A

[HOUSE OF LORDS]

KENT COUNTY COUNCIL . . . . . APPELLANTS

AND

KINGSWAY INVESTMENTS (KENT) LTD. . . RESPONDENTS

SAME . . . . . APPELLANTS B

AND

KENWORTHY . . . . . RESPONDENT

[ON APPEAL FROM KINGSWAY INVESTMENTS (KENT) LTD. *v.* KENT COUNTY COUNCIL]

C

1969 Oct. 27, 29, 30; Nov. 3, 4, 5, 6, 10; Dec. 16

Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest, Lord Upjohn and Lord Donovan

Town Planning—Planning permission—Conditions—Outline planning permissions subject to approval of detailed plans—"Permission shall cease to have effect after . . . three years unless . . . approval . . . notified"—No provision covering time required for appeal to Minister against refusal of approval—Compliance with condition outside developer's control—Whether unreasonable and repugnant to planning legislation—Whether void—Whether severable—Whether permission void in toto—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 14 (1), 16 (1)—*Town and Country Planning General Development Order*, 1950 (*S.I.* 1950, *No.* 728), *arts.* 5, 11. D E

By section 14 (1) of the Town and Country Planning Act, 1947:

". . . where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission . . ." F

By article 5 (2) of the Town and Country Planning General Development Order, 1950:

"Where an applicant so desires, an application, expressed to be an outline application, may be made . . . for permission for the erection of any buildings subject to the subsequent approval of the authority with respect to any matters relating to the siting, design or external appearance of the buildings, or the means of access thereto, in which case particulars and plans in regard to those matters shall not be required and permission may be granted subject as aforesaid (with or without other conditions) or refused, provided that:— (i) where such permission is granted, it shall be expressed to be granted under this paragraph on an outline application and the approval of the authority shall be required with respect to the matters reserved in the permission before any development is commenced; . . ." G H

If the authority reject the application or fail to give notice

of their decision within two months (see section 16 of the Act of 1947 and article 11 of the Order of 1950) there may be an appeal within one month to the Minister.

In 1952 the local planning authority for Kent granted two applications by a development company for outline planning permission to develop 365 acres in a rural area of Kent, subject to conditions regularly attached to such permissions by the authority. Condition (i) required details of proposals to be submitted to and approved by the authority before any work began. Condition (ii) provided that

> "The permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) . . ."

The landowners submitted some plans within the three years and further details at varying dates thereafter, extensions of time being granted under condition (i) until October, 1962, but none was approved. The authority, having by that date decided that development of the whole 365 acres was no longer desirable in the public interest, refused any further extension of time. Thereafter 165 acres, by then under separate ownership, were developed under permission; but after public inquiries about the remaining 200 acres the Minister decided that by reason of condition (ii) the original outline permissions had expired.

In 1953 the owner of a plot of land in a rural area in Kent was granted outline planning permission to build a house on it, subject to two similar conditions. He did not submit details within the three years, but in subsequent years sought approval for a variety of developments which were refused, and his appeal to the Minister, following a public inquiry, at which the inspector was of opinion that the development would be contrary to good planning policy, was dismissed.

In the two cases the landowners sought declarations from the court that condition (ii) was unreasonable and void and that the permissions of 1952 and 1953 still subsisted:—

Held, that time conditions could validly be annexed to a grant of outline planning permission.

Held further (Lord Reid and Lord Upjohn dissenting) that condition (ii) was intra vires section 14 (1). When outline permission was granted under article 5 the grantee would know that he should submit details two or three months before the end of the three years' period specified in the condition, allowing two months for the authority to give or fail to give their decision and a month in which to appeal to the Minister, a matter entirely within the grantee's control. Further, the effect of the provision for appeal was that the permission ceased to have effect after the expiration of three years unless within that time approval had been notified by the authority or unless it was held on appeal that within that time approval should have been notified. Moreover, the time condition was fundamental and, if it had been void, it could not have been deleted so as to leave the permission subsisting.

Per Lord Reid and Lord Upjohn: If condition (ii) were held ultra vires, it would be severable because it does not alter the character of the permission given (post, pp. 91C, D, 114E).

Decision of the Court of Appeal [1969] 2 Q.B. 332; [1969] 2 W.L.R. 249; [1969] 1 All E.R. 601, C.A. reversed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Crisp from the Fens Ltd. v. *Rutland County Council* (1950) 114 J.P. 105, C.A.

Davis v. *Miller* [1956] 1 W.L.R. 1013; [1956] 3 All E.R. 109, D.C.

Ellis v. *Dubowski* [1921] 3 K.B. 621, D.C.

Fawcett Properties Ltd. v. *Buckingham County Council* [1961] A.C. 636; [1960] 3 W.L.R. 831; [1960] 3 All E.R. 503, H.L.(E.).

Hall & Co. Ltd. v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1, C.A.

Hamilton v. *West Sussex County Council* [1958] 2 Q.B. 286; [1958] 2 W.L.R. 873; [1958] 2 All E.R. 174.

Kruse v. *Johnson* [1898] 2 Q.B. 91, D.C.

McDonald v. *McDonald* (1875) L.R. 2 H.L. 482, H.L.(Sc.).

Marks & Spencer Ltd. v. *London County Council* [1951] 2 T.L.R. 1139; [1951] 2 All E.R. 1025; [1951] W.N. 624; [1952] Ch. 549; [1952] 1 All E.R. 1150, C.A.; *sub nom. London County Council* v. *Marks & Spencer Ltd.* [1953] A.C. 535; [1953] 2 W.L.R. 932; [1953] 1 All E.R. 1095, H.L.(E.).

Murray v. *Inland Revenue Commissioners* [1918] A.C. 541, H.L.(Sc.).

Nokes v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014; [1940] 3 All E.R. 549, H.L.(E.).

Pigot's Case (1614) 11 Co.Rep. 26b; 77 E.R. 1177.

Potato Marketing Board v. *Merricks* [1958] 2 Q.B. 316; [1958] 3 W.L.R. 135; [1958] 2 All E.R. 538.

Pyx Granite Co. Ltd. v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.; [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.(E.).

Reg. v. *County of London Justices and London County Council* [1893] 2 Q.B. 476, C.A.

Reg. v. *Lundie* (1862) 31 L.J.M.C. 157.

Rossi v. *Edinburgh Corporation* [1905] A.C. 21, H.L.(Sc.).

Theatre de Luxe (Halifax) Ltd. v. *Gledhill* [1915] 2 K.B. 49, D.C.

The following additional cases were cited in argument:

Blackpool Corporation v. *Starr Estate Co. Ltd.* [1922] 1 A.C. 27, H.L.(E.).

Crowe v. *Lloyds British Testing Co. Ltd.* [1960] 1 Q.B. 592; [1960] 2 W.L.R. 227; [1960] 1 All E.R. 411, C.A.

Forbes v. *Git* [1922] 1 A.C. 256, P.C.

James v. *Secretary of State for Wales* [1967] 1 W.L.R. 171; [1966] 3 All E.R. 964.

Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345, H.L.(E.).

Mason v. *Provident Clothing & Supply Co. Ltd.* [1913] A.C. 724, H.L.(E.).

Miller-Mead v. *Minister of Housing and Local Government* [1963] 2 Q.B. 196; [1963] 2 W.L.R. 225; [1963] 1 All E.R. 459, C.A.

North Eastern Railway Co. v. *Lord Hastings* [1900] A.C. 260, H.L.(E.).

Ormond Investment Co. Ltd. v. *Betts* [1928] A.C. 143, H.L.(E.).

Rex v. *Faversham Fishermen's Co.* (1799) 8 Term Rep. 352.

Russell v. *Amalgamated Society of Carpenters and Joiners* [1912] A.C. 421, H.L.(E.).

Slough Estates Ltd. v. *Slough Borough Council (No. 2)* [1969] 2 Ch. 305; [1969] 2 W.L.R. 1157; [1969] 2 All E.R. 988, C.A.

Strickland v. *Hayes* [1896] 1 Q.B. 290, D.C.

Tewkesbury Gas Co., In re; Tysoe v. *Tewkesbury Gas Co.* [1911] 2 Ch. 279.

Watling v. *Lewis* [1911] 1 Ch. 414.

Wells v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 1000; [1967] 2 All E.R. 1041, C.A.

APPEALS from the Court of Appeal (Davies and Winn L.JJ., Lord Denning M.R. dissenting).

The two appeals were (a) an appeal from an order of the Court of Appeal dated December 10, 1968, allowing an appeal by the present respondents, Kingsway Investments (Kent) Ltd., and dismissing an appeal by the present appellants, the Kent County Council, from an order of Lyell J. dated April 29, 1968, and (b) an appeal from an order of the Court of Appeal dated December 10, 1968, allowing an appeal by the present respondent, Allan Kenworthy, and dismissing an appeal by the present appellants from an order of Lyell J. dated April 29, 1968. By order dated May 1, 1969, the House of Lords ordered that the appeals be conjoined and that the parties be allowed to lodge one case and one appendix in respect of both appeals.

The plaintiffs in the two actions, Kingsway Investments (Kent) Ltd. ("Kingsway"), owners of 200 acres of land in Strood and Malling, Kent, and Allan Kenworthy, owner of land at Teston, Maidstone, Kent, by writs issued on January 20 and March 11, 1966, respectively, claimed against the defendants, the Kent County Council as the local planning authority, declarations in respect of outline planning permissions granted in 1952 and 1953, respectively, that a condition subject to which each permission was granted was void and that the permissions were otherwise valid.

The actions were heard consecutively by Lyell J., it being agreed by counsel for the parties in the Kenworthy action that the relevant facts were indistinguishable from those in the first action, and the trial judge was invited to treat the submissions as applying to both actions. Lyell J. in a reserved judgment on April 29, 1968, held that in each case the relevant condition was ultra vires and void because it made no provision to cover the time required for an appeal to the Minister, but that the condition was incapable of being severed from the rest of the outline planning permission and that therefore the permissions were wholly void and did not subsist.

The plaintiffs appealed. The grounds of their appeal and of the cross-appeal of the council are set out in the report of the decision of the Court of Appeal [1969] 2 Q.B. 332, 336–337.

The 200 acres owned by Kingsway and formerly owned by one Shahmoon lay in an area of outstanding natural beauty. Kingsway claimed to be entitled to develop them by building but the Kent County Council opposed the development as being contrary to the public interest. Kingsway claimed that outline planning permission had been given in 1952 and was still valid and could not be revoked without payment of compensation to them.

On March 19, 1952, prospective purchasers of the land from Shahmoon, C.A.S. (Industrial Developments) Ltd., applied to the council for permission to develop an area including the 200 acres. On October 14, 1952, the council granted planning permission for the development of the area in question, subject to the following conditions:

"(i) That details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the local planning authority before any works are begun;

(ii) the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above;

(iii) that schemes of tree-planting shall be submitted to and approved by the local planning authority within the period referred to in condition (ii) above . . .

and that the grounds for the imposition of such conditions are:

(i) No such details have been submitted;

(ii) in order to prevent the accumulation of permissions in respect of which no details have been submitted; and

(iii) in order to preserve the natural amenities of the area."

C.A.S. did not purchase the land but successive applications for an extension of the time limit were agreed to up to September 26, 1962. No extension after that date was agreed. After that date Kingsway bought the 200 acres.

There were several public inquiries as to the proposed development of the 200 acres and both the Minister and the council were of opinion that (save for a very small part) the 200 acres ought not to be developed. On August 25, 1965, the Minister held that the original permission had expired by reason of the time limit.

In 1952 the respondent Kenworthy bought an acre of land in Teston village. In November, 1952, he applied for outline planning permission to build a house on it. On January 8, 1953, the Maidstone Rural District Council notified him of a grant of permission to develop the land in the following terms:

"Take notice that the Maidstone Rural District Council, in exercise of its powers delegated by the Kent County Council, the local planning authority under the Town and Country Planning Act, 1947, has granted permission for development of land situate at Tonbridge Road, Teston, and being outline application for dwelling . . . subject to the conditions specified hereunder:

1. The subsequent submission and approval of details relating to: (*a*) siting, height, design and/or external appearance of the building; (*b*) means of access.

2. The permission ceasing to have effect after the expiration of three years from the date of issue unless within that time approval has been signified to those matters reserved under condition 1 above."

The respondent did not comply with condition 2.

On August 11, 1958, he applied for permission to build two houses on the land. On October 29, 1958, the application was refused. He did not appeal.

On October 2, 1964, he applied for permission to build a house and garage on the land. On January 15, 1963, the application was refused. He appealed to the Minister and there was an inquiry. The inspector found that the land was outside the "village envelope" for Teston as

adopted by the planning authority. He was of opinion that the proposed development, if allowed, would constitute an unjustified extension of the village into an attractive rural countryside and that the use of the proposed access way would increase the risk of accidents. On November 22, 1965, the Minister dismissed the appeal.

David Widdicombe Q.C. and *E. A. Vaughan-Neil* for the appellants. The relevant statutory provisions are sections 6, 12 (1), 13, 14 (the key section) and 16 of the Town and Country Planning Act, 1947, and articles 3, 5, 6, 8 and 11 of the Town and Country Planning General Development Order, 1950.

When outline planning permission has been given and an application is made for approval of the reserved matters the local authority are under a duty to determine the application. They must do so within two months: see article 5 (8) of the Order of 1950. They are confined to dealing with the reserved matters: see *Hamilton* v. *West Sussex County Council* [1958] 2 Q.B. 286.

Section 14 of the Act of 1947 shows what conditions were authorised by Parliament. It is submitted: (1) The conditions imposed must be relevant to the implementation of planning policy. (2) Time conditions are relevant to the implementation of planning policy. (3) Time conditions have received judicial and legislative recognition. (4) The conditions provided for by section 14 include time conditions on the implementation of the permission and not only on the actual physical development of the land.

Submission (1) is not controversial: see *Fawcett Properties Ltd.* v. *Buckingham County Council* [1959] Ch. 543; [1961] A.C. 636, 684–685, and Winn L.J. in the Court of Appeal in the present case [1969] 2 Q.B. 332, 359.

As to submission (2), the facts in the *Kenworthy* case illustrate the justification for time conditions. The land was on the edge of the village. It may not be desirable to spread the village or to overstrain its services. The decision on any particular application may depend on how an earlier application on other land was dealt with, and whether it will be implemented. The local authority needs to know which permissions are still alive in order to plan the whole area and deal with other applications. They are entitled to say that they will give permission to build a house provided that it is built in the near future, say within two years, but that they will not give permission in perpetuity, thus assuring themselves the right to reconsider the matter later if the permission has not been implemented. If the word " approval " were not in the condition the obligation might be discharged by putting in pro forma plans, however lacking in serious intent.

As to submission (3), time conditions were held to be valid in *Marks & Spencer Ltd.* v. *London County Council* [1951] 2 T.L.R. 1139; [1952] Ch. 579; [1953] A.C. 535; *James* v. *Secretary of State for Wales* [1967] 1 W.L.R. 171; and *Hamilton* v. *West Sussex County Council* [1958] 2 Q.B. 286, 290, 298, 299. The validity of the condition under appeal in this case was not disputed. Parliament has referred to time conditions in section 3 of the Town and Country Planning Act 1947, section 41 (3) of the Caravan

Sites and Control of Development Act 1960, and sections 65 (4) (*c*) and 66 (3) of the Town and Country Planning Act 1968.

As to submission (4) it is the permission which is either unconditional or subject to conditions, not the development of the land.

As to the validity of this particular time condition, no general approach is laid down in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 559, 570, 572, 578–579, 590; [1960] A.C. 260, 287 (where the case went to the House of Lords, but not on the question of conditions attached to planning permission); *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228, 229, 230, 233 (which was approved in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636) and *Kruse* v. *Johnson* [1898] 2 Q.B. 91, 96, 99, 101, 103–104, 107, 113.

From these cases one can extract the following propositions: (1) The onus of showing that a condition is ultra vires is on the plaintiff. It is assumed that the planning authority had regard to the correct factors, unless the plaintiff shows the contrary. (2) In considering whether a condition is ultra vires one must assume that the local authority will administer it reasonably. (3) Conditions, like by-laws, should be construed benevolently. (4) It is no concern of the court whether the condition serves its planning purpose efficiently or inefficiently.

As to the construction of an Act by later legislation, see *Maxwell on Interpretation of Statutes*, 12th ed. (1969), pp. 69–70; *Ormond Investment Co. Ltd.* v. *Betts* [1928] A.C. 143, 154; and *Kirkness* v. *John Hudson & Co. Ltd.* [1955] A.C. 696, 710–711, 724–725, 734, 735, 738–739.

The Minister's circulars referred to in the judgments in the court below [1969] 2 Q.B. 332, 357, 358 are not admissible evidence. Alternatively, they do not harm the appellants' argument. There is no serious objection to Circular No. 87, dated May 11, 1950, but Circular 5/68, dated February 6, 1968, is not relevant in a case in which the writs were issued in 1966.

Statements of ministerial policy are not relevant when the court is considering a point of law. They are not subject to cross-examination, and so little weight should be attached to them.

As to the question whether the condition can be severed from the permission, if the condition is invalid, the whole of the planning permission goes. One can only strike out something obviously trivial: see the *Pyx Granite* case [1958] 1 Q.B. 554, 578–579, and *Pigot's Case* (1614) 11 Co.Rep. 26b, 27b. In the report of the latter case in 77 E.R. at p. 1179, footnote (*c*), the general principle is stated

> " that if any clause, etc., void by the statute or by the common law be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void."

What was said in *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, 245, 251–252, 256, 261–262 is adopted: see also *Potato Marketing Board* v. *Merricks* [1958] 2 Q.B. 316, 333.

One must ask oneself what the authority would have done if they had thought the condition was not available. In the present case they would certainly not have granted leave for so large a development without a time limit, having regard to its impact on the neighbourhood.

Had the authority known that this condition was not available they might have done one of several things: (1) Insisted on a full and detailed permission and not merely an outline, since the development was too important for that; (2) imposed a condition on the time for the commencement of the work; (3) attached a condition for the submission of plans within three years; (4) refused permission while inviting the applicants to discuss the matter and agree the form of the development. But the one thing they would not have done would have been to grant planning permission without any condition at all.

The tests of severability should be: (1) The only conditions which should be severed and struck out, leaving the permission standing, are trivial ones.

(2) Taking the principle set out in the notes to *Pigot's Case*, 77 E.R. 1179, one may look at the bad part of a clause and see whether or not it is inextricably mixed up with the good part: see *Hall's* case [1964] 1 W.L.R. 240, 251–252, referring to the dictum of Hodson L.J. in the *Pyx Granite* case [1958] 1 Q.B. 554, 578–579. In the present case all the conditions are on an equal footing and stand or fall as a group.

The issue in these appeals is one of statutory construction. If the condition was valid when it was imposed, subsequent events cannot make it invalid. It would be wrong to judge the validity of a condition so widely used by planning authorities by reference to the facts of two particular cases. There is no possible hardship in either of the two present cases.

The approach submitted should give rise to no hardship because, if planning permissions fail, there is power in section 18 of the Act of 1947 for the authority to grant permission for the retention of existing buildings or works.

In the phrase "approval has been notified" in condition (ii) "approval" refers to the approval of the local planning authority and the reference is to the local planning authority's procedure: see article 5 (8) (*a*) of the General Development Order. The notification referred to is that of the local planning authority, not the Minister. The phrase must be read without any prejudice to the powers of the Minister on appeal. The decision of the Minister is not the same as that of the local planning authority: see section 221 (4) (*d*) of the Town and Country Planning Act, 1962, which came into force after that date. Thereafter it can be said that the Minister's decision is backdated. The provision shows that the Minister's decision is not substituted for the local authority's. The origin of that provision is in section 69 (3) (*d*) of the Town and Country Planning Act, 1954. The definition of "planning decision" in section 69 (1) of that Act refers to section 16 for its meaning; while section 16 refers back to the Town and Country Planning Act, 1947.

It is submitted therefore: The approval referred to in condition (ii) is that of the local planning authority. The phrase "approval has been notified" is a term of art: see articles 5 (8) and (9) and 11 of the General Development Order of 1950. In section 16 (1) of the Act of 1947 the expression "from the receipt of notification" is used: see also subsection (3). In the case of the local planning authority's decision, but not of a ministerial decision, there are two steps to be taken. It is the notification

and not the resolution which constitutes the grant of approval: see also *Slough Estates Ltd.* v. *Slough Borough Council (No. 2)* [1969] 2 Ch. 305. A

The Minister's right to deal with the matter on appeal after three years is not taken away. Condition (ii) must be read as subject to his overriding right to determine the matter on appeal and it does not take away that right. But the planning authority cannot extend the time for their own decision. The applicant must put in his plans in time for the authority to give a decision within three years. B

Alternatively, after the words " three years " in the condition one should read " and such time thereafter as is necessary for the Minister to determine any competent appeal." The appeal would have to be lodged within 28 days of any decision given within the three years. Condition (i) requires the same proviso to be implied or understood.

This condition should be construed benevolently, so that it should, if possible, be made to work, and not with a high degree of technicality, but rather with regard to the intention of the authority. C

Planning permissions should not be construed against the planning authority: see *Crisp from the Fens Ltd.* v. *Rutland County Council* (1950) 114 J.P. 105, 108–109, 111.

It is not correct that time conditions are limited to those referred to in section 14 (2) of the Act of 1947: see *Fawcett's* case in the Court of Appeal [1959] Ch. 543, 559; *Pyx Granite* in the Court of Appeal [1958] 1 Q.B. 554, 573, and *Hall's* case [1964] 1 W.L.R. 240, 248, 261, and section 18 (5). Section 19 is not relevant. The examples given in section 14 (2) are conditions of a different kind to those now in question. Note the opening words of the subsection: " Without prejudice to the generality of the foregoing subsection . . ." D

No question of " derogation from grant " arises. One must distinguish between derogation from a grant, on the one hand, and a grant limited by a condition, on the other. Parliament has authorised the grant of limited permissions and so there is no question of taking away what has been granted: see *Forbes* v. *Git* [1922] 1 A.C. 256, 259 and *In re Tewkesbury Gas Co.* [1911] 2 Ch. 279, 280, 283–284. The distinction on which the appellants rely is made in *Watling* v. *Lewis* [1911] 1 Ch. 414. E F

The approach by reference to the principle of derogation from grant is beside the point. It only brings one back to the statutory construction of section 14 and the question what was granted by virtue of the Act.

As to the argument that compliance with the condition is not within the applicant's control, that is irrelevant. It is the essence of planning control to regulate what the landowner can do with his land including, in a proper case imposing conditions, compliance with which is outside his control. G

Alternatively, the matter is not outside the applicant's control. The time for submitting plans is entirely for the applicant. The authority has a duty to decide on them within two months and the decision is confined to the matters reserved. There is a right of appeal and the decision whether to appeal is for the applicant.

As to severability, if the condition is invalid the whole of the planning permission goes. One can only strike out something which is obviously trivial. The intention of the authority is important: see *Russell* v. *Amalgamated Society of Carpenters and Joiners* [1912] A.C. 421, 430, 435, 437, H

441–442; *Mason* v. *Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724, 745, both cases of restraint of trade.

As to by-laws, see *Halsbury's Laws of England*, 3rd ed., Vol. 24 (1958), para. 948, pp. 515–516, and *Rex* v. *Faversham Fishermen's Co.* (1799) 8 Term Rep. 352, 356; *Reg.* v. *Lundie* (1862) 31 L.J.M.C. 157, 160, and *Strickland* v. *Hayes* [1896] 1 Q.B. 290, 292.

As to the validity of this condition the relevant questions to be asked are: (1) Have the plaintiffs shown that the council took into account any irrelevant matters? There is no evidence of this. (2) Have the plaintiffs shown that the council left out of account any relevant matters? There is no evidence of that. (3) Have the plaintiffs satisfied the court that the condition is such that no reasonable authority would impose it? It is not. (4) Is the condition authorised by section 14 (1)? It is. (5) Is there a derogation from the grant? No.

Douglas Frank Q.C. and *Patrick Freeman* for the respondents. The respondents challenge the suggestion that these conditions are used by most local planning authorities. Such a practice would indicate a failure to exercise their discretion.

In construing a permission one is only entitled to look at the application and the permission itself, considered against the background of the relevant Act: see *Miller-Mead* v. *Minister of Housing and Local Government* [1963] 2 Q.B. 196, 215.

Section 21 of the Act of 1947 gives the planning authority power to revoke or modify permissions to develop. Section 65 of the Act of 1968, limiting the duration of planning permissions to five years if the works are not begun within that time, involves the revocation of obsolete permissions and puts a filter on the scheme of the previous Acts.

This condition is not authorised by the statute. A procedural condition can only be imposed when it is expressly authorised by the Act, i.e., any condition which relates to the commencement, manner and duration of the development. In section 14 (2) Parliament found it necessary to make express provision for a temporary permission.

The Act of 1947 was concerned with two things: (1) whether planning permission should be granted and (2) how it should be carried out. It was found necessary to make provision for the procedure by the General Development Order of 1950. Article 5 was not otiose. Procedural conditions are only valid if they are found in terms in section 14 (2) (*b*) of the Act or article 5 of the Order.

One must distinguish between giving permission and giving approval. Without the warrant of the Statutory Instrument, the authority cannot arrogate to themselves the right to exercise a jurisdiction which the Act does not give them. In the scheme of the Act as a whole there is no warrant in section 14 (1) for the imposition of any procedural conditions. The Act, by section 14, allows the authority to impose conditions as to the manner of the development. The Minister can impose conditions in relation to other matters, including procedural conditions.

The fulfilment of the conditions must be within the applicant's control. It must be something capable of being broken by him. It must also be capable of being enforced in accordance with the statutory provisions for enforcement by the local planning authority: see section 23 of the Act of

1947. When there is a limited permission and the applicant is in breach of the limitation or condition, he cannot be charged with carrying out the development without permission. Part III of the Act of 1947 is concerned with the control of development: see in particular sections 12 to 18. The permission enures in perpetuity, subject to the provisions of this part of the Act, e.g., where permission restricts the use of the land to a person or class of persons, but section 14 (1) does not recognise that the planning authority can by a condition of their own cause the permission to lose its effect after a certain date: see also sections 19 and 25 and the definition of "planning permission" in section 119 (1). The purpose of permission is the control of the development of land and there is no room in section 14 (1) for any conditions other than those directly relating to the way the development is to be carried out. It is impossible to reconcile a condition like the one in the present case with the enforcement provisions of the Act. Nowhere in the Act does anything give the local planning authority the power to say that a permission shall cease to have effect.

This is supported by the Act of 1968. If there is any doubt about the construction of a statute one can invoke a subsequent statute, though one cannot use the second Act to create a doubt: see *Crowe* v. *Lloyds British Testing Co. Ltd.* [1960] 1 Q.B. 592, 623.

Neither in section 66 nor in any other section of the Act of 1968 is there any power given to a local planning authority to make conditions that approval shall be given within a specified time: see also section 67 (3).

It is basic that the condition must have been validly imposed in the first place. Section 14 (2) does not validate what would have been invalid under subsection (1). One cannot take away with one hand what has been given, even temporarily, with the other. Section 14 (3) enables regulations to be made giving the Minister power to say how applications shall be dealt with.

A time condition which relates to the commencement, manner and termination of the development is not objectionable when it is within the control of the applicant and is enforceable. The condition must relate to the permitted development. The local planning authority are empowered to grant permission and attach a condition to the permission, but they cannot reserve to themselves a future power to grant an approval.

For this sort of procedural condition one must look at section 14 (3) and article 5 of the General Development Order of 1950.

It is submitted: (1) If condition (ii) has any authority that must be found in section 14 (1) of the Act of 1947. In the Kingsway permission there is a contingent revocation, a stipulation that in the absence of a certain event the permission shall cease to have effect. That cannot be reconciled with section 21 dealing expressly with revocation orders. In construing section 14 one must apply the maxim expressio unius, exclusio alterius. The words "cease to have effect" in condition (ii) are the same in effect as a revocation order, without providing the safeguards and compensation which are provided: see section 27.

(2) Section 14 (1) presupposes a condition which can be complied with by the applicant. If that were not so and if the effectiveness of the condition depended on the action of a third party, e.g., the borough surveyor, one would be giving the applicant something which might prove to be

worthless, according to the will of some other person. There must be something which can be complied with by the applicant and a failure to comply with it will make him liable to penalties.

(3) Condition (ii) is using a back-door method to put into article 5 of the General Development Order a condition which the Minister has not authorised under it. It is irreconcilable with article 5. It is also a fetter on the right of the local planning authority and the applicant to agree on extension of time for approval if, for example, plans were put in two months before the expiration of the three years. By a planning condition the local planning authority cannot take away a permission already given. They can only do by agreement what section 25 of the Act of 1947 empowers them to do: see also article 5 of the Town and Country Planning General Development Order, 1963 (S.I. 1963 No. 709) following the Act of 1962.

(4) Section 14 (3) is exhaustive as to the powers "for regulating the manner in which applications for permission to develop are to be dealt with by local planning authorities."

In respect of these submissions the maxim generalia specialibus non derogant applies: see *Blackpool Corporation* v. *Starr Estate Co. Ltd.* [1922] 1 A.C. 27, 34, *per* Viscount Haldane.

Section 14 (1) presupposes a condition which directly relates to the commencement, manner and duration of the development.

If one can have a condition requiring the submission of plans within three years, it is manifestly unfair to impose on the applicant a condition the fulfilment of which depends on the will of another.

On the appellants' submissions there could be three years for the approval of the local planning authority and none for the approval of the Minister. This is a restriction on the right of appeal to the Minister, conferred by the Act, against the refusal of the local planning authority to approve the reserved matters or their failure to do so timeously. The objection to condition (ii) would be similar even if the period named were longer than three years, because an appeal might be pending at the end of them. As to appeals to the Minister, see section 16 of the Act of 1947. It was necessary in the condition, if it was to be valid, to provide for the right of appeal. But the condition is not ambiguous and, in the absence of ambiguity, one cannot read into it anything such as the appellants have suggested.

Before the Minister can look at the appeal against the refusal of the local planning authority to approve the reserved details he must determine a separate appeal against the condition itself. The former appeal must be decided on town planning grounds only. But, taking the condition as it stands, it ceases to have effect at the end of three years, and so the Minister would have before him an appeal relating to a permission which had ceased to exist. As to appeals, see article 11 of the General Development Order of 1950 and the proviso to section 15 (2) of the Act of 1947.

The Minister has a general power to order a public inquiry for the purpose of exercising any of his functions. When he comes to consider the question of extending the three years named in the condition he must have regard to all the planning circumstances. But if because condition

(ii) were read literally there were no permission left at the end of the three years, the Minister would have no jurisdiction left. A

The rule of construction to be applied is that unless there is an ambiguity on the face of the words used the court will not interfere. An applicant ought to be able to rely on the ordinary meaning of a condition. In these circumstances there is no authority for implying words in condition (ii), as the appellants suggest. The condition as it stands would prevent the Minister from adjudicating between the applicant and the local planning authority. If, through no fault of his own, an applicant is deprived by a condition of his right of appeal, that invalidates the condition, which is ultra vires. As to the principles of construction see *North Eastern Railway Co.* v. *Lord Hastings* [1900] A.C. 260, 268. It is not possible for the Minister to back-date his decision, as suggested by the appellants. B

It is not desired to attack condition (i). But under the plain words of condition (ii) the permission would cease to have effect at the end of three years. Thereafter the local planning authority have neither any permission or document before them on which they can act. The Minister can only act if he has a document or permission on which he can adjudicate. But if the time of the permission has expired, there is no such document: see also section 16 of the Act of 1947 and section 41 (3) of the Caravan Sites and Control of Development Act, 1960. *Davis* v. *Miller* [1956] 1 W.L.R. 1013, 1017–1018 supports the submission that there can be no question of the Minister back-dating any decision. Condition (ii) does not conform with the Act and is unenforceable. C D

As to severability, the first question is whether there is room in a planning case for the principle propounded in *Hall's* case [1964] 1 W.L.R. 240, 251–252. That case together with the dictum of Hodson L.J. in the *Pyx Granite* case [1958] 1 Q.B. 554, 578–579 are the only authorities. In the House of Lords in that case there was some argument concerning the validity of conditions and the power of the court to make declarations: see pp. 275–276. On that point the present respondents would adopt the appellants' argument in reply at pp. 280–281. If the respondents' argument in that case had been right, it would have concluded the matter. E

In a planning case the right test is whether or not the condition goes to the merits of granting permission, whether or not it is related to the development. Does it amount to requiring further and better particulars of the development? Is it a component part of the description of the permitted development? F

It is submitted: (1) No help can be found in cases concerning contract, because contracts are inter partes and planning is sui generis. Any comparisons must be with by-laws. (2) Since the applicant has no share in drafting the document, he should not stand in peril because of a mistake by the planning authority. G

In the Court of Appeal in the present case [1969] 2 Q.B. 332, 355, Lord Denning M.R. referred to *Wells* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 1000, 1007. That case has nothing to do with the present case. H

As to ultra vires conditions, see *Ellis* v. *Dubowski* [1921] 3 K.B. 621; *Rossi* v. *Edinburgh Corporation* [1905] A.C. 21, 26; *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill* [1915] 2 K.B. 49; *McDonald* v. *McDonald*

(1875) L.R. 2 H.L. 482, 488–489; *Strickland* v. *Hayes* [1896] 1 Q.B. 290 and *Mason's* case [1913] A.C. 724.

There is no authority for quashing the whole of the permission in this case and nothing in the Act to justify it. *Hall's* case [1964] 1 W.L.R. 240 was decided without any authority to show that if the condition is taken out the whole of the permission falls. In such a case as this there is nothing in law to prevent severance, if it is possible. If a condition is bad one should always sever, where it is possible. To make the test the question whether a condition is fundamental or trivial is far too uncertain. The present case is distinguishable from *Hall's* case because here it relates to no part of the development and is not fundamental to the way in which it is to be carried out. It is not necessary to say that *Hall's* case was wrongly decided for the purposes of that case.

In summary: (1) The condition is repugnant to the Act because: (a) it is not authorised by the relevant sections; (b) it fetters the statutory right of appeal to the Minister; (c) it has built into it a power of revocation not authorised by the Act; (d) performance is not within the control of the applicant. (2) If the permission is invalid it is severable from the permission.

Patrick Freeman following. Section 41 (3) of the Caravan Sites and Control of Development Act, 1960, points the difference between a full application for planning permission and an outline application in relation to time and the point at which it begins to run. If there were a grant of permission with all the details fully expressed, then the time specified in relation to the commencement, manner and termination of the work could be a fixed period running from a certain date, e.g., from the issue of the permission. It would be different in the case of outline permission because the same phraseology would not meet the circumstances. There would be an outline application for an operation on a piece of land expressed in general terms, subject to the reserved matters being approved before the work was done. But there is no reason why a time condition should be imposed. It could not run from the date of the permission because the work cannot be started until the approval of the reserved matters. The applicant must know where he stands. There is a difference between a condition on a permission and a condition on a development.

In the construction of planning documents "condition" may be an inapt word, but so is "grant," especially in relation to the acts of a planning authority. The Act takes away the freedom of the subject and the authority licenses him. The permission should be approached as though it were a licence dealing with restrictions on the thing authorised by it. One cannot consider the intention of the parties, because there are no parties to a planning permission as there are to a contract. One need go no further than the maxim "benignae faciendae sunt interpretationes ut res magis valeat quam pereat." A bad clause in subordinate legislation of this nature is only bad in itself and does not taint clauses which are good. Accordingly the condition can be severed. The whole permission does not fail if the condition is held invalid. It would not be proper for the appellants to succeed by alleging that their own condition on their own permission was invalid.

[LORD REID intimated that their Lordships did not require further

argument from the appellants on the question of the validity of time conditions in general.] A

David Widdicombe Q.C. in reply. As to the validity of this particular time condition: (1) In condition (ii) the "approval" is the approval of the local planning authority. (2) There should be implied in condition (ii) the words suggested by Lord Denning M.R. [1969] 2 Q.B. 332, 350–351. (3) There are procedures whereby the applicants by asking for an extension of time could get the matter determined by the Minister. (4) If that is B wrong, the invalidity of condition (ii) is limited to the words "approval . ." etc. and the effect is that any plans submitted after the three years need not be considered by the local planning authority at all.

In effect condition (ii) is only adding a time limit for the doing of matters referred to in condition (i). It is to be read without prejudice to the right of appeal in the Act and the General Development Order. If an applicant acts reasonably he can normally do everything required C within the period named.

As to the argument that the condition excluded an appeal to the Minister, *Davis* v. *Miller* [1956] 1 W.L.R. 1013, 1018–1019 is inferentially more in favour of the appellants than the respondents: see also *Reg.* v. *County of London Justices and London County Council* [1893] 2 Q.B. 476, 487, 490–491, 493–494, 497. The general approach of Bowen L.J. in D that case applies here and the effect is to preserve the right of appeal.

There is no foundation in the Act for the distinction between procedural conditions and conditions on development.

As to severability, if the permission is left standing without the condition, it will be contrary to the intention of the Act.

Douglas Frank Q.C. In *Reg.* v. *County of London Justices and London County Council* [1893] 2 Q.B. 476, 492, 493 the court was construing an E Act of Parliament and dealing with the question of an ambiguity in the Act, but here it is not clear whether the appellants are alleging ambiguity in the Act or in the condition.

Their Lordships took time for consideration.

F

Dec. 16, 1969. LORD REID. My Lords, the facts in these two cases have been set out by my noble and learned friends and I shall not repeat them. Nor shall I deal with the matter on which your Lordships are all agreed—that there can be valid conditions setting time limits to planning permissions if something is not done within a prescribed time. The question in these cases is whether on their true construction the conditions as to time attached by the appellants to outline planning permissions G granted to the respondents are or are not valid.

Section 14 (1) of the Town and Country Planning Act, 1947, authorises the local planning authority to grant permission to develop land "subject to such conditions as they think fit." But it is, I think, clear that there are limitations on this power to impose conditions. In the first place, any condition must be reasonably related to planning considerations. H Secondly, it must not be ultra vires. And thirdly, it must not be unreasonable—using that word in a somewhat restricted sense. I do not think that ultra vires and unreasonableness are indistinguishable. A condition

A is ultra vires if it conflicts with some requirement of the Act. But it may not be unreasonable to attempt to do something which the Act forbids.

These conditions were reasonably related to planning control. If, after outline permission has been given for one development in a particular area, another developer seeks permission for another development in that area, there may be nothing intrinsically wrong with the second proposed development but on planning grounds there may be no room B for both in the same area. So in order to do justice to the second application the planning authority must know within a reasonable time whether the first scheme is to proceed. And that requires that some time limit should be put on the availability of the first permission. And no doubt there are other justifications for time limits.

But a time limit can only be intra vires if it does not conflict with C the applicant's statutory right to appeal to the Minister should the local planning authority decide against him. The applicant must act reasonably. He cannot be heard to complain if unreasonable action on his part deprives him of his right to appeal. But he can complain if the operation of the time condition is such that by reason of matters not within his control he may be deprived of that right. I say "may be deprived" because the validity of a condition must be capable of determination D when it is first imposed. So if there is any substantial chance that, notwithstanding reasonable action on his part, the condition may operate to cut off his statutory right, then the condition must be ultra vires.

I can see nothing wrong in a condition that plans must be approved within three years provided that if at the end of that period an appeal is pending before the Minister the time shall be extended so that the Minister can decide that appeal. If the applicant submits his plans for approval E by the local planning authority more than two months before the expiration of the three years no action or inaction of that authority can prevent him from appealing within three years. If the authority approves within that period well and good—the condition is satisfied. If it rejects or seeks to modify the plans within two months then the applicant can immediately appeal. If it comes to no decision within that period then F the Act allows an immediate appeal on the ground that the authority is deemed to have refused the application. And it is not unreasonable that the applicant should have to submit his plans for approval at least two months before the end of the three years.

But it would, in my view, be ultra vires to impose a condition that the outline permission shall cease to have effect at the end of three years unless plans have been approved within that period. The applicant G cannot control the time which the Minister may take to dispose of an appeal, and these matters are often so complicated that the Minister may need more than a year to carry out his duties and reach a decision. So the applicant cannot know how long before the expiry of the three years he must submit his plans for approval if he is to be sure of getting a final decision within that period. It may be that in the great majority H of cases there would be no difficulty in getting a decision within three years even where an appeal to the Minister is necessary. But as I have said the validity of a condition must be determinable when it is imposed. Circumstances may change and complications may arise even in an

apparently simple case. So I do not think we can say that in some cases such a condition would be valid but in others invalid.

It was not argued that there can be any difference between the first (*Kingsway*) case where the position was complicated and the second (*Kenworthy*) case where it was comparatively simple. So I shall deal first with the condition in the *Kenworthy* case because it is more simply expressed. Two conditions were imposed in each case and those imposed in the *Kenworthy* case were:

> "1. The subsequent submission and approval of details relating to:—(*a*) siting, height, design and/or external appearance of the building; (*b*) means of access.
>
> "2. The permission ceasing to have effect after the expiration of 3 years from the date of issue unless within that time approval has been signified to those matters reserved under condition 1 above."

It appears to me that in condition 1 approval means an approval which enables the development to proceed: if the local planning authority disapproves and that is reversed by the Minister, then the approval of the Minister satisfies the condition. If approval meant approval by the local planning authority, then in such a case there never would be any approval by the local planning authority and the condition would not be satisfied, but it would be invalid because it would deny the right to appeal if the local authority disapproved and to found on the Minister's approval if the appeal succeeded.

It further appears to me that approval in condition 2 must have the same meaning, and that this condition plainly means that unless some authority entitled to approve has given its approval—"signified" has no technical meaning—before the three years have elapsed the permission "ceases to have effect" on the expiration of the three years. And, if that is so, I do not see how a permission which has ceased to have effect could be brought to life again and restored to effectiveness by anything done by the Minister after it had ceased to have effect. So I would hold this condition invalid as conflicting with the statutory right to appeal. It is, I think, proper to give a "benevolent" interpretation to such conditions in the sense that if their wording is reasonably capable of an interpretation which makes them valid, that interpretation should be adopted. But that does not entitle a court to read in something which is not there and I could not read into condition 2 some qualification that approval by the Minister after the three years had elapsed was sufficient to satisfy the condition.

The conditions in the *Kingsway* case are differently expressed. They are:

> "(i) that details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the local planning authority before any works are begun; (*ii*) the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above;"

On the face of it condition (i) is invalid because it denies a right of appeal. If the local planning authority disapproves and that decision is reversed, then there never is any approval by the local planning authority and the condition would not be satisfied. But this condition is obviously taken from paragraph 5 of the General Development Order, 1950 (S.I. 1950, No. 728). That paragraph is badly drafted because it provides with regard to outline permission that "the approval of the authority shall be required with respect to the matters reserved" without any express reference to the right to act on the Minister's approval if the local authority does not approve. But the development order must be read as a whole and therefore that must be read in to avoid a conflict with the later provisions regarding appeals. I am prepared to assume that that fact does entitle us to read something in to condition (i), although I must say that I find it difficult to relate this to any hitherto recognised ground for holding that a provision read as a whole has a meaning which its words taken by themselves are not reasonably capable of bearing. What, then, is to be read in? All that would be necessary would be to read in after "approved by the local planning authority" the words "or approved by the Minister on appeal."

In the second condition there is no express reference to the local planning authority and it is not very clear whether the approval therein referred to is approval by that authority or approval by whatever authority is entitled to give approval. But I am prepared to accept the appellants' argument that it means approval by the local planning authority. Then it is said that, by reason of the close connection between the two conditions, we must also bring in here the expanded meaning of approval adopted in condition (i). Again I am prepared to accept that meaning so that the condition would read "unless within that time approval has been notified by the local planning authority or intimated by the Minister on appeal." But that would not help the appellants because it would mean that, if there was an appeal from an adverse decision of the local authority, the permission would cease to have effect unless the Minister's approval had been intimated within the three years. If that is what the condition means, then for the reasons I have already given I would hold it invalid.

But the appellants' argument is that we can expand condition (ii) in such a way that the time limit does not apply to the case where there is an appeal to the Minister and he gives approval after the expiry of the three years. It is my misfortune that I have been unable to understand that argument or the grounds or principles on which it is based. It is one thing to say as regards condition (i) that approval by the Minister is equivalent to approval by the local authority. But it is going much further to say with regard to condition (ii) that approval by the Minister is more than equivalent to approval by the local authority so that while the time limit applies to approval by the local authority it does not apply to approval by the Minister. The time limit is the essence of condition (ii). If the condition applies at all I do not understand on what ground we are entitled to disregard the time limit. Nor do I see on what ground we are entitled to say that this condition ceases to have any application after an appeal has been taken to the Minister.

If, as I hold, condition (ii) in each of these cases is ultra vires, then

the question arises whether these conditions are severable. If they are severable the conditions must be struck out and the permissions will then continue to be effective for an unlimited time. If the conditions are not severable and are invalid, then the permissions themselves must have been invalid ab initio. Whichever way this question is decided the practical consequences could be far reaching and, to say the least, embarrassing.

There is a surprising dearth of authority on this matter, for it may affect many classes of case besides those relating to town and country planning—cases where an authority has granted a licence or permission coupled with an ultra vires condition or limitation. The question of severance has often arisen with regard to contracts. But there the position is quite different. It is a general rule that the court will not remake a contract and to strike out one term and leave the rest in operation is remaking the contract. So it is not surprising that there can only be severance of a contract in exceptional circumstances.

But that is not so with regard to a unilateral licence or permission. Suppose that a planning authority purports to impose a condition which has nothing whatever to do with planning considerations but is only calculated to achieve some ulterior object thought to be in the public interest. Clearly, in my view, the condition should be severed and the permission should stand. But suppose, on the other hand, that a condition, though invalid because ultra vires or unreasonable, limits the manner in which the land can be developed, then the condition would not be severable, for if it were simply struck out the result would be that the owner could do things on his land for which he never in fact obtained permission, and that would be contrary to the intention of the statute. So I am of opinion that *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 was rightly decided. And I think that the observations of Hodson L.J. (as he then was) in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 579 were made with this kind of case in view.

But the present case does not fall within either of these classes. It does not fall within the first because these conditions were related to planning considerations. And it does not fall within the second because severing these time conditions would not enable the owners to do anything on their land of a kind which the planning authority did not intend them to do. It would only extend the time during which the owner could act.

The authorities give little help. In a well-known passage in the *Pyx Granite* case Lord Denning said, at p. 572:

> "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction."

I entirely agree but I do not think that he had in mind a case like the present case. We were referred to *Rossi* v. *Edinburgh Corporation* [1905]

A.C. 21. But this question did not arise there. It was held that it would be ultra vires to attach certain conditions to a licence to sell ice cream, but there was no question of an existing licence which contained ultra vires conditions. The question could have been argued in *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill* [1915] 2 K.B. 49 and *Ellis* v. *Dubowski* [1921] 3 K.B. 621 where ultra vires conditions were attached to cinematograph licences but no one suggested that the result was that exhibitors had been breaking the law by exhibiting without licences. It was recognised that the licences were valid although the conditions were not.

I agree with the statement of principle by Devlin J. in *Potato Marketing Board* v. *Merricks* [1958] 2 Q.B. 316, 333 when he said:

> "In all these cases, the question to be asked is whether the bad part can be effectively severed from the good. I think that the demand relating to total arable acreage of the farm can be struck out from the form without altering the character of the rest of it."

I do not think that striking out the time conditions would alter the character of these permissions. And there is a further point of some importance. A multitude of these permissions containing invalid time conditions have been followed by development within the three years and it would be rather absurd if all those permissions were held to have been invalid ab initio so that all those apparently lawful operations now turn out to have been in breach of planning legislation. On the other hand, if these conditions are severable all that will happen will be that some outline permissions thought to have expired will still be in force and the planning authority will have to consider whether circumstances have so altered that it is now necessary to revoke them. I would therefore dismiss these appeals.

LORD MORRIS OF BORTH-Y-GEST. My Lords, in each of these appeals a question arises whether a condition which Kent County Council attached when granting permission for development of land was or was not valid. If the condition is held to be invalid a further question arises as to whether the permission nevertheless subsisted as though the condition had never been imposed. The condition which has been questioned is substantially though not precisely the same in each appeal.

The facts which are relevant in regard to the first appeal may be briefly stated. A company called C.A.S. (Industrial Developments) Ltd. was in the year 1952 interested as prospective purchaser of land which belonged to Mr. Shahmoon. The land was known as the Trosley Towers Estate. It comprised an area of some 365 acres. The land was partly within the area of the Strood Rural District Council and partly within the area of the Malling Rural District Council. Some of the land was on the upper part of an escarpment facing south and some of the remainder was wooded land on the top of the escarpment. The desire of the company was to build a large number of houses upon the land. The company availed itself of the right given by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728) to make outline applications to the two rural district councils (each one being in respect of the land within the council's area). Paragraph 5 (2) of that Order provides as follows:

"Where an applicant so desires, an application, expressed to be an outline application, may be made under the preceding paragraph for permission for the erection of any buildings subject to the subsequent approval of the authority with respect to any matters relating to the siting, design or external appearance of the buildings, or the means of access thereto, in which case particulars and plans in regard to those matters shall not be required and permission may be granted subject as aforesaid (with or without other conditions) or refused, . . ." A B

There are two provisos, the first of which reads:

"(i) where such permission is granted, it shall be expressed to be granted under this paragraph on an outline application and the approval of the authority shall be required with respect to the matters reserved in the permission before any development is commenced; . . ." C

The applications were made on March 25, 1952.

On October 14, 1952, the Kent County Council notified the company that they had granted permission for development of the land in accordance with the particulars supplied with the outline application and had granted permission subject to conditions. In the case of the permission in respect of land in the rural district of Malling the conditions were as follows: D

"(i) that details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the local planning authority before any works are begun;

"(ii) the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above; E

"(iii) that any such details shall not include provision for buildings to be erected on the escarpment of the North Downs or along the frontage to the Pilgrims' Way;

"(iv) that schemes of tree planting shall be submitted to and approved by the local planning authority, carried out within the period referred to in condition (ii) above, and maintained to the satisfaction of the local planning authority for such period of time as may be specified, in respect of any buildings which, in the opinion of the local planning authority, would be prominent in the landscape and as to which screening by way of tree planting is in the authority's opinion necessary." F G

It is important to observe that no suggestion has been made that the council were not entitled to impose conditions (i), (iii) and (iv). It is common ground that though the permission related to the land to which the application related (365 acres) the effect of condition (iii) was that no building at all would be allowed on a very considerable part of that acreage. No suggestion has been made that this could be regarded as a derogation from a grant. The council made it very clear that they had no intention of approving any building development on the escarpment of the North Downs or along The Pilgrims' Way. H

The notice to the company set out the grounds for the imposition of the conditions. They were as follows:

"(i) No such details have been submitted; (ii) in order to prevent the accumulation of permissions in respect of which no details have been submitted; (iii) in order to prevent the carrying out of sporadic development in an area of great landscape value; and (iv) in order to preserve the natural amenities of the area."

The permission in respect of the land in the rural district of Strood was granted subject to conditions corresponding to conditions (i), (ii) and (iv) in the permission in respect of the land in the rural district of Malling, the omission of (iii) (and its related reason) being for geographical reasons.

The company were reminded that if they were aggrieved by the fact that the permission granted to them was subject to conditions they were entitled (by notice served within a month) to appeal to the Minister in accordance with section 16 of the Town and Country Planning Act, 1947. They were informed also that the Minister had power to allow a longer period for the giving of a notice of appeal and would exercise the power in cases where an applicant deferred the giving of notice because negotiations were in progress in regard to the proposed development.

In fact the company did not appeal. At no time was there an appeal to the Minister in regard to the imposition of condition (ii). But the fact that there was no appeal in no way precludes the right, if invalidity is established, to have it proclaimed.

Before examining the contentions which are raised it is only necessary to mention that within the period of three years from October 14, 1952, several lay-out proposals were submitted. None, however, was acceptable. When on September 26, 1955, the council wrote to Mr. Shahmoon in regard to applications made by him, they stated that they agreed to extend the period for the submission of the details referred to in condition (i) (of the permission notified to C.A.S. (Industrial Developments) Ltd.). They agreed to extend the period for a further three years from September 26, 1955. So permission continued. During the further three years other lay-out and siting proposals were submitted. They were not approved. Upon an application made in June, 1958, on behalf of Mr. Shahmoon the county council (on September 3, 1958) agreed to extend the period of submission of details. It was extended for a further period of three years from September 26, 1958. Within this further period certain lay-out and siting proposals were submitted. None was approved. In 1959 a company, Croudace Ltd., purchased part of the estate and at a later date they received permission to proceed with plans for the erection of houses on the area that they had bought. It was an area of 165 acres. That left Mr. Shahmoon with 200 acres. By far the greater part of the 200 acres consists of the land on which buildings are not to be erected. In June, 1961, the county council again extended the time for the submission and approval of plans. The extension was for a period of 12 months from September 26, 1961. Before September 26, 1962, an application was made on behalf of Mr. Shahmoon for a further extension for a further year. That application was, however, not granted. At some date the respondents became the owners of the 200 acres: on January 20, 1966, they began the present proceedings. So it comes about that over 13 years

after condition (ii) was imposed its validity is challenged. The respondents claimed that the permission for development granted on October 14, 1952, still subsists. The council contend that it expired on September 26, 1962, when the last of the extended periods came to an end. The respondents based their claim on the contention that condition (ii) was unlawful and of no effect in that it was ultra vires or unreasonable or both.

The second appeal concerns an acre of land in the village of Teston, near Maidstone, of which the respondent Mr. Kenworthy is the owner. In November, 1952, he applied for outline planning permission to build a house on the site. On January 8, 1953, permission for development was granted subject to two specified conditions which were:

> "1. The subsequent submission and approval of details relating to:—(*a*) siting, height, design and/or external appearance of the building; (*b*) means of access.
>
> "2. The permission ceasing to have effect after the expiration of three years from the date of issue unless within that time approval has been signified to those matters reserved under condition 1 above."

While, as will be seen, there are certain differences between the wording of these two conditions and the wording of the first two conditions in the first appeal, the differences in relation to the second condition are quite minor.

The respondent did not at any time appeal to the Minister in respect of the imposition of the conditions. Nor did he submit any details in regard to the erection of a house. The three-year period expired in January, 1956. After the three-year period had expired he made (on August 11, 1958) an application for permission to build two houses on the site. That application was refused on October 29, 1958. From that refusal there was no appeal. Some years later he made an application for permission to build a house and garage on the site. That application was on October 2, 1964. That application was (on January 15, 1965) refused. He then appealed to the Minister. An inquiry was then held which resulted in a report from an inspector to the effect that the proposed development would result in an unjustified extension outside what was referred to as the "village envelope" for Teston and also that the risks of accident would be increased by the use of the access which was proposed. The appeal was dismissed by the Minister on November 22, 1965. The respondent then claimed that the conditional permission for development granted him on January 8, 1953, was still in existence in spite of condition (ii). That condition he contended was unlawful and void and of no effect. He further contended that the planning permission should nevertheless be held to be subsisting and should be treated as having been granted without condition (ii) forming any part of it. So on March 11, 1966, he began proceedings claiming declarations to that effect. If the contentions are correct it must be immaterial that the ruling of the court was not sought until 13 years after condition (ii) was imposed. So also must it be immaterial that there was no appeal to the Minister after the condition was imposed. Different considerations apply if the condition was not void. A condition may be imposed which is intra vires but which

may be in terms which the Minister, on appeal being made to him in accordance with the regulations, might decide to vary.

The first question in both appeals, therefore, is whether it was within the lawful powers of the appellants to impose a condition that the permission which was granted should cease to have effect after the expiration of three years (from the date of issue) unless within that time approval had been notified (or signified) to matters referred to (or reserved) in regard to layout, siting, height, design, external appearance and means of access.

A power to impose conditions on the grant of permission to develop land was given by section 14 of the Town and Country Planning Act, 1947. I refer to that Act because it was the Act in force at the times of the grants of permission in this case. The local planning authority, if dealing with an application, had to have regard to the provisions (so far as material) of the development plan (if there was one already in existence) and to any other material considerations. If there is a development plan (see s. 5) which is approved by the Minister, the local planning authority is under obligation (see s. 6) to carry out a fresh survey of the area at least once in every five years: some amendment of the plan might result from this. It is relevant to have this in mind when deciding whether any time condition is appropriate on the grant of permission on an outline application.

When dealing with an application for permission to develop land a local planning authority has power (see s. 14 (1)) (a) to grant permission unconditionally, or (b) to grant permission subject to such conditions as they think fit, or (c) to refuse permission. The language of the section denotes that if conditions are imposed they are conditions attached to the permission. It is provided by subsection (3) of section 14 that provision may be made by a development order regulating the manner in which applications for permission to develop land are to be dealt with by a local planning authority. It was in the General Development Order, 1950 (made in exercise of the powers conferred, inter alia, by section 14), that provision was made which allowed for an application to be expressed as an "outline application." The essence of such an application is that the permission which is asked for will be subject to the later approval of the authority in regard to the reserved matters (relating to siting, design, external appearance or means of access). It will often be of the greatest assistance to an applicant to be able to make such an application. He will not want to incur all the expense or employ all the time and energy which will be involved in the preparation of an application other than an outline one if in the result he is not going to get permission at all. In one of the notes on the application form used by the respondents it was stated that an application for permission to erect buildings made as an outline application would be considered as one "for approval in principle." The notes further set out that such approval in principle would be subject to the subsequent submission to the local planning authority of all details (relating to siting and the other matters above referred to) and subject to the approval of those matters by the authority. It is beyond question that such a condition is valid. The General Development Order, 1950, makes it obligatory to obtain

the approval of the authority with respect to the reserved matters before any development is commenced. So if permission is granted after an outline application the applicant clearly knows that that permission is conditional and that it will not be of use to him until he is able to submit details as to siting and design and the like which are acceptable. It must, of course, be assumed that the authority will act in good faith. They must not misuse their functions so as indirectly and without paying compensation to achieve what would amount to a revocation or modification of a permission already given. Any refusal by them to give approval of details submitted to them can be the subject of an appeal to the Minister. The Minister may overrule the authority.

The notes to which I have referred (which, of course, have no binding effect on a court) further state that the authority's "approval in principle" would be subject to the submission of the further details within three years. Here, then, is a time condition and the question arises whether any time condition is intra vires when permission is granted on an outline application. It has been seen that in paragraph 5 (2) of the General Development Order, 1950, after the reference to the condition as to the subsequent approval of the authority, there are in brackets the words "with or without other conditions." The authority to impose such "other conditions" must, however, derive, not from the General Development Order, but from section 14 (1) of the Act of 1947. The power there given is to impose such conditions as the authority see fit. Subsection (2) gives a power "without prejudice to the generality" of subsection (1) to impose a condition, inter alia, requiring the discontinuance at the expiration of a specified period of any use of land that is authorised. That would be a condition requiring that a permitted use of land should only be for a limited time. That is something quite different from the condition which is being examined in the present case. We are here concerned to examine whether an outline permission to develop may have some time condition attached to the permission. Thus, if there were a condition attached to the permission which made such permission subject to the submission within three years of the further details as to the reserved matters the effect, if the condition were valid, would be that if no details were submitted within three years the permission would lapse and be at an end. The learned judge and Lord Denning M.R. and Davies L.J. all thought that such a condition would be valid. I agree with them.

Though the words of section 14 (1) are wide, and though in subsection (2) there is a reference to the "generality" of subsection (1), it is not every condition that would be valid and sustainable. There must be a planning consideration which warrants its imposition. In *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228 Lord Greene M.R. pointed out in the course of his judgment that if an executive discretion is entrusted by Parliament to a body such as the local authority then

> "if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters."

So, said Lord Greene, at p. 229:

> ". . . a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

In his speech in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 Lord Jenkins said, at p. 684:

> "The power to impose conditions though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy."

The authority in the present case were invited to deal with an outline application. They were invited to grant permission to develop land which would be a permission subject to conditions. By section 14 (1) the conditions which could be imposed by the authority would be such "as they think fit." Though one condition (that is that designated by article 5 (2) (i) of the General Development Order, 1950) was one which it was obligatory to impose, any other conditions would have to be conditions which were relevant to the grant of outline permission. They would have to be "germane to the matter in question." In my view, some time considerations may be highly relevant to the grant of outline permission. It may be that some such permissions will not be implemented. They might only be implemented after a long period of time. But it may be of great consequence to an authority, when considering development within an area as a whole or when considering other or later particular applications, to know the extent of permitted development that will actually be carried out. Where applications are not outline applications, but are made with full details (and after incurring all the expense necessarily involved in the preparation of such details) there is a reasonable probability that if permission is granted the permitted development will actually be carried out. The authority can reasonably take that into their calculations. It will often be quite essential for an authority to know with some measure of certainty what are the realities in the pattern of development in their area. No mere question of administrative convenience is here involved. Nor do I think that reason (ii) is directed to any such consideration or that condition (ii) should be regarded as so based. If an outline permission is not going to be converted into firmer form, then the needs of a community may require that other permissions or permissions to others should be granted.

I am, therefore, of the opinion that a condition attached to an outline permission which makes the permission conditional upon plans for approval being submitted within a reasonable period is intra vires section 14 (1) of the Act.

The condition now being examined is one, however, which is in different form. It goes beyond what was indicated in the notes to which I have referred. The permission is conditional not only upon the submission for approval but upon the approval of plans within a stated period: the words are "unless within that time approval has been notified.". I see no difference between the use of the word "notified" in the one case and of "signified" in the other. It is to be observed that the condition does not in terms state by whom approval is to be notified or signified.

In order to examine the points which have been debated it will be convenient to consider the two permissions which together relate to the area of 365 acres. Before there can be "approval" of details (that is, details relating to layout, siting, height, design and external appearance of proposed buildings and means of access) there must, of course, be submission of details. It may be that the requirement of approval and not merely of submission was thought to be desirable in order to meet the situation that would arise where someone submitted details within time which, either because they were inadequate or unacceptable, were not approved, and then asserted that he was entitled in perpetuity thereafter and as many times thereafter as he liked to submit alternative details. The importance which the authority attached to the time element is, therefore, emphasised by the adoption of the word "approval." Though there might be willingness to extend time, a desire to keep control of time is manifested.

The general attack upon the validity of the imposition of time restrictions (other than those denoted in section 14 (2) (*b*)) was in the alternative replaced by an attack upon the validity of the form of time restriction which is set out in condition (ii). It was said that the condition is in a form going beyond any condition that could be imposed under section 14 or under article 5 of the General Development Order, and also that it is in a form which could involve revocation without compensation. It was said that the condition involves a restriction upon the right of appeal. It was said that the condition is in a form which takes power of compliance away from or outside the control of the grantee. Some of these contentions are inter-related.

It is of passing interest to note that in *Hamilton* v. *West Sussex County Council* [1958] 2 Q.B. 286 the case proceeded on the basis of the validity of the grant of an outline permission subject to a condition that the permission was to become null and void unless satisfactory plans and elevations giving details of the design and siting of the building were submitted to and approved by the local planning authority within two years.

Before an application for outline permission is made thought will, in the nature of things, have been given to the scope and nature of a project which it is desired to carry out. When an application is made it is necessary to submit such written information as to the proposals as will be sufficient to enable the planning authority to assess their merits from a planning point of view. In the present case that was done in March, 1952. When outline permission was granted in October, 1952, the time condition concerning approval of details then began to run. To the uninitiated or perhaps to those hopefully waiting for a house in which to live it might well seem that three years would be time enough and to spare for the preparation thereafter of the details of what a developer already had in mind and

for their examination and (if acceptable) approval by the planning authority. But we are told that in practice and in experience the wheels of planning (in reference to such a housing project as has given rise to this litigation) cannot be hastened. The attack on condition (ii) as it developed was, however, not directed to the period of three years. The attack would equally be made, so it was stated, had the period been longer or much longer. It is to be remembered also that there could have been an appeal to the Minister and he could have been asked to substitute a period of time longer than three years. Those with practical knowledge of the skills of planning experts and of the complexities that may be involved in drawing up details of reserved matters would have known in 1952 whether it was appropriate to expect that in the normal course of things there would be approval within three years. If regard is paid to practice it is to be noted that by agreement a period of three years in the present case extended to a period of ten.

What is said is that if details are submitted well within the three-year period the authority for one reason or another might take a long time to consider them and the period might elapse before approval was given. The delay would not, it is said, have been the fault of the grantee or one which it would have been in his power to avoid. This point calls for consideration even though it would seem to be inconceivable that any planning authority having expressed their approval would then assert, if their approval were given after the period, that condition (ii) would bring the result that permission to develop no longer existed. What is further said is that if the authority give notification just before the end of the three years that they do not approve the details submitted, the grantee may be denied his right to appeal within the time permitted to him. It is further said that if he appealed to the Minister within the three-year period the Minister might not be able to give a decision within the period, so that there could not be approval within the time. It was solely on the limited ground that no provision had been made to cover the time required for an appeal to the Minister that the learned judge held that condition (ii) was ultra vires and void.

Where outline permission for the erection of buildings is granted under the provisions of article 5 of the General Development Order, 1950, and where thereafter (see article 5 (3)) there is an application for approval, the authority must give notice of their decision within two months (see article 5 (8)). There could be an agreement in writing to extend that period. A grantee of permission would be under no obligation to agree and would, in such a case as the present if extension of time was being negotiated, probably prefer to agree to an extension of the three-year period. If the authority fail to give notice of their decision within the two months' period then (see section 16 of the Act of 1947 and article 11 of the General Development Order, 1950), there may be an appeal (within one month) to the Minister: it will be an appeal on the basis that, and as though, approval had been refused and as though notification of refusal had been made within the two months' period.

It is to be observed that nowhere in the conditions which were imposed in this case was there any limitation expressly imposed upon the right of appeal. But unless an extension of the three-year period was by agreement

arranged the grantee would know that to safeguard himself he should submit his details of the reserved matters some two or three months before the end of the three-year period. That would allow for the full two months' period in which the authority are to give or to fail to give their decision and the month (if he desired so long) in which he could appeal, All this would be entirely within the control of the grantee. He could ensure that an appeal (if one becomes necessary) is before the Minister within the three-year period. On appeal (see section 16 (3) of the Act of 1947) the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the authority. There is no time limit imposed upon the Minister. If the Minister decided that the planning authority ought to have given their approval in regard to the reserved matters, but if the Minister only so decided at a date after the three-year period, I find it hard to imagine that any authority would say that because they, the authority, had not notified their approval within the three years then, notwithstanding that the Minister had held that they should have done so, the permission was nevertheless at an end. Yet it is upon such a thesis that ultimately the argument of the respondents is based. An argument which for its success demands a close scrutiny of words, involves also that public authorities must be alert to see whether words can be given a meaning which would halt all action. It is the respondents who are suggesting lines of reasoning and courses of action by planning authorities which the latter would be most unlikely ever to favour or to adopt.

The argument makes it necessary to turn to a closer examination of condition (ii) and of its words " unless within that time approval has been notified to those matters referred to in condition (i) above." Whose approval is being referred to? Condition (ii) refers to and follows upon and is closely linked with condition (i). The " matters referred to in condition (i) " are the details which on an outline application did not have to be supplied but which in accordance with condition (i) had to " be submitted to and approved by the local planning authority before any works are begun." It seems clear, therefore, that the approval in condition (ii) is the same approval as is referred to in condition (i)—which is expressly stated to be the approval of the local planning authority. So as a matter of construction the approval referred to in condition (ii) is the approval of the local planning authority. The word " notified " denotes a notification of the local planning authority (see section 16 (1) of the Act of 1947). Condition (ii) is, therefore, really an addition to condition (i): it is an addition by which a time limit is added.

Reverting to condition (i), which is in no way challenged, it is seen that details of the reserved matters must be " submitted to and approved by the local planning authority before any works are begun." That condition is imposed because it must be imposed. (See article 5 (2) (i) of the General Development Order, 1950, set out above.) " The approval of the authority shall be required with respect to the matters reserved in the permission before any development is commenced." The " authority " is clearly the " local planning authority " earlier referred to in the article. What, then, is the position if, after submission to them of the details, the authority do not approve—but if there is an appeal to the Minister and if the Minister allows the appeal? The process of reasoning, based upon the ardent

literalism which the respondents wish to apply to condition (ii), must have the effect that if the authority wrongly fail to give their approval then condition (i) cannot be satisfied. Condition (i) expressly refers to approval by the authority. If the authority have refused approval, then no works can be begun. Hence there is complete frustration.

It is manifest, however, that this cannot be right. The General Development Order, 1950, which requires that condition (i) be imposed makes provision (see article 11) for appeal to the Minister. It would not be sensible to hold that though there is provision for appeal any success that an appeal might seem to yield would all be illusory and in vain. When, in the scheme which is embodied in the statute and authorised by the Development Order, appeals are provided for, it must have been the intention that appeals could be effectively pursued. In *Murray* v. *Inland Revenue Commissioners* [1918] A.C. 541, 553 Lord Dunedin said:

> "It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a judge to declare a statute unworkable."

The same thoughts, I venture to think, guided Lord Simon L.C. when in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014, 1022, he said:

> "... if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

In *Reg.* v. *County of London Justices and London County Council* [1893] 2 Q.B. 476 Lord Esher M.R. referred to the necessity of reading enactments, at p. 488:

> "subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature."

Here, then, we have a statutory instrument requiring that there must be a condition that the approval of the local planning authority shall be required with respect to the reserved matters before any development is commenced. The same statutory instrument provides for an appeal to the Minister. As a matter of common sense and to bring about an effective result I would consider that development could be commenced if in spite of a refusal of approval by the local planning authority the Minister held on appeal that there should not have been a refusal. This is not a matter of filling in gaps in legislative provisions. It is merely a matter of ensuring that each of two provisions is to have rational effect. So in the present case the effect of condition (i) is that no works are to be begun until details have been submitted to and approved by the local planning authority. The effect of adding provision for an appeal is that no works are to be begun until details have been submitted to and approved by

the local planning authority or until it is held on appeal that the details ought to have been approved.

It seems to me that similar reasoning should apply to condition (ii) which merely follows upon and supplements conditions (i) by the addition of a time limit. The approval in condition (ii) is the same approval as is referred to in condition (i). Just as the procedure for appeal must be made to work in the case of condition (i), so must it be made to work in regard to its supplementing condition. By condition (ii) the permission ceases to have effect after the expiration of three years unless within that time approval has been notified by the planning authority to the matters referred to in condition (i). The effect of having provision for appeal is that the permission ceases to have effect after the expiration of three years unless within that time approval has been notified by the local planning authority or unless it is held on appeal that within that time approval should have been notified by the local planning authority to the matters referred to in condition (i).

I consider, therefore, in agreement with the result reached by Lord Denning M.R., that condition (ii) was not void. I need not deal more specifically with the second appeal for it is agreed that it will be resolved in the same way as the first.

In each action the respondents claimed a declaration that the relevant permission subsisted but did so as though condition (ii) had never formed any part of it. It is common ground that on the facts the permissions no longer subsists, if condition (ii) was not void. I turn, therefore, to consider whether, on the basis (contrary to my view) that condition (ii) was void, the permissions nevertheless subsist.

It appears that it was the practice of the local planning authority to attach condition (ii) when outline permissions were granted. It was suggested that this indicated a failure to exercise discretion. Rather, in my view, does it indicate that it was thought to be most desirable to keep control of the timing of development. For the reasons which I have earlier set out it seems to me that development may be impeded and purposeful planning may be thwarted if without restrictions of time there are outstanding permissions which are permissions in principle but which give no prospect of resulting in development. What is potential in regard to some land could defeat what could be practical and urgent in regard to other land.

There might be cases where permission is granted and where some conditions, perhaps unimportant or perhaps incidental, are merely superimposed. In such cases if the conditions are held to be void the permission might be held to endure just as a tree might survive with one or two of its branches pruned or lopped off. It will be otherwise if some condition is seen to be a part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it. In his judgment in *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, 251–252 Willmer L.J. pointed to the contrast between a case in which one or two trivial conditions might be held to be ultra vires (where it would be difficult to justify saying that the whole permission failed) and a case in which conditions are " fundamental to

the whole of the planning permission" in which case the planning permission would fail. In the same case Pearson L.J. (as he then was), differentiated, at p. 261, between conditions which are "essential, or at least important," and those which are "trivial or at least unimportant."

On this issue I am in agreement with the conclusion reached by the learned judge and by Lord Denning M.R. If in 1952 and 1953 the points had occurred to the respondents and if they or anyone else had persuaded the appellants that condition (ii) was invalid all the indications are, not that the appellants would have abandoned a time condition, but that they would have insisted on one while so phrasing or redrafting its wording as to meet the somewhat technical points that have now for so many days claimed the attention of the courts. I agree with the learned judge and with Lord Denning M.R., that the appellants considered that a time condition was of fundamental importance and I agree that if condition (ii) is void it cannot be deleted so as to leave the permission (subject to the other conditions) still subsisting.

For the reasons which I have given I would on both points allow the appeals.

LORD GUEST. My Lords, the principal question in these appeals is whether a condition attached to a grant of outline planning permission providing that the planning permission shall lapse if details of the reserved matters are not approved within three years has been validly imposed by the local planning authority.

"Outline permission" is a creature of the Town and Country Planning General Development Order, 1950, which by article 5 (2) provides as follows:

> "Where an applicant so desires, an application, expressed to be an outline application, may be made under the preceding paragraph for permission for the erection of any buildings subject to the subsequent approval of the authority with respect to any matters relating to the siting, design or external appearance of the buildings, or the means of access thereto, in which case particulars and plans in regard to those matters shall not be required and permission may be granted subject as aforesaid (with or without other conditions) or refused, provided that:—(i) where such permission is granted, it shall be expressed to be granted under this paragraph on an outline application and the approval of the authority shall be required with respect to the matters reserved in the permission before any development is commenced . . ."

"Outline permission" as such finds no place in the Town and Country Planning Act, 1947. It first appears in its statutory form in the Town and Country Planning Act, 1968, section 66 (1), which provides as follows:

> "In this section and section 65 above, 'outline planning permission' means planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Minister of matters (referred to in this section as 'reserved matters') not particularised in the application."

In the *Kingsway* case, which I will take as typical, outline planning permission was granted subject to condition (i) in the following terms: A

> " that details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the local planning authority before any works are begun; "

and condition (ii) in the following terms:

> " the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above; " B

The conditions in the *Kenworthy* case are not in substantially different terms. The reasons given for the imposition of these conditions were as follows:

> " (i) No such details have been submitted; (ii) in order to prevent the accumulation of permissions in respect of which no details have been submitted; . . ." C

The necessity to apply for planning permission for any development (as therein defined) is contained in section 12 of the 1947 Act. Section 14 (1) provides as follows:

> " Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations." D E

Appeals to the Minister against the planning authority's decision are dealt with under section 16. An appeal must be lodged within twenty-eight days of the notification of the planning authority's decision. By section 16 (3) and article 5 (8) of the General Development Order, if the planning authority do not deal with the application for approval within two months of the date of the application, then the applicant can treat it as a refusal and he may appeal to the Minister as under the terms of section 16. F

The respondents, who have no objection to condition (i), maintain that condition (ii), which they categorise as a " time condition," was ultra vires of the planning authority's powers under the Act. It is contended that all time conditions on outline permission, apart from that provided in section 14 (2) (*b*), are invalid. In my view, the condition referred to in section 14 (2) (*b*) is not a time condition at all. It merely requires the removal of the building at the end of a specified period. In any case, section 14 (2) is " without prejudice to the generality " of section 14 (1), which itself is in the widest terms. The argument proceeds on the basis that, once outline planning permission has been granted, only such procedural conditions can be imposed as are authorised by article 5 (2) of the General Development Order; and that it was incompetent by a side wind to effect what was really a revocation order which could only be validly imposed under section 27 of the 1947 Act with the consequent payment of compensation. G H

In my view, these objections are not well founded. The power under section 14 (1) is to impose such conditions as the planning authority think fit. The conditions may be imposed on permission to develop but they need not relate specifically to the manner and time of development. In imposing the conditions the planning authority are obliged to have regard to the development plan so far as material and any other material considerations. So long as the condition relates to the implementation of planning policy then, in my view, the condition is valid.

The power of the planning authority to impose conditions on outline permission is not, in my view, limited to the matters referred to in article 5 (2) of the General Development Order. That article specifically says that the conditions therein provided may be " with or without other conditions."

In my view, it is quite impossible to say that time conditions do not relate to the implementation of planning policy. It may be very necessary for the planning authority, in considering the planning of a whole area, to know what outline permissions are extant and what outline permissions have lapsed. It is not unimportant to note that the provisions of the Planning Acts subsequent to 1947 appear to proceed upon the basis that certain time conditions are valid, for example, the provisions of section 41 (3) of the Caravan Sites and Control of Development Act, 1960, and sections 66–68 of the Town and Country Planning Act, 1968, make it plain that time conditions as to the submission of plans or as to the commencement of development were considered valid. There is little difference in principle between such conditions and a time condition as to the approval of plans.

My view, accordingly, is that the general argument for the respondents that time conditions can only be validly imposed under section 14 (3) of the 1947 Act is unsound and ought to be rejected.

I next proceed to consider whether this particular condition, that the permission shall cease to have effect after the expiry of three years, unless within that time approval has been notified as to the matters reserved under condition (1), is ultra vires. The respondents contend that this condition was ultra vires in that it cuts down the applicant's right of appeal to the Minister against the refusal of the planning authority to give approval to the reserved matters or their failure to deal timeously with these matters. If, of course, the applicant's right of appeal to the Minister was necessarily cut down by the imposition of condition (i) I should have unhesitatingly held it to be ultra vires; but I do not think this is so. Neither condition (i) nor condition (ii) makes any reference to appeal to the Minister, but it must be implicit in condition (i) that the applicant's right of appeal to the Minister is not excluded. To exclude it would be in plain defiance of section 16 of the 1947 Act and article II of the General Development Order. For the same reasons it appears to me that the applicant's right of appeal to the Minister must equally be preserved under condition (ii). The planning authority could never be heard to say that condition (ii) had not been complied with because they had not approved of the plans, although a subsequent appeal to the Minister had been successful and the Minister had held that they ought to have approved. This is on the basis that the appeal is decided by the Minister within the period of three years. So the

only difficulty arises in relation to an appeal which is pending at the end of three years, but has not yet been decided. The applicant is put on notice on the imposition of condition (ii) that permission will expire at the end of three years if the plans are not by then approved subject to his right of appeal to the Minister. If the applicant wished to preserve his right of appeal, he would realise that his appeal must be lodged before the expiration of the three years. I see nothing unreasonable in a condition which requires the applicant to take timeous steps to secure that end. He must, therefore, lodge his plans for approval at least three months before the expiry of the three years—two months to allow the planning authority to deal with them under article 5 (8) of the General Development Order and one month within which to appeal to the Minister under section 16 of the 1947 Act. The applicant could, of course, always obtain extension of these time limits by agreement with the planning authority or the Minister as the case may be. Upon a proper construction of condition (ii) it is implicit, in my view, that the applicant should act reasonably in the matter having regard to the preservation of his rights under the Act. The only problem, therefore, concerns a competent appeal to the Minister which is pending at the expiry of the three years but which has not yet been decided. It is argued that, by reason of the terms of condition (ii) such an appeal would become incompetent after the expiry of three years because the permission would by that time have lapsed and the Minister's jurisdiction would have terminated. I do not agree. I should have thought on principle that an appeal pending against either the imposition of the three-year condition or against a refusal of the planning authority to deal with or approve of the plans would continue to be competent notwithstanding the expiry of the three years. I am confirmed in my view by the authorities cited by Mr. Widdicombe for the appellant, in particular *Davis* v. *Miller* [1956] 1 W.L.R. 1013, 1018–1019, Lord Goddard C.J.

Accordingly, approaching the matter from the point of whether condition (ii) is unreasonable, I have reached the conclusion that it is not. I have already expressed the view that it is not ultra vires of the Act provided the applicant acts reasonably, having regard to the preservation of his rights. There is no necessity for his rights of appeal under the Act to be cut down.

I have had the advantage of reading the speech of my noble and learned friend, Lord Morris of Borth-y-Gest. For the reasons given by him and also for those which I have endeavoured to express, my view is that condition (ii) is valid. I prefer on the whole the judgment of the Master of the Rolls in the Court of Appeal to that of the majority.

Upon the view that the condition is valid it is strictly unnecessary for me to decided whether the condition is separable, but as your Lordships are not in agreement upon the principal question it becomes necessary for me to express my view on this matter.

I have not found it an easy question. It would, in my view, be a very surprising result for the law to reach, that although the planning authority had given outline planning permission which was to expire at the end of three years, unless details were approved by them within that time, yet because a time limit was ultra vires unlimited planning permission remained to be exercised at any time in futuro upon the approval of the reserved matters. This may, of course, be a result of the authorities but I should

not, without considerable hesitation, reach such a conclusion. Planning permission is an animal sui generis not to be compared with licences and similar permissions. It seems to me that planning permission is entire. If a condition as to its grant flies off owing to its invalidity, the whole planning permission must go; and it is impossible to separate the outline permission without the time limit from the grant. The good part is so inextricably mixed up with the bad that the whole must go (see *Pigot's Case* (1614) 11 Co.Rep. 26b, 27b and *McDonald* v. *McDonald* (1875) L.R. 2 H.L. 482, 488–489, Lord Cairns L.C.). I agree with the observations of Hodson L.J. (as he then was) in the *Pyx Granite* case [1958] 1 Q.B. 554, 579. I agree, therefore, for these reasons and also for the reasons given by my noble and learned friend, Lord Morris of Borth-y-Gest, that if the condition is invalid the invalid part cannot be separated from the permission and the whole permission must go.

For these reasons I would allow these appeals.

LORD UPJOHN. My Lords, these conjoined appeals raise questions of some general importance to would-be developers of land who seek planning permission, particularly outline planning permission, and to local planning authorities, as to the validity of conditions as to time within which the permission must be exercised and, if not valid, as to the severability of such conditions from the main permission.

In the case of the first appeal the predecessor in title of the respondents Kingsway Investment Ltd. (Kingsway) applied for outline planning permission to develop 365 acres of the Trosley Towers Estate near Wrotham. Two applications were necessary as the land lay within the area of two rural district councils and consequently planning permission was granted by the Kent County Council (the council) in two documents both dated October 14, 1952, and so far as relevant in identical terms. The grant was in these terms:

> "... the Kent County Council the local planning authority under the Town and Country Planning Act, 1947, has granted permission for development of land ... in accordance with the particulars supplied with your outline application for permission dated March 25, 1952, submitted by you to the Kent County Council ... subject to the conditions specified hereunder: —
>
> (i) That details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the local planning authority before any works are begun; (ii) the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above."

Condition (iii) is irrelevant but, as statutory authority required, the grant of permission stated that the grounds for the imposition of such conditions were (so far as relevant):

> "(i) No such details have been submitted; (ii) In order to prevent the accumulation of permissions in respect of which no details have been submitted."

In the *Kenworthy* case, on November 24, 1952, Mr. Kenworthy applied for outline planning permission to develop one house on an acre of land that he owned at Teston, near Maidstone, and on January 8, 1953, planning permission was granted in accordance with his outline application subject to conditions, the first being in substance the same as condition (i) in the *Kingsway* case but condition 2 was slightly different; it was in these terms:

> "The permission ceasing to have effect after the expiration of 3 years from the date of issue unless within that time approval has been signified to those matters reserved under condition 1 above."

The reasons given for the imposition of these conditions were in substance the same as in the *Kingsway* case.

The subsequent history of the *Kingsway* case was lengthy and complex; many extensions of time for performance of the conditions were agreed but ultimately time expired on September 26, 1962. Later, in May, 1963, planning permission was granted to Croudace Ltd. to develop 165 of the 365 acres, but as the issue between the parties depends solely upon the effect of the planning permission granted on October 14, 1952, I need not pursue these matters further. It is agreed that the *Kenworthy* case stands or falls with the *Kingsway* case.

My Lords, the questions for your Lordships are first, whether condition (ii) is invalid because the permission is expressed to cease *if approval* is not granted within three years and, secondly, if so, is that condition severable from the planning permission so that the permission stands without any time limit for its performance, or does the invalidity of the time limit bring down and invalidate the whole permission?

To answer the first of these questions I must set out the relevant sections of the Town and Country Planning Act, 1947. The fundamental section which empowers a local planning authority to impose conditions is section 14 (1), which is in these terms:

> "Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

Section 16 deals with appeals to the Minister. Subsection (1), so far as relevant, is in these terms:

> "Where application is made under this Part of this Act to a local planning authority for permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by that authority, or is granted by them subject to conditions, then if the applicant is aggrieved by their decision he may by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision, and in the manner prescribed by the development order, appeal to the Minister."

Subsection (3) provides in effect that unless the local planning authority gives notice of their decision on any application for permission within the

period prescribed by the development order or any extended period as may be agreed, then the provisions of subsection (1) shall apply as if the permission had been refused by the local planning authority and notification of their decision had been received by the applicant at the expiration of the prescribed period or any agreed extended period.

Under the powers conferred upon the Minister by the 1947 Act he made a General Development Order (S.I. 1950, No. 728) ["the Development Order"] the validity of which is not in issue.

The 1947 Act nowhere mentioned an "outline" application and the right to make such an application was granted by article 5 (2) of the Development Order, which provided that such an application might be granted but subject, among other conditions, that

> "(i) where such permission is granted, it shall be expressed to be granted under this paragraph on an outline application and the approval of the authority shall be required with respect to the matters reserved in the permission before any development is commenced."

Article 5 (8) provided that for the relevant purpose the local planning authority must give notice of their decision within two months from the date of receipt of the application or such extended period as might be agreed, so that for the purposes of section 16 (3) of the 1947 Act the local authority was deemed to have refused permission if it did not give notice within that period, and then by article 11 the applicant is entitled to appeal to the Minister within one month thereafter.

The principles upon which the validity of a condition attached to a planning permission are to be tested is not in doubt. As Lord Denning said in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636, 679, planning conditions are on much the same footing as by-laws to which they are so closely akin.

Your Lordships were naturally referred to *Kruse* v. *Johnson* [1898] 2 Q.B. 91 and to the well-known judgment of Lord Russell C.J. at p. 99. I do not cite from it, but note in passing that in his view by-laws should be benevolently interpreted, and I accept that conditions annexed to a planning permission should be interpreted in the same spirit. Furthermore, it is not in doubt that a grant of outline planning permission is a grant of permission for the relevant purposes of the Act and the Development Order.

My Lords, these principles have been discussed in subsequent authorities, notably by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 and in a number of opinions in this House in *Fawcett's* case [1961] A.C. 636.

These principles were felicitously summarised in that case by Lord Jenkins, at p. 684:

> "The power to impose conditions though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably

capable of being regarded as relevant, to the implementation of planning policy." A

Lord Jenkins continued on p. 685:

> "This does not mean that the wisdom or merits of a condition imposed in any given case can be made the subject of an appeal to the court at the instance of a person objecting to the condition."

He then quoted from the headnote to the *Wednesbury Corporation* case [1948] 1 K.B. 223, 224: B

> "The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power."

The first question is whether a time condition can validly be annexed to a grant of outline planning permission and, in agreement with all of your Lordships, I am of opinion that it can. It was so held by Harman J. in *Marks & Spencer Ltd.* v. *London County Council* [1951] 2 T.L.R. 1139, who was upheld on this point unanimously in the Court of Appeal [1952] Ch. 549 by Evershed M.R., Jenkins and Morris L.JJ. C

The reason is twofold: in the first place, under section 6 of the 1947 Act it is the duty of the local planning authority after the preparation of its first development plan, every five years to carry out a fresh survey of that area and to submit to the Minister a report of the survey together with proposals for any alterations or additions which appear to them to be required. Clearly it would make such subsequent surveys an exercise of doubtful utility if some part of the relevant area is subject to outline planning permission which may or may not be exercised in the foreseeable future; in this connection it is, I think, material to note that the practice has grown up whereby in many cases an outline application is made and granted although the applicant is only intending to enhance the value of his land upon a sale in the future and is not himself proposing to carry out the development. But there is a second reason, that in some cases, at all events, the annexure of a time condition is made necessary by reason of the fact that in a particular area only a limited development ought in the interests of planning policy to be permitted and if a developer does not exercise his permission, then it should cease to be effective and be given to another. I regret that I am unable to agree with Winn L.J. who took the view that a time condition can only be validly imposed in cases falling within section 14 (2) (*b*) of the 1947 Act. D E F

But what is a valid time condition must depend upon the circumstances of each particular case. Thus, there can be no objection to the imposition of a reasonable time limit for the *submission* of detailed plans after a grant of outline planning permission, for compliance with that depends solely upon the action of the applicant. What is reasonable must depend, among other things, on the area and amount of development, its importance in relation to the locality, and so on. Upon that matter the test is that laid down in the *Wednesbury* case [1948] 1 K.B. 223: was the time limited for submission of plans so unreasonably short that no reasonable authority could properly have imposed such a short time? In this appeal your Lordships are not concerned with that, for no one has suggested that even in G H

relation to the Kingsway application three years is too short. Further, no one doubts that condition (i) is valid; it is imposed upon grantor and grantee of the permission by the terms of article 5 (2) (i) of the Development Order. In this case the question is whether the council have exceeded their powers in this sense that by condition (ii) they have purported to limit the statutory rights conferred by the 1947 Act and the Development Order upon the applicant in relation to his rights of appeal to the Minister. If so, that condition is necessarily invalid and ultra vires the council, for neither the Act nor the Development Order conferred any power upon a planning authority to limit in any way the rights of appeal to the Minister; this is not a matter of reasonableness but of excess of jurisdiction.

Condition (ii) in the *Kingsway* case as a matter of construction plainly limits the effectiveness of the permission to the submission (these words must plainly be implied) and approval of the details referred to in condition (i). I incline to the view that the approval must in the context be the approval of the local planning authority. Upon that footing it seems to me clear that the right of the applicant to appeal is plainly limited, for construing the condition literally there is no obligation upon the applicant to submit his plans until just before the expiry of the three years and then the refusal of the council actual or deemed (by virtue of section 16 (3)) might not be given within three years from the application and his right of appeal might not arise until after the expiry of that period when by its terms the permission has come to an end, so that there is nothing against which he can appeal.

But it is argued that interpreting the terms of the permission benevolently, as I agree they must be, the applicant is put on notice that he must submit his details under condition (i) three months or at least two months before the expiry of the three years so that he can appeal from the council's actual or deemed refusal before the expiry of the three years. Then, if the applicant does appeal to the Minister within the three-year period but the Minister does not make his decision within that period, is his right of appeal preserved beyond that period? This is, I think, a difficult question which was not very fully argued before your Lordships though it was suggested that *Davis* v. *Miller* [1956] 1 W.L.R. 1013 was some authority in favour of the view that it would be, but the point was not expressly taken there. If not so preserved that seems to me fatal to the validity of the clause for, in my opinion, it is no answer as was contended before your Lordships that a Minister acting reasonably must as a matter of course extend the right of the applicant to appeal out of the time limited by condition (ii); for that converts an absolute right of appeal into a right of appeal at the discretion of the Minister and must as a matter of law, in my opinion, be fatal to validity.

But assuming that the right of appeal, once notice of appeal has been given within the three years, is thereby preserved that does not, in my opinion, save the validity of the clause. True the applicant ought to submit his detailed plans well before the expiry of the three years, but there is no obligation upon him to do so by the terms of the condition; subsequent events after the grant of outline permission may, without fault upon the part of the applicant, make it difficult to put them in in good time and then approval within the specified time depends upon the good offices of the planning

authority; again, the fact that they may invite agreement of the applicant to an extension of time cannot affect his legal rights. In my opinion, a clause which makes the grant of planning permission cease to have effect upon an act which may be outside the control of the applicant is bad for it may affect his rights of appeal and makes them dependent upon the acts of the planning authority. I agree in this respect with the judgment of Davies L.J. in the court below. I note, too, that in his circular dated February 6, 1968, the Minister in effect took the same view.

It was suggested that some words could be read in by way of necessary implication to give business efficacy to the condition, but the words suggested do not seem to me sufficient for the purpose and I think the words in the condition must be read in their ordinary meaning. Alternatively, it was said, if submission of plans be implied in condition (ii), then "the approval" could be struck out, but that does complete violence to the actual words used in the condition.

My Lords, as I have said, the *Kenworthy* case has throughout been treated as standing or falling with the *Kingsway* case but it is in fact an a fortiori case, for the approval referred to in condition (ii) there cannot, as a matter of construction, be read as the approval of the local planning authority but must necessarily include the approval of the Minister where an appeal is made to him and, as he may take as long as he pleases to determine any appeal, so the condition is therefore quite plainly bad.

In my opinion, if a local planning authority is not content with the imposition of a time limit as to the submission of plans but desires to refer to approval of plans, then the condition will require substantial redrafting so as to make the right of appeal depend in no wise upon any act to be performed by the planning authority within any given time.

For these reasons I am of opinion condition (ii) is ultra vires the local planning authority as it may restrict the statutory rights of appeal conferred upon the applicant. So I must turn to the question of severability of the offending condition from the rest of the grant of permission.

This is a very difficult question and perhaps lacks any substantial body of settled judicial authority. The only contract cases where this question has been fully developed are contracts in restraint of trade and afford no guidance for they are sui generis.

The by-law cases are helpful for, as I have mentioned earlier, they are closely analogous to conditions annexed to planning permission and so, too, are the authorities on conditions imposed by the many statutory bodies.

I find the observations of Devlin J. in *Potato Marketing Board* v. *Mericks* [1958] 2 Q.B. 316 helpful though of the most general character, and the facts of the case were very different. The marketing board sent out a questionnaire demanding information on a number of points to which the defendant objected and the judge held that his objection was in law good in part. The question was whether these demands were severable. Devlin J. said, at p. 333:

> "I must, therefore, find the right answer as a matter of principle, and I think that the principle to be applied is that which is applied to all classes of documents which are partly good and partly bad because, for example, they are in part illegal or ultra vires. In all these cases,

A the question to be asked is whether the bad part can be effectively severed. . . ."

By "effectively severed" I think that the learned judge meant effectively severed without making nonsense of that which remained. Certainly this has been the interpretation placed upon the principle in the by-law cases. See, for example, *Reg.* v. *Lundie* (1862) 31 L.J.M.C. 157, 160. Cockburn C.J. said:

B

> "The doctrine is established that if a by-law can be divided, it may be valid as to so much as is good. Several cases have been brought to our notice, but each by-law must stand or fall upon its own merits."

Other cases show that where possible the invalid conditions will be rejected leaving that which is valid standing and effective. See, by way C of example, *Rossi* v. *Edinburgh Corporation* [1905] A.C. 21; *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill* [1915] 2 K.B. 49 (overruled on another point in the *Wednesbury* case [1948] 1 K.B. 223) and *Ellis* v. *Dubowski* [1921] 3 K.B. 621.

There have been recent cases under the 1947 Act where the invalid condition was held to bring down the whole permission. In the first—*Pyx Granite Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. D 554, 578–579 Hodson L.J. said it was "impossible to mutilate the Minister's decision by removing one or more of the conditions." Another example was *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 where, applying the observations of Hodson L.J. in the *Pyx Granite* case [1958] 1 Q.B. 554, the Court of Appeal held that the invalid condition brought down the whole permission. Pearson L.J., at p. 261, thought that only unimportant or trivial conditions could be rejected, leav- E ing the remainder standing.

In these two cases (clearly correctly decided on this point), however, it is of cardinal importance to note that the invalid conditions went to the root of the planning permission itself and severely restricted the permission applied for, and the observations of Hodson and Pearson L.JJ. respectively must be read in that light.

F But a condition as to time does not go to the root of the permission itself; it is purely collateral and could be altered without affecting the actual grant of the permission.

In complete contrast to the *Pyx Granite* and *Shoreham* cases, the condition as to time in this case formed no component part of the permission itself.

G Lord Denning M.R. and Lyell J. really tested this question of severance by posing the question would the council have granted the outline permission in perpetuity, and the plain answer to that is of course not. With all respect, that seems to me to be the wrong question to pose for the purpose of this test. That is only stating a possible effect of invalidity; it certainly cannot be a test of severability because that prejudges the matter. The correct question to the council is do you realise that the time condition as H drawn is invalid, to which the answer would be: that is my mistake, I must alter it as I only want to impose a reasonable limitation as to time for the purpose of my planning policy.

Unfortunately the courts have no power to substitute a reasonable time limit.

By way of contrast, in the *Pyx Granite* and *Shoreham* cases I would suppose that the proper question is, do you realise that those conditions are invalid, to which the answer would have been: but they are absolutely essential restrictions upon my grant of permission, and if invalid the applicant cannot have any permission to do what he wants.

Counsel for the respondents adopted as part of his argument the powerful submissions of Mr. Ramsay Willis in the *Pyx Granite* case when it went to your Lordships' House [1960] A.C. 260, 280–281 against a holding of total invalidity. It was, however, unnecessary for this House to rule upon this point.

It would, in my opinion, be most unjust, unless there is some compelling principle of law which makes it necessary to impose such injustice, to reach the conclusion that because the planning authority seeks to impose upon a planning permission which is otherwise entirely good an invalid time limit that the whole permission should fail. The applicant, who may have acted upon the permission, suddenly finds through no fault of his own that, after all, he has not and never has had any valid permission at all. Let me say that in putting it in that way I am not introducing any concept of estoppel nor any doctrine of contra proferentes—see the observations of Singleton L.J. in *Crisp from the Fens Ltd.* v. *Rutland County Council* (1950) 114 J.P. 105. I am only pointing out the injustice which is inflicted upon one of Her Majesty's subjects if the matter is merely seen through the spectacles of the local planning authority.

In my opinion, condition (ii) can readily be severed without doing any violence to the language that remains and without affecting in any way the substance of the grant of permission itself so that the grants of permissions were valid, the respective conditions (ii) were invalid but the original grants of permission remain valid and effectual without those time conditions.

For these reasons I would dismiss these conjoined appeals.

LORD DONOVAN. My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend, Lord Morris of Borth-y-Gest. I entirely agree with it and for the same reasons would allow the appeals.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.; Barlow, Lyde & Gilbert for Girling, Wilson & Harvie, Margate; Argles & Court.*

F. C.