[HOUSE OF LORDS]

PIONEER AGGREGATES (U.K.) LTD. . . . RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT AND OTHERS . . . . . APPELLANTS

1984 March 15, 19, 20; May 24

Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill, Lord Bridge of Harwich and Lord Brandon of Oakbrook

Town Planning—Planning permission—Abandonment—Permission granted to work minerals on site—Commercial decision by occupiers to terminate operations—Restoration of site to satisfaction of planning authority—New occupiers wishing to resume working on site—Whether planning permission abandoned—Town and Country Planning Act 1971 (c. 78), s. 33(1)[1]

In 1950 the Minister of Town and Country Planning granted a mining company planning permission to win and work limestone from a quarry subject to conditions, inter alia, regarding the restoration of the site on completion of quarrying. The company extracted limestone from the site from 1950 to 1966, when they wrote to the local planning authority giving notice that they would cease quarrying at the end of that year. In January 1967 the planning authority wrote to the company informing them that the restoration conditions had been met to its satisfaction. In 1978 the new owner of the site wished to resume quarrying and inquired of the planning authority whether planning permission would be necessary. The planning authority replied that the 1950 permission had been abandoned or, alternatively, on a construction of the 1950 permission, the permitted development had been completed and could not be resumed without the grant of a fresh permission. After some token quarrying by the owner, the planning authority served an enforcement notice on the owner requiring it to cease excavating minerals. The owner appealed to the Secretary of State who, disagreeing with his inspector, held that the permission had been abandoned. The owner's appeal from the minister was allowed by Glidewell J. and the Court of Appeal dismissed the planning authority's appeal from his decision.

On appeal by the planning authority:—

Held, dismissing the appeal, that the Town and Country Planning Act 1971 as amended, provided a comprehensive code of planning control under which, by section 33(1), a grant of planning permission enured for the benefit of the land and all persons for the time being interested in it and it followed that a valid permission capable of implementation could not be abandoned by the conduct of an owner or occupier of land (post, pp. 140F, 141G–H, 142G, 145F–G); that, accordingly, the decision in 1966 to cease to win and work limestone could not amount to an abandonment of the 1950 permission nor, on the true construction of its terms, had the permitted development

[1] Town and Country Planning Act 1971, s. 33(1): see post, p. 141F–G.

on the site been completed so as to require fresh permission before resumption of mineral workings (post, p. 146E–G).

Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578, H.L.(E.) applied.

Pilkington v. Secretary of State for the Environment [1973] 1 W.L.R. 1527, D.C. approved.

Slough Estates Ltd. v. Slough Borough Council (No. 2) [1969] 2 Ch. 305, C.A. disapproved.

Decision of the Court of Appeal (1983) 82 L.G.R. 112 affirmed.

The following cases are referred to in the opinion of Lord Scarman:

Ellis v. Worcestershire County Council (1961) 12 P. & C.R. 178

Hartley v. Minister of Housing and Local Government [1970] 1 Q.B. 413; [1970] 2 W.L.R. 1; [1969] 3 All E.R. 1658, C.A.

Hoveringham Gravels Ltd. v. Chiltern District Council (1977) 76 L.G.R. 533, C.A.

Newbury District Council v. Secretary of State for the Environment [1978] 1 W.L.R. 1241; [1979] 1 All E.R. 243, C.A.; [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)

Petticoat Lane Rentals Ltd. v. Secretary of State for the Environment [1971] 1 W.L.R. 1112; [1971] 2 All E.R. 793, D.C.

Pilkington v. Secretary of State for the Environment [1973] 1 W.L.R. 1527; [1974] 1 All E.R. 283, D.C.

Prossor v. Minister of Housing and Local Government (1968) 67 L.G.R. 109, D.C.

Slough Estates Ltd. v. Slough Borough Council (No. 2) (1967) 19 P. & C.R. 326; [1969] 2 Ch. 305; [1969] 2 W.L.R. 1157; [1969] 2 All E.R. 988, C.A.; [1971] A.C. 958; [1970] 2 W.L.R. 1187; [1970] 2 All E.R. 216, H.L.(E.)

The following additional cases were cited in argument:

Hepworth v. Pickles [1900] 1 Ch. 108

LTSS Print and Supply Services Ltd. v. Hackney London Borough Council [1976] Q.B. 663; [1976] 2 W.L.R. 253; [1976] 1 All E.R. 311, C.A.

Mouson & Co. v. Boehm (1884) 26 Ch.D. 398

Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528; [1971] 2 W.L.R. 711; [1971] 2 All E.R. 475, C.A.

APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords (Lord Roskill, Lord Brandon of Oakbrook and Lord Brightman) given on 20 October 1983 by the Peak Park Joint Planning Board against an order of the Court of Appeal (Eveleigh and O'Connor L.JJ. and Sir David Cairns) dated 15 June 1983, 82 L.G.R. 112 upholding Glidewell J. on 19 February 1982, 46 P. & C.R. 113 whereby he allowed the appeal of the respondent, Pioneer Aggregates (U.K.) Ltd., against the decision of the Secretary of State for the Environment notified by letter dated 15 April 1981 dismissing their appeal and that of Edmund Harry Mollatt against an enforcement notice served on them on 25 February 1980 by the planning board in respect of land situated at Hartshead Quarry, Hartington, Derbyshire.

The facts are set out in the opinion of Lord Scarman.

Michael Barnes Q.C. and *Harold Singer* for the planning board. The issue of law is whether the right to develop land by virtue of a planning permission can by the actions of the relevant parties be abandoned. If the answer is in the negative then no further issue arises; if it is in the affirmative then there is a question whether, on the facts of this case, the right to work limestone on a site in Derbyshire has been abandoned. There is such a doctrine of abandonment. Rights which exist in relation to the use of property may be acquired by a variety of means including statute, contract and prescription and it is established that such rights may be lost by abandonment. For example, rights under easements or of ownership of property may be abandoned and there is no reason why rights under planning permissions created by the Town and Country Planning Act 1971 should be in any special category, and no reason why those rights should be incapable of being abandoned. If there can be such abandonment, the test is to ask whether a reasonable person knowing all the facts would conclude that the right had been permanently given up.

[LORD ROSKILL: What direction would you give a jury as to the meaning of abandonment?]

It would have to be explained that a planning permission ran with the land and it had to be ascertained as a matter of fact if it had been abandoned, giving the word its ordinary English meaning. On the facts of the present case there was material whereby a finding of abandonment could be reached. The more limited principle, which derived from the Court of Appeal decision in *Slough Estates Ltd. v. Slough Borough Council (No. 2)* [1969] 2 Ch. 305 to the effect that rights under a planning permission could be lost by an election between two inconsistent rights, is but an example of how abandonment may be inferred from the conduct of the parties. [Reference was made to the *Slough* case [1971] A.C. 958, 971, *per* Lord Pearson; [1969] 2 Ch. 305, 316–318, *per* Lord Denning M.R., 321–322, *per* Salmon L.J., and 323, *per* Karminski L.J.; (1967) 19 P. & C.R. 326, 356.] Examples of analogous cases can be found in the law of easements: *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528, 553; restrictive covenants (*Hepworth v. Pickles* [1900] 1 Ch. 108, 110); trade marks (*Mouson & Co. v. Boehm* (1884) 26 Ch.D. 398) and planning law (*Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413, 419.)

Dealing with the reasons why abandonment is said not to apply: (1) that the Act of 1971 is a complete code and it does not mention abandonment: unless the *Slough* case was wrongly decided, it is not necessary to introduce into the planning law some such doctrine; (2) that section 33 of the Act of 1971 is not consistent with abandonment, the purpose of the provision is to make it clear that planning permission is not personal to the applicant but runs with the land, section 33(1) is entirely consistent with that argument; (3) that where land has a planning permission, more than one person may have an interest, the question remains whether the rights under the permission have been abandoned; (4) the difficult position for a purchaser, if rights in land can

A be abandoned, this is always a problem which a purchaser has; (5) that termination of planning permission is limited to the situations provided for in the Act of 1971 and the Town and Country Planning (Minerals) Act 1981, the principle of abandonment nevertheless applies subject to the need for stringent proof by those claiming abandonment; (6) that *Newbury District Council v. Secretary of State for the Environment* [1978] 1 W.L.R. 1241 offers cogent reasons for keeping the *Slough* decision B within narrow confines and not extending it, the *Newbury* decision is of no assistance one way or the other as to whether planning permission can be abandoned. The principle of abandonment of rights relating to property is not a principle of equity nor of private law. It can apply to rights regulated by statutes. [Counsel then addressed their Lordships on the question whether, on the facts of the instant case, the right to C extract limestone from the area of land to the north of Heathcote Lane conferred by the planning permissions had been lost by virtue of the more limited principle of abandonment by an election between inconsistent rights.]

David Widdicombe Q.C. and *Charles George* for the occupiers. The Act of 1971, supplemented by the Town and Country Planning (Minerals) Act 1981, is a complete code that does not admit any superimposition of D a doctrine of abandonment. It is indicative that Parliament had in mind the termination of planning permissions by time limits in certain circumstances: see sections 41, 42, and 43 of the Act of 1971. If the subject has been considered and dealt with by statute, there is no other method of termination. Planning permissions are to be dealt with by reference to the statutory code which spells out what can and cannot be E done in considerable detail, and one is confined to those methods. It would be strange if such a complicated code had a common law principle imposed upon it. It follows further that a planning permission does not cease to have effect by the exercise of any doctrine of election: *Slough Estates Ltd. v. Slough Borough Council (No. 2)* [1969] 2 Ch. 305 was a similar situation to that in *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527 and should have been decided the F same way. Dealing with the analogous cases of common law abandonment of property rights, the test for abandonment of easements in *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 is much stricter than the proposed "reasonable man" test for abandonment of a planning permission. No reliance can be placed on *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413 which was not dealing with an G existing use right but an immunity: see *LTSS Print and Supply Services Ltd. v. Hackney London Borough Council* [1976] Q.B. 663. *Hepworth v. Pickles* [1900] 1 Ch. 108 was dealt with as a case of presumed licence and no other interests were affected: it did not deal with the question of other persons. There is no example of a statutory right being abandoned, except perhaps in relation to trade marks; however, the Trade Marks Act 1938, section 26(3), specifically uses the word "abandon" and thus trade H marks can be distinguished from planning permissions. A doctrine of abandonment would raise numerous problems. The abandonment of part of a planning permission would raise the question of severance. Nor would it be as simple to formulate a test for abandonment as was

suggested. On the assumption that there is no principle of abandonment, there is no room even for the narrower concept of abandonment by election as in *Slough Estates Ltd. v. Slough Borough Council (No. 2)* [1969] 2 Ch. 305. That decision is inconsistent with *Newbury District Council v. Secretary of State for the Environment* [1978] 1 W.L.R. 1241. The principle on which the Court of Appeal decision in *Slough* is based, election, should be overruled, though the decision on its facts can still be justified by reference to the principle in *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527.

Barnes Q.C. in reply. Dealing with the point that the provisions of the Act of 1971 are to be regarded as a code, the courts over the last decade have created two principles relating to town planning whereby rights may end without looking at any register: see *Prossor v. Minister of Housing and Local Government* (1968) 67 L.G.R. 109 and *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527. Therefore the Act of 1971 cannot be regarded as a complete code. *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413 is also relied on. Although an "existing use" case where one must first ask whether a use has ended with an intention that it shall permanently cease, the end result in such a case, as in cases of abandonment of planning permission, is to ask whether the rights have been abandoned or given up.

The Secretary of State and Mr. Mollatt were not represented.

Their Lordships took time for consideration.

24 May. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I agree with it and, for the reasons stated in it, I would dismiss this appeal.

LORD SCARMAN. My Lords, in this appeal two questions fall to be considered by the House. The first is a question of legal principle: whether a planning permission for the development of land can be abandoned by act of a party entitled to its benefit. Abandonment, it is said, has the effect that thereafter no person can lawfully resume the hitherto permitted development without obtaining a fresh planning permission. The local planning authority, appellant in this appeal, submits that abandonment effective to terminate a planning permission is recognised by law. The respondent, the owner of land to which the permission in dispute relates, submits that no such abandonment is recognised by law.

If the answer to the question of principle be in the affirmative, it will become necessary to consider whether upon the facts of the case the permission was abandoned. If it were, the appeal (on this premise) would succeed. But if the question of principle should be answered in the negative, the appeal must be dismissed unless the House is prepared to accept the appellant's alternative contention, which raises the second question: namely, has the development, which was permitted by the relevant planning permission, been completed? It is conceded, correctly,

A that, if what was then permitted has been completed, a resumption of the same type of operations would be not the resumption of the earlier development but a new development requiring a fresh planning permission. The first question is of importance in the planning law. If, however, the second question be answered in the affirmative, the appeal would have to be allowed irrespective of the answer to the first. The second question depends upon the proper construction of the terms of
B the relevant planning permission, and upon their application to the facts of the case.

My Lords, I propose first to outline such of the facts as are necessary to determine the two questions. The subsidiary issue as to whether the permission has been abandoned will not arise unless in law it is possible to abandon it.

C

The facts

For a full statement of the facts I would refer to the admirable judgment of Glidewell J. before whom the appeal came from the enforcement notice after being dismissed by the Secretary of State: see (1982) 46 P. & C.R. 113.

D The Peak Park Joint Planning Board, the appellant, is the local planning authority for the part of Derbyshire which includes the area of land with which the appeal is concerned. Pioneer Aggregates (U.K.) Ltd., the respondent, is the owner of the land. By an enforcement notice dated 25 February 1980 the board required Pioneer to remedy what in the notice was alleged to be a breach of planning control, namely development of the land by certain mining operations. Pioneer
E admits the operations but contends that they constituted no breach of planning control. The case is really a test case. Pioneer is not mining on the site. It knew that the local planning authority took the view that to resume mining on the site would be a breach of planning control. It fired one blast to remove some stone so as to bring the difference of opinion to a head. Pioneer has done nothing further save to exercise its
F rights of appeal against the enforcement notice.

The site to which the notice relates is an area of some 25 acres within the Peak District National Park. It is to the north of a lane leading to the hamlet of Heathcote. I shall refer to this area as the northern or the appeal site. There is on the appeal site an existing limestone quarry and attendant plant and buildings. But until the test firing of February 1980 there had been no quarrying or other mining
G operations since 1966.

The history of mining on the appeal site, so far as presently relevant, can be shortly stated. On 31 October 1950 the then Minister of Town and Country Planning (to whom at the time application for planning permission to work minerals had to be made) granted Hartshead Quarries Ltd. permission for the mining and working of limestone on an
H area of land which included the appeal site. This area included, additionally to the appeal site, a larger piece of land on the south side of Heathcote Lane and separated from the appeal site by the lane. The permission allowed for the construction of a tunnel under the lane. The reason for the tunnel (which, however, was never constructed, though a

detailed permission was granted in 1955) becomes clear from a study of the conditions imposed for the disposal of waste material. So long as mining was confined to the appeal site, waste material was to be tipped on to a spoil bank. If and when mining was extended to the area south of the lane, the waste material was to be brought across (or under) the lane and tipped in the quarry made by the excavations on the northern site. Since they bear on the second question, it will be convenient at this stage to quote in full two of the conditions subject to which permission was granted:

> "3. On the completion of quarrying in the area north of the highway tipping of waste material on the said spoil bank shall cease and all waste material shall be deposited within the excavations formed by quarrying in that area to a level surface. 4. On the conclusion of quarrying in the area north of the road all mineral stocks shall be stored in that area."

It is clear from these two conditions that quarrying on the land to the south of the lane was envisaged as (allowably) continuing after conclusion of quarrying to the north, but that, if it did, waste material should no longer be deposited on the spoil bank but in the northern quarry and mineral stocks were to be stored on the northern site.

On 9 November 1962 a further permission was granted extending the area of excavation and of tipping subject to conditions. Nothing turns on this permission, which is to be read merely as an extension of the 1950 permission subject to certain conditions.

Hartshead extracted limestone from the appeal site from 1950 to 1966. On 15 September 1966 they wrote to the board a letter in which they gave notice that they would cease quarrying not later than 31 December of that year. They had confined their operations to the appeal site, although they had acquired the land, or, at the very least, the mineral rights in the land to the south of the lane. Their letter dealt with all the land covered by the planning permission, i.e. the land both to the south and the north of the lane. It indicated clearly their intention to cease quarrying and to vacate all the land and to remove their plant and buildings. The board relies on this letter and the subsequent course of negotiations to establish their case that Hartshead, by electing to treat the 1950 permission (together with its 1962 extension) as at an end, abandoned it.

I pass over the negotiations which followed upon Hartshead's ceasing from mining operations save only to mention that they negotiated with the board a satisfactory solution to the restoration problem. On 6 January 1967 the board wrote to Hartshead informing them that the restoration conditions had been met to its satisfaction. The board did not insist on a full compliance—probably because it believed that Hartshead's departure marked the finish of mining operations on the land to which the permission related.

In 1978, Pioneer became interested in the area covered by the permission of 31 October 1950 as extended by that of 9 November 1962. It asked whether planning permission to quarry was needed. By letter

dated 29 January 1979 the board took the two points which now fall to be decided by the House. The board said:

> "In relation to the entire quarry (one planning unit) for which planning permission was granted by letter dated 31 October 1950, as extended by the permission of 9 November 1962, planning permission for the site has been abandoned."

The letter is ambiguous. It is not clear whether it refers to all the land covered by the 1950 permission or only to the land north of the lane (the appeal site). I read it as alleging that planning permission in relation to all the land to which the 1950 permission related had been abandoned. Whether that be right or wrong, the letter certainly did go on to deal explicitly with the appeal site and in relation to that site made the second, alternative point upon which the appellant relies in the appeal. The board said:

> "In addition and in the alternative, the north-west area having been completed to the written satisfaction of the planning authority pursuant to the third condition [of the 1950 permission], cannot now be opened up without a new express permission."

The first question—Abandonment

If the board is right, a valid planning permission can be abandoned by the conduct of a landowner or occupier of land; and the effect of the party's conduct will be to bind all persons interested in the land now or hereafter whether or not they have notice of the abandonment. The planning permission would be entered in a public register; but not so its abandonment. Nor would it be possible by inspection of the land to discover whether the permission had been abandoned, for the absence of implementation of a planning permission is no evidence that a valid permission does not exist. It is perhaps not surprising that no trace of any such rule can be found in the planning legislation. If there be such a rule, it has been imported into the planning law by judicial decision.

The case upon which the appellant relies for the existence of such a rule is *Slough Estates Ltd. v. Slough Borough Council (No. 2)*. The case is reported as follows: at first instance before Megarry J. (1967) 19 P. & C.R. 326; in the Court of Appeal [1969] 2 Ch. 305, and in the House of Lords [1971] A.C. 958. It is the only reported case in which a rule of abandonment has been recognised as applicable to a planning permission. The plaintiff owned a trading estate of some 500 acres. In January 1945, when about half the estate had been developed, the company sought permission to develop the remaining 240 acres. On 17 October 1945 the council wrote to the company permitting development for industrial purposes. But between 1945 and 1965 the company behaved as if the 1945 permission did not exist. The company sought and obtained fresh planning permissions for factory building covering about 150 of the 240 acres. In 1955, 90 acres remained undeveloped. The company, in accordance with their post-1945 practice, applied for permission to develop the 90 acres for industrial buildings; but this time it was refused. The company then applied for and obtained £178,545 compensation for loss of development value.

In 1966 the company made a startling change of course: it applied to the High Court for a declaration (inter alia) that the permission of 17 October 1945 was still in force. The trial judge, Megarry J., held that the terms of the letter of 17 October 1945 were so obscure that the planning permission was ineffective but embarked, obiter, on a lengthy discussion as to the possibility of abandonment, expressing the view that, if an owner or occupier of land evinced by his conduct an unequivocal intention to abandon planning permission, such permission would be extinguished by abandonment. The Court of Appeal ruled that the October 1945 letter upon its true construction was a valid outline planning permission but held that the company by claiming and obtaining compensation had elected to abandon its rights under the permission and could not now revive the permission. The company had made its election between inconsistent rights, the effect of which was to extinguish the permission. On appeal, this House held that the purported permission of 1945 was ineffective because it failed to identify the land to which it related. Lord Pearson, with whose speech the other members of the House agreed, expressly reserved the question whether a planning permission could be abandoned.

The decision of the Court of Appeal was, of course, binding on Glidewell J. and the Court of Appeal in the present case. Both courts refused, however, to accept that the *Slough* decision introduced into the planning law any general rule of abandonment, treating it as a limited exception to what they held was the general rule, namely that planning permission cannot be extinguished merely by conduct. They went on to find that the facts of the present case did not fall within the *Slough* exception of election. Accordingly, Glidewell J. allowed Pioneer's appeal from the Minister (who had held that planning permission could be abandoned), and the Court of Appeal dismissed the board's appeal from his decision. Neither court dealt expressly with the second question raised in the appeal, though it was, the House was informed, raised. Impliedly, they must be considered to have rejected the board's contention.

My Lords, on the question of abandonment I find myself in agreement with both courts below that there is no such general rule in the planning law. In certain exceptional situations not covered by legislation, to which I shall refer, the courts have held that a landowner by developing his land can play an important part in bringing to an end or making incapable of implementation a valid planning permission. But I am satisfied that the Court of Appeal in the *Slough* case erred in law in holding that the doctrine of election between inconsistent rights is to be incorporated into the planning law either as the basis of a general rule of abandonment or (which the courts below were constrained to accept) as an exception to the general rule that the duration of a valid planning permission is governed by the provisions of the planning legislation. I propose now to give my reasons for reaching this conclusion.

Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of*

State for the Environment [1981] A.C. 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.

Parliament has provided a comprehensive code of planning control. It is currently to be found in the Town and Country Planning Act 1971, as subsequently amended. Part II of the Act of 1971 imposes upon local planning authorities the duty of preparing and submitting to the Minister development plans formulating their policy and their general proposals for the development and use of land in their area. Widespread publicity has to be given to the preparation or alteration of such plans. There is provision for local public inquiries in certain specified circumstances. Part III imposes general planning control. Section 23(1) declares the rule: subject to the provisions of the section, planning permission is required for the development of land. There are certain exceptions, of which the most notable are rights in connection with the use of land existing prior to certain specified dates related to the introduction of planning control (commonly called "existing use rights"): sections 23 and 94 of the Act. Section 29 deals with the grant of planning permission: note that the local planning authority must have regard to the provisions of the development plan. In determining an application for permission the authority must take into account "any representations" made to them within the time specified in the section. And there are extensive provisions for giving publicity to applications: sections 26 to 28.

Section 33(1) is of crucial importance. It provides:

> "Without prejudice to the provisions of this Part of this Act as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested therein."

The clear implication is that only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein. I would comment, in passing, that the provision in section 33(1) was in the law as section 21 of the Town and Country Planning Act 1962, when the *Slough* case [1969] 2 Ch. 305 was decided: but the Court of Appeal made no reference to it.

The provisions in the Town and Country Planning Act 1971 governing the duration, modification, revocation, and termination of planning permission are extensive; see sections 41 to 46. It is unnecessary to analyse them in detail. Perhaps the most significant common feature of the various procedures is the involvement of public authority, local and central, when questions as to duration, modification, revocation, or termination of planning permission arise. And, of course, the procedures involve notice to persons interested as well as to the applicant and/or landowner.

Orders can also be made by a local planning authority for the discontinuance of a use of land or for the removal of buildings under section 51. The Secretary of State must confirm any such order made, and again there is provision for publicity.

Section 52 enables a local planning authority to enter into an agreement with a landowner restricting or regulating the development or use of land. The agreement is registrable.

Indeed, the permissions and orders to which I have briefly referred are, with one exception, either registered in a register maintained under the planning legislation, or registrable as local land charges under the Local Land Charges Act 1975. The exception is a notice ("completion notice") under section 44 of the Act of 1971 setting a time limit after which, subject to confirmation by the Minister, a planning permission shall cease to have effect. Such notices are, however, the subject of a specific, though optional, inquiry of the local authority contained in the officially approved form of inquiry used in connection with searches of the local land charges register.

Finally, it is necessary to refer to the recent amendment to the Act of 1971, namely the Town and Country Planning (Minerals) Act 1981. Section 7 provides that there shall be introduced into the Act of 1971 a new section 44A setting a limit to the duration of a planning permission to work minerals. Section 10 is directly in point. It introduces into the Act of 1971 a new section 51A under which the mineral planning authority, if it appears that the working of minerals has permanently ceased on any land, may prohibit its resumption. If such a prohibition is contravened, a criminal offence is committed. These provisions are not yet in force. But they strongly reinforce the view of the law relating to planning control as being a comprehensive code, and they show clearly that the problem of the future of planning permission for the working of minerals where mining operations have permanently ceased is left to public authority, and that subject to the usual safeguards such permission can be effectively terminated by order under the new section 51A.

Viewed as a question of principle, therefore, the introduction into the planning law of a doctrine of abandonment by election of the landowner (or occupier) cannot, in my judgment, be justified. It would lead to uncertainty and confusion in the law, and there is no need for it. There is nothing in the legislation to encourage the view that the courts should import into the planning law such a rule—recognised though it is in many branches of the private law (e.g. the law of easements, the commercial law, and the law of trade marks) as Megarry J. in his

learned, though obiter, discussion of the principle has shown in *Slough Estates Ltd. v. Slough Borough Council (No. 2)*, 19 P. & C.R. 326.

There is, however, quite apart from the *Slough* case a number of reported judicial decisions which, upon first sight and before analysis, might seem to suggest that there is room in the planning law for a principle, or an exception, allowing the extinguishment of a planning permission by abandonment.

Three classes of case can be identified. The first class is concerned not with planning permission but with existing use. In *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413 the Court of Appeal (Lord Denning M.R., Widgery and Cross L.JJ.) held that the Minister as the tribunal of fact was entitled to find on the evidence that the resumption of a car sales use on a site where previously there had been two uses, namely car sales and a petrol-filling station, was after a cessation of the car sales use for some four years a material change of use and so properly the subject of an enforcement notice. The Minister, the court held, was entitled to find as a fact that the previous use had ceased, having been abandoned by the owner or occupier of the land. This was not a case of abandoning a planning permission. There was in fact no existing use of the land for car sales because the use had ceased years ago. An existing use, which has been deliberately ended before a resumption arises, is not existing at the date of resumption: accordingly, the resumption was a material change of use, and so required planning permission. The issue was one of fact, as Widgery L.J. emphasised in his judgment. And it had nothing whatever to do with the extinguishment of a planning permission. Widgery L.J. in the course of his judgment made a significant comment, at p. 422:

> "When the car sales use ceased in 1961 there could be no question of a material change of use on which an enforcement notice could be founded in reliance on that fact alone."

The use no longer existing, the change back four years later was the material change of use on which the notice could be founded.

The second class of case has been described as that of the "new planning unit"—a term coined by Widgery L.J. in *Petticoat Lane Rentals Ltd. v. Secretary of State for the Environment* [1971] 1 W.L.R 1112. This line of cases was discussed in *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578 (by Viscount Dilhorne, at pp. 598–599 and by myself, at pp. 616–617). I will not repeat what was then said. Two comments, however, should be made. First, the cases are, without exception, cases where existing use rights were lost by reason of a new development sanctioned by a planning permission. There is no case, so far as I am aware, in which a previous planning permission has been lost by reason of subsequent development save in circumstances giving rise to the third class of case, which I shall discuss in a moment. In the class of case now under discussion the existing use right disappears because the character of the planning unit has been altered by the physical fact of the new development. As Lord Parker C.J. remarked in the first of the cases, *Prossor v. Minister of Housing and Local Government* (1968) 67 L.G.R. 109, 113:

"The planning history of this site, as it were, seems to me to begin afresh . . . with the grant of this permission . . . *which was taken up and used* . . ." (Emphasis supplied).

Secondly, it is clear that where the evidence fails to establish the creation by development actually carried out on the land of a new planning unit the grant of planning permission does not preclude a landowner from relying on an existing use right. Indeed, as *Newbury's* case itself shows, existing use rights are hardy beasts with a great capacity for survival.

The third class of case comes nearer to the facts and law of the present appeal. These cases are concerned not with existing use rights but with two planning permissions in respect of the same land. It is, of course, trite law that any number of planning permissions can validly co-exist for the development of the same land, even though they be mutually inconsistent. In this respect planning permission reveals its true nature—a permission that certain rights of ownership may be exercised but not a requirement that they must be.

But, what happens where there are mutually inconsistent permissions (as there may well be) and one of them is taken up and developed? The answer is not to be found in the legislation. The first reported case appears to have been *Ellis v. Worcestershire County Council* (1961) 12 P. & C.R. 178, a decision of Mr. Erskine Simes Q.C. to which Lord Widgery C.J. referred with approval in what must now be regarded as the leading case on the point, *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527.

Mr. Erskine Simes, in a passage which Lord Widgery C.J. was later to describe as exactly illustrating the principle, said, at p.183:

"If permission were granted for the erection of a dwelling house on a site showing one acre of land as that to be occupied with the dwelling house, and subsequently permission were applied for and granted for a dwelling house on a different part of the same acre which was again shown as the area to be occupied with the dwelling house, it would, in my judgment, be impossible to construe these two permissions so as to permit the erection of two dwelling houses on the same acre of land. The owner of the land has permission to build on either of the sites, but wherever he places his house it must be occupied with the whole acre."

Pilkington was a Divisional Court decision. It has been approved by the Court of Appeal in *Hoveringham Gravels Ltd. v. Chiltern District Council* (1977) 76 L.G.R. 533. Its facts were that the owner of land was granted planning permission to build a bungalow on part of the land, site "B." It was a condition of the permission that the bungalow should be the only house to be built on the land. He built the bungalow. Later the owner discovered the existence of an earlier permission to build a bungalow and garage on another part of the same land, site "A." That permission contemplated the use of the rest of the land as a smallholding. He began to build the second bungalow, when he was served with an enforcement notice alleging a breach of planning control. The Divisional Court held that the two permissions could not stand in respect of the

same land, once the development sanctioned by the second permission had been carried out. The effect of building on site "B" was to make the development authorised in the earlier permission incapable of implementation. The bungalow built on site "B" had destroyed the smallholding: and the erection of two bungalows on the site had never been sanctioned. This was certainly a common sense decision, and, in my judgment, correct in law. The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation.

My Lords, I find nothing in any of these cases to cast doubt on the view of principle to which a study of the legislation has led me. Indeed, *Pilkington's* case [1973] 1 W.L.R. 1527 may be contrasted with the *Slough* case [1971] A.C. 958 in that it reveals the proper exercise of the judicial function in a field of codified law. It is a decision supporting and strengthening the planning control imposed by Parliament in contrast with the Court of Appeal's decision in the *Slough* case [1969] 2 Ch. 305 which renders control uncertain, is likely to cause confusion, and which to that extent works to undermine the intention of Parliament.

Strangely and ironically, it would appear that the *Slough* case could have been decided along *Pilkington* lines. For, assuming the validity of the 1945 planning permission in the *Slough* case, several acres of the estate which in the 1944–45 plan had been included as a car park were covered with factory buildings constructed pursuant to a subsequent planning permission. Under the *Pilkington* rule the subsequent development would have sufficed to make the outline plan approved in 1945 incapable of implementation. Lastly, it will be observed that the *Pilkington* situation resembles the "new planning unit" class of case in that a permitted development which has been carried out has so altered the character of the land that its planning history now begins with the new development.

For these reasons I would answer the first question in the appeal in the negative. There is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned.

The second question—Completion of permitted development

I turn now to the second of the two main questions in the appeal. The board submits that upon the true construction of the terms of the 1950 permission as extended by the 1962 permission the permitted development to the north of Heathcote Lane has been completed and cannot be resumed without a fresh planning permission. It is recognised that the area of land to which the 1950 permission related comprised more than the appeal site in that the permission related to areas to the

north and south respectively of Heathcote Lane and was drafted so as to grant permission to work minerals in both areas. It is said, however, that it was a permission for two separate developments and that, upon the cesser by Hartshead of mining operations north of the lane together with the restoration of the land to the satisfaction of the board, the development was completed so that a resumption now in that area would be a new development requiring fresh planning permission. Particular reliance is placed on conditions 3 and 4 of the permission (the two conditions which I have earlier set out) whereby it was provided that on the completion of quarrying on the northern site waste material should be deposited in the quarry on the northern land and mineral stocks should be stored on the northern land. The suggestion is that these conditions indicate either a completion of the authorised development of the northern land before the commencement of a separate development south of the lane or, at the very least, two separate developments whether contemporaneous or successive.

My Lords, I do not so read the permission. In terms it relates to the whole area of land south and north of the lane. It is a permission to mine and work minerals in that area. It contains detailed conditions as to method of working and as to restoration work after quarrying. The permission plainly envisages the continued use of the northern land for mineral working even after quarrying in that area has ceased; for the northern land is to be used at all times both during and after quarrying north of the lane for the deposit of waste material and for the processing and storage of minerals, from whatever part of the land to which the permission relates they are won. The permission, as I read its terms, contemplated an authorised development of the land south and north of the lane treated as one planning unit.

I reject, therefore, the submission that the permission was for two separate developments and that one of them was complete when Hartshead ceased operations in 1966. I suspect that in 1966 the board confused the commercial termination of Hartshead's operations with the completion of the development permitted by the 1950 permission as extended in 1962. A commercial decision to terminate operations upon land where there is a valid planning permission for such operations cannot by itself extinguish the planning permission unless the terms of the permission provide that such shall be the effect of the termination. To give such effect to a commercial decision in the absence of terms to that effect in the planning permission would be to fly in the face of section 33(1) of the Town and Country Planning Act 1971 which lays down that, save where the permission so provides, the grant of planning permission enures for the benefit of the land and of all persons for the time being interested in the land.

For these reasons I would dismiss the appeal with costs.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. For the reasons he gives I too would dismiss this appeal with costs.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Scarman, with which I agree, I would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Scarman. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Theodore Goddard & Co.; Coward Chance.

C. T. B.

[PRIVY COUNCIL]

TAMAITIRUA KAITAMAKI . . . . . APPELLANT

AND

THE QUEEN . . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1984 March 28; May 1

Lord Scarman, Lord Elwyn-Jones, Lord Brandon of Oakbrook, Lord Brightman and Sir George Baker

New Zealand—Crime—Rape—Consent—Penetration with consent or in belief that woman consenting to sexual intercourse—Continuation after realisation that woman unwilling—Whether rape—Crimes Act 1961 (No. 43 of 1961), ss. 127, 128

New Zealand—Appeal to Privy Council—Legal aid—Whether Court of Appeal having jurisdiction to grant legal aid for appeal to Privy Council—Offenders Legal Aid Act 1954 (No. 62 of 1954), ss. 2(1), 3(1)

Section 127 of the Crimes Act 1961 provides: "For the purposes of this Part of this act, sexual intercourse is complete upon penetration; . . ." Section 128 provides: "(1) Rape is the act of a male person having sexual intercourse with a woman or girl—(*a*) Without her consent; . . ."

The defendant was charged on indictment with one offence of rape contrary to section 128 of the Crimes Act 1961 and one offence of burglary. The Crown's case was that he broke into a young woman's flat and twice raped her. There was no dispute that sexual intercourse had taken place on two occasions, but his defence was that the woman consented or he honestly