THAMES HELIPORTS PLC v. LONDON BOROUGH OF TOWER HAMLETS

COURT OF APPEAL (Beldam, Ward and Schiemann LL.J.): November 28, 1996:

Town and country planning—whether change of use—declarations sought—whether floating heliport "development"—definition of "land"—banks and bed of river only—test whether anything changed on the land which is capable of being material from an environmental point of view—whether heliport had permitted development rights for temporary use—correct planning unit for 22 sites—declarations inappropriate—primarily for the planning authorities to determine

Thames Heliports Plc (TH) proposed to establish a heliport facility on a vessel which would navigate up and down the tidal River Thames, an which would stop from time to time at one of 22 sites to enable helicopters to land and take off (the proposal). At such times, it would not be moored or attached to the river bed or its banks. TH sought declarations from the court that the proposal did not constitute any material change in the use of "land", and so was not "development" which required planning permission pursuant to sections 55 and 57 of the Town and Country Planning Act 1990 (the TCPA 1990). Alternatively, if permission was required, TH argued that there should be a declaration that the proposal would have planning permission granted for it by the Town and Country Planning (General Permitted Development) Order 1995 (the GDO 1995). This permitted, *inter alia*, land to be used temporarily for any purpose for not more than 28 days in the calendar year. TH argued that each of the 22 sites must be looked at in turn to see whether permission had been given for the purposes of a heliport for the 28 days.

The High Court declared that the proposal would not constitute operational development of land, but would constitute a change of use of land for the purposes of section 55 of the TCPA 1990. The Court further decided that it would not be correct to take each site of activity separately. All the activities were linked and the whole area including the banks of the river would be involved. TH appealed.

Held, allowing the appeal in part, that the proposal *could* constitute a change of use of land for the purposes of section 55 of the TCPA 1990, and a declaration was made to that effect. It was not right for the court to hold as a matter of law that a material change of use *would* occur, as this was a value judgment entrusted to the planning authorities and not to the court. It is clear planning law that one can make a change in the use of the land by carrying on activities on that land although nothing physical is done to the land itself. One must ask has anything changed on the land which is capable of being material from an environmental point of view. "Land" was defined in the TCPA 1990 as any corporeal hereditament, which in the present context meant the bed and banks of the river, but not the flowing water. It was an accurate analysis of the proposal to say that river bed was being used for the bearing of water in which boats navigate and that the proposal might not significantly affect this, but it was not an adequate analysis for the purposes of planning law. The Town and Country Planning legislation is designed to regulate questions of the human environment and not questions of physics. One must look at the question from the point of view of human beings likely to be affected by the change which would occur. The carrying out of the proposal was manifestly capable of being material in an environmental context, whether one looked at the sites individually or in their totality. It was not necessary to express a view whether operational development would be involved.

The judge had been wrong to answer the questions on the boundaries of land to which the temporary permission granted by the GDO 1995 attached, and no declarations should be made in relation to them. It was not for the court to make

declarations in relation to hypothetical questions, and TH had no intention of using the whole of the tidal Thames, or the 22 sites, for only 28 days in total. As for any particular location, the court was not persuaded that, as a matter of law, a planning authority could not validly serve an enforcement notice in relation to land which was larger than that subjacent to a vessel. The courts have repeatedly affirmed that the determination of the boundaries of the planning unit is initially for the planning authority, and is essentially a matter of fact and degree. For temporary uses, the decision taker should define the area of the land with reference to the purpose of the use. It was inappropriate to use the mechanism of securing a declaration from the court so as to inhibit the decision takers from forming their own views on this.

Legislation construed:

The Town and Country Planning Act 1990 (c. 8), sections 55, 57, 336(1); the Town and Country Planning (General Permitted Development) Order 1995 (S.I. 1995 No. 418), Schedule 2, part 4 (Temporary buildings and uses). The relevant parts of the legislation are set out in the judgment of Schiemann L.J.

Cases cited:

(1) *Attorney-General, ex rel. Yorkshire Derwent Trust Ltd v. Brotherton* [1992] 1 A.C. 425; [1991] 3 W.L.R. 1126; [1992] 1 All E.R. 230; (1992) 136 S.J.(L.B.) 11; 90 L.G.R. 15; (1991) 63 P. & C.R. 411; [1991] EGCS 129; (1992) 156 L.G.Rev. 406; [1992] *Gazette*, 15 January, 31; [1991] NPC 130; *The Times*, December 10, 1991; *Financial Times*, December 10, 1991; *The Independent*, January 16, 1992, H.L.; reversing [1991] Ch. 185; [1991] 2 W.L.R. 1; (1990) 61 P. & C.R. 198; (1990) 134 S.J. 1367; *The Independent*, August 8, 1990, C.A.; reversing [1990] Ch. 136; [1989] 2 W.L.R. 938; (1989) 133 S.J. 484; [1989] 2 All E.R. 423.

(2) *Bernstein v. Skyviews & General Ltd* [1978] 1 Q.B. 479; (1977) 121 S.J. 157; [1977] 2 All E.R. 902; (1977) 241 E.G. 917; *sub nom. Bernstein of Leigh (Baron) v. Skyviews & General* [1977] 3 W.L.R. 136.

(3) *Blundell v. Catterall* (1821) 5 B. & A. 268.

(4) *Burdle v. Secretary of State for the Environment* [1972] 1 W.L.R. 1207; 116 S.J. 507; [1972] 3 All E.R. 240; (1972) 24 P. & C.R. 174; 70 L.G.R. 511, D.C.

(5) *The Calgarth* [1927] P. 93.

(6) *Church Commissioners for England v. Secretary of State for the Environment* (1995) 71 P. & C.R. 73.

(7) *Duffy v. Secretary of State for the Environment* (1981) 259 E.G. 1081; (1981) J.P.L. 811.

(8) *Embery v. Owen* [1851] 6 Ex. 369.

(9) *Fuller v. Secretary of State for the Environment* [1988] 1 E.G. 55; [1988] 1 P.L.R. 1; (1988) 56 P. & C.R. 84, C.A.; affirming (1987) 283 E.G. 847; [1987] J.P.L. 854.

(10) *Johnston v. Secretary of State for the Environment* (1974) 118 S.J. 717; (1974) 28 P. & C.R. 424; 73 L.G.R. 22, D.C.

(11) *Kwik Save Discount Group Ltd v. Secretary of State for Wales* (1981) 42 P. & C.R. 166; (1980) 79 L.G.R. 310; (1980) 257 E.G. 169; [1981] J.P.L. 198, C.A.; affirming (1978) 77 L.G.R. 217; (1978) 37 P. & C.R. 170; [1978] 247 E.G. 562, D.C.

(12) *Lyon v. The Fishmongers Company and the Conservators of the River Thames* [1876] 1 App. Cas. 662.

(13) *Parkes v. Secretary of State for the Environment* [1978] 1 W.L.R. 1308; (1978) 122 S.J. 349; [1979] 1 All E.R. 211; (1978) 36 P. & C.R. 387; (1978) 77 L.G.R. 39; (1978) E.G. 595; [1979] 1 J.P.L. 33, C.A.; reversing [1978] J.P.L. 316.

(14) *G. Percy Trentham Ltd v. Gloucestershire County Council* [1966] 1 W.L.R. 506; 130 J.P. 179; 110 S.J. 52; [1966] 1 All E.R. 701; 18 P. & C.R. 225; 64 L.G.R. 134; [30 Conv. 330], C.A.; affirming (1965) 195 E.G. 211; [1965] C.L.Y. 3806, D.C.

(15) *Pyx Granite & Co. Ltd v. Ministry of Housing and Local Government* [1960] A.C. 260; [1959] 3 W.L.R. 346; 123 J.P. 429; 103 S.J. 633; [1959] 3 All E.R. 1; 10 P. & C.R. 319; 58 L.G.R. 1; [[1959] C.L.J. 143; 75 L.Q.R. 455; 22 M.L.R. 664; 29 Conv. 486; [1960] J.P.L. 400; [1964] J.P.L. 26], H.L.; reversing [1958] 1 Q.B. 554; [1958] 2 W.L.R.

371; 122 J.P. 182; 102 S.J. 175; [1958] 1 All E.R. 625; 56 L.G.R. 171; 9 P. & C.R. 204; [74 L.Q.R. 187; 75 L.Q.R. 36; 21 M.L.R. 404; 22 Conv. 313; [1958] J.P.L. 402]; [1958] C.L.Y. 820, 2658, 3343, C.A.

(16) *Rawlins v. Secretary of State for the Environment* (1989) 60 P. & C.R. 413; [1990] 1 P.L.R. 110; [1990] J.P.L. 326; (1990) 154 L.G. Rev. 993, C.A.; affirming [1989] J.P.L. 439, D.C.

Appeal by Thames Heliports Plc against the decision of Sir Haydn Tudor Evans, sitting in the Queen's Bench Division, on December 21, 1994, declaring that planning permission was required for their proposed use of a vessel for a heliport on various sites on the tidal section of the River Thames. The respondents, the London Borough of Tower Hamlets, represented the eleven local planning authorities who would be affected. The facts are set out in the judgment of Schiemann L.J.

Michael Fitzgerald, Q.C. and *Robert Fookes* for the appellants.
David Widdicombe, Q.C. and *Michael Druce* for the respondents.

SCHIEMANN L.J.

Introduction

This case raises several points of general interest concerning the impact of the Town and Country Planning legislation on the Thames and other rivers.

It concerns a proposal (the proposal) to establish a heliport facility on a vessel which will navigate up and down a stretch of some 10 miles of the Thames stopping from time to time in mid river at one or other of some 22 sites between Chelsea Harbour and Greenwich to enable helicopters to land and then take off from the vessel. A maximum of 22,000 helicopter movements per year is envisaged. Clearly, all this may have a significant environmental impact. A planning application for a heliport at a single land site by the Thames at Cannon Street has already been turned down on its merits by the Secretary of State for the Environment (the Secretary of State). Some would claim an environmental advantage of the proposal over that which has been turned down is that the inevitable disturbance created by helicopters will be spread more thinly over a wider area rather than being concentrated on one site. Others would say that it is better to concentrate all the disadvantages in one place rather than encourage helicopter landings all along the Thames. That value judgment is not for this court which has not been given jurisdiction by Parliament to make rulings on planning merits.

The case comes before the court because the parties have sought declarations of law from the court as to the impact of the Town and Country Planning legislation on the proposal. Mr Fitzgerald, Q.C. on behalf of the applicants submits first that the legislation has no impact whatever on the proposal. Alternatively he submits that if the legislation does impact on the proposal then its effect is to grant planning permission for it without further ado. Mr Widdicombe, Q.C. (who appears for the London Borough of Tower Hamlets which has been chosen by the 11 planning authorities potentially affected by the proposal as the lead authority for its consideration) invites the court to reject each of these submissions. It would manifestly be convenient for Mr Fitzgerald's clients simply to go ahead without asking for permission secure in the knowledge that no enforcement proceedings can be taken. These proceeding are designed to give them that security.

The main legal questions of general import which we were invited to address were:

1. How, if at all, does the legislation impact on activities carried out on boats stationary in midsteam
2. How does the legislation impact on an activity carried out on parts of a large area (the sites) in circumstances where
(a) those sites are separated from each other by other parts where the activity primarily under consideration (the primary activity) is not carried on; and
(b) the primary activity is not carried on at more than one site at a time.

There is a subsidiary matter which pervades this case, namely that many questions in planning law depend on an evaluation of facts which the legislature has entrusted initially and primarily to the planning authorities including the Secretary of State. In general in this type of case the courts' jurisdiction is invoked *after* the decision has been made by a planning authority when it is sought to control the legality of that decision. While the jurisdiction of the courts to make anticipatory declarations in planning matters *before* any evaluation has been done by the planning authorities is undoubted,[1] the court will be extremely cautious in making pronouncements at such an early stage. In particular the court will not make judgments in relation to questions of mixed fact and law which are primarily entrusted to planning authorities.

It has to be born in mind that Parliament has provided in section 192 of the Town and Country Planning Act 1990 a mechanism for the citizen who wishes to discover whether a proposed use of buildings or other land would be lawful under the planning legislation. In general it will be appropriate to use that method rather than come to the courts for the answer. However, Mr Fitzgerald, Q.C. and Mr Widdicombe, Q.C. submit that the court can by its judgment at this stage help the planning process function more smoothly and efficiently. As will appear, I consider that up to a point it is indeed convenient for the court to make declarations at this stage. I record in passing that the Secretary of State has been asked by the parties whether he wishes to be joined in these proceedings but has taken the view that this would be inappropriate.

There are broadly two matters of concern to the parties: is planning permission required for the proposal and, if so, is it granted by the General Development Order 1995? I look at these matters in turn.

Is planning permission required?

Mr Fitzgerald, Q.C. puts his case thus:

1. It is common ground that the proposal can only constitute development if it involves a material change in the use of land.[2]
[It is common ground between the parties that the proposal does not involve the carrying out of building, engineering, mining or other operations in, on, over or under land.[3]]

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[1] *Pyx Granite & Co. Ltd v. Ministry of Housing and Local Government* [1960] A.C. 260.

[2] That is clear from the Town and Country Planning Act 1990. Section 57(1) provides that:
Planning permission is required for the carrying out of any development of land.
Section 55(1) provides that:
Development means the carrying out of building, enginerring, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

[3] See *Parkes v. S.S. for the Environment* [1978] 1 W.L.R. 1308.

2. Land is defined in the 1990 Act by *section 336(1)*

> In this Act, except in so far as the context otherwise requires ... "land" means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land.

Flowing Water is not a corporeal hereditament or part of a corporeal hereditament. Therefore we are here concerned with the bed and banks of the river solely.

3. The first task therefore is to identify the land in relation to which the question is asked. In the context of the present case that involves identifying its situation vertically and horizontally.

(a) The vertical part of this exercise involves considering such questions as "is land merely the soil constituting river bed and banks or does it include the water and air above the soil?".

(b) Turning to the question "what are the horizontal boundaries of the site under consideration?" one must consider separately each bit of the bed of the river over which it is anticipated that the vessel would be stationed.

4. The second task is to see whether it is proposed to change the use of the land as identified. As to this, he submitted that the existing use of the river bed was to support and contain water for navigation that the carrying out of the proposal would not alter that use and that therefore no change of use was involved in the proposal.

5. It is only if a change of use of that identified land is proposed that one might have to go on to consider a third task, namely, to determine whether or not that change of use is material. He accepted that, if the court got as far as having to consider the third task, it should proceed on the basis that a change of use *could* be material. However the court should not attempt to decide whether the proposed change of use *would* be material.

The following are my views under each of those heads.

1. I accept for present purposes that the proposal can only constitute development if it involves a material change in the use of land.

2. and 3. It is common ground and I accept for present purposes that whichever segment of the bed of the river one focuses on is a corporeal hereditament and that flowing water is not a corporeal hereditament. Mr Widdicombe submitted that flowing water in circumstances such as the present is part of a hereditament. He based that submission cases[4] dealing with the *maxim cuius est solum eius est usque ad coelum et ad inferos* and, no doubt feeling forensically naked without a decent covering of case law, cited cases referring to the rights at common law of navigation and of riparian owners.[5] For my part, I do not regard any of these cases as particularly helpful in coming to a decision as to what constitutes land for the purposes of the Town and Country Planning Act 1990. So far as the vertical identification of the land is concerned I am prepared to come to a decision in this matter on the basis most favourable to Mr Fitzgerald's submissions namely that for

[4] Such as *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] 1 Q.B. 479 and the cases cited there.

[5] Such as *Lyon v. The Fishmongers Company and the Conservators of the River Thames* [1876] 1 App.Cas. 662 and the cases cited there.

that purpose in the context of the present case land means the bed and banks of the river.

So far as the horizontal identification of the land is concerned I do not find it necessary at this point in the argument to come to a decision. That is because, for reasons I shall give later this judgment, I consider the establishment of the boundaries is primarily a matter for the planning authorities and that the court's decision should be the same whatever the horizontal boundaries.

4. and 5. I am unable to accept Mr Fitzgerald's two stage approach to the question whether there would be a material change in the use of land if the proposal went ahead. Planning law is concerned, in this context, with the effect on others of the making of material changes in the use of land. In the context of the problems facing the appellants and the planning authorities I do not find the separation of the questions—"does the proposal involve the making of a change in the use of land" and "does the proposal involve the making of a material change in the use of land"—at all helpful in focusing the eye on that which matters from an environmental point of view.

The materiality of something will depend on the context in which it is being examined. One must always ask: material for what purposes? If I go shopping and put a pound of butter in my basket but just outside the shop someone swaps the pound of butter for a pound of margarine there is no material change so far as the weight of the basket which I have to carry on the journey home is concerned but there is a material change when it comes to tomorrow's breakfast.

It is clear planning law that one can make a material change in the use of land by carrying on activities on that land although nothing physical is done to the land itself. Suppose I lay protective matting over the whole of a field. That matting would not be part of the corporeal hereditament. I then introduce a market use with the benefit of planning permission. Then I cease the market use and decide to change to use by massed brass bands. However, I still keep the same protective matting lying on the land. From the point of view of the Borough Engineer that might not be a material change of use of the land. No additional stability or safety problems are involved. For him it is quite adequate to say that before and after there were people tramping on matting laid on earth. He could say and say correctly from his standpoint that there had been no material change of use in the land.

However, while indeed it would be an *accurate* analysis of the situation to say that both before and after the concerts the land has been used for the purpose of walking standing and sitting by human beings, such an analysis is in my judgment not *adequate* for the purposes of planning law. For those purposes one must go on to ask: has anything changed on the land which is capable of being material from an environmental point of view? Once one asks that question, one finds that the sound emanating from the land by reason of the presence of the massed colliery bands is potentially highly material as seen through the eyes of the patients in the neighbouring hospital. They might well say that I have made a material change in the use of my land. They would regard the presence of the protective matting as being, like the line in *The Importance of Being Ernest*, immaterial.

Coming closer to the present case, I accept that it is an accurate analysis of the situation to say that both before and after the arrival of the vessel the land underneath it is used for bearing the weight of and confining the bounds of liquid and whatsoever solids are suspended in that liquid. However, I do

not consider that this analysis provides the answer to what I regard as the relevant question, namely: does the propsal involve activities which may involve making a material change in the use of the river bed and banks. Much may depend on the nature of the solids which are suspended. If a flowing river is damned up and raw sewage flows where previously clear water used to flow that would in my judgment be capable of constituting a material change of use of land.

I accept that it is an accurate analysis of the situation to say that the river bed is currently being used for bearing the weight of water in which oats navigate and that the implementation of the proposal may not significantly affect the truth of that assertion. But again I do not consider that it provides the answer to what I consider is the relevant question, namely, does the proposal involve activities which may involve making a material change in the use of the river bed and banks.

It seems to me that it is an equally correct analysis to say that whereas now the land is used for bearing the weight of water and ships which *do not* attract helicpoter traffic, the proposal is to use the land for bearing the weight of water and ships which *do* attract helicopter traffic.

The question which faces the court is: which of these analyses is appropriate in the context of the Town and Country Planning legislation? In my judgment it is the last because the legislation is designed to regulate questions of the human environment and not questions of physics. One must look at the question "has someone made a material change in the use of land?" from the point of view of human beings likely to be affected by the change which has occurred. The worm's eye view adopted by Mr Fitzgerald is accurate but not taken from the appropriate viewpoint for the purposes of the planning legislation.

It is important that the court and the planning authorities remember the words of Lord Parker C.J. recorded in *G. Percy Trentham Ltd v. Gloucestershire C.C.*[6]:

> ... Town and Country Planning is a comprehensive operation and ... its object, namely, overall control of development, would be seriously impeded if a narrow view were to be taken as to the relevant considerations.

To hold, as Mr Fitzgerald submits we should hold, that the legislation provides one answer if the vessel is tethered to the river bed or banks but another answer if the vessel is kept stationary by the use of its engines alone would be to take far too narrow a view and produce a result against which common sense rebels.

In the present case, the carrying out of the proposal is manifestly capable of being material in an environmental context. That is so whether one is looking at the sites individually or in their totality.

The first declaration sought by the plaintiffs in their originating summons was:

> Whether helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames ... constitutes the operational development of or change of use of land for the purposes of sections 55, 57 and 336 of the Town and Country Planning Act 1990.

[6] [1966] 1 W.L.R. 506 at 509.

The learned Judge answered that question as follows:

> Helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames (as described in the plaintiff's first affidavit and exhibit MBF2) would not constitute the operational development of land but would constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990.

For my part, I consider that the judge went too far although he is not to be blamed for doing so since he was acting at the express request of the parties in taking upon himself the ultimate decision on the merits. He declared not merely that the proposed activities *could* amount to making a material change of use of land but that they *would*. Mr Widdicombe conceded that on the minimal information before the court it was conceivable that one or more of the sites might be in such an environment that it would be legally possible to take the view that the landing of helicopters on a vessel stationed in that part of the river would not amount to the making of a material change of use.

It would be conclusive of the dispute between the parties if we rule that the landing could *not* constitute development of land and therefore it was in my judgment legitimate to come to the court at this stage in the hope of such a declaration. If such a holding were correct then section 192 would have no application to the plaintiffs proposed activities and would not be available to them nor would it be appropriate to apply for planning permission. However I understand that my Lords agree with me that we should not give such a negative ruling. In those circumstances there is room for argument as to whether it is appropriate to make any declaration at all since the court's judgment would seem adequate. We have heard no argument on operational development and it is not necessasry for our decision that we should express a view on the correctness of that part of the judge's declaration.

For my part I would confine any declaration that we make to the following:

> Helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames (as described in the plaintiff's first affidavit and exhibit MBF2) could constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990.

The second question posed in the Summons for the judge was:

> Whether the operation of a heliport on the tidal River Thames as posed in the plaintiff's draft agreement ... constitutes development within the meaning of section 55 of the Town and Country Planning Act 1990 namely a material change of use of land; or, alternatively is capable of constituting a material change of use.

To this the learned Judge answered:

> The operation of a heliport on the tidal River Thames as proposed in the plaintiff's draft agreement ... would constitute development within the meaning of section 55 of the Town and Country Planning Act 1990, namely a material change of use of land.

Here the judge was considering not the individual sites but the 10 mile stretch of the Thames covered by the draft agreement. Mr Widdicombe submitted that it was plain not merely that development *could* be involved but that it *would* be. I do not consider that it would be right for this court to

hold as a matter of law that a material change of use would occur. That is a value judgment entrusted to the planning authorities and not to this court. If my Lords agree that a declaration in relation to the first question be made in the terms proposed earlier in this judgment there appears to me to be no necessity for any declaration at all in relation to the second question.

Has planning permission been granted?

For the purposes of this part of the case, Mr Fitzgerald assumes against himself that the court has decided, as in the event it has, that the proposal could involve development. He submits that, absent a revocation (which would attract compensation), planning permission is granted by the *Town and Country Planning (General Permitted Development) Order 1995* (the GDO).[7]

The Act provides in section 58(1)(a) and section 59 that planning permission may be granted by a development order.[8] The GDO by Article 3(1) grants planning permission:

> For the classes of development described as permitted development in Schedule 2.

That schedule covers a considerable number of matters which might amount to development but which were regarded by Parliament as not being of sufficient significance for the environment to warrant requiring the developer to ask for planning permission and thus put in motion the whole lengthy and expensive planning process. In some cases the lack of significance is the result of the physical nature of what is intended in other cases it is the result of the lack of duration of what is intended. Thus Part 4 of Schedule 2 describes under class B as permitted development:

> The use of any land for any purpose for not more than 28 days in total in any calendar year ...

The vessel has a length of 47.2 metres and a width of 13.1 metres. If a declaration were made that permission has been granted by the GDO for helicopters landing or taking off from a vessel wherever on the Thames that vessel happened to be then a very considerable number of potential sites would be involved. Even restricting oneself to the proposal, 22 sites were involved, many of which were close to one another. Thus between Lambeth Bridge and Waterloo Bridge we have five sites in a stretch of the river which can be walked in a quarter of an hour.

Instinctively, one feels that it would be surprising if Parliament intended that a heliport vessel successively stationed each month on each of those five sites throughout the summer should be regarded as sufficiently transitory not to require the invocation of the planning process. However, Mr Fitzgerald's submission is forceful and elegant in its simplicity. He submits that one must look at each of the 22 sites in turn and ask oneself: has permission for the use of that site for the purposes of a heliport for 28 days been given by the GDO? He submits that if one asks that question the answer is in the affirmative beyond argument. He relies on the fact that each

[7] The Judge decided this case under the 1988 rather than the 1995 GDO but nothing turns on the difference and it is convenient to use the current version.

[8] Although we are concerned with the General Development Order, it is worth noting that planning permission can also be granted by special development orders for specific projects such as the proposal.

of the sites is separated from the others by a stretch of water upon which there is no intention that the vessel should be stationed for the purpose of serving as a heliport. On the other hand he accepts that it is implicit in his submission that, if the mode of operations were to be not as currently envisaged but were instead to involve a slowly moving vessel which it was possible to use as a heliport whilst it was moving, then no enforcement notice could be upheld unless it were shown that there had been more than 28 days use as a heliport at any particular location. In practice this would be impossible.

The parties evidently saw the problem which faced them as follows. Taking the word "land" in Schedule 2 as referring to the bed and banks of the river, does the land refer to the whole length and breadth of the river or some part of it? How are the confines of that part to be established? Is it, as the appellants contend, the land underneath the ship at any one time, is it the whole of the Thames, or is some intermediate position applicable?

They sought the help of the court by means of an originating summons. The questions posed in the originating summons in relation to the GDO are threefold being directed respectively to the whole of the tidal River Thames, the area of the tidal River Thames delimited by the two extremes of the 22 sites namely from Greenwich to Chelsea and particular locations where the vessel might be at any particular moment. The questions were formulated as follows.

> 1. Whether helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames for not more than 28 days in total in any calendar year would constitute development granted permission by virtue of [the GDO].
>
> 2. Whether helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames as proposed in the plaintiff's draft agreement ... for not more than 28 days in total in any calendar year would constitute development granted permission by [the GDO].
>
> 3. Whether helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames at a particular location for not more than 28 days in total in any calendar year would constitute development granted permission by virtue of [the GDO].

The question paper on which the parties sought and seek to examine the court is a tribute to the examiners' ingenuity. The judge settled down to answer it. He answered the first two questions in the affirmative and the last question in the negative. While I have sympathy with him for embarking on the examination paper set for him by the parties I think he was wrong so to do, and this for a number of reasons.

The first and second declarations

The first and second declarations related to something which the applicants had no intention of doing. As Mr Fitzgerald readily conceded, a mere 28 days of helicopter operations would be of no commercial or other interest to his clients. It is not the court's business to make declarations in relation to hypothetical questions. We are here to solve problems of importance to litigants and should not put off doing that in order to give our opinions on matters of no immediate interest to the parties.[9]

[9] See the cases cited in the Supreme Court Practice under Ord. 15 r. 16.

I note a further but not presently crucial point.[10]

The third declaration

The third declaration sought is the only one which could arguably decide a matter of significance to the parties. A declaration that from any particular location a vessel could operate for 28 days as a heliport (a positive declaration) might be of significant advantage to the appellants *if but only if* the result of making such a declaration would be to ensure that any enforcement notice thereafter issued by, a planning authority under section 172 or the Secretary of State under section 182 could be met by the assertion that it had already been bindingly decided by the court that there had been no breach of planning control because the required planning permission had been granted by the GDO. If a declaration did not have that effect then it would serve no purpose.

It is therefore important to consider the enforcement provisions in Part VII of the Act. The most significant aspect of these so far as the present case is concerned is that an enforcement notice must specify the precise boundaries of the land to which the notice relates.[11] Now the fixing of the boundaries of land in relation to which it is proposed to take enforcement action is a matter which Parliament has left initially to the planning authorities subject to control by the Secretary of State on appeal. Parliament has provided in section 285 of the Act that the validity of an enforcement notice is not to be questioned in the courts on any grounds on which an appeal to the Secretary of State may be brought under Part VII of the Act except by such an appeal. One of those grounds is that the matters do not constitute a breach of planning control.[12] The control of the courts is limited by section 289 to appeals from the Secretary of State on points of law.

In my judgment it would only be right for the court to exercise its discretion to make a declaration in the context of the present case if it were persuaded that, as a matter of law, a planning authority *could* not validly serve an enforcement notice in relation to land which is larger than that subjacent to a vessel. I am not so persuaded.

It is common ground that there is nothing in the Act which points to the conclusion that each site must be considered on its own. As I have indicated it is one I find I would find surprising. What then about the case law? None of the cases have tackled precisely the problem before us.

There are, however, numerous cases in which the court has grappled with the problem: what is the correct planning unit?[13] That phrase is not to be found in the Act but is used by those, including the courts, who have to make decisions in this field as a conceptual tool to help them answer a problem

[10] The declarations are not clear. Suppose two or more vessels are eventually engaged in helicopter operations. Was the judge declaring in the first declaration that each vessel could operate for 28 days or was he declaring that they only had 28 days between them? Could all the vessels operate on the same day and, if so, at the same times and if so how would this count towards the total?

[11] Town and Country Planning (Enforcement Notices and Appeals) Regulations 1991, Regulation 3.

[12] s.174(2)(c).

[13] See for instance *Burdle v. S.S. for the Environment* [1972] 1 W.L.R. 1207; *Johnston v. S.S. for the Environment* (1974) 28 P. & C.R. 424; *Kwik Save Discount Group Ltd v. S.S. for Wales* (1978) 37 P. & C.R. 170; *Duffy v. S.S. for the Environment* (1981) J.P.L. 811; *Fuller v. S.S. for the Environment* (1988) 56 P. & C.R. 84; *Rawlins v. S.S. of the Environment* (1989) 60 P. & C.R. 413; and *Church Commissioners for England v. S.S. for the Environment* (1995) 71 P. & C.R. 73.

which faces them. It can be useful when considering questions such as "on what land should I focus when considering whether a material change of use has occurred; is it a large site, in which case what has happened in one corner of it may not be material, or is it the corner of the site where the change of activity has actually occurred?" That was the problem in *Burdle*, *Johnston*, and *Rawlins*, all enforcement notice cases. A similar problem arose in a case where a certificate of lawfulness was sought. That was the position in *The Church Commissioners'* case. That case concerned a huge shopping complex of 300 shops. The proposal was to change the use of one of the shops. The appellant developer identified the whole complex as the planning unit and asserted that a change of use proposed in one of the shops would not require planning permission. The planning authority and the Secretary of State on appeal identified the single shop in question as the planning unit and held that what was proposed would require planning permission. The court held they were entitled to do so. The concept of a planning unit can also be useful in enforcement cases in situations where part of a large site splits off and the question arises whether the split off part can make use of a permission which had been given for the larger site or of an existing use right which attached to a larger site. Those were the problems in *Kwik Save*, *Duffy* and *Fuller*.

What one sees time and again in these cases is that the court, while occasionally prepared to hold that the decision maker has made an error of law in his identification of the planning unit, repeatedly affirms that the determination of the boundaries of the planning unit is initially for the planning authority and is essentially a matter of fact and degree. Even where, as in *Burdle*, the court held that the Secretary of State had erred in the test to be applied it sent the case back to him to apply the correct test and indicated that the answer was an open question.

There is nothing in the case law to which our attention has been drawn or of which I am aware which would preclude, for instance the Secretary of State, from concluding that the five nearly adjacent sites to which I have referred above are to be treated as one planning unit so as to inhibit any reliance on the GDO for more than 28 days. The task for the decision taker when considering Part 4 of the Schedule and what is the appropriate planning unit is to look at the phrase "The use of any land for any purpose" broadly in the light of the declared desire of the applicant to use for one project a number of sites on the river. I do not consider that the decision taker should define the land without reference to the purpose.

I consider it inappropriate to attempt to use the mechanism of securing a declaration from the court so as to inhibit the decision takers primarily entrusted by Parliament with the difficult task of deciding these matters from forming their own view.

The Act provides in section 192 a method of obtaining from the planning authority a certificate of lawfulness of use. It is noteworthy from section 193(4) that the planning authority in dealing with an application for such a certificate is not bound to accept the boundaries of the land specified by the applicant. If he applies for too large a site the authority's certificate can cut it down. Parliament did not envisage for understandable reasons that he might apply for too small a site. If a planning authority takes the view that the application is made in relation to too small a site then it seems to me that their appropriate course is to refuse to issue the certificate while perhaps indicating that an application in respect of a larger site might fare rather better.

I would refuse to make any declarations in relation to the three questions posed under this head in the summons. If I were persuaded that the only possible planning unit for the purpose of enforcement action were the site occupied by the vessel at any one time I might take a different view. However I am not so persuaded and therefore regard it as inappropriate to make a declaration.

The judgment

The judge did not, as I have done, refuse to answer the examination paper. He held at page 36:

> I am not persuaded that it would be correct ... to take each individual site of activity as the basis of permitted development. Whilst I accept that geographical separation of the sites is an important factor, in this case all the activities are in my view linked ... The whole area including the banks of the river will be involved.

For myself, I prefer to express no view on this. It may be that one or more of the 22 sites can be considered as a planning unit. However, for reasons which I have sought to indicate, I regard it as inappropriate for the court to decide in an action for a declaration the boundaries of land to which any permission granted by the GDO attaches.

I would therefore allow the appeal, set aside the order made by the judge and substitute merely one declaration, namely:

> Helicopters landing on or taking off from a vessel floating but not moored on the tidal River Thames (as described in the plaintiff's first affidavit and exhibit MBF2) could constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990.

WARD L.J. I begin by paying tribute to the gripping submissions advanced by counsel, especially by Mr Fitzgerald, Q.C. They deserve more than a mere expression of agreement with the orders proposed by my Lord and for that reason I express my views, albeit shortly. I answer the questions in this way:

Is planning permission required?

1. There is no operational development of the land as defined in section 55 of the Town and Country Planning Act 1990, that is to say no "carrying out of building, engineering, mining or other operations" and this is so obvious that it would not merit mention but for the fact that I note that these operations can be carried out "in, on, *over* or under land". I add the emphasis. "Over" must mean above, that is to say not touching or physically connected to the land. It suggests at least the "land" can extend vertically beyond its surface. It would be odd that an operation over land is a development but that "a change of use in the ... land" cannot encompass a change in an activity which takes place somewhere over/above the land. A consistent interpretation would seem to demand a wide interpretation.

2. The interpretation with which we are directly concerned, however, is as to the meaning of development other than operational development, that is to say development by:

> The making of any material change in the use of any buildings or other land.

3. Land is defined in section 336(1) as "any corporeal hereditament". The running water in the Thames may be corporeal but it is not an hereditament because it cannot be inherited.

> A river ... is more complex consisting as it does not only of the bed and banks which contain the water and which are capable of ownership, but of the running water which, so long as it flows within the banks, is *res nullius*:

per Lord Jauncey of Tullichettle in *A.-G. ex rel. Yorkshire Derwent Trust Ltd v. Brotherton*.[14] No ordinary users of the language will be surprised by the conclusion that water is not land.

4. So what is the land? It is and can only be the river bed and the river banks.

5. But what is the use being made of the river bed and its banks? As already suggested by Lord Jauncey, their use is to form the channel through which the tidal waters ebb and flow.

6. The crucial question, in my judgment, is how wide that use as a channel is to extend. I take the answer and the right test from the judgment of Lord Denning M.R. in *G. Percy Trentham Ltd v. Gloucestershire County Council*[15]:

> You should look at the whole area on which a particular activity is carried on, including uses which are ordinarily incidental to or included in the activity.

So the use of the bed and banks is to provide the channel which constitutes the tidal river. The use which is ancillary to this container through which a navigable tidal river runs, is the exercise of rights of passage through it and all that is ordinarily incidental to and included in that activity. In *A.-G. v. Brotherton* Lord Jauncey, comparing the right of navigation over water and a right of way on land, said[16]:

> The two rights are similar inasmuch as each confers upon the public the right of passage ...

It may well be, as Mr Fitzgerald contends, and as *Bundell v. Catterall* asserts, that this is a right upon water not upon the land, but the question is not directed to characterising the *right*, but identifying the ancillary uses to which the land, *i.e.* of the bank and bed, is put, ancillary, that is, to its primary use as the container for the flowing water. The right of passage is described in this way by Holroyd J. In *Bundell v. Catterall*[17]:

> By the common law, all the King's subjects have in general a right of passage over the sea with their ships boats and other vessels, *for the purposes of navigation commerce trade and intercourse*, and also in navigable rivers ...

It seems to me, therefore, that the activity which is ordinarily incidental to

[14] [1992] 1 A.C. 425 at 445G.
[15] [1966] 1 W.L.R. 506 at 512D.
[16] At pp. 444H–445A.
[17] (1821) 5 B. & Ald. 268 at 294.

the use of this container for flowing water is the activity of ships boats and other vessels passing over the water for the purposes of navigation, commerce, trade and intercourse.

7. In order to see whether there is a change in use as I have now defined it, it becomes necessary to establish the nature of the use for which the plaintiffs seek planning permission. Their scheme involves converting a former passenger carrying cruiser by fitting it out with the flat deck upon which the helicopter can land. It is, of course, necessary for this vessel to ply up and down the river for the purpose of arriving at which ever is the appropriate point at which the helicopter will land and, once passengers have embarked and disembarked, the vessel will move off again and tie up to the bank. That, submits Mr Fitzgerald, is the ordinary navigation of the river. But that is not the essential part of the scheme. The success of the scheme depends upon the vessel maintaining a fixed position for howsoever long it may take for the river taxis to arrive with passengers, for the helicopter to land and later take off again and for the passengers then to disembark by the river taxis to the bank. The essential part of the operation requires the maintenance of this fixed position. Viewing the operation as a whole but recognising what its essence is, is that a change in use?

In *G. Percy Trentham* Diplock L.J. said (and I do not repeat this in order to be rude to Mr Fitzgerald):

> I do not think that anywhere, except in a court of law, it would be argued with gravity that a Dutch barn or grain and fodder stores or any ordinary farm building are properly described as repositories. A Gloucetershire farmer would say they were farm buildings and would laugh at their being called "repositories".

Adopting that approach, if a Thames boatman would laugh at the notion that the activity of holding this converted cruiser stationary in the river whilst a helicopter lands on it and takes off from it is an ordinary use of the channel containing the flowing waters of the River Thames, then it would seem to me that the first declaration as amended by my Lord is justified. I venture to think the boatman would laugh. He would no doubt see that:

(a) maintaining the vessel accurately in a stationary position is the antithesis of plying up and down;
(b) helicopters landing on the converted deck is a change in the ordinary activities taking place within the banks of the river.

In my judgment the scheme is capable of constituting a change in use.

8. During the course of the hearing we had many entertaining analogies to assist, or not to assist, the argument as the case may be. They ranged from the flying boats to the Ark Royal and to the diver who for reasons I have now forgotten was standing on the river bed underneath the stationary vessel. Analogies are, of course, of the most limited assistance but having reflected about the question, I became struck with the metaphor of an old fashioned bath tub. It is a container for water. The river banks and the river bed are likewise such a container. The primary use is to contain the water. The ancillary use may then range from taking a bath in it to—and I hope I do not reduce the seriousness of the question to flippancy—playing with one's model boats or even growing water lilies in it. We have no difficulty in saying we are using this container for this or that purpose. So viewed, the river bed and the river banks, *i.e.* the land are being used by the plaintiffs.

Conclusion

The proposed scheme could constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990. Whether any such use is material or not should be for others not this court to decide.

What planning permission is granted by the general development order?

That depends on the identification of the correct planning unit. I would have thought that the plaintiff would have considerable difficulty in establishing 22 separate planning units at each of the identified landing sites. This contention does not seem to me to sit easily with the way in which the evidence in support of the declaration is submitted. Mr Franklin's affidavit states:

> 3. The plaintiff ... has formulated plans to operate a floating heliport on the River Thames in London ...
> 5. The River Thames, for the purposes of this summons, is the tidal part of the river down stream of Teddington Lock.

Since it would seem to me that the scheme envisages the use of an identifiable area or unit being the course of the river bed between points A and B and since the main purpose is to move in a planned way up and down within that site for a single purpose of getting passengers on and off a helicopter which is to land on one and only one vessel then there is a unity in the scheme as a whole.

That said, for the reasons given by Schiemann L.J., I agree that it is not appropriate for us to usurp decisions which are primarily entrusted by Parliament to others.

In the result I agree that the appeal should be allowed as he has proposed.

BELDAM L.J. For the reasons stated by Lord Justice Schiemann, I agree that any declaration made by the court should not go beyond the declaration he proposes. I also agree that helicopters landing on or taking off from a vessel, floating but not moored in the tidal River Thames, could constitute a change of use of land for the purposes of section 55 of the Town and Country Planning Act 1990.

Mr Fitzgerald, Q.C. for the appellants argued that the use of the helicopter landing barge to receive and fly off helicopters at a given spot on the River Thames was incapable of amounting to "development of land within the meaning of that phrase in section 55 of the Town and Country Planning Act 1990". The sheet anchor of Mr Fitzgerald's argument is the definition of "land" in section 336 of the Act. "Land" is there defined to mean:

> ... any corporeal hereditament, including a building ...

The parties were agreed that, although the banks and bed of the river are capable of being part of a hereditament, water flowing between the banks and over the bed cannot be so regarded because a riparian owner has no property or proprietary right in flowing water. His right is a right to the undiminished flow of the water from the upper owners. As Parke V.C. said in *Embrey v. Owen*:

> It is a right only to the flow of the water and the enjoyment of it subject to the similar rights of all proprietors of the banks on each side to the

> reasonable enjoyment of the same gift of providence. It is only therefore for an unreasonable and unauthorised use of this common benefit that an action will lie.

Equally however the parties agreed that the water of an enclosed lake, though fed by stream at either end, would be regarded as included in a hereditament.

Further Mr Fitzgerald was prepared to concede:

(a) That if the appellant's vessel was held by the fluke of an anchor in the river bed or by line to a bollard on shore, the vessel could be regarded as making use of land.
(b) That if a helicopter landed on a part of the river bed uncovered at low water, it would be regarded as making use of land.
(c) That if the vessel grounded and the helicopter landed and flew off from it, it would be making a use of land.

But Mr Fitzgerald argued that, so long as the vessel's bottom was separated even by an inch of water from contact with the river bed and it was manoeuvring under powered jets to maintain station over a particular part of the bed, it would not be making use of the land. He further argued that, even when manoeuvring to maintain station over a particular point on the river bed, the vessel was simply exercising a public right to navigate and was not in any way changing the use made of the land. In so far as Mr Fitzgerald's argument rested on the definition of land in section 336 of the Act, it seems a formidable argument but the delicate distinctions between what is and what is not use of land so defined and thus of development are so fine as to lead me to question whether the argument is correct.

To begin with, I cannot accept Mr Fitzgerald's claim that the vessel maintaining station for a period of an hour or more over the same spot in the river bed is exercising a public right of navigation. Whilst wary of any analogy with the public right of passage over a dedicated highway, I would echo the words of Scutton L.J. in *The Calgarth* where he said[18]:

> Another distinction is that in a highway by land one proceeds by physical contact, but in water one proceeds by floating along in the water and it is only in special circumstances that there is any right to ground or sit on the bottom of a river just as there is no right to sit in the middle of a road and say one is exercising a right to use a public roadway.

The stationary vessel is not navigating: it is an obstruction to navigation.

Further the helicopters landing on and taking off from the appellant's vessel make use of the airspace above the river bed, and the vessel itself makes use of the water flowing over the river bed. I cannot in the context of planning legislation regard the proprietary rights of the riparian owner in the water ebbing and flowing between the banks and over the bed as the determinative factor. Planning legislation is not simply concerned with the use made of land in the narrow sense of employing the physical characteristics of a particular part of the surface; it is concerned with an area affected by the activity. That the operation of helicopters from the appellant's vessel is capable of having a considerable impact over a wider area than the immediate area occupied by the vessel in the river, is shown by

[18] [1927] P. 93 at 107.

the report of September 27, 1991 on the application of City of London Heliport Ltd to operate a heliport adjoining the north bank of the Thames near Mondial House. The Secretary of State in his decision on that application said:

> The River Thames in Central London is a particularly sensitive setting for any major development and there can be little doubt that the development of a heliport in this location could cause significant noise and visual damage, most notably to the river itself in terms of views from and along it as well as pleasure trips on it and to the riverside walk which is protected by both national and local planning policies.

The water ebbing and flowing up the Thames makes use of the bed and banks of the river and by using the water the vessel keeping station also makes use of the bed and banks of the river to ensure its flotation. Accordingly I would hold that the appellant's proposal is capable of amounting to material change in the use of land and so to development within the meaning of development in section 55 of the Act. I would accordingly make the declaration in the terms proposed by Lord Justice Schiemann.

Appeal allowed in part. Application for leave to appeal to the House of Lords refused.

Solicitors—Frere Cholmeley Bischoff; Solicitor to the London Borough of Tower Hamlets.

Reporter—William Upton.