Status: Positive or Neutral Judicial Treatment

*52 Duguid v Secretary of State for the Environment, Transport and the Regions and Another

Court of Appeal

28 July 2000

(2001) 82 P. & C.R. 6

(Ward , Judge and Bell L.JJ.):

July 28, 2000 [1]

H1 *Town and country planning—Enforcement notice requiring cessation of use of land for markets—Notice not expressly safeguarding permitted development rights to hold market for 14 days in year—Mansi principle—Occupier liable for offence of not complying with enforcement notice pursuant to section 179(1) of Town and Country Planning Act 1990 —Whether enforcement notice ought to have been modified—Proper construction of section 179(1)*

H2 The appellant owned part of a disused airfield where he held Sunday markets and car boot sales. He was served with an enforcement notice requiring him, *inter alia* , to cease using the land for the purposes of markets and/or car boot sales. He appealed to the respondent against the notice. The respondent's Inspector dismissed the appeal and upheld the enforcement notice but failed to amend it so as to safeguard the appellant's permitted use rights under the Town and Country Planning (General Permitted Development) Order 1995 for temporary use of the land for the holding of markets for not more than 14 days in total in any calendar year. The appellant applied to quash the Inspector's decision in the High Court. It was argued that under section 179(1) of the Town and Country Planning Act 1990 , the applicant could be said to be in breach of the notice and therefore liable to prosecution if he exercised his temporary market use rights because on a literal reading of that section, an “activity required by the notice to cease [was] being carried on”.Section 181(2) of the Act states that “any provision of an enforcement notice requiring a use of land to be discontinued shall operate as a requirement that it shall be discontinued permanently, to the extent that it is in contravention of Part III ; and accordingly the resumption of that use at any time after it has been discontinued in compliance with the enforcement notice shall to that extent be in contravention of the enforcement notice”. The application was dismissed on the basis that it was not necessary to amend the enforcement notice in order to safeguard the permitted development rights because it is only resumption “to the extent that it is contravention of Part III ” that constitutes a contravention of the enforcement notice and there was no contravention of Part III if planning permission has been granted by, *inter alia* , development order. The appellant appealed to the Court of Appeal.

H3 **Held,** dismissing the appeal, that it is not necessary to amend expressly an enforcement notice in order to safeguard an occupier's lawful use rights. It is wrong to apply a literal construction to the wording of section 179(1) of the Town and Country Planning Act 1990 . The purpose to be served by the Act is to confine the activity which is to cease to the activity which constitutes the breach of planning permission and not encompass any activity which can lawfully be carried on. An occupier is entitled to use an enforcement site for permitted development purposes once he has indicated that he has ceased to use it for, and has in fact discontinued, the permanent purposes prohibited by the enforcement notice.

H4 Legislation construed:

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Town and Country Planning Act 1990, s.179(1) . ***53**

H5 Cases referred to:

(1) *Cord v. Secretary of State for the Environment and Torbay Borough Council (1981) J.P.L. 40* .

(2) *Day and Others v. Secretary of State for the Environment (1980) 78 L.G.R. 27* .

(3) *Mansi v. Elstree Rural District Council (1965) 16 P. & C.R. 153* .

(4) *Monomart (Warehouses) Ltd v. Secretary of State for the Environment (1977) 34 P. & C.R. 305* .

(5) *Newport v. Secretary of State for the Environment (1980) 40 P. & C.R. 261* .

(6) *R. v. Harfield [1993] 2 P.L.R. 23* .

(7) *Trio Thames Ltd v. Secretary of State for the Environment and Reading B.C. [1984] J.P.L. 183* .

H6 **Appeal to the Court of Appeal** by Ronald Duguid against the decision of H.H. Judge Rich, Q.C. (sitting as a Deputy High Court Judge of the Queen's Bench Division) dated November 12, 1999, whereby he dismissed an application under section 289 of the Town and Country Planning Act 1990 to challenge the dismissal of an appeal by the Secretary of State for the Environment, Transport and the Regions against an enforcement notice issued on December 23, 1997, requiring him, *inter alia* , to stop using part of a disused airfield at Gainsborough Road, Hemswell Cliff, Lincolnshire, for the purposes of holding markets and/or car boot sales. The second respondents were West Lindsey District Council. The facts are set out in detail in the judgment of Ward L.J.

H7 **Representation**

Timothy Comyn for the appellant.

Alice Robinson for the respondent.

The second respondents did not appear and were not represented.

Ward L.J.:

The Problem

1 When he allowed the appellant leave to appeal, H.H. Judge Rich Q.C. (sitting as a Deputy High Court Judge of the Queen's Bench Division) stated as his reasons for that decision that there was an “arguable point on new provisions of (the Town and Country Planning Act 1990) of some general importance” to a recurrent problem of how to safeguard an established or permitted use of land to which a landowner could revert after an enforcement notice had required him to discontinue other uses of the land in breach of planning control.

The Lie of the Land

2 We are concerned with part of the old R.A.F. airfield at Hemswell in Lincolnshire. The R.A.F. still occupy part of the property but much of it has passed into private ownership. The appellant,

Mr Ronald Duguid, acquired some 18 hectares of the disused airfield in 1983. It was put to agricultural use, which is the permitted use for the land. In about November 1989 part of the land was first used for the purpose of car parking to serve the former technical site on the airfield. An application for planning permission for the construction of a car park was, however, refused. Nevertheless the car parking continued and in 1992 hardstanding roadways were constructed to facilitate that use. Part of the site also became used by a tenant for Sunday markets and when the tenancy ended towards the end of 1993, the appellant later re-opened the operation himself and continued to use the site for ***54** Sunday markets and the parking of motor vehicles. An application for permission to continue use of the land for car parking was refused in November 1995. On February 12, 1996 the local council, being the West Lindsey District Council, issued an enforcement notice to stop the use of the land for the holding of the markets and car boot sales. The appellant appealed against that enforcement notice, a public inquiry was held but on March 12, 1997 the inspector dismissed that appeal.

3 It would appear that the appellant continued to use the enforcement site for the parking of motor vehicles after the time for compliance had passed but at least he relocated the market and car boot sale enterprise to another area of his land to the west of the site which had been identified in that enforcement notice. He installed portable toilets and connected septic tanks. On other parts of his property he continued the agricultural use growing cereals and other arable crops.

4 As the Director of Development Services reported to the Planning Committee on August 6, 1997:

> "22. From investigations carried out by the enforcement officer, immediately before and after the compliance date within the previous enforcement notice, it appears that, by fact and degree the current use of the site is a material change of use and the whole planning unit has a mixed agricultural cereal growing use and use for car parking and Sunday markets …
>
> 23. Whilst the site owner has relocated the market to land outside the area covered by the previous enforcement notice, I am of the opinion that a breach of planning control continues to take place. To prevent the market and parking being shifted to different areas within the site it is recommended that the whole planning unit be enforced against, as indicated on the plan accompanying this report."

5 His recommendation was accepted and the council considered it expedient to issue an enforcement notice on December 23, 1997 relating to the appellant's land at Gainsborough Road, Hemswell Cliff, Lincolnshire.

6 The relevant terms of that notice were as follows:

> **"3. The Matters Which Appear to Constitute the Breach of Planning Control.**
>
> Without planning permission, change of use of the land from use for agriculture to mixed uses of: (i) agriculture (ii) parking of motor vehicles and (iii) holding markets and/or car boot sales.
>
> **4. Reasons for Issuing this Notice.**
>
> It appears to the Council that the above breach of planning control has occurred within the last ten years.
>
> The site is located within an area of open countryside wherein it is the policy of the District Planning Authority that development will be strictly controlled … and will only be permitted where essential to the needs of agriculture … or which otherwise is in accordance with specific adopted policies. The use of the site for holding Sunday markets, car boot sales and car parking is in conflict with Structure Plan Policy 97 and

West Lindsey Local Plan Deposit Draft Policy C1, and is alien and highly intrusive, completely destroying the open character of the site itself, and seriously detracting from the appearance of the wider rural area.

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The Council do not consider that planning permission should be given, because planning conditions could not overcome these objections.

5. What you are Required to do.

(i) stop using any part of the land for the purpose of parking motor vehicles

(ii) using any part of the land for the purposes of holding markets and/or car boot sales

(iii) remove from the land the portable toilet … and the connected septic tank

(iv) remove from the land the four hardstanding roadways and linking roads constructed in connection with motor vehicle parking …

(v) following the removal of the hardstanding roadways and septic tank … seed the said parts of the land with grass.

6. Time for Compliance

(i) and (ii) 1 month after this notice takes effect.

(iii) 6 weeks after this notice takes effect.

(iv) 3 months after this notice takes effect.

(v) 9 months after this notice takes effect.

7. When this Notice Takes Effect.

This notice takes effect on February 16, 1998, unless an appeal is made against it beforehand."

7 Mr Duguid exercised that right of appeal on the grounds provided by section 174(2)(a), (b), (c), (d), (f) and (g) of the 1990 Act. Mr W.J. Weeks F.R.I.C.S. was appointed by the Secretary of State for the Environment to determine the appeal. He held an inquiry into the appeal on August 11, and September 2, 1998. He made two inspections and he dismissed the appeal, upheld the notice varied only by extending the periods for compliance and he refused to grant planning permission on the application deemed to have been made under section 177(5) of the Town and Country Planning Act 1990 as amended.

8 For present purposes it is material to record how the Planning Enforcement Officer dealt with a ground of the appeal that there was no breach of planning control. In his written evidence to the

Inspector he said:

> "5.1 By fact and degree the activities taking place on the land within the enforcement site on Sundays, the use of the land on other days and the permanent appearance of the land used for the market and parking, *i.e.* planting of hardwearing turf, white painted lines, advertisements displayed, located toilet connected to a septic tank, the white metal post, the hardcore and compounded earth roadways have the appearance of a permanent market site.
>
> 5.2 The use is not seen as a temporary use granted planning permission by Article 3 and Class B of Part 4 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 , but a material change of use."

9 Under that order ("the GPDO ") a temporary change of use is authorised for any purpose for not more than 28 days in total in any calendar year of which not more than 14 days in total may be for the purposes of the holding of a market or car boot sale. As I understand it, no application was made to the Inspector to amend the enforcement notice in order specifically to deal with any use of the land pursuant to the GPDO .

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10 With the leave of Mr Malcolm Spence, Q.C. (sitting as a deputy High Court Judge of the Queen's Bench Division), Mr Duguid nonetheless appealed contending in his notice of application that:

> "3. The evidence led by the West Lindsey District Council … was to the effect and purpose that the market enforced against was a permanent market held on the land on Sundays and other days. That is, a use not seen as a temporary use granted planning permission by (GPDO) but a material change of use without the benefit of planning permission to a permanent use for markets.
>
> 4. In the circumstances of the case and by reason of the rule in Mansi v. Elstree RDC [1964] as applied or extended in *Monomart (Warehouses) Ltd v. S.S. (1977) 34 P. & C.R. 305* ; Day & Others v. S.S. (1980) 78 L.G.R.P. 27 ; *Newport v. S.S. (1980) 40 P. & C.R. 261* ; *Cord v. S.S. & Torbay B.C. (1981) J.P.L. 40* ; this was a case where the inspector was required in law to see to it that the requirements of the enforcement notice did not prohibit any use or activity which Mr Duguid was or is entitled to carry on the land by virtue of any provision of the relevant legislation namely, the Town and Country Planning Act 1990 ; including the holding of 14 one-day markets on the land by virtue of planning permission granted under section 58(1)(a) and … (the GPDO).
>
> 5. Accordingly the decision of the Secretary of State by his inspector should be remitted by the court to the Secretary of State … for rehearing and determination by him with the court's opinion that the requirements of the enforcement notice to stop using any part of the land for the purpose of holding markets and/or car boot sales be amended in such a manner as to safeguard from that prohibition the permitted development rights granted under (the GPDO) to use the land for the holding of markets on not more than 14 days in any calendar year."

11 On November 12, 1999 H.H. Judge Rich, Q.C. dismissed that appeal but gave leave to appeal to us as I have already set out.

The Judgment of H.H. Judge Rich, Q.C.

12 The learned judge considered the cases referred to and also *R. v. Harfield [1993] 2 P.L.R. 23 where the Court of Appeal (Criminal Division)* concluded that the enforcement notice properly construed did not make the permitted ancillary use a use in contravention of the notice. He said:

> *"This refusal, I think, leaves Mansi as good law …*

The Court did not refer to section 93 which seems to me clearly to justify the distinction, which it in fact made. But for that section, discontinuance of the use would satisfy the requirements of the enforcement notice and resumption would not constitute a contravention of the notice. Section 93(1) however provides that the discontinuance of the use 'shall not discharge the enforcement notice' and by sub-section (2) it is provided that '… any provision of an enforcement notice requiring a use of land to be discontinued shall operate as a requirement that it shall be discontinued permanently *to the extent that it is in contravention of Part III of this Act* ; and accordingly the resumption of that use … after it has been discontinued in compliance with the enforcement notice shall to that extent be in ***57*** contravention of the enforcement notice' (again my (Judge Rich's) italics). The enforcement notice prohibited the resumption of the use only to the extent that it is in contravention of Part III, which because of the permission for the petrol station use, parking ancillary to the use of the land as a petrol station was not.

There is no contravention of Part III, if planning permission has been granted whether on application or by the GPDO or for resumption after enforcement of the last lawful use: see s.57 of the Act.

So far as the use with which the Appellant in this case is concerned, a GPDO permission for a temporary use can only begin in a calendar year when there have not already been more than 1.4 days of market use. It follows that it would be necessary to discontinue the more permanent market use against which the enforcement notice was directed before the permitted temporary use could be begun. Thus on the basis of the decision of the *Court of Appeal in Harfield* , no risk of prosecution would arise if such temporary, 14-day use was begun, after discontinuance of the more permanent use, and there would be no need to amend the enforcement notice in order to safeguard the possibility of such use …

That conclusion is independent of any identification of a material difference between the market use enforced against, which the Inspector accepted had indicia of permanence some of which the enforcement notice also required to be removed, and the permitted 14-day use. Such distinction may well, on the facts of this case, have justified the failure to incorporate into the enforcement notice words safeguarding the materially different 14-day use, irrespective of the effect of s.181(2) of the Act of 1990 as s.93(2) of the Act of 1971 has now become.

…

… Sub-section (6) of s.179 had, as originally enacted, so far as material reproduced s.89(5) of the 1971 Act. It thus had imported, for the purpose of identifying a contravention of the notice, s.181, which reproduces s.93 of the 1971 Act, which remains unamended. Section 179 as now substituted by the 1991 Act is in completely different terms. It defines breach of an enforcement notice in sub-section 1 as follows:

> 'Where at any time after the end of the period for compliance with an enforcement notice … any activity required by the notice to cease is being carried on, the person who is then the owner of the land is *in breach of the notice* .'

By sub-section (2) it is provided that 'where the owner of land is in breach of an enforcement notice he shall be guilty of an offence'. The formulation of the definition of breach by reference to the carrying on of the activity 'at any time', seems to render unnecessary the provision of s.181 in continuing the effect of the notice after initial compliance, so as to make resumption 'to the extent that it is in contravention of Part III' a contravention of the enforcement notice.

If, however s.179 as now substituted were construed as rendering s.181(2) otiose, it would be necessary, in order to safeguard even a GPDO use to exclude such use from the 'activity required by the notice to cease'. I have searched the Carnwath Report (Enforcement of Planning Control) HMSO February 1989 on which the relevant parts of the 1991 Act were based, to identify some mischief which might justify ***58*** such construction. I do not think that the substitution of the new s.179 was intended to have

such effect, and would not so construe it unless there were no other proper construction. I think that the difficulty is resolved if one asked what is meant by ‘is being carried on’? Section 181(2) remains in force and must be given meaning and effect. It has no other function than to define the uses which may not be resumed without involving a contravention of the enforcement notice. It is only resumption ‘to that extent’ (that is ‘to the extent that it is in contravention of Part III)’, that constitutes a contravention of the enforcement notice. If the use is not in such contravention then, in my judgment, when it is resumed, it is not, for the purposes of s.179(1); ‘the activity required by the notice to cease’, and therefore on resumption it is not the same activity which ‘is being carried on’.

For these reasons I conclude that it is not necessary to amend the enforcement notice in order to safeguard the Appellant's right to carry on a 14-day market as permitted by the GPDO and accordingly the appeal should be dismissed.”

The Issues arising on the appeal

13 I cannot dispel the nagging fear that there is an Alice in Wonderland quality to this appeal, though I hasten to add that I do not intend to be critical of counsel and their instructing solicitors in saying so. The formal issue has to be whether the inspector erred in not somehow amending the enforcement notice expressly to provide that the use of the land which it was required should stop did not include use of the land in accordance with the GPDO . Since the appeal to him on ground (f) of section 174(2) did not advance any argument that the notice should be amended, he can hardly be blamed for not doing so and, on one view of the matter, that is the end of any appeal against his decision letter. The real reason for this appeal is said to be to protect the appellant from a risk of prosecution for use of the land within the GPDO , Mr Comyn submitting that in the light of the learned judge's judgment, there are now doubts whether *Mansi* and *Harfield* can stand authoritatively after the amendments made to the 1990 Act. The air of unreality pervading the appeal arises because counsel, if I have correctly understood them, seem virtually agreed that these doubts are quite unfounded.

The Legislative Provisions

14 The Town and Country Planning Act 1990 replaced the Town and Country Planning Act 1971 . For all practical purposes relating to this appeal the relevant provisions are not materially different in substance and effect. The changes which troubled the judge arise from the amendments to the 1990 Act made by the Planning and Compensation Act 1991 which implemented certain recommendations made by Robert Carnwath, Q.C. , as he then was, in his report entitled “Enforcing Planning Control” (HMSO February 1989). I must pinpoint those changes. I will, however, state the law as it is, that is to say the 1990 Act as amended. The scheme of Part VII dealing with enforcement is as follows:

Section 172

(1) The local planning authority may issue a notice (in this Act referred to as an “enforcement notice”) where it appears to them—

(a) that there has been a breach of planning control …

***59**

Section 171A

(0) For the purposes of this Act—

(a) carrying out development without the required planning permission …

constitutes a breach of planning control.

Section 173

(1) An enforcement notice shall state—

(a) the matters which appear to the local planning authority to constitute the breach of planning control …

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are—

(a) remedying the breach by … discontinuing any use of the land or by restoring the land to its condition before the breach took place …

(5) An enforcement notice may, for example, require—

(a) the alteration or removal of any buildings or works; …

(c) any activity on the land not to be carried on except to the extent specified in the notice."

15 It will be seen that "the activities which the authority require to cease" must be for the purpose of "discontinuing any use of land". The language of the unamended 1990 Act is different. Section 173 before the amendment provided that:

"(2) An enforcement notice shall also specify—

(a) any steps the local planning authority require to be taken in order to remedy the breach; …

(3) In this section 'steps to be taken in order to remedy the breach' means steps … including—

(ii) the discontinuance of any use of land."

The nomenclature has changed but there is no significant change of substance.

16 Section 174 gives a right of appeal to the inspector and the relevant ground is in Section 174(2)(f) :

"that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters …"

17 Section 179 creates the offence where the enforcement notice is not complied with. It provides:

(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.

(2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence …

(4) A person who has control of or an interest in the land to which an ***60** enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.

(5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence.

18 Section 179 was originally couched in different language similar to section 89 of the 1971 Act. The original provision was:

> "179
>
> (1) Where—
>
> (a) a copy of the enforcement notice has been served … and
>
> (b) any steps required by the notice to be taken (other than the discontinuance of a use of land) have not been taken within compliance period,
>
> then … that person shall be guilty of an offence …
>
> (6) Where, by virtue of an enforcement notice—
>
> (a) a use of land is required to be discontinued …
>
> then, if any person uses the land … in contravention of the notice, he shall be guilty of an offence."

19 Once again I cannot see any material difference between the offence established by carrying on an activity required by the notice to cease and making some use of the land which was required to be discontinued. I will deal later with the significance, if any, of the addition in the amended section 179 of the words "at any time".

20 Section 180 deals with the effect of planning permission, etc., on enforcement or breach of the enforcement notice. It provides that where after service of the notice planning permission is granted for any development carried out before the grant of that permission, the notice shall cease to have effect so far as inconsistent with that permission though the liability of any person for an offence in respect of a previous failure to comply is unaffected. I must look at section 181 in more detail. It provides:

> (1) Compliance with an enforcement notice, where in respect of—
>
> (a) the completion, removal or alteration of any buildings or works;
>
> (b) the discontinuance of any use of land; or
>
> (c) any other requirements contained in the notice,
>
> shall not discharge the notice.
>
> (2) Without prejudice to sub-section (1), any provision of an enforcement notice requiring a use of land to be discontinued shall operate as a requirement that it shall be discontinued permanently, to the extent that it is in contravention of Part III; and accordingly the resumption of that use at any time after it has been discontinued in compliance with the enforcement notice shall to that extent be in contravention of the enforcement notice.

21 The 1991 Act made no amendment of any significance—it substituted "removal" for "demolition" in section 181(1)(a) .

The Relevant Authorities

22 I do not propose to examine the several cases referred to in the Notice of Application for Leave to Appeal against the decision letter nor to comment on Judge Rich's analysis of them. Counsel did not demand that of us. In my judgment, it is sufficient to enquire first whether the so called " *Mansi* ***61*** doctrine" has survived the 1991 changes. *Mansi v. Elstree RCD (1964) 16 P. & C.R. 153* concerned land on which primary use was made of a number of glasshouses but where there was a long established subsidiary use of part of the land, including one of the

glasshouses, for retail sales of nursery produce and other articles. The appellant then intensified the latter use until the glasshouse became primarily a shop. The local planning authority served an enforcement notice reciting that the appellant had changed the use of the glasshouse from use for agricultural purposes to use for the sale of goods, and requiring the appellant to discontinue the latter use. No reference was made in the notice to the former subsidiary use, nor was there any provision for its continuance. On appeal the appellant contended that the notice purported to restrict the appellant's activities further than it legitimately might, by forbidding even the use for retail sales as a subsidiary use. The judgment of the Divisional Court was given by Widgery J. who, of course, brought a far greater experience of this field to his judgments than I have been able to command in mine. Of the issue identified above he said at p. 161:

> "Mr Shaw's other point, of course, is on very much stronger ground—indeed, it seems to me quite unanswerable—when he alleges that the notice in the form in which it was served went too far. On the Minister's own finding, there was a very old established use affecting these premises for the sale of goods by retail. *True that use is a limited restricted one, but nevertheless the Planning Acts gave no power to the local authority to restrict or remove that use, such as it was* . It seems to me that when this matter was before the Minister, the Minister should have recognised that a notice requiring discontinuance of all sale of goods went too far and that he ought to have amended the notice under the powers given to him so as to make it perfectly clear that the notice did not prevent the appellant from using the premises for the sale of goods by retail, provided that such sale was on the scale and in the manner to which he was entitled in 1959, as the Minister himself had found. *True that use was a subsidiary one, but nevertheless it should be protected* and, in my judgment, this appeal should be allowed to the extent that the decision in question should be sent back to the Minister with a direction that he ought to amend the notice so as to safeguard the appellant's established right as found by the Minister to carry on the retail trade in the manner and to the extent to which the Minister has found it was carried on in 1959." (It is my emphasis added.)

23 For my part I entertain no doubt that the passages I have highlighted remain perfectly good law, and they are crucial to this appeal.

24 The next authority of relevance is *R. v. Harfield [1993] 2 P.L.R. 23, a decision of the Court of Appeal (Criminal Division)* . There the appellant was charged on indictment with using his land for the parking of commercial vehicles in contravention of an enforcement notice, contrary to section 89(5) of the Town and Country Planning Act 1971 which became section 179(5) of the 1990 Act before its amendment. The requirements of the notice were to "discontinue the use of land for the parking of commercial vehicles" and to remove from the land all commercial vehicles. An appeal against the notice was withdrawn though the appellant reserved his right to contend that parking commercial vehicles which was ancillary to use of the land as a petrol filling station should be permitted. At his trial he was not allowed to lead ***62*** evidence that the parking alleged in the indictment was such an ancillary use. Latham J. gave the judgment saying at p. 30:

> "In his ruling, the judge was also influenced, as it appears to us, by the fact that the enforcement notice had on its face required the appellant to remove from the land all commercial vehicles and quite clearly, and on his own admission, he had not done so. The charge, however, was not brought under Section 189(1) of the Act, that is a charge of failing to take any steps required by the notice, but under Section 89(5) of the Act, namely that the appellant was making a use of land which he had been required to discontinue. It is accepted by counsel for the respondent that any use which is ancillary to a permitted primary use is itself permitted without the need for any separate planning permission: see *Trio Thames Ltd v. Secretary of State for the Environment [1984] J.P.L. 183* . *No enforcement can take away these legally permitted rights* : this has been referred to before us as the *Mansi* doctrine. More important, the authorities clearly establish the proposition that *any enforcement notice will be construed so as to retain any such right* ; and although in some appeals against enforcement notices which appear to have taken away such rights, inspectors, or the Secretary of State, have inserted the saving clause in respect of ancillary uses, the courts have made it clear that this is not strictly necessary. *The rights are always retained* ." (Again I add the

emphases.)

25 In my view the judgment has a logical cohesion which enables it to stand alone and I do not understand why its integrity is in any way dependent upon or linked to section 93 of the 1971 Act, now section 181 . The cornerstone of the judgment is that no enforcement notice can take away legally permitted rights. All else flows from that central proposition. It is based on *Mansi* : *Mansi* remains good law: and those guiding principles govern the case before us.

Conclusions

26 If I accept Miss Robinson's short answer to the appeal, and I do, then applying the *Harfield* approach and asking whether GPDO rights are retained, the short answer is that they are and so the appellant should not be at risk of prosecution if, having discontinued the permanent use of his land for the Sunday markets and car boot sales, he then holds no more than 14 such markets in any one calendar year.

27 A longer answer is obtained by working through the statutory scheme. An enforcement notice can only properly be issued where there has been a breach of planning control: section 172(1)(a) . The activity which the authority can require to cease is the discontinuing of that use of the land which, it must follow, constitutes that breach of planning control. The local authority would have no power to require the cessation of any use of the land which is lawful use. Their powers are limited to and circumscribed by the Act. A breach of planning control is constituted by carrying out development of the land without the required planning permission: section 171A(1)(a) . If he were to act within the scope of the GPDO , the appellant would act within, not without, permitted planning permission: sections 58 and 59 . Because use within the GPDO is permitted use, it is lawful use and we are back to *Mansi* and *Harfield* . The enforcement notice cannot take away legally permitted rights of use.

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28 I appreciate that in *Mansi* the decision in question was sent back to the Minister with a direction that he should amend the notice to safeguard the appellant's established right as found by the Minister to carry on the retail trade in the manner and to the extent which the Minister had found to have been the old established use. In that case it made obvious good sense to do so. Having found what use was to be treated as established use, ‘twere well that the Minister define it to avoid any future argument as to the extent of that which he found. There is, by contrast, absolutely no need at all to refer to the GPDO because it operates as a matter of law within parameters that are certain, being those defined by the order itself. The local planning authority and the inspector were right to apply the KISS principle to this notice by keeping it short and simple.

29 Having already offended that principle myself both in terms of the length and content of this judgment, I still have to deal with the amendments to section 179 . Three points arise. The first is the effect of those changes. They simplified an otherwise quite complex set of provisions in which there were distinctions to be drawn between an “original owner” and a “subsequent owner” and the shifting of liability between them. There was a change to format of the offences but I see no significant difference arising out of the way the offences are now grouped and defined. Engaging in “activity required by this notice to cease” is not materially different in substance from making “a use of land” which was “required to be discontinued”.

30 The second point is that if the section is *literally* applied, then the offence may be said to have been committed whenever he held a market or car boot sale after the cessation of the permanent use even if it was within what would have been permitted by the GPDO because the “activity required by the notice to cease” was “using any part of the land for the purposes of holding markets and/or car boot sales”. But a literal construction is the wrong construction. The purposive construction is to be preferred. The purpose to be served is to confine the activity which is to cease the activity which constitutes the breach of planning permission. That was, it is common ground in this case, the holding of *permanent* markets and/or car boot sales. The notice cannot be construed so as to make a criminal offence out of lawful activity. GPDO activity is lawful activity. It is legitimate to conduct it.

31 Thirdly, there is the introduction of the words “at any time” which troubled the judge and led him to wonder whether section 181 had been rendered otiose. I do not share that concern. The words simply made clear that time begins to run after the end of the period for compliance with the enforcement notice. No offence is committed before then. I confess I have failed to understand why section 181 has to be “imported” into section 179 . Section 181 has its own proper part to play in the scheme. The purpose of section 181 is to make plain that the enforcement notice operates permanently and does not cease to have effect once there has been compliance with its terms. It is right that that should be separately stated. It would be unsatisfactory to leave that important principle in the air to be deduced only from the use of the words “at any time” in a section which has the sole function of creating criminal offences.

32 Looking at the terms of section 181 , it seems to me that the conclusions I have already reached are supported by the language of the section though in my view those conclusions are not necessarily solely dependent upon it. What must be discontinued permanently is that use of the land which the enforcement notice required to be discontinued but only “ *to the extent that it* ***64** *is in contravention of* Part III ”. This serves to confirm the analysis I have already made of the preceding sections to the effect that it is breaches of planning permission which are not countenanced whereas uses with planning permission are not caught by the enforcement notice. Accordingly, as section 181(2) provides, “resumption of *that* use”, *i.e.* resumption of the unlawful use in breach of planning control “at any time after it (the unlawful use) has been discontinued in compliance with the enforcement notice shall *to that extent* ”, (*i.e.* to the extent it is in contravention of Part III , or in other words, to the extent it is use *without* planning permission, and by implication to that extent only and to no other extent), continue to be in contravention of the enforcement notice. In my judgment it all hangs together.

33 The result is hardly a surprise: The appellant is entitled to use his land for GPDO purposes once he has indicated that he has ceased to use it for and has in fact discontinued the permanent purposes prohibited by the enforcement notice. The enforcement notice is clear and certain and requires no amendment. If the appellant has gained anything by delaying the inevitable curtailing of his business and by such consolations he can derive from this judgment, then he will be happy even though his appeal has to be dismissed. It must be rare that one wins though one loses.

Judge L.J.:

34 I agree.

Bell J.:

35 I also agree.

H8 **Representation**

Solicitors— Chattertons , Lincolnshire LN9 6DS; Treasury Solicitor .

H9 *Reporter* —Megan Thomas.

Appeal dismissed.

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1. Paragraph numbers added by the publisher.

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