the determination of legal rights in existing buildings or uses of land a new jurisdiction

g conferred exclusively on the minister. I am of the opinion that before this change was effected, a determination by justices under s 23(4) of the 1947 Act that an existing building or use of land was either permitted or beyond the reach of enforcement proceedings would have been as effective as a High Court declaration to give rise to an estoppel *per rem judicatam*. But, whether this was so or not, the most formidable difficulty which the arguments of counsel for Havering council and counsel for the

h Secretary of State must surmount, if they are to succeed, is to persuade the House that the substituted jurisdiction now exercised by the Secretary of State in relation to grounds (b) to (e) of s 88(2) of the 1971 Act is intended to be of such limited effect that it deprives the owner or occupier of land of the opportunity which he formerly enjoyed to have it conclusively determined once and for all, by action for a declaration if not by application

j to justices, that his building or use of land is for one reason or another immune from further attack by enforcement notice.

Certain other provisions of the 1971 Act are relied on by the appellants. Section 88B(1)(c) provides:

'On the determination of an appeal under section 88 of this Act, the Secretary of State may . . . (c) determine any purpose for which the land may, in the circumstances

obtaining at the time of the determination, be lawfully used having regard to any past use of it and to any planning permission relating to it.'

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Subsection (3)(b) provides that any such determination shall be final. Section 94 provides a procedure whereby an owner or occupier of land may apply for and obtain from the local planning authority in the first instance, or if refused by the local planning authority from the Secretary of State on appeal under s 95, a certificate referred to as an 'established use certificate', that his existing use of land was begun before the beginning of 1964 or in certain other circumstances such as to place it beyond attack by enforcement notice. Section 94(7) provides:

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'An established use certificate shall, as respects any matters stated therein, be conclusive for the purposes of an appeal to the Secretary of State against an enforcement notice a copy of which has been served in respect of any land to which the certificate relates, but only where the copy of the notice is served after the date of the application on which the certificate was granted.'

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The submission made is that the finality of a determination under s 88B(1)(c), which it is conceded will be effective to defeat an enforcement notice directed against a use of land resumed in reliance on the determination, and the conclusive effect of an established use certificate show that when Parliament intended a determination, in this statutory context, to be final and conclusive of any issue determined it made express provision to that effect and that the absence of any such express provision as to the effect of a determination by the Secretary of State allowing an appeal on any of the grounds (b) to (e) under s 88(2) demonstrates that Parliament did not intend those determinations to be conclusive.

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I do not accept this submission. It seems to me, on the contrary, that these provisions, on a proper understanding of the role they play in the context of the planning enforcement machinery, do not detract from but lend support to the conclusion that Parliament must have intended the determination of any issue arising under grounds (b) to (e) of s 88(2) in favour of an appellant to be conclusive. The purpose of s 88B(1)(c) can only be understood in the light of s 23(9) of the 1971 Act, which provides:

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'Where an enforcement notice has been served in respect of any development of land, planning permission is not required for the use of that land for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.'

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The effect of this subsection is that, when an owner or occupier of land discontinues a use of land in compliance with the requirements of an enforcement notice, it is not enough to entitle him to resume the immediately preceding use to show that, before the unauthorised change, that use was immune to enforcement procedure, having been begun before 1964; he may only resume a previous use which was itself begun lawfully, ie without any breach of planning control: see *Young v Secretary of State for the Environment* [1983] 2 All ER 1105, [1983] 2 AC 662. In these circumstances, it is obviously desirable that an owner or occupier of land who is to be required by an enforcement notice which the Secretary of State upholds to discontinue an existing use of land should be entitled to ascertain what, if any, previous use of the land he may safely resume without being subject to enforcement proceedings directed against that use. But this would not be an issue arising for determination in the appeal against the notice unless express provision authorising its determination were made, as it is, by s 88B(1)(c). It would be futile to provide for such a determination unless it was intended to protect the owner or occupier of land from enforcement proceedings when he resumed the use determined to be lawful; so the concession in this regard is rightly made. But it would surely be a bizarre result that a decision by the Secretary of State dismissing an appeal against an enforcement notice requiring discontinuance of the existing use of land and determining that a previous use might lawfully be resumed should effectively protect that use against future

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enforcement proceedings but that a decision allowing the appeal on the ground that the existing use was itself lawful should not.

- a Very similar reasoning applies to the provision in s 94(7) for the conclusive effect of an established use certificate. A certificate may be granted on the application of the owner or occupier of land by the local planning authority without any dispute. If it is so granted, it does not result from the determination of any contested issue and, in the absence of express provision, there would again be no basis for attributing to it conclusive effect.
- b The effect of the express provision is this. If the owner or occupier of land anticipates that his existing use may be subject to enforcement proceedings and wishes to have the matter settled in advance, he may apply for an established use certificate before any enforcement notice is served and, if the local planning authority do not grant the certificate, he may eventually succeed on appeal under s 95 and obtain a certificate with conclusive effect. But, if the local planning authority forestall him by the service of an enforcement notice requiring discontinuance of the existing use before his application for an established use certificate is made, it will then be too late to apply for a certificate under s 94. Instead he will appeal against the notice on ground (e) under s 88(2) and the Secretary of State on that appeal will have to determine precisely the same issue as that which he would have otherwise determined on an appeal under s 95. It seems to me again a bizarre result which Parliament cannot have contemplated or intended that
- c determination of the issue in the appellant's favour on the appeal under s 95 should be conclusive but that the same determination under s 88 should not.
- d

All these considerations bring me to the conclusion that the determination in favour of the appellant of an appeal against an enforcement notice on any of the grounds (b) to (e) under s 88(2) does give rise to an estoppel per rem judicatam. In these circumstances I do not need to examine the argument that an alternative protection for owners and occupiers of land against harassment by the service of repeated enforcement notices is available by way of judicial review of decisions by the local planning authority to issue such notices.

I would accordingly dismiss the Secretary of State's appeal in the case of Thrasyvoulou.

- e So far in this opinion I have used the expressions 'estoppel per rem judicatam' and 'issue estoppel' indifferently. But before turning to the subsidiary issue which arises in the second appeal it is necessary to distinguish between them by reference to the careful terminology used by Diplock LJ in *Thoday v Thoday* [1964] 1 All ER 341 at 352, [1964] P 181 at 197-198. He said:
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- g 'The particular type of estoppel relied on by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel", is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given on it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim, "nemo debet bis vexari pro una et eadem causa". In this application of the maxim, causa bears its literal Latin meaning. The second species, which I will call "issue estoppel", is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on
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one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.' a

Adopting this terminology and classification, and applying it by analogy to the issues which arise on an appeal against an enforcement notice on any of the grounds (b) to (e) of s 88(2), I think the analogue of a 'cause of estoppel' will arise whenever the determination of the ground decided in favour of the appellant on an appeal against one enforcement notice can be relied on in an appeal against a second enforcement notice which is in the same terms and is directed against the same alleged development as the first. That is the position in the case of *Thrasylvoulou*, for example, in relation to the 1985 notices alleging change of use to use as a hostel. On appeal against the earlier notices it had been determined that the use of the premises was not use as a hostel and, there being no subsequent change of use alleged, that determination was conclusive in the second appeal. But the subordinate issue in the *Oliver* appeal is whether an issue estoppel, strictly so called, arose from a successful appeal against an earlier enforcement notice which was effective to defeat the enforcement notice which is the subject of the present proceedings. b

The land which is the subject of the enforcement notice now in question is an area of irregular shape behind 13 to 19 The Avenue, Hornchurch with a narrow strip between 11 and 13 giving access to The Avenue. I shall refer to the land as a whole as 'the site'. In 1982 the local planning authority served an enforcement notice relating to a structure standing on the site and alleging a breach of planning control by making a material change of use of the structure to a use for storage purposes without the grant of planning permission required in that behalf. The *Olivers* appealed against this notice on the ground, *inter alia*, that the use of the structure in question was part of the use of the site as a whole as a transport and storage depot which was an established use of the site, having been commenced before 1964, and was therefore immune from attack by enforcement notice. The case for the local planning authority before the inspector appointed to determine that appeal accepted that certain buildings on the site had an established use for storage purposes and that the open parts of the site on which no buildings stood had an established use for what were described as 'ancillary purposes such as the parking of vehicles'. In effect the local planning authority were contending that different parts of the site were to be treated as distinct planning units and asserting that the use for storage of the structure to which the notice related, which consisted of a trailer stationed on the site, involved the making of a material change in the use of that unit. c

The appellants were asserting that the site as a whole was a single planning unit with the benefit of an established use and that the use for storage of the structure in question was part of that established use. d

The inspector resolved the issue in favour of the appellants. He found that at the date of service of the enforcement notice the trailer had become a fixture on the site. He continued: e

'I take the view that the hardstanding, on which the trailer was stationed at the date of service of the notice, is part of the premises which has an established use for storage purposes, which use clearly appertains to the whole of the established use site, and not only to the buildings thereon. Whether or not the trailer, at the date of service of the notice, was a building or structure, its use for storage purposes does not constitute a breach of planning control, and the appeal succeeds on [that] ground.' f

The enforcement notice served on 10 January 1986 alleged a breach of planning control by making a material change of the use of the land to a 'use for the purposes of a g

a business of merchants, importers, repackers and distributors of goods including paper products textiles and candles without the grant of planning permission required in that behalf'. The inspector who determined the appeal against this notice in favour of the local planning authority found that there had been a material change in the character of the site as a whole since 1963 to the use as described in the notice.

b It is submitted for the local planning authority that no relevant issue estoppel arises from the first inspector's decision because it concerned a part only of the site and concerned only a use for storage purposes. It seems to me, however, that the first inspector's decision involved by necessary implication the finding that the use in fact being made of the site at the date of service of the first enforcement notice was an established use, however described. It is expressly conceded in these proceedings that there had been no material change in the character of the use between the dates of the two enforcement notices. Accordingly, it follows, in my opinion, that the local planning authority are now estopped from asserting that there was a material change of use between 1963 and 1982 which expressly contradicts a finding made by the first inspector which was not merely incidental or ancillary to this decision but was the essential foundation for his conclusion that no breach of planning control was involved in the use being made of the structure which was the subject of the first notice. As Mr Malcolm Spence QC said in his judgment:

d '... it does not make the slightest difference to the question of the application or otherwise of issue estoppel to a particular case that on the first occasion the local planning authority described the use in one manner and on the second occasion they described it in another manner, when it is conceded that the actual use is the same use on each occasion. This is merely a matter of language. On each occasion the use was the same, and on each occasion the issue was the same.'

e I would accordingly dismiss the second appeal.

LORD BRANDON OF OAKBROOK. My Lords, for the reasons given in the speech of my noble and learned friend Lord Bridge, I would dismiss the appeals.

f **LORD GRIFFITHS.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge. I agree with it, and for the reasons that he gives I, too, would dismiss both appeals.

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge. I agree with it, and for the reasons given therein I, too, would dismiss the Secretary of State's appeal in the case of Thrasyvoulou. I would also dismiss the second appeal.

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge. I agree with it, and for the reasons given by my noble and learned friend I, too, would dismiss both appeals.

Appeals dismissed.

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