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mind to that particular task it seemed to him to be clear that it did not admit of the interpretation contended for by the respondents before the magistrates and accepted by them.

For these reasons, he allowed the appeal and directed that the matter be remitted to the justices with a direction that they should continue the hearing.

STUART-SMITH J. agreed.

Comment. Section 88(10) undoubtedly refers only to an appeal under section 88 but this does not resolve the issue of when such an appeal has been finally determined. If there were to be a successful appeal to the High Court the decision of the Minister would not be final and the appeal would have to be redetermined. While accepting that everything Bridge J said in *Garland* was *obiter*, his words seem clear enough. He is stating that an appeal to the Minister (or to the High Court) is finally determined when it has been dismissed and the time for appealing further has expired without further appeal having been instituted. On the merits of the arguments the need for certainty is irrelevant as either interpretation will give that certainty. The main argument in favour of Bridge J's approach is that, if there were to be an appeal to the High Court, this must presumably "stop the clock." So you have the odd situation that time starts running once the appeal has been dismissed by or on behalf of the Minister but somehow has to be stopped or rolled back, if an appeal to the courts is made. The cause of certainty would seem to be met by fixing the date from which the enforcement notice takes effect, as the date when the specified time for appeal to the court has lapsed. The point is a very technical one (and otherwise the case would seem to be without merit) but it is one which may have to be reconsidered by a higher court.

Enforcement notice served relating to use of land for garage use—previous use for general industry unchallenged before inspector—rejected by inspector in his decision—held, that the inspector erred in rejecting unchallenged evidence without good reason.

Gabbitas v. Secretary of State for the Environment and Newham Borough Council (Queen's Bench Division, His Honour Judge Dobry Q.C., July 4, 1984)[2]

[2] *D. Lamming* (Messrs Gilman and John Murphy) *R. Purchas* (Treasury Solicitor). Report prepared by Werner Ullah, Barrister.

This was an appeal under section 246 of the Town and Country Planning Act, 1971 against a decision of an inspector dismissing an appeal against an enforcement notice which required the applicant to "discontinue the use of the land for the purposes of the maintenance, repair or spraying of motor vehicles."

The appellant had contended that the premises had been used by Gabbitas & Son, sack and bag merchants, from 1917 until 1973, a use within Class IV of the Use Classes Order, 1972, *i.e.* for general industry. The industrial process was to receive flour bags, to clean them by a vacuum machine and to repair them. The salvaged contents were released as pig food. The inspector had recorded that the appellant alleged that noise machinery was involved and there was considerable dust resulting from the cleaning process and that the noise of the machinery could be heard some distance away. There was no dispute that the present use was a general as distinct from light industrial use.

The grounds of the appeal were that the inspector had erred in law in disregarding or rejecting the unchallenged evidence of the appellant and in failing to give good and sufficient reasons for rejecting that evidence.

JUDGE DOBRY Q.C. said that Mr. Lamming had submitted that the inspector's determination was unsupported by evidence. The reference in the Secretary of State's decision letter to the evidence before him of the pre-1972/3 use was based on the appellant's evidence that noisy machinery was involved and that there was considerable dust resulting from the cleaning process and that there were two beating machines and a powered conveyor used in the industrial process.

The applicant's evidence in chief was taken on oath and was not challenged. He knew about the exact use since 1932, when he became a joint owner and had given evidence as to the scale of operation he said that this evidence was confirmed by a Mr. Ottoway who was a former employee of the company.

The council had given no evidence at all about the use prior to 1972/3, whilst the appellant's evidence was direct and detailed. Yet the inspector had described the appellant's evidence as "allegations," which by

itself could be relied upon as an error of law. However, there were more serious defects in the inspector's decision: he gave no reasons for rejecting uncontradicted evidence and made no reference to the evidence being unchallenged. Miss Liddell, a witness called by the council, had not sought to contradict the evidence of fact given by Mr. Gabbitas. Further, the inspector appeared to have assumed that the acceptance of a witness' evidence required independent evidence, that was to say, corroboration. That was not correct in this case. The more rational reason was that no complaints had been received from local residents.

Mr. Purchas submitted that the inspector's decision indicated that the inspector had rejected the appellant's submissions. The emission of noise and dust had to have caused detriment to local residents, and the inspector was entitled to draw the inference that, as a matter of degree, this was a Class III use, relying on the absence of complaint over 50 years. The inspector was also entitled to have regard to the failure to call independent evidence. This was a sound reason for finding the appellant's evidence unconvincing.

Mr. Purchas also submitted that the inspector's task was to decide whether the former use was Class III or IV. The present use was clearly Class IV, the garage activities having been described by Miss Liddell. There was noise generated by the power-driven tools, a general body of mechanical repairs, spraying activity, dust and welding. The level and intensity of use and fumes were of a different nature to previously.

In his (Judge Dobry's) view an inspector's task in this category of enforcement appeal was difficult. He had to deal with a former use and had to determine whether the use was general or light industry. When he went on site, he had to reconstruct in his mind the effect of the noise and dust and the other factors to determine whether the use fell into one or the other of those two use Classes. To do this, he had of course to make the necessary findings of fact as to the relevant factors. Had he fallen into error?

The inspector had concluded that the pre-1973 use had no material impact on the quality of the residential development. If he had done this by either rejecting the appellant's evidence for a good reason, or by finding that the use described in unchallenged evidence was acceptable in a residential area, the decision could not be challenged. But the inspector had confined his conclusion to the fact that no complaints were received by the appellant over many years (including, to some extent, the 25 years before the town planning legislation was enacted). Furthermore, he appeared to have given, as a subsidiary reason, the absence of what he described as independent evidence. There was no doubt that he had failed to direct himself properly as to the relevant considerations, and this was an error of law.

Application allowed.

Comment. If it could have been established that the premises from 1917 to 1973 had been used for an activity which came within Class IV of the Use Classes Order, the change to the motor-vehicle related use would not have been development for which planning permission was needed. The definition of Classes III and IV contained in the Order is not an easy one to apply, as it turns on a judgment as to whether the processes carried on or the machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity; see on this *W. T. Lamb Properties Ltd.* v. *Secretary of State for the Environment and Crawley B.C.* 1983 J.P.L. 303. The Courts will not normally interfere with such a judgment made by the Secretary of State or his inspectors, unless there has been a misdirection in law or the judgment is totally unreasonable; but see *Forkhurst* v. *Secretary of State for the Environment and Brentwood District Council* 1982 J.P.L. 449 which seems to divert from this approach.

In this case, Judge Dobry accepted he could not have upset the inspector's judgment as to whether on the evidence the use was acceptable in a residential area. Instead, he concluded that the inspector had erred in law by his approach to the evidence. The inspector appears to have assumed that because the evidence given by the appellant was "self serving" it needed independent corroboration. The point is not an easy one. Important issues are at stake in an enforcement notice appeal and the temptation on an appellant (who is also giving evidence) to emphasise those facts which suit his case, will be strong. Nevertheless, the duty of the inspector is to consider and weigh the evidence that is submitted. As the decisions in *Kentucky Fried Chicken (G.B.) Ltd.* v. *Secretary of State for the Environment* 1977 J.P.L. 727 and *Westminster*

Renslade Limited v. *Secretary of State for the Environment and the London Borough of Hounslow* 1983 J.P.L. 454, show, the inspector does not have to accept unchallenged evidence given by one side and is entitled to rely on his own judgment. Nevertheless, in a case like this when all the evidence pointed to the previous use being general industrial, the onus was on the inspector to explain either why he did not believe that evidence or why he thought the evidence showed that the use was light industrial. The evidence could not be simply ignored because it was uncorroborated.

Enforcement notice served relating to erection of a wall abutting a highway—appeal lodged under s.88 Town and Country Planning Act 1971—later withdrawn and reinstatement refused by the Secretary of State—on appeal to the High Court, held that the Secretary of State had no power under s.88 to reinstate an appeal when it had been validly withdrawn and the enforcement notice had taken effect—observations on whether enforcement notice had been properly issued.

R. v. Secretary of State for the Environment ex parte Monica Theresa Crossley (Queen's Bench Division, Webster J., September 19, 1984).[3]

The applicant applied for judicial review of a decision of the Department of the Environment by which the department refused to reinstate her appeal against an enforcement notice which was served on her dated March 23, 1978.

The applicant and her husband lived at Rivendell Farm, which was situated on a bridleway.

Soon after the applicant and her husband went into occupation of the farm they formed the intention of building a brick wall on land which they thought was a few feet to the north of the bridleway. A neighbour alleged that she had rights of way over the land in question and sued the applicant in relation to what was alleged to be an obstruction by the proposed wall of the bridleway over which the neighbour claimed a right of way. Soon after the action was instituted the plaintiff obtained an injunction restraining the applicant from building the wall, which was later lifted and the applicant did in fact build the wall.

On March 23, 1978 the South Oxfordshire District Council served on the applicant an enforcement notice stating that it appeared to the council that there had been a breach of planning control in that the land fronting what was described in the enforcement notice as a bridle-way had been developed by the erection of a wall in excess of one metre in height abutting a highway. It required the applicant to remedy that alleged breach by reducing the height of the wall to one metre above the level of the adjoining bridle-way.

The notice was stated to take effect, subject to the provisions of section 88 of the Town and Country Planning Act 1971 at the end of a period of fifty days, beginning with the date of the notice, so that it would have come into effect at about the end of May 1978. On May 9, the applicant appealed to the Secretary of State against the enforcement notice.

In October 1978, Fay J. gave judgment in the civil action but by that date the plaintiff had effectively abandoned her claim, although the defendant (the applicant) had not abandoned her counterclaim.

Because of various factors the public inquiry into the validity of the enforcement notice was not fixed to take place until April 1981, but shortly after the applicant had received notice of the date, she withdrew her appeal against the enforcement notice on February 28, 1981.

In affidavits the applicant said that she had withdrawn that appeal because the solicitor for the Highways Department of the Oxfordshire County Council assured her that he had explained the implications of the judgment, to the local planning authority and further stated that it was suggested to her that the withdrawal of her appeal would create grounds for the local planning authority to withdraw the enforcement notice before it took effect.

The applicant also said that she had withdrawn her appeal because she genuinely believed that the effect of the county court judgment that the wall and the bridle-way were not contiguous rendered the enforcement notice ineffective, and was supported in this belief by the withdrawal by the Oxfordshire County Council of a

[3] *P. Clarkson* (Messrs. Slade, Son & Taylor, Oxford). *C. Symons* (Treasury Solicitor). Report prepared by Werner Ullah, Barrister.