[HOUSE OF LORDS]

NEWBURY DISTRICT COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT APPELLANT

NEWBURY DISTRICT COUNCIL . . . . RESPONDENTS

AND

INTERNATIONAL SYNTHETIC RUBBER CO. LTD. APPELLANTS

[CONJOINED APPEALS]

1980 Jan. 14, 15, 16, 17, 21, 22; Feb. 28

Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman and Lord Lane

Town Planning — Planning permission — Conditions — Aircraft hangars used for storage of vehicles—Planning permission to use for storage of synthetic rubber—Whether necessary—Condition attached that buildings to be demolished by specified date—Whether valid—Whether hangars used as "repository" —Whether grant of planning permission extinguishing existing use rights—Town and Country Planning Act 1971 (*c.* 78), *ss.* 29 (1), 30 (1) [1]*—Town and Country Planning (Use Classes) Order* 1950 (*S.I.* 1950 *No.* 1131), *art.* 3 (1), *Sch.*[2]

In 1941 land in open country was requisitioned by the Crown for use as an airfield. Two large hangars were built. The airfield remained operational until 1947. After 1947 the hangars were used by the Ministry of Agriculture to store food supplies and from 1955 to 1959 they were used for storing civil defence vehicles by the Home Office. The surrounding area was restored to agricultural use and in 1959 family trustees were granted planning permission to use the hangars to store fertilisers and corn on condition that they were removed by the end of 1970. In 1961 the trustees bought the freehold from the Crown and granted a 40-year lease back to the Crown at a nominal rent.

A rubber company, I.S.R., then applied for permission to use the hangars "as warehouses for the storage of synthetic

[1] Town and Country Planning Act 1971, s. 29: "(1) . . . where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan . . . and to any other material considerations, and—(*a*) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit. . . ."

S. 30: "(1) Without prejudice to the generality of section 29 (1) . . . conditions may be imposed on the grant of planning permission thereunder— . . . (*b*) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period. . . ."

[2] Town and Country Planning (Use Classes) Order 1950, art. 3: "(1) Where a building or other land is used for a purpose of any class specified in the Schedule to this Order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

Sch.: ". . . Class X. Use as a wholesale warehouse or repository for any purpose."

rubber" and on May 31, 1962, I.S.R. were given planning permission for the use of the two hangars as warehouses on condition the buildings were removed "at the expiration of the period ending December 31, 1972." Having obtained planning permission, I.S.R. in July 1962 bought the two hangars and the 40-year lease from the Crown at an auction. The particulars of sale at the auction referred to the development plan and the local planning authority's general policy to secure removal of war-time buildings. In November 1970 I.S.R. applied for a 30-year extension of their permission which was due to expire in December 1972. In January 1971 the extension application was refused as it conflicted with the development plan in "an area of outstanding natural beauty."

I.S.R. continued to use the hangars after the end of 1972 and did not remove them. In November 1973 the local authority served two enforcement notices. I.S.R. appealed to the Secretary of State, who after a public inquiry held that the condition for the hangars' removal was invalid under the Town and Country Planning Act 1971 because it was extraneous to the proposed use. The Divisional Court dismissed the local authority's appeal against the quashing of the enforcement notices. On appeal, the Court of Appeal allowed the appeal.

On appeal by the Secretary of State and I.S.R.:—

Held, allowing the appeals, (1) that I.S.R. did not require the grant of planning permission for their intended use of the hangars in 1962 since the use by the Home Office of the hangars after 1955 for storing civil defence vehicles was use as a "repository" within the meaning of Class X of the Schedule to the Town and Country Planning (Use Classes) Order 1950 and that therefore their use by I.S.R. in and after 1962 as a wholesale warehouse for the storage of synthetic rubber involved no material change of user but was an existing use (post, pp. 597A–D, 602C–E, 605A–C, F–G, 614F—615C, 624C–E).

Dicta of Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, and of Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512, C.A. disapproved.

(2) That where the grant of planning permission, whether it be permission to build or for a change of use, was of such a character that the implementation of the permission led to the creation of a new planning unit existing use rights attaching to the former planning unit were extinguished; but that in the present case the grant of planning permission in May 1962 did not create a new planning unit, and that accordingly, I.S.R. were not precluded from relying on the existing use rights attaching to the site (post, pp. 597E–F, 598H—599C, 603A, 606E—607B, 617G—618D, 626C–F).

Prossor v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109, D.C. and *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112, D.C. considered.

(3) That in any event, even if planning permission had been necessary for the use by I.S.R. of the hangars, in the circumstances of the present case the condition for their removal did not fairly or reasonably relate to the permitted development and was therefore void (post, pp. 601D–E, 602F–G, 609F–G, 621F–G, 628G—629B).

Per curiam. For conditions attached to the grant of a planning permission to be intra vires and valid the conditions

imposed must be for a planning purpose and not for any ulterior one and they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them (post, pp. 599H—600A, 607F—608C, 618F—619A, 627A–E).

Pyx Granite Co. Ltd. v. *Ministry of Housing and Local Government* [1960] A.C. 260, H.L.(E.) considered.

Decision of the Court of Appeal [1978] 1 W.L.R. 1241; [1979] 1 All E.R. 243 reversed.

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

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

City of London Corporation v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169.

East Barnet Urban District Council v. *British Transport Commission* [1962] 2 Q.B. 484; [1962] 2 W.L.R. 134; [1961] 3 All E.R. 878, D.C.

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

Gray v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15, C.A.

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

Horwitz v. *Rowson* [1960] 1 W.L.R. 803; [1960] 2 All E.R. 881.

Kingston-upon-Thames Royal London Borough Council v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549; [1974] 1 All E.R. 193, D.C.

Kingsway Investments (Kent) Ltd. v. *Kent County Council* [1971] A.C. 72; [1970] 2 W.L.R. 397; [1970] 1 All E.R. 70, H.L.(E.).

Leighton and Newman Car Sales Ltd. v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1, C.A.

Mixnam's Properties Ltd. v. *Chertsey Urban District Council* [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627, H.L.(E.).

Mounsdon v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645; [1960] 2 W.L.R. 484; [1960] 1 All E.R. 538, D.C.

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.

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

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

Reg. v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720; [1974] 2 W.L.R. 805; [1974] 2 All E.R. 643, D.C.

Swallow and Pearson v. *Middlesex County Council* [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

Trentham (G. Percy) Ltd. v. *Gloucestershire County Council* [1966] 1 W.L.R. 506; [1966] 1 All E.R. 701, C.A.

The following additional cases were cited in argument:

Bendles Motors Ltd. v. *Bristol Corporation* [1963] 1 W.L.R. 247; [1963] 1 All E.R. 578, D.C.

Brayhead (Ascot) Ltd. v. *Berkshire County Council* [1964] 2 Q.B. 303; [1964] 2 W.L.R. 507; [1964] 1 All E.R. 149, D.C.

Calcaria Construction Co. (York) Ltd. v. *Secretary of State for the Environment* (1974) 72 L.G.R. 398.

Cozens v. *Brutus* [1973] A.C. 854; [1972] 3 W.L.R. 521; [1972] 2 All E.R. 1297, H.L.(E.).

Emma Hotels Ltd. v. *Secretary of State for the Environment* (1979) 250 E.G. 157, D.C.

Essex Construction Co. Ltd. v. *East Ham Borough Council* (1963) 61 L.G.R. 452, D.C.

Halsall v. *Brizell* [1957] Ch. 169; [1957] 2 W.L.R. 123; [1957] 1 All E.R. 371.

Howard v. *Secretary of State for the Environment* [1975] Q.B. 235; [1974] 2 W.L.R. 459; [1974] 1 All E.R. 644, C.A.

Ives (E.R.) Investment Ltd. v. *High* [1967] 2 Q.B. 379; [1967] 2 W.L.R. 789; [1967] 1 All E.R. 504, C.A.

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

Lissenden v. *C.A.V. Bosch Ltd.* [1940] A.C. 412; [1940] 1 All E.R. 425, H.L.(E.).

LTSS Print and Supply Services Ltd. v. *Hackney London Borough Council* [1975] 1 W.L.R. 138; [1975] 1 All E.R. 374, D.C.; [1976] Q.B. 663; [1976] 2 W.L.R. 253; [1976] 1 All E.R. 311, C.A.

Miller-Mead v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; [1962] 3 W.L.R. 654; [1962] 3 All E.R. 99, D.C.

Slattery v. *Naylor* (1888) 13 App.Cas. 446, P.C.

Slough Estates Ltd v. *Slough Borough Council (No. 2)* [1971] A.C. 958; [1970] 2 W.L.R. 1187; [1970] 2 All E.R. 216, H.L.(E.).

Tessier v. *Secretary of State for the Environment* (1975) 31 P. & C.R. 161, D.C.

Town Investments Ltd. v. *Department of the Environment* [1978] A.C. 359; [1977] 2 W.L.R. 450; [1977] 1 All E.R. 813, H.L.(E.).

Western Fish Products Ltd. v. *Penwith District Council* (1978) 77 L.G.R. 185, C.A.

Young v. *Bristol Aeroplane Co. Ltd.* [1946] A.C. 163; [1946] 1 All E.R. 98, H.L.(E.).

APPEALS from the Court of Appeal.

These were appeals by leave of the House of Lords by the appellants, the Secretary of State for the Environment and the International Synthetic Rubber Co. Ltd., from an order dated July 14, 1978, of the Court of Appeal (Lord Denning M.R., Lawton and Browne L.JJ.) allowing an appeal by the respondents, the Newbury District Council from an order dated February 18, 1977, of the Divisional Court of the Queen's Bench Division (Lord Widgery C.J., Michael Davies and Robert Goff JJ.). By that order the motion of the respondents that a decision of the appellant, the Secretary of State for the Environment dated July 24, 1975, be remitted to the Secretary of State for re-hearing and determining together with the opinion or direction of the Divisional Court was dismissed.

The facts are set out in their Lordships' opinions.

David Widdicombe Q.C. and *Anthony Anderson* for the appellant company. There are three issues in this appeal: (1) The validity of the

condition. (2) Whether planning permission was needed in view of Class X of the Use Classes Order. (3) What has been termed "blowing hot and cold." A

(1) It is not disputed that if the condition is invalid the whole planning permission goes. Then the question arises whether an enforcement notice can be served? The answer is in the negative because of the date when it was served. The Court of Appeal held that the condition was valid. In summary, the appellant's contention is that it is invalid because it does not fairly and reasonably relate to the permitted development. The condition must relate to the use of the hangars as warehouses but this condition goes far beyond that. B

(2) This raises the question whether there was any need for planning permission at all. This involves consideration of the Town and Country Planning (Use Classes) Order 1950, article 3, Schedule, Class X. Class X of the Order of 1950 combined Classes X and XI of the Town and Country Planning (Use Classes) Order 1948. This makes it plain that in the Order of 1950 "wholesale" in the expression "use as a wholesale warehouse or repository" is confined to warehouse. "Repository" does not connote storage of articles exclusively for business purposes. C

(3) Where there are existing use rights and planning permission is not necessary, whether the appellants nevertheless are bound by the maxim: qui sentit commodum sentire debet et onus; he who takes the benefit must also take the burden. It is said that the appellants are precluded from relying on existing use rights in Class X as they had taken up and implemented the permission granted to them in May 1962. This is a false point because there is no way of ascertaining which of the two alternatives the appellants acted under, namely, whether they went by way of relying on their existing use rights or under the permission granted to them. In the case of building operations it is plain whether a person is acting under a planning permission for the physical evidence can be seen, namely, the bricks and mortar. Alternatively, where there are existing use rights and also there is planning permission how can it be said that a person has taken the benefit of that permission when he does not need it? D E F

The following statutory provisions give the necessary background to this appeal: the Town and Country Planning Act 1971, sections 22 (1) (2) (*f*), 23 (1) (5) (6), 24 (1) (2) (*b*) (4), 25, 27, 29 (1), 30 (1) (*a*) (*b*) (2), 33 (1) (2), 36 (1) (3), 51 (1) (4), 52 (1) (2), 53 (1), 87 (1) (2) (3) (4), 88 (1) (*b*) (*d*) (3), 89 (1), 91, 170 (1) (2), 246, 266 (1) (*b*) (2) (3) (7), 290.

(1) For a condition imposed pursuant to section 29 (1) the Act of 1971 to be intra vires a local planning authority and valid it must satisfy three tests: (i) it must fairly and reasonably relate to a planning purpose; (ii) it must fairly and reasonably relate to the permitted development, and (iii) it must not be so unreasonable that no reasonable planning authority could have imposed it (see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223). G

The first and second tests stem from the statute: see section 29 which is concerned with the determination of applications for planning permission. As to the second test, section 29 is in Part III of the Act relating to control of development and development is defined in section 22. H

A Section 29 is dealing with control of development in particular cases—the development which is the subject of the application in question, for example. The decision is a decision on the application and in this case any conditions imposed must fairly and reasonably relate to the use of the land in question. Section 30 (1) is helpful as being illustrative of what Parliament intended to come within section 29 albeit section 30 commences with the words, "Without prejudice to the generality of section 29 (1) of this Act. B . . ." It is inherent in section 29 that any condition imposed must relate to the permitted development. To impose a condition as in the present case that at the end of the relevant period the buildings must be removed is to impose a condition which is not connected with the permitted development; it is not related to user. It is pertinent to contrast the language of section 29 with that of section 33 (2) where the planning authority can specify the use for which the building may be used.

C The first reported case relating to imposed conditions is *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572, where Lord Denning laid down the proposition that for "conditions, to be valid," they "must fairly and reasonably relate to the permitted development." The actual decision was reversed on appeal [1960] A.C. 260 on the ground that the development in question was allowed D under a private Act but, as Lord Reid stated in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751, Lord Denning's formulation of the law was approved by this House in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636.

Reliance is placed on *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 in that it confirms the three tests and E affords a good example of the third test. The language of section 29 (1) would appear to be in the widest terms but that the power to impose conditions is subject to limitations is made manifest in the speech of Lord Reid in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72, 86. The condition imposed in *City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169 satisfied all three tests. *Kingston-upon-Thames Royal London Borough* v. *Secretary of* F *State for the Environment* [1973] 1 W.L.R. 1549 supports the three tests. True, the first test is not explicitly mentioned because it was not necessary so to do but the other two are expressly mentioned at p. 1553. In *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 the conditions were held invalid because they could not satisfy the first test.

G (2) The use of the hangars by the Home Office was use as a repository and so was its previous use for the storage of fertilisers and the appellant's use of them is as a wholesale warehouse. All these uses are in the same class—Class X. Therefore there was no change of user involving development requiring planning permission. For the general accepted meaning of "repository," see the *Shorter Oxford English Dictionary*, 3rd ed. (1944), H p. 1707: "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited, or stored." Havers J.'s definition in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, in confining it to a building used for storage "in the course of a trade or business" was wrong and was un-

necessary for the decision in that case. The appellants have no quarrel with Lord Denning M.R.'s definition in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 provided that the concluding words in brackets are omitted: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe (as part of a storage business)." *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment* (1974) 72 L.G.R. 398 does not carry the matter any further. In any event, as *Town Investments Ltd.* v. *Department of the Environment* [1978] A.C. 359 shows, that use by a Government department is a business use.

(3) "Blowing hot and cold." This principle stems from the judgment of Lord Denning M.R. Lawton L.J. held that it was not necessary to decide this question and Browne L.J. disagreed with the Master of the Rolls on this issue. Browne L.J.'s formulation of the principle is correct in that it can only apply in circumstances such as those that pertain in *Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109.

It is a well established principle of planning law that a person who has been granted planning permission is not prevented from subsequently contending that no such permission was necessary by reason of existing use rights: see *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422; *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645; *Miller-Mead* v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; *Essex Construction Co. Ltd.* v. *East Ham Borough Council* (1963) 61 L.G.R. 452; *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 and *Emma Hotels Ltd.* v. *Secretary of State for the Environment* (1979) 250 E.G. 157.

As to the cases relied on by the respondents, *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15 and *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112, these are all distinguishable for those cases concern the creation of a new planning unit in that they involved the erection of new buildings. [Reference was also made to *Western Fish Products Ltd.* v. *Penwith District Council* (1978) 77 L.G.R. 185.]

John Newey Q.C. and *Christopher Symons* for the Secretary of State. The role of the Secretary of State in this appeal is: (1) to defend what he understands to be his function in enforcement notice appeals; (2) to justify his conclusions in the present case and (3) to make submissions in relation to the suggestion that equitable estoppel should apply in planning matters.

(1) There is no controversy in relation to this question. Appeals in respect of enforcement notices are governed by section 88 of the Town and Country Planning Act 1971. Before 1960 such appeals lay to magistrates' courts. The magistrates heard the evidence and directed themselves on the law and they reached their conclusions. The Act of 1960 allowed the Minister to give a decision on the merits. In all other respects the position of the Secretary of State is the same as that of magistrates before 1960. Under section 246 appeals lie from the Secretary of State to the High

A Court but only on points of law. If the Secretary of State is wrong on a point of law the High Court pursuant to R.S.C., Ord. 59, will remit the case to the Secretary of State to apply the law correctly to the facts.

On the validity of the condition, there is a slightly different approach from that of the district council. The three tests which must be applied to determine whether the condition is valid are: (i) The condition must come within the wording of section 29 (1) of the Act of 1971 as clarified B and illustrated by section 30: *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72. This would exclude conditions for non-planning purposes. *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 was rightly decided. (ii) The condition must fairly and reasonably relate to the permitted development. It is conceded that the removal of a building may reasonably relate to the C permitted development. (iii) The condition must be reasonable. In relation to the second and third tests the role of the Secretary of State is the same as that of the court on the question of reasonableness. Reliance is placed on the observations of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 and *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735.

D Section 33 (2) of the Act of 1971 is a useful provision for the planning authority and also for a developer. It is possible under this section for the planning authority to restrict the use of the land. Without this provision a developer who has permission to erect a building would have no permission to use the building without making a further application for planning permission. But it is a subsection of limited application and E cannot be used by converse reasoning to support the proposition that the local authority can attach a condition to a change of use permission requiring the demolition of a building.

The Secretary of State considered that in the circumstances of the present case, where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of F years was not specifically related to the change of use in respect of which the planning permission was granted and was unreasonable. He therefore concluded that the condition was invalid. The Secretary of State directed himself correctly as to the law and having so directed himself he reached the correct conclusion on the facts. The judgment of the Divisional Court (1977) 75 L.G.R. 608 is supported and in particular the observation of G Michael Davies J., at pp. 611–612, that it would be an injustice to the freeholder if the buildings were removed.

The correct method of ridding land of a non-conforming use is to proceed under section 51 of the Act of 1971. Parliament intended that this procedure should be used and the appropriate compensation paid. Compensation may not necessarily be a large amount. It frequently occurs, H as became the position in the present case, that an applicant has only a leasehold interest in the building concerned and thus a condition requiring the demolition of that building may well amount to a requirement that the applicant commits an act of waste as against his landlord.

As to existing use rights, the Secretary of State, as his decision letter makes plain, expressly directed himself in the terms of Lord Denning M.R.'s dictum in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512. It is conceded that the dictionary definitions of " repository " are against the Secretary of State. But the word has to be seen in its context. The three relevant decisions, *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803; *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 and *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment*, 72 L.G.R. 398, in relation to " repository " all import the concept of business usage. This is correct. In the Town and Country Planning (Use Classes) Order 1950 a wholesale warehouse is in Class X and a repository in Class XI. The 1950 Order does not define either warehouse or repository and both are placed in the same class—Class X. A wholesale warehouse obviously involves business premises to which goods are delivered and from where goods are despatched. According to the dictionary a " repository " is a place where, for example, archives are kept. But the word " repository " in Class X of the 1950 Order is coloured by the words " wholesale warehouse." It is emphasised that this reference to a wholesale warehouse colours the description of a repository. " Wholesale warehouse " covers the genus.

On " blowing hot and cold," the Secretary of State is greatly concerned at the prospect of the importation of this doctrine into planning law: see *Western Fish Products Ltd.* v. *Penwith District Council*, 77 L.G.R. 185, 200. Planning is concerned with the development of land and planning permission enures to the benefit of land and all persons for the time being interested therein: section 33 (1) of the Town and Country Planning Act 1971.

The introduction of equitable estoppel into the planning system will result in rights and obligations varying according to the persons concerned and depending on such factors as to what certain persons knew or did not know at the relevant time. The Secretary of State fears there would be much uncertainty and that it would work to the detriment of the ordinary citizen and would enormously complicate planning administration. It would raise great difficulties for planning officers and planning committees. See the article entitled " Planning Permissions—Blowing Hot and Cold " in [1979] J.P.L. 815. Reliance is placed on the same cases as those relied upon by Mr. Widdicombe Q.C.

Peter Boydell Q.C., *R. M. K. Gray* and *James May* for the district council. The council accept that in order to uphold the judgment of the Court of Appeal they must satisfy the House on two issues: (i) that there was an error of law on the part of the Secretary of State and (ii) that the Secretary of State was correct in determining that the company had no Class X right.

Having received planning permission on May 31, 1962, at a time when the company had no interest in the land several courses were open to them. One was to appeal to the Secretary of State. The company took with their eyes open this permission for two months later in July 1962 they bought a lease of the land at auction and the permission was referred to in the auction particulars. Before the Divisional Court nothing was said

about the position of the freeholder for the condition imposed was in the freeholder's favour. The position of freeholders was first mentioned in the judgment of Michael Davies J. in his reserved judgment.

On validity, section 88 of the Act of 1971 concerns appeals against an enforcement notice. The Secretary of State should have exercised his powers under subsections (5) and (6) of section 88. But the Secretary of State put it out of his power to vary the condition because he had held as a matter of law that it was a void condition. The question at issue here is: what are the functions of the Secretary of State when he is entertaining an enforcement notice appeal of this nature and considering a condition? The Secretary of State has a dual function when he is exercising this appellate jurisdiction, namely (a) he has to consider whether the condition is void in law and if he holds it is not void in law then (b) he goes on to exercise his functions under section 88 (5) and (6) and considers all the circumstances of the case and whether he should substitute another condition. It is vital to keep separate these two functions for the first is a quasi-judicial function. The second function is the exercise of the highest planning function in this country. This is the heart of the respondent's case. In the present case there has been a confusion by the Secretary of State and the Divisional Court between these two functions.

The Secretary of State should have held that the condition was not void in law and then gone on to exercise his powers under section 88 and made a decision. If the judgment of the Court of Appeal is upheld then the case should be remitted to the Secretary of State with the direction that the condition is not void in law and he can then exercise his powers under section 88. There is no evidence whatsoever that the Secretary of State has exercised his powers under subsections (5) and (6).

In determining the validity of a condition there are two tests applicable, not three as suggested by the appellants: (i) Is the condition imposed for a planning purpose? and (ii) is it a condition that no reasonable planning authority could have imposed (the *Wednesbury Corporation* principle [1948] 1 K.B. 223)? Strong reliance is placed on the following example: a local authority has a piece of land not required for fifteen years when it is scheduled to be the site of a public library. The local authority allow a single-storey building to be erected on the land for use as a warehouse with a condition that it must be removed after fifteen years. After ten years there is a change of use to a cash-and-carry store. On the appellant's argument there could not be imposed a condition for demolition of the building because of the change of use!

In *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636, 678, Lord Denning considered that the principles applicable to planning conditions are analogous to those applicable in the by-law cases. In those circumstances it follows that the present condition cannot be attacked because it cannot be said that the present action of the respondents is "fantastic and capricious": *Slattery* v. *Naylor* (1888) 13 App.Cas. 446, 452. The principle laid down in *Kruse* v. *Johnson* [1898] 2 Q.B. 91 can be applied a fortiori to a planning case, namely, that in determining the validity of by-laws made by public representative bodies the court ought to be slow to hold that a by-law is void for unreasonableness.

The *Wednesbury Corporation* case [1948] 1 K.B. 223 shows that the courts are extremely slow to interfere in by-law cases and it follows that very rarely should the Secretary of State interfere with a condition imposed by a local planning authority. A

Cases such as *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735; *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72 and *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549 all suggest that there are but two tests. Further, in the *Kingsway Investments* case [1971] A.C. 72 all their Lordships' speeches equated planning conditions with by-laws and referred to *Kruse* v. *Johnson* [1898] 2 Q.B. 91 as containing the principle to be applied. As to the contention that this condition would lead to a loss of rights under section 23 (5) of the Act of 1971, it is true that requiring the removal of a building at the end of a planning period deprives the applicant of his right to resume the former use of the land. The appellants claimed that the rights in question were those enjoyed between 1955-1959. But that does not avail them for they were illegal rights since all that the Home Office had was immunity from proceedings being taken in respect of the contravention of previous planning control because the Crown never received planning permission. In the circumstances there was an abandonment of use before 1955 and the observations of Bridge J. in *LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1975] 1 W.L.R. 138, 142F–G are applicable. B C D

As to waste, if a condition is imposed that the recipient cannot carry out then he has a right of appeal against it. This point would equally apply to a question of operations on land or buildings. E

It is further said that the condition was void because if the local planning authority wished to have these hangars removed the correct procedure was for them to have gone under sections 51 or 52 of the Act of 1971. But the fact that the matter could have been dealt with under other provisions is nihil ad rem. It is not a relevant consideration in law that there were other methods available to the local planning authority to achieve the same object but involving the payment of compensation under section 51. Moreover, it is wholly unrealistic in the present case to suggest that because some kind of statutory agreement might have been reached under section 52 it should have been used when no-one considered it relevant and all parties considered the condition to be an acceptable way of achieving the local planning authority's known planning objections. The Court of Appeal were not satisfied that Berkshire County Council might have achieved the objective of the removal of the hangars by proceeding under section 16 of the Berkshire County Council Act 1953. F G

As to the meaning of " repository," it is not every use which fits into a use class. There are many that do not: *Tessier* v. *Secretary of State for the Environment* (1975) 31 P. & C.R. 161. The Home Office user was the same sui generis user as that in the *Tessier* case. The Home Office use was not within Class X of the Order of 1950 at all. The Secretary of State was entitled so to hold. H

If the ambit of Class X is as wide as the appellant company contend

A then a museum would come within Class X, but a museum is specifically included in Class XVII. A burial ground is a good example of a repository that does not come within the ambit of Class X. This shows that the dictionary definition of "repository" cannot be imported as a definition into Class X. The word "repository" has been consistently defined by the courts as being a building where goods are kept or stored in the course of a trade or business: see, for example, *G. Percy Trentham Ltd.* v. B *Gloucestershire County Council* [1966] 1 W.L.R. 506, 513, *per* Diplock L.J. Further, the definition of "repository" contained in the Order of 1958 is irrelevant in construing the Order of 1950: see *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment*, 72 L.G.R. 398, 401, *per* O'Connor J.

The Home Office user as storage of civil defence vehicles necessitated C no traffic to the premises save in the event of a national emergency whilst the user by the appellant company necessitated a great deal of traffic to and from the site. This is what impressed the inspector and the Secretary of State. If there is some element on which the Secretary of State could find as he did then the authorities show that the courts will not disturb his decision without his finding was perverse, in the sense that the evidence could not support it: *Bendles Motors Ltd.* v. *Bristol Corporation* [1963] D 1 W.L.R. 247. Reliance is placed on the observations of Lord Reid in *Cozens* v. *Brutus* [1973] A.C. 854, 861, 862, that it is a question of fact what is the meaning in the ordinary use of the English language of, in the present case, the word "repository." Then it has to be considered in its context. It is to be noted that not only the Secretary of State but all members of the courts below found for the definition of "repository" as contended for by the respondents. "Repository" in the present context E has to be construed in a more limited sense than its ordinary natural meaning. Whether or not a given use falls within a particular use class is a matter of fact and the Secretary of State on that matter of fact will not be disturbed by the courts: *LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1976] Q.B. 663.

The purpose of the Use Classes Order is to relieve the developer from F seeking planning permission for what would otherwise be a material change of use and therefore one would expect to find some similarities between the various uses mentioned in a given class. Thus there is a genus in Class XI: "Use as a boarding or guest house, a residential club, or a hotel providing sleeping accommodation." If Class X was concerned with storage per se it would merely have contained the words "a store for any purpose." The issue on the present appeal on this question comes down G to the meaning of the word "repository" as a question of fact. Was the Secretary of State's decision in the present case untenable or perverse or so unreasonable that no Secretary of State could have reached it? The answer is plainly in the negative.

On "blowing hot and cold," the argument can be put in three ways: (1) as it was adumbrated in *Prossor* v. *Minister of Housing and Local* H *Government*, 67 L.G.R. 109. (2) As an application of the maxim, he who enjoys the benefit must suffer the burden. (3) Election.

(1) Hitherto the *Prossor* principle has only applied to building operations. It has not yet been extended to where there has been a change of

development. This issue can be put in three alternative ways: (a) Where a planning permission is sought, granted and implemented, the planning history starts afresh. (b) Alternatively, and more narrowly, the planning history starts afresh where the acceptance and implementation of the planning permission is inconsistent with reliance on earlier existing use rights. In the present case there is an assumption that there was a lawful condition for removal of the hangars. Earlier existing use rights, namely, as a warehouse or a repository are inconsistent with existing use rights— they are inconsistent with the permission of 1962, because once the hangars had been removed clearly there can be no use of the land as a warehouse. This is akin to a waiver. This second formulation of the argument is more restrictive because some of the cases subsequent to the decision in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109, have queried the width of the language used by Lord Parker C.J. in *Prossor*. The key word in both formulations in (a) and (b) is "implemented." (c) This is the narrowest formulation: the planning history starts afresh as under (b) above except where no permission was ever required either because the use was in existence on July 1, 1948, or because there was a deemed permission under the general development order. The respondent relies on formulations (a) and (b).

There are five cases on the principle adumbrated in *Prossor* all of which have been decided within the last ten years whilst the cases relied on to the contrary by the appellants are very much older. Those on which the respondents rely are: *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15; *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112; *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549 and *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1.

True, all the above were cases where some building was permitted by the planning permission. It is also conceded that the principle has not yet been extended to an exclusively change of use case but (i) there seems no reason in principle why the doctrine of *Prossor* should not apply to a change of use case, and (ii) it would make for confusion if one of two kinds of planning act development was subject to the *Prossor* principle whilst the other was not. So many cases are both development by operation and development by change of use. This could lead to complex situations and problems. What was done in the present case was what was contemplated by the Court of Appeal in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1.

(2) Another way of looking at the quasi-estoppel or election in this case is to see it as an application to planning law of the principle that a benefit cannot be taken without associated burdens. The appellant company, having taken the benefit of the 1962 permission, cannot now allege that permission was unnecessary in order to avoid the obligations attached to the permission. The application of the maxim, qui sentit commodum sentire debet et onus to planning cases was discussed in argument in *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303,

A 308, but whether it could be applied in such cases was specifically left undecided (p. 315). The maxim is merely a way of formulating the quasi-estoppel or election which can arise in a wide variety of circumstances of which the present case is one example. Examples of its application, neither of them planning cases, are to be found in *Halsall* v. *Brizell* [1957] Ch. 169 (an obligation to contribute to the maintenance of an easement) and *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 (another ease-
B ment case), but there is no logical reason why the principle should be inapplicable to planning cases. There was a discussion of the principle (in the very different context of the Workmen's Compensation Acts) in this House in *Lissenden* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412 and in *Young* v. *Bristol Aeroplane Co. Ltd.* [1946] A.C. 163. The question of loss of a planning permission by abandonment (in very different circum-
C stances from the present case) was also discussed in *Slough Estates* v. *Slough Borough Council (No. 2)* [1971] A.C. 958, but the point was left specifically undetermined by Lord Pearson at the end of his speech (p. 971F).

(3) The appellant company's conduct can also be seen as raising a quasi-estoppel or election; the company could have made in 1962 the inquiries which it made in 1972 and the question could then have been
D resolved. The choice between two inconsistent courses, which is a prerequisite of an election, can be based on implied knowledge of the existence of those two courses as well as on actual knowledge. The doctrine is set out in *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed. (1977), p. 313.

In 1962 the appellant company by its actions led the planning auth-
E ority to believe that it was relying on the planning permission granted in 1962 to the exclusion of previous planning permission. If it had been made plain that the company was relying on existing use rights then the local planning authority would have made a discontinuance order with a ten year condition.

As to the argument advanced on behalf of the Secretary of State that
F the principle enunciated by Lord Denning M.R. would cause uncertainty, the contrary was in fact the case, because the 1962 planning permission was a document certain in its terms and available to any purchaser, whereas the rights claimed by the company depended on an examination of uncertain facts said to be established by imprecise evidence, which would have become inevitably more imprecise by the passing of time.

Newey Q.C. in reply. The effect of section 88 (7) of the Town and
G Country Planning Act 1971 is to provide that whenever an appellant has appealed, for example on ground (*b*) of section 88 (1), then the Secretary of State has jurisdiction and the effect is the same as if the appellant has actually lodged an appeal under section 88 (1) (*a*). On the Secretary of State receiving an appeal pursuant to section 88, which includes an appeal under ground (*b*), his first function is to decide whether the appeal under
H ground (*b*) is valid or not. If he decides that the appeal under ground (*b*) should be upheld then he quashes the enforcement notice. The effect of that is to place the appellant in a position which cannot be challenged. In the present case if the Secretary of State correctly decided that the con-

dition was invalid then the company is in a completely unchallengeable position. The company has used these hangars for storage since before 1963. If the Secretary of State decided that the company had existing use rights then the enforcement notice must be quashed since the use existed before 1963 and again the company is in an unchallengeable position.

As to tests of legal validity, the difference with the respondents appears to be one of wording rather than of substance. It is said that the Secretary of State mis-directed himself in law but if one peruses the Inspector's report it will be seen that he does not rely on Circular 5–68. It is plain on the documents that the Secretary of State did not mis-direct himself.

It is not necessary for the House to determine the question of waste. But as a general proposition it is a question of unreasonableness for the Secretary of State to consider.

On "blowing hot and cold," in so far as existing use rights are concerned: see section 94 of the Town and Country Planning Act 1971. *Prossor* v. *Minister of Housing and Local Government,* 67 L.G.R. 109, and that line of cases were correctly decided where as in those cases there are building operations. The principle in *Prossor* has nothing to do with estoppel but with the principle that planning rights exist in rem. The test is a practical one: Has a new planning unit come into existence where building operations are involved? If the physical character of the land has been altered substantially so as to create a new planning unit then a new planning history begins.

A mere permission for change of use does not alter the physical nature of the land and does not create a new planning history. If the *Prossor* principle were extended it would lead to great difficulties: see section 22 (1) of the Act of 1971. A building, engineering or mining operation all affect the physical character of the land to create a new planning unit. On the other hand, a change of use can rarely create a new planning unit in the Crown's submission. It is conceded, however, that there are circumstances where this could happen, for example, where permission is granted to change the use of residential premises in single occupation to a multi-occupation use, such as where a house is divided into flats.

Widdicombe Q.C. in reply. A perusal of the leases in this case shows that the hangars were not chattels but part of the realty. As to section 88, the key subsection containing the powers of the Secretary of State is subsection (5). Subsections (6) and (7) are machinery to implement the provisions of subsection (5).

As to the three tests for validity of the condition, the second test that the condition "must fairly and reasonably relate to the permitted development" is in the statute. It is an advantage in the administration of planning law to have three and not two tests. The appellants would refer once again to section 29 of the Act of 1971 and of the examples contained in section 30. If the second test is to be treated as separate then the third test has still a reasonable life and scope of its own.

As to *Kruse* v. *Johnson* [1898] 2 Q.B. 91, the appellants join issue with the respondents on the question of byelaw cases having any relevance in planning matters.

A It is pertinent to observe that if the language of Class X had read: " wholesale warehouse or store " this would have led to difficulties because it might have been considered to have included a departmental store and therefore the word " repository " was used instead of it. As to *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 the definition adopted there of " repository " appears to have come from *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803. But in that latter case the B definition of repository there given was not necessary to the decision. It is further to be noted that in the Use Classes Order 1950 the draughtsman uses the word " business " when he deems it necessary so to do.

The argument put forward on behalf of the Secretary of State in relation to the *Prossor* principle is adopted. Many of the earlier cases such as, for example, *Mounsdon* v. *Weymouth and Melcombe Regis Borough* C *Council* [1960] 1 Q.B. 645 were decided by Lord Parker C.J. who decided *Prossor,* 67 L.G.R. 109.

Boydell Q.C. in reply. On an examination of those cases in which Lord Parker was party to the decision it will be seen that in none of them was planning permission acted upon, which is the *Prossor* principle.

Their Lordships took time for consideration.

D

February 28. VISCOUNT DILHORNE. My Lords, on May 7, 1962, the appellants, the International Synthetic Rubber Co. Ltd. (hereafter referred to as " I.S.R.") sent to the Hungerford Rural District Council who were then acting for the Berkshire County Council, then the local planning authority, an application dated May 3, 1962, for permission to E use two hangars on what had been Membury Airfield as warehouses for the storage of synthetic rubber. They said that they were prospective buyers of the hangars from the Air Ministry and that as considerable capital outlay would be involved, " it would be appreciated if the planning authorities could see their way to giving their permission to cover as long a period forward as is possible."

I.S.R. were then occupying one of the hangars under a lease granted F to them by the Secretary of State for Air for nine years commencing on May 8, 1961.

On May 31, 1962, the Hungerford Rural District Council gave that company permission to use the two hangars as warehouses subject to two conditions, one being that " The buildings shall be removed at the expiration of the period ending December 31, 1972."

G The written statement of the Berkshire County Council which accompanied the county map in February 1960, said that:

> " Problems have arisen from time to time regarding the use of buildings on sites relinquished by government departments. These are often suitable in design for industrial or storage use, although frequently their location in open countryside renders them unsuitable H in location as permanent centres of employment, and detrimental to landscape amenities. The local planning authority will normally only permit permanent changes of use in localities appropriate in the

light of their general policy objectives for the distribution of employment; otherwise they will seek to secure the removal of the buildings. Temporary periods of changed use may be permitted in particular circumstances."

On July 26, 1962, I.S.R. bought the two hangars and the Secretary of State's leasehold interest in the land under a lease for 40 years which commenced on November 30, 1961.

I.S.R. did not, as they could have done, appeal against the imposition of the condition that the hangars should be removed. On November 4, 1969, they applied for planning permission to make an extension to an existing office on the airfield. They were given permission to do so subject to the condition that at the expiration of the period ending December 31, 1972, the building should be removed.

On November 5, 1970, I.S.R. applied for an extension of the permission to use the hangars as warehouses for 30 years. On January 4, 1971, this application was refused and on June 25, 1971, I.S.R. appealed against this refusal.

The two hangars and the extension to the office were not removed at the expiration of the period ending December 31, 1972, and on November 12, 1973, the hangars and extension still not having been removed, the Hungerford Rural District Council served two enforcement notices on I.S.R. requiring their removal within three months.

I.S.R. appealed against these notices to the Secretary of State for the Environment. Although the case in respect of the enforcement notice relating to the office extension differed in some respects from that relating to the notice applying to the hangars, it was agreed that the result of the appeal as to the notice in respect of the office extension should depend on and follow the result of the appeal as to the notice about the hangars. No separate argument was therefore advanced in connection with the office extension.

These appeals were brought under section 88 of the Town and Country Planning Act 1971 which provides for an appeal against an enforcement notice on any of seven grounds. In this case only the first two are relevant. They are as follows:

> "(1) . . . (*a*) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged; (*b*) that the matters alleged in the notice do not constitute a breach of planning control."

In the notice of appeal relating to the hangars it was asserted, first, that the condition as to the removal of the hangars was void with the result that the permission granted in 1962 was unconditional, and, secondly, that the authorised use of the hangars on July 1, 1948, the date when the Town and Country Planning Act 1947 came into force, was "warehouse/storage" and that the hangars were used for "warehouse/storage purposes throughout the period 1948/62."

If the authorised use of the hangars on July 1, 1948, was "warehouse/storage" and that use had not been abandoned or if the "existing

A use" of the hangars was for "warehouse/storage purposes," it was not necessary to apply for planning permission to use the hangars for those purposes.

The first question to be considered in this appeal appears to me to be: *Was planning permission necessary for the use by I.S.R. of the hangars as warehouses?*

Before making his decision on these appeals the Secretary of State B directed a local inquiry. The inspector who held the inquiry reported on February 5, 1975. His findings of fact were accepted by the Secretary of State and the relevant findings were as follows: that Membury Airfield ceased to be operational in 1947; that from 1947 to 1953 the hangars were used as a storage depot on behalf of the Ministry of Agriculture, Fisheries and Food; that in 1953 the airfield was transferred to the United States C Air Force and the use then made of the hangars is not known; that in 1954 it became a sub-depot of No. 3 Maintenance Unit at Milton; that from 1955 to 1959 the hangars were used by the Home Office for the storage of Civil Defence vehicles; and that in 1959 an 11 year permission was granted for the use of the hangars for the storage of fertilisers subject to the condition that at the end of that period the hangars would be removed.

D The inspector concluded on the facts that there was a clearly established use of the hangars when in Crown occupation prior to 1959 for storage and that the only gap in their use for storage was when they were used by the United States Air Force and that after that, use for storage was resumed. In his view the application for permission to use them for the storage of fertilisers in 1959 was unnecessary and I.S.R. did not E require planning permission to use them for storage as that was their previous use.

The Secretary of State in his decision letter of July 24, 1975, held that when the hangars were used for storage purposes from 1947 to 1953 and again from 1955 to 1959 the hangars formed an independent planning unit. He held that the Home Office use of them was not use as wholesale warehouses nor was it use as repositories coming within Class X of F the Town and Country Planning (Use Classes) Order.

It was not contended by the appellants that the use by the Home Office was use as wholesale warehouses but it was submitted that the hangars were then used as repositories.

By the Town and Country Planning (Use Classes) Order 1948 (which came into force on the same day as the Town and Country Planning Act G 1947) it was provided by paragraph 3 (1) that:

> "Where a building or other land is used for a purpose of any class specified in the Schedule to this Order, the use of such building or other land . . . shall not be deemed for the purposes of the Act to involve development of the land."

Class X in the Schedule read as follows: "Use as a wholesale warehouse H for any purpose, except storage of offensive or dangerous goods." And Class XI as follows: "Use as a repository for any purpose except storage of offensive or dangerous goods." "Repository" was defined in paragraph 2 (2) of this Order as meaning "a building (excluding any land

occupied therewith) where storage is the principal use and where no business is transacted other than incidentally to such storage." The meaning of " wholesale warehouse " was also defined.

In 1950 this Order was replaced by the Town and Country Planning (Use Classes) Order 1950. The purpose of this Order was to amalgamate certain of the use classes so that a wider range of changes of use might take place without involving development requiring planning permission.

Classes X and XI of the Order of 1948 were amalgamated and Class X in the Order of 1950 read as follows: " Use as a wholesale warehouse or repository for any purpose." In subsequent Use Classes Orders, this has not been altered.

The definitions of " repository " and " wholesale warehouse " were omitted from the 1950 and subsequent Use Classes Orders but, if it had been the intention that these words should bear a different meaning from that they bore from 1948 to 1950, I would have expected that to have been made clear.

In my opinion the definition of " repository " in the Order of 1948 is an excellent definition of the meaning that would ordinarily be given to that word.

The Secretary of State based his decision on a sentence of Lord Denning M.R. in his judgment in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506. Lord Denning had pointed out that under Class X a building used as a repository for storing furniture could be used as a repository for storing archives without getting planning permission and then went on to say, at p. 512: " A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (my emphasis).

In an earlier case *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810 Havers J. had said: " ' Repository,' I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business."

He did not say why he thought that nor did Lord Denning say why he thought that the storage must be part of a storage business. It may be that the conjunction of " wholesale warehouse " and " repository " in Class X of the Order of 1950 led to the view that as use as a wholesale warehouse would be use for a business purpose, use as a repository must also, to come within Class X, be for a business purpose but if this was so, the history of the Order shows, in my opinion, that it was not well-founded. A place may be used as a repository for archives without being used as part of a business, e.g. a muniment room. The merger of Classes X and XI of the Order of 1948 into Class X of the Order of 1950 was not done with the object of altering the meaning to be given to the word " repository " but to extend the changes of use that might be made without planning permission.

All the members of the Divisional Court (Lord Widgery C.J., Michael Davies and Robert Goff JJ.) and all the members of the Court of Appeal (Lord Denning M.R., Lawton and Browne L.JJ.) agreed that the use of the hangars by the Home Office was not use as a repository.

Despite the unanimity of judicial opinion and despite the strong view

A expressed by Lord Denning M.R. [1978] 1 W.L.R. 1241, 1250, that "no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber" and that of Lawton L.J., at p. 1253, that

> "As a matter of the ordinary modern usage of the English language, . . . no literate person would say that the use to which the Home Office had put the hangars in the 1950s was, or that the company
B are now, using them as a repository"

I feel compelled to say that to describe the use of the hangars when so filled as use for a repository is, in my opinion, a perfectly accurate and correct use of the English language. They were when used by the Home Office used as repositories for fire-pumps and so to describe them is just as correct as it is to describe a burial place as a repository for the
C dead.

The Secretary of State cannot be blamed for holding that they were not used as repositories coming within Class X in the light of what was said in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 but in my view it is wrong to say that to come within that class use as a repository must be use as part of a storage business.

D My conclusion on this part of the case is that the use by the Home Office was use as a repository coming within Class X and that, consequently, unless that use was abandoned—and that was not established—or unless I.S.R. cannot now rely on that use in consequence of "blowing hot and cold," I.S.R. can now, by virtue of Class X, use the hangars as wholesale warehouses without planning permission.

E *Blowing hot and cold*

The respondents contended that the appellant was precluded from relying on existing use rights and Class X as they had taken up and implemented the permission granted to them on May 31, 1962. This contention found favour with Lord Denning M.R. He said, that in 1962 I.S.R. had two inconsistent courses open to them, [1978] 1 W.L.R. 1241,
F 1250–1251:

> "One was to apply for a grant of planning permission; the other was to rely on any existing use rights that might be attached to the site. Once they opted for planning permission—and accepted it without objection—they had made their bed and must lie on it. No doubt they did not know of the past history, but that was only
G because they did not choose to rely on it. They should not be allowed to bring it up again now."

I do not know whether I.S.R. before they applied for planning permission in May 1962 and before they had acquired the hangars could have found out the past history but however that may be, I find this passage from Lord Denning's judgment difficult to reconcile with his
H acceptance of the argument advanced in *Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15 that the fact that a man applies for planning permission does not debar him from afterwards alleging that he was entitled to rely on "existing use" rights.

Lawton L.J. did not find it necessary to decide this question and Browne L.J. did not agree with Lord Denning on this.

It was not until the decision in *Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109 that any support can be found for the proposition that application for followed by the grant and use of planning permission prevented reliance on existing use rights. In that case permission was given for the rebuilding of a petrol station subject to the condition that no retail sales other than of motor accessories should take place thereon. After the rebuilding second-hand cars were displayed for sale on the site. An enforcement notice was served. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J. said, at p. 113:

> "... assuming that there was ... an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April, 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ..."

The correctness of this decision was doubted by Winn L.J. but not by Lord Denning M.R. in *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15. There the planning permission was to build premises twice the size of premises which had been destroyed by fire. Lord Denning doubted whether, having obtained that permission and having taken advantage of it by building the new premises, the appellants could afterwards rely on existing use rights. Winn L.J. did not think it necessary to decide the case on that ground. He thought that there was no sufficient proof of existing use rights.

These two cases were reviewed in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112. In this case Widgery L.J., with whose judgment Lord Parker C.J. agreed, while thinking that the *Prossor* case, 67 L.G.R. 109, was rightly decided, thought it was a case which should be applied with some little care. In this case planning permission was given for the erection of a building on a clear site and the building was put up. Widgery L.J. said, at p. 1117:

> "Where that happens ... in my judgment one gets an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use, that is to say, immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, it is a use which can be restrained by planning control."

My Lords, there are a number of cases, of which *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645

A is one, in which it has been held that a grant of planning permission does not prevent it being subsequently contended that no such permission was necessary on account of existing use rights and I do not myself think that the decision in the *Prossor* case, 67 L.G.R. 109, is sustainable on the basis that the obtaining and taking up of planning permission in itself prevents reliance on such rights.

If, however, the grant of planning permission, whether it be permission to build or for a change of use, is of such a character that the implementation of the permission leads to the creation of a new planning unit, then I think that it is right to say that existing use rights attaching to the former planning unit are extinguished. It may be that in the *Prossor* case the erection of the new building created a new planning unit. If it did, and it is not very clear from the report, then in my view that case was rightly decided.

It is clear that in this case the grant of the planning permission in May 1962 did not create a new planning unit and so, in my opinion, I.S.R. were not precluded from relying on the existing use rights attaching to the site.

If, contrary to my view, planning permission was necessary for the use of the hangars by I.S.R., the validity of the condition attached to that permission has to be determined.

The validity of the condition

Section 29 (1) of the Town and Country Planning Act 1971 requires a local planning authority when dealing with an application for planning permission to have regard to the provisions of the development plan so far as material "and to any other material considerations," and gives the planning authority power, subject to the provisions of a number of sections (which have no relevance to this case) to grant planning permission, either unconditionally or subject to such conditions as it thinks fit or to refuse permission.

The power to impose conditions is not unlimited. In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 Lord Denning said, at p. 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Reid said in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751, this statement of law was approved by this House in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636.

It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed

them: see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, *per* Willmer L.J. at p. 248, *per* Harman L.J. at p. 255, *per* Pearson L.J. at p. 261; *City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169 and *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720.

The conditions in this case were clearly imposed for planning purposes. Did they fairly and reasonably relate to the proposed development? If they did not, it is unnecessary to consider whether they were so unreasonable that no planning authority could reasonably have imposed them. The Secretary of State came to the conclusion that the condition that the hangars should be removed at the end of the period during which their use as warehouses was permitted, did not fairly and reasonably relate to their use as warehouses. The Court of Appeal held that he was wrong.

In 1968 the Ministry of Housing and Local Government published a circular entitled " The Use of Conditions in Planning Permissions " as guidance to the use of the power. In the paragraph headed " Is the condition relevant to the development to be permitted? " the following appears:

> " A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected. It may so spring, for example, if with both buildings on it, the site would be overdeveloped. But the grant of permission for a new building or for a change of use cannot properly be used as a pretext for general tidying-up by means of a condition on the permission."

The attention of the inspector was drawn to this paragraph and it was contended that he and the Secretary of State had reached the conclusion that the condition did not fairly and reasonably relate to the permission granted on the ground that, in view of this statement in the circular, a condition requiring the removal of a building could not be attached to a permission relating to its use. If they had decided this question on this ground, they were in my opinion, wrong. Although it may be that only in exceptional cases could it be held that a condition requiring the removal of buildings fairly and reasonably related to the grant of permission for their use, such cases may occur.

I do not, however, think that the inspector or the Secretary of State decided this question on this ground. The inspector held that:

> ". . . the condition that such substantial and existing buildings as the two hangars should be removed would appear to flow from a general wish to restore the area as a whole rather than from any planning need arising from the actual purpose for which the permission was sought. It was not necessary to that purpose, or to the protection of the environment in the fulfilment of that purpose: it was a condition extraneous to the proposed use."

So he held that the condition was void.

The Secretary of State in his decision letter said:

> "The inspector's conclusions have been considered. It is evident that the local planning authority imposed the condition to remove the hangars to safeguard their long term policy for industrial development in rural areas and to secure the future improvement of the amenity of the area of the appeal site. It is considered however, in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable."

This appears to me in substance to be a repetition in different language of the inspector's conclusion. The Secretary of State agreed with him as to the object the local planning authority had sought to achieve. They both emphasised the substantial nature of the existing buildings. The contention that the Secretary of State misdirected himself by holding that a condition requiring demolition of a building could not be attached to a use permission does not appear to me established.

If in the circumstances of this case the condition imposed was not, in the Secretary of State's opinion, fairly and reasonably related to the permission granted, the courts cannot interfere with his conclusion unless it is established that he misdirected himself or reached a conclusion to which he could not reasonably have come. That has not been done.

The Secretary of State held that the condition which in his view was invalid, was not severable from the permission granted and that consequently this permission was void. In my opinion he was entitled so to do and I consequently conclude that the enforcement notices were invalid and also that as the use of the hangars by I.S.R. started before January 1, 1964, no enforcement notice can now be served.

I would allow the appeals and restore the order of the Divisional Court. In my opinion the proper order as to costs should be that no order should be made in respect of the Secretary of State's costs and that the Newbury District Council should pay the appellants' costs in this House and in the Court of Appeal.

LORD EDMUND-DAVIES. My Lords, I seek to do no more than add some short comments on the three main issues involved in these appeals, as I share in the common agreement of your Lordships that the appeals must be allowed and the order of the Divisional Court restored, and this for the reasons advanced in the speech of my noble and learned friend, Viscount Dilhorne.

Of the three issues, the first logically calling for consideration is whether, on the true construction of Class X of the Town and Country Planning (Use Classes) Order 1950, the use by the Home Office of the former aircraft hangars between 1955 and 1959 for the long-term storage of civil defence vehicles constituted use as a "repository." A negative answer to that question has hitherto been given throughout by the

Secretary of State, the Divisional Court and the Court of Appeal. But the true answer, as I think, is that there was a Class X user of the hangars right back to 1950, when the Use Classes Order of that year put "wholesale warehouse" and "repository" uses for the first time in the same user class. It is common ground that the I.S.R. user was as a wholesale warehouse, and the sole dispute on this aspect of the case relates to the nature of the Home Office four years' user. If, as I.S.R. assert, it was as a "repository," it follows that the later user by them involved no material change of user and therefore no "development," and, accordingly, no planning permission was necessary. The issue accordingly resolved itself into the proper meaning of the term "repository." Havers J. said in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810: "'Repository,' I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business." This was followed by the obiter dictum of Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512, that: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (Emphasis added). But, my Lords, the relevant words of the Use Classes Order itself are "repository for any purpose," and the qualification judicially imposed was, with respect, contrary both to the Order itself and to the generally accepted meaning of "repository." There is, I hold, no material difference (as far as the Use Classes Order is concerned) between a furniture repository or a repository for archives (cited by Lord Denning M.R. as typical uses of the word) and the use of the hangars by I.S.R. as a wholesale warehouse. It follows, accordingly, that no planning permission was required by them in turning the hangars to such use.

My Lords, as to the earlier issue raised, that relating to the interpretation of sections 29 and 30 of the Town and Country Planning Act 1971, I desire to say no more than that, in my judgment, learned counsel for I.S.R. went farther than he need in submitting that a condition for removal of buildings could *never* be attached to a planning permission restricted to change of use. It is true that such was the view expressed in the ministry circular 5/68, issued in 1968 ("The Use of Conditions in Planning Permissions") and followed by the Secretary of State in the present case. But whether a removal condition may properly be imposed in *some* circumstances, wholly different from those of the present case, may on another occasion call for careful consideration. For present purposes it is sufficient to hold, as I do, that, in the circumstances of the instant case, the condition for removal of the hangars did not fairly or reasonably relate to the permitted development.

The third issue ("Blowing hot and cold") was not advanced at the inquiry and was therefore never considered by the Secretary of State. Nor was it raised in the notice of motion to the Divisional Court, though it was adverted to at the hearing, Michael Davies J. restricting himself to saying (1977) 75 L.G.R. 608, 612: "I do not think that there is any comfort for the appellant [Newbury District Council] in it," and Robert Goff J. expressing himself similarly. In the Court of Appeal it was sympathetically received by Lord Denning M.R. alone. Learned counsel for the

Secretary of State expressed alarm in this House at the prospect of the view expressed by Lord Denning M.R. receiving acceptance by your Lordships, envisaging as one of the possible results the destruction even of what had long been regarded as established rights of user. I restrict myself to saying that I am in respectful agreement with all your Lordships in holding that, on the facts of this case, the "hot and cold" doctrine should be regarded as having no application.

LORD FRASER OF TULLYBELTON. My Lords, these appeals, which were heard together, raise questions of planning law as it affects two hangars built by the Royal Air Force on Membury Airfield during the war. The hangars now belong to the International Synthetic Rubber Co. Ltd. ("I.S.R."), who are the appellants in one appeal. The appellant in the other appeal is the Secretary of State for the Environment. The respondent in both appeals is Newbury District Council. After the war the hangars were used for storing various things but it is unnecessary to go further back than 1955. From 1955 to 1959 they were used by the Home Office for the long-term storage of civil defence vehicles, including "Green Goddess" fire engines. In 1959 planning permission was given for the hangars to be used for the storage of agricultural products, subject to a condition that the buildings were to be removed at the expiration of a period ending December 31, 1970. Thereafter one of them was used for a time for storing fertilisers and agricultural goods. On May 31, 1962, planning permission was granted to I.S.R. by the predecessors of the respondents as planning authority, for use of the hangars as "warehouses." The permission was not expressed to be for a limited period, but it was subject to two conditions, one of which was that "The buildings shall be removed at the expiration of the period ending December 31, 1972." In July 1962 I.S.R., having been granted planning permission, bought the hangars and proceeded to use them as warehouses.

In 1970, when the time for demolition was drawing near, they applied for an extension of the planning permission for 30 years, but their application was refused by the respondents. I.S.R. appealed to the Secretary of State against the refusal, and on November 12, 1973, while the appeal was pending, an enforcement notice was served on them requiring them to comply with the condition that the hangars be removed. (A separate enforcement notice was served on I.S.R. at the same time relating to the removal of another small building. This notice was also the subject of an appeal which forms part of the present proceedings, but we heard no separate argument about it and I need not refer to it again.) I.S.R. appealed to the Secretary of State against the enforcement notice, and against the refusal to extend the planning permission for 30 years. After a public inquiry, the Secretary of State upheld I.S.R.'s appeal against the enforcement notice on the ground that the condition attached to the planning permission of 1962 was invalid and was not severable from the rest of the notice. But he rejected an argument for I.S.R. to the effect that no planning permission had been required in 1962 because the hangars had been in use since 1947 for a purpose in the same use class as wholesale warehouse. He dismissed the appeal against the refusal to extend planning permission for 30 years. The Divisional

Court refused an appeal against the Secretary of State's decision. The Court of Appeal allowed an appeal by the respondents and held that the enforcement notice was valid but they again rejected the argument that planning permission had been unnecessary. It will be convenient to consider that argument first.

Was planning permission necessary in 1962 *for use of the hangars as warehouses?*

The Town and Country Planning (Use Classes) Order 1950 provides in paragraph 3 that where a building or other land is used for a purpose specified in the Schedule to the Order, the use of the building or land for any other purpose of the same class shall not be deemed to involve development of the land in the sense of the Town and Country Planning Acts. The result is that planning permission for the change of use within the class is not required. Class X in the Schedule is as follows: "Use as a wholesale warehouse or repository for any purpose." It was common ground that the hangars had been used since 1959 as wholesale warehouses. It was also common ground that if the use of the hangars by the Home Office from 1955 to 1959 had been as "repositories" such use would be within Class X of the Order and that therefore no planning permission would be required to use them as wholesale warehouses. The question in dispute is whether the use by the Home Office for the long-term storage of civil defence vehicles was use as a "repository." The Secretary of State and all the learned judges who have so far considered this question have held that the Home Office did not use the buildings as repositories. It is therefore only with diffidence that I reach the opposite conclusion, as I feel bound to do. In the Court of Appeal, Lord Denning M.R. said that it was a matter of impression depending on the meaning that one gives to the word "repository" in one's own vocabulary: [1978] 1 W.L.R. 1241, 1249. He went on, at p. 1250:

> "My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber."

The other learned Lords Justices agreed with Lord Denning's view and they also expressed agreement with the statement by Lord Denning in the case of *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 as follows: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (My italics). That statement was quoted by the Secretary of State in his decision letter in the present appeal and he naturally and properly relied upon it in making his decision. But the words in italics were not strictly necessary to the decision in the case of *Trentham.* They seem to have been taken from an earlier statement, which was also obiter, by Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810. In my respectful opinion, for the reason which I am about to explain, the words in italics are not correct.

The question is not simply what the word "repository" means in ordinary speech, but what it means as used in Class X of the Schedule

A to the Order of 1950. The two meanings are not necessarily identical. In ordinary speech the word is seldom used, but when used it is applied mainly to two things, a furniture repository and a repository for documents. In the latter sense it may be applied either to a building such as the Public Record Office or to places such as a safe or a desk in which a person's will or codicils are likely to be found after his death; in neither case is the storage "as part of a storage business." But the *Shorter* B *Oxford English Dictionary*, 3rd ed. (1944), p. 1707, gives the word a much more general meaning. It gives the first meaning of "repository" as "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited, or stored." In this Order the meaning is not restricted, because Class X includes repository "for any purpose." It seems to me that buildings used for the long-term storage of vehicles fall clearly within that C description. The reason why the draftsman preferred the word repository to the commoner word "store" may be that "store" is sometimes used to include a retail shop such as a "department store."

If it were permissible to refer to the Use Classes Order of 1948, which was repealed and replaced by the Order of 1950, the matter would, I think, be even clearer because in paragraph 2 (2) of the Order of 1948 "repository" is defined as meaning "a building . . . where storage is D the principal use and where no business is transacted other than incidentally to such storage." In the Schedule to the Order of 1948, use as a wholesale warehouse and use as a repository were in separate Use Classes, numbered X and XI respectively. But in the Schedule to the Order of 1950 those classes were amalgamated and the definition of repository was omitted. Comparison of the two Orders is of course permissible, E but there is no way in which the courts can know for certain what was the purpose of these changes. In any event, what matters is their effect which has to be ascertained by construing the Order of 1950, and not by relying on the explanatory note attached to it which is not part of the Order but is intended merely to indicate its general purport. In these circumstances I do not think it would be legitimate to assume that the meaning of repository was the same in both Orders, or to use the 1948 F definition as an aid to construing the Order of 1950. I shall therefore disregard the Order of 1948.

It follows from what I have said that in my opinion the change of use from repositories to wholesale warehouses was a change between two uses, both of which were within Class X. It was therefore not development and did not require planning permission. So, unless I.S.R. G are precluded from relying upon the Home Office use of the buildings as repositories, it is immaterial whether the enforcement notice was valid or not.

Blowing hot and cold

In the Court of Appeal Lord Denning M.R. held that, even if the H hangars had been used as "repositories" by the Home Office, I.S.R. would not now be entitled to rely upon existing use rights derived from that use, because they had accepted and acted upon the grant of planning permission in 1962, which was subject to the condition of removal, and

they could not turn round now and say they did not need planning permission after all. That would be blowing hot and cold and should not be allowed. He applied the maxim of law and equity: "Qui sentit commodum sentire debet et onus." Mr. Boydell said that the planning authority had been prejudiced by I.S.R.'s apparent acceptance of the planning permission with its attached condition for nearly 10 years, and I was at first attracted by the argument. The principle for which Mr. Boydell contended was stated by him thus: "The planning history of a site starts afresh when the acceptance and implementation of planning permission is inconsistent with reliance on earlier existing use rights." I doubt whether that formulation really applies to the circumstances of the present case, because the implementation of the 1962 planning permission can hardly be said to have been inconsistent with reliance on earlier existing use rights during the period before December 31, 1972. During that period there was nothing to show whether I.S.R.'s use of the hangars was in reliance on the planning permission of 1962 or on earlier existing use rights. But apart from that point which arises on the facts of this appeal, I am of opinion that the principle contended for is unsound. It would introduce an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land. To do so would lead to uncertainty and confusion. It would also interfere with the convenient practice whereby prospective vendors or purchasers of land apply for planning permission as a precaution if there is doubt about whether their proposals are already permissible or not. It would, moreover, be inconsistent with a number of decided cases, including *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645.

The only circumstances in which existing use rights are lost by accepting and implementing a later planning permission are, in my opinion, when a new planning unit comes into existence as in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109. That was a case where planning permission had been given for the rebuilding of a petrol service station and the rebuilding had been carried out. Lord Parker C.J. said, at p. 113:

> "... by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ..."

Prossor's case was approved in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1, 10, where the facts were very similar, and in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 where a new building was erected covering the whole of an area of open land. Such physical alteration will normally be made only in implementation of planning permission for erection of new buildings, but it might be made in implementation of planning permission for a change of use in some circumstances. For example, as was suggested in argument, there

A is the case of a single dwelling house being divided into separate flats by purely internal alterations, for which the only planning permission required would be for a change of use. Accordingly I do not think that the principle should be limited to cases of planning permission for rebuilding, although it will only seldom apply to planning permission for change of use.

For these reasons I do not consider that I.S.R. are precluded from B relying upon their existing use rights derived from the Home Office use of the site. It follows that there is nothing to prevent their continuing to use the hangars as warehouses or, if they choose, reverting to using them as repositories.

Validity of the enforcement notice

C Having regard to the opinion which I have already expressed, it is not strictly necessary to consider this matter, but as we were urged by counsel for all the parties to give what guidance we could, I shall express my opinion on the questions that arise.

The power on which the respondents relied to justify the condition attached to the planning permission granted in 1969 was derived from section 17 (1) of the Town and Country Planning Act 1962, but it is D more convenient to refer to section 29 (1) of the Town and Country Planning Act 1971, which does not differ from the earlier enactment in any material respect. Section 29 (1) provides as follows:

> "Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, E in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or *subject to such conditions as they think fit*; . . ."

F The words that I have italicised would appear on their face to confer an unlimited power, but it is plain that the power is subject to certain limitations. If authority for that proposition is needed it is to be found in the speech of Lord Reid in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72, 86. In order to be valid, a condition must satisfy three tests. First, it must have a planning purpose. It may G have other purposes as well as its planning purpose. But if it is imposed solely for some other purpose or purposes, such as furtherance of the housing policy of the local authority, it will not be valid as a planning condition: see *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720. Second, it must relate to the permitted development to which it is annexed. The best known state- H ment of these two tests is that by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 which has been followed and applied in many later cases. Lord Denning said, at p. 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

One reason, relevant to the instant case, why it would be wrong to secure removal of buildings by the use of a condition unrelated to the permitted development is that it would enable the planning authority to evade its liability to pay compensation for removal under section 51 of the Act of 1971. Thirdly, the condition must be "reasonable" in the rather special sense of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 229. Thus it will be invalid if it is "so clearly unreasonable that no reasonable planning authority could have imposed it" as Lord Widgery C.J. said in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549, 1553.

There was no dispute between the parties that tests substantially in the terms I have set out were those relevant for the present purpose. It may not be strictly necessary to specify the second of these tests separately, as it may be included within the third, but I think it is desirable to set it out as a separate test lest it be overlooked.

It remains to ascertain whether the Secretary of State applied these tests in the present case. Clearly the condition for the removal of the buildings was imposed in furtherance of the authority's planning policy, and it therefore satisfied the first test. I think it also satisfies the third test. The second test raises more difficulty. The reasons for the Secretary of State's decision on this part of the appeal are given in paragraph 8 of his decision letter, which included the following passage:

> "It is evident that the local planning authority imposed the condition to remove the hangars to safeguard their long term policy for industrial development in rural areas and to secure the future improvement of the amenity of the area of the appeal site. It is considered however in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable. It is therefore concluded that the condition was invalid. The allegation that [I.S.R.] failed to comply with the condition is therefore inappropriate. The appeal succeeds on ground (b) and the enforcement notice is being quashed."

Ground (b) is a reference to section 88 (1) (*b*) of the Act of 1971 which provides that an appeal may be taken to the Secretary of State against an enforcement notice on the ground: "(*b*) that the matters alleged in the notice do not constitute a breach of planning control." I am not sure whether paragraph 8 is intended to mean that a condition for removal

of buildings could never, as a matter of law, be sufficiently related to planning permission which was merely for a change of use (as distinct from permission for the erection of buildings), or that on the facts in this case, it was not related to the permission. On the whole I am inclined to think that the former view is correct, because the only circumstance of the case which is mentioned is that planning permission has been sought "merely for a change of use of existing substantial buildings." I am also influenced by the fact that that appears to be the opinion of the Secretary of State's department as set out in the circular 5/68, dated February 6, 1968, issued by the former Ministry of Housing and Local Government with its accompanying memorandum on "The Use of Conditions in Planning Permissions," paragraph 9 of which includes the following sentence:

> "A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that *a new building is to be erected.*" (My italics.)

That statement is, in my opinion, too absolute and the words in italics are not supported by authority. If (as I am inclined to think) it explains the reason on which the Secretary of State's decision was based, then the reason was, in my opinion, erroneous in law. But even if that is so, I am satisfied that, if the Secretary of State had correctly appreciated that a condition for removal of buildings attached to permission for change of use might be valid, he would nevertheless have certainly decided that in the circumstances of this case it was not sufficiently related to the permission and was therefore invalid. There was nothing that I can see about the change of use to a wholesale warehouse which required or justified a condition for removal of the buildings. The reason why the planning authority ordered their removal was to improve or restore the amenity of the neighbourhood by getting rid of ugly buildings. No doubt that was a very proper object, but it had nothing particularly to do with the use of the buildings as warehouses. The fact that the permission was in substance a temporary permission, as the Court of Appeal held, does not seem to me to be relevant to this matter.

Accordingly I am of opinion that, even giving this condition the benevolent treatment to which, like a byelaw, it is entitled, it was invalid. If planning permission had been required for the change of use in 1962, the Secretary of State would have been right in so deciding and also in deciding that, as the condition could not be severed from the permission, the permission itself was invalid, although his reason for doing so was (on my reading of his letter) wrong.

I would allow the appeal by I.S.R. with costs here and below against Newbury District Council. The Secretary of State must bear his own costs throughout.

LORD SCARMAN. My Lords, the House has under consideration two appeals. Both the Secretary of State for the Environment, to whom I shall refer as "the Minister," and the International Synthetic Rubber

Co. Ltd., to whom I shall refer as "the company," appeal against the reversal by the Court of Appeal of the decision of the Divisional Court dismissing the appeal of the Newbury District Council, to whom I shall refer as "the council," from a decision of the Minister allowing the company's appeal against an enforcement notice served on it by the Hungerford Rural District Council as agent for the local planning authority to whose statutory functions and duties the council has succeeded. The council, as local planning authority, seek to uphold a condition imposed by Hungerford Rural District Council upon a planning permission granted to the company on May 31, 1962, to use two ex-R.A.F. hangars as warehouses for the storage of synthetic rubber. The condition was that "The buildings shall be removed at the expiration of the period ending December 31, 1972." The Minister, holding that the condition was invalid quashed the enforcement notice. The Divisional Court agreed. But the Court of Appeal, ruling that the condition was valid, upheld the enforcement notice. This House gave leave to appeal.

The Minister announced his decision by letter dated July 24, 1975. He accepted the facts as found by his inspector after a public inquiry held by him in January 1975. The appeal site comprises two large aerodrome hangars on either side of an unclassified road and enclosed in a perimeter fence at the former Membury airfield some five miles north-west of Hungerford and just south of the M4 motorway. The freehold was vested in the Crown until 1961, when it was returned to the Gilbey family who had owned the land before the war.

The airfield is an area allocated on the county map for service requirements but is surrounded for the most part by land in agricultural use ("white" on the map, indicating that it is not planned to disturb the existing use). The airfield was operational until 1947. From 1947 until 1953 the two hangars were used by the Ministry of Agriculture, Fisheries and Food "as a buffer storage depot." In 1953 the depot was cleared and the airfield transferred to the United States Air Force for their use. The nature of the U.S.A.F. use is not known. In 1954 the Royal Air Force took over the airfield (including the hangars) for use as a sub-depot of No. 3 Maintenance Unit. From 1955 to 1959 the hangars were used by the Home Office for the storage of civil defence vehicles. In 1959 planning permission was granted to Mr. J. S. Gilbey (a member of the family whose land it had been before the war) for use of the hangars for the storage of agricultural products (including fertiliser). Permission was conditional upon the buildings being removed at the expiration of the period ending December 31, 1964—which was later extended to December 31, 1970. A certain Mr. James was allowed to use, and did use, one of the hangars for the storage of agricultural products and fertiliser. In 1961 the company began to use one hangar for the storage of synthetic rubber.

In 1962 there occurred the planning application and permission with which these appeals are directly concerned. On May 3, 1962, the company applied for permission to use the two hangars "as warehouses for the storage of synthetic rubber," declaring (with strict accuracy only so far as one hangar was concerned) that they were already in use for that purpose. On May 31, 1962, planning permission was granted subject to

A conditions. The relevant terms of the permission were that the local planning authority permitted:

> " Use of two hangars on Membury Airfield as warehouses . . . subject to compliance with the conditions specified hereunder: 1. The buildings shall be removed at the expiration of the period ending December 31, 1972. 2. . . . [irrelevant to the two appeals]."

B The reasons for the conditions were stated to be:

> " 1. To accord with the local planning authority's policy regarding industrial development in rural areas. 2. To safeguard the amenities of the area."

The company did not appeal against the conditions. But two months later, in July 1962, it took a long lease of the site, and put both hangars C to use as warehouses.

On November 5, 1970, the company applied for planning permission to use the hangars as warehouses for a further 30 years (i.e. until the expiry of their lease) from December 31, 1972. Clearly the company saw their right of use as based on a temporary permission expiring at the end of 1972. Permission was refused, and on June 25, 1971, the company appealed to the Minister. D

The company did not remove the hangars by December 31, 1972, but continued its use of them. On November 12, 1973, the local planning authority served an enforcement notice requiring the company to remove them. The company appealed to the Minister against the notice.

After stating the facts, the inspector, who took the public inquiry, E concluded:

> " . . . that there was a clearly established use of the appeal hangars when in Crown occupation, prior to 1959, for storage. Foodstuffs were stored from 1947 to 1953, then the hangars were part of a sub-depot for No. 3 Maintenance Unit at Milton, then from 1955 to 1959 they were used for storing civil defence vehicles."

F

He noted that, after a gap in 1953, when the United States Air Force had the use of the airfield, the storage use was resumed and commented that " The application for permission for storage in 1959 [the Gilbey application] appears to have been unnecessary." Though his report contains a very helpful discussion of what he calls " the legal implications " of the facts, he was careful to leave them to the Minister. He G contented himself with two recommendations confined to the planning aspects of the case: the first that, if the Minister decided that there had been a breach of planning control, the condition for removal of the hangars should not be discharged, and the second that the planning appeal should be dismissed.

Three questions arise on these facts. First, was planning permission H required when it was granted in 1962? I shall call this the existing use point. Secondly, if it was not, can the company now rely on an existing use right and so avoid the condition imposed, that the hangars should be removed by the end of 1972? I shall call this the estoppel point.

Thirdly, if planning permission was required, was the condition one which the local planning authority could lawfully impose? The first question turns on the true construction of the Use Classes Order 1950—the effective order in 1962. The second and third questions raise points of great importance in the law of planning control and its enforcement.

Existing use

The Town and Country Planning Act 1971 (the Act) consolidated the statute law relating to town and country planning in England and Wales. Part III (sections 22 to 53) provides for general planning control, and Part V (sections 87 to 111) for the enforcement of planning control. Section 22 (1) (which reproduces the earlier law) defines development as meaning "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." Subsection (2) provides that certain operations or uses of land shall not be taken to involve development of the land including

> "(*f*) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use thereof for any other purpose of the same class."

This provision has been a feature of the legislation ever since the Town and Country Planning Act of 1947. A Use Classes Order had been made under that Act in 1948. It was revoked and replaced by the Use Classes Order 1950, which is the effective order for the purposes of these appeals. (In its turn it has been replaced by subsequent orders.) Where a building or other land is used for a purpose of any class specified in the Schedule to the order, its use for any other purpose of the same class shall not be deemed to involve development of the land: (article 3 (1)). The Schedule specifies, amongst other classes. "Class X—Use as a wholesale warehouse or repository for any purpose."

The purpose of the Use Classes Order becomes evident when one reaches section 23 (1) of the Act, which provides that subject to the provisions of the section "planning permission is required for the carrying out of any development of land." Since a change of use within a class is not deemed to involve development, planning permission for the change of use is not required. The effect, therefore, of Class X is that premises previously used as a repository for any purpose may be used as a wholesale warehouse; and vice versa. In neither case does the law deem any development to be involved or require the grant of planning permission. A comparison of the Order of 1950 with that of 1948, which it revoked, is, in my judgment, permissible and instructive. The Order of 1950 amalgamated certain use classes to be found in the earlier Order, thus permitting a wider range of changes of use to take place without the requirement of planning permission. The Order of 1948 placed use as a wholesale warehouse in Class X and use as a repository in Class XI: it also included definitions of "wholesale warehouse" and "repository." The Order of 1950 has no definition of either term: but, since the

purpose of the Order is the amalgamation of certain use classes to be found in the Order of 1948, it is legitimate, for the purpose of construing the Order, to note the meaning of these terms in the two use classes which the Order of 1950 has amalgamated into one (the new Class X). The Order of 1948 provided that "wholesale warehouse" means "a building where business, principally of a wholesale nature, is transacted," and that "repository" means "a building . . . where storage is the principal use and where no business is transacted other than incidentally to such storage."

It is common ground that the company uses the hangars as wholesale warehouses. If, therefore, the lawful prior use was that of a "repository for any purpose," planning permission was unnecessary: for there would be an existing use right entitling the company to use them as wholesale warehouses.

It is also common ground (though at one time the council was disposed to deny it) that the Crown use, which began in 1947 and with two "service" breaks continued until 1959, was lawful. The inspector has found and the Minister has accepted that this use was "for storage purposes." In other words, the hangars were buildings in respect of which there had been lawfully established an existing storage use prior to the arrival of the company on site.

The sole issue, therefore, is as to the meaning to be given to the words "repository for any purpose" where they appear in the Order. The company's submission is that "repository" is (as defined in the Order of 1948) a building used for storage, and that Class X includes such use "for any purpose." The Minister and the council submit that the context requires that a limitation be placed on the words "for any purpose," namely a limitation to the purposes of a storage business. This construction found favour with the Divisional Court and the Court of Appeal. Reliance was placed on *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, a decision of the Court of Appeal. In that case the Court of Appeal reached the unsurprising conclusion that use as a farm shed was not use as a repository; Diplock L.J. commenting that nowhere, except in a court of law, did he think it would be argued "with gravity" that ordinary farm buildings are properly described as "repositories." In his judgment, however, Lord Denning M.R. essayed a definition of repository. He said, at p. 512: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, as part of a storage business." The Court of Appeal applied this definition in this case. After hearing Mr. Widdicombe's submissions for the company (no doubt very persuasive, if his argument in this House be any guide), the Master of the Rolls felt that his "one answer" must be "a matter of impression." So far, I agree. But then he added [1978] 1 W.L.R. 1241, 1250: "My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber." I cannot, with respect, agree. I find that neither the standard English dictionaries nor my experience of the English language as writer and student suggest that the qualification "as part of a storage business" is to be embodied in the ordinary meaning of the

word "repository." The primary and literal meaning of "repository" is what anyone acquainted with its Latin origin would expect—a place or receptacle where things are stored. But there is also an old established secondary meaning "A place where things are kept or offered for sale; a warehouse, store, shop, mart": *Shorter Oxford English Dictionary*, 3rd ed., p. 1707, and repeated in subsequent editions. But this meaning is not limited to use "as part of a storage business." It embraces any business use, as distinct, for example, from a repository used for domestic, museum, or academic purposes. Two questions, therefore, arise. First, is "repository" used in the Order in its primary, or literal, sense? Secondly, if not, is the term "use as a repository" a reference to a general business use or to a use limited to that of a storage business?

The language of the class is wide enough to permit the primary, or literal, meaning. But the context, I think, makes the secondary, but well established, meaning the more likely. In this respect, I note that Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, defined "repository" as a building wherein goods were kept in the course of trade or business. Although the various classes scheduled to the Order make strange reading and include some oddly assorted bedfellows, they are classes. The Order being part of the apparatus of planning control, I look for a planning link between the several members of each class: and this is not difficult to ascertain, though the linkage is looser in some classes than in others. So far as Class X is concerned, if each of the two specified uses is a business use, the planning link between them is established without doing any violence to the English language. But I cannot go the step further which was taken by Lord Denning M.R. in the *Trentham* case [1966] 1 W.L.R. 506 and construe the business use as limited to that of a storage business. The words "for any purpose," though consistent with a general limitation of the class to business use, negative the possibility of limiting use as a repository to a specific type of business. The express limitation of "wholesale" upon the warehouse use is to be contrasted with the express extension of the repository use to such use "for any purpose."

The question for decision is, therefore, whether the Crown use of the hangars for storage purposes between 1947 and 1959 was a business use. The word "business" is apt to include official or governmental business as well as commercial business. The relevance of business to planning is that it is associated with a certain character of development and a certain level of activity upon and adjacent to the land, e.g., the type of buildings and the level of traffic movement. As such, it matters not whether the Crown is storing goods in the hangars for the purposes of public business or a wholesaler for his private business purposes or any other commercial enterprise for its business purposes. To quote the Order of 1948, "where storage is the principal use and where no business is transacted other than incidentally to such storage," the nature or purpose of the business for which the repository is used is immaterial for planning purposes. The one essential limitation, which is to be compared with the "wholesale" limitation upon warehouse use, is implicit in the word "repository," namely, that the principal use is storage. So

understood, Class X does embrace the Home Office and Ministry of Food use. Mr. Boydell, for the council, sought to avoid this conclusion by submitting—correctly—that not all uses of land are included in the Use Classes Order. He urged upon the House the proposition that the Crown use was sui generis, (in English, a distinct, unique use) and not covered by Class X. I do not accept his proposition. Properly considered, the Crown use was as much a storage use for its business as would be that of any commercial enterprise for its business.

Accordingly, I think the *Trentham* limitation, "as part of a storage business," was erroneous and that Class X is wide enough to include the Crown use in this case. The Crown did, and the company does, use the hangars for storage, each for the purposes of its business: and no business is transacted on the site save that which is incidental to storage. My conclusion is, therefore, that the planning permission obtained by the company in 1962 was unnecessary. There was an existing use right by virtue of Class X of the Use Classes Order.

The estoppel point ("Blowing hot and cold")

The Court of Appeal did not have to decide whether the company by taking up and then exercising the 1962 planning permission had estopped itself from relying on its existing use right; for the court was unanimous that no such right existed. But, as your Lordships are agreed that planning permission was unnecessary, the point does now arise for decision.

In the Court of Appeal, Lawton L.J. found the point attractive, but, since it did not arise, expressed no final opinion. Browne L.J. did not find the point attractive. He said [1978] 1 W.L.R. 1241, 1256:

> "I will only say that as at present advised I am afraid that I do not agree with Lord Denning M.R. on this point, except where the circumstances are as in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109 and the cases which have followed and applied that decision—viz. where a new planning unit—and indeed in those cases a new physical unit—has been created."

Lord Denning M.R., however, was prepared to lay down a broad general principle. He said, at p. 1250:

> "*Blowing hot and cold.* In case I am wrong about 'repository' I must turn to the final point, which is this: seeing that I.S.R. accepted the grant of planning permission in 1962 (subject to the condition of removal), can they now turn round and say that they did not need planning permission at all? Being entitled, as they say, to use the hangars for storing rubber without any permission at all. Mr. Widdicombe submitted that they could. He referred to *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 and *East Barnet Urban District Council* v. *British Transport Commission* [1962] 2 Q.B. 484. But Mr. Boydell on the other side referred to *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303, 315; *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15; *Petticoat Lane Rentals Ltd.*

v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 and *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549, 1552. To my mind the maxim of law and equity applies here: Qui sentit commodum sentire debet et onus. He who takes the benefit must accept it with the burdens that go with it. It has been applied recently in *Halsall* v. *Brizell* [1957] Ch. 169 and *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, 394. It is an instance of the general principle of equity considered in *Crabb* v. *Arun District Council* [1976] Ch. 179, 187–188 and it is, in my view, particularly applicable in planning cases. At any rate in those cases where the grant of planning permission opens a new chapter in the planning history of the site."

His last sentence is an echo of *Prossor's* case, 67 L.G.R. 109, which, I think, was correctly decided. But, as I shall endeavour to show, it does not follow from the correctness of *Prossor's* case that "the general principle" of equitable estoppel is applicable to planning cases.

As every law student who has read the opening chapters of *Snell's Principles of Equity* (now in its 27th ed. (1973)), knows, equity, as a body of law ancillary to the common law, developed so as to provide a protection for interests in property which was more effective than the remedies available at law. The Court of Chancery acted on the conscience of the legal owner of property. Equitable interests were strictly not proprietary in character, but rights in personam. Although they have developed a proprietary character, they are not enforceable against all the world. The purchaser for value without notice is not bound. In the field of property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.

The case law does not support Lord Denning's view. In *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422 Parker J. refused to hold that the plaintiffs, having treated an enforcement notice as a good notice, were estopped from denying its validity. He said, at p. 426: ". . . no person can waive a provision or a requirement of the law which is not solely for his benefit but which is for the public benefit."

In *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 a Divisional Court, which included Lord Parker C.J., referred to "the principle" applied in *Swallow's* case with approval and held that appellants who had obtained a conditional planning permission were not precluded from arguing that it was unnecessary.

Although the point was not argued, this House in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260 implicitly accepted Lord Parker's view: for in that case the appellant company, though it had obtained a conditional planning permission, was granted a declaration that their development was authorised by the Malvern Hills Act 1924 and so did not require permission.

Mr. Widdicombe, for the appellants, referred us to other cases to the same effect; notably *East Barnet Urban District Council* v. *British*

A *Transport Commission* [1962] 2 Q.B. 484, in which Lord Parker C.J. was a member of the court.

My Lords, I agree with the view so consistently expressed by Lord Parker C.J. that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law. I forbear to discuss the cases upon which Lord Denning M.R. founded his view to the contrary because B Mr. Boydell for the respondents did not seek to rely upon them. Indeed Mr. Boydell based his argument on *Prossor's* case, 67 L.G.R. 109, the principle of which is independent of any equitable doctrine. Suffice it to say of the authorities mentioned by Lord Denning in the passage which I have quoted that, if and in so far as they suggest (and I do not think that they do) that equitable estoppel has a place in the C law of planning control, they are incorrect in law and should not be followed.

In *Prossor's* case Lord Parker C.J. enunciated a genuine planning principle. The appellant's predecessor in title had obtained planning permission for the rebuilding of a petrol service station on a by-pass. It was subject to a condition that no retail sales other than the sale of motor accessories should be carried out on the site. The appellant D displayed on the site second-hand cars for sale. Being served with an enforcement notice, he claimed an existing use right. Though it was held that he had not established an existing use right, the Divisional Court also held that, by reason of the exercise of the planning permission to rebuild, the appellant was bound by the condition attached to the permission.

E The case has nothing whatever to do with equitable estoppel. The permission was for a new operational development of the site, i.e. the rebuilding. Lord Parker C.J. put it thus, at p. 113:

> "The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used. . . ."

F *Prossor's* case has been followed in a number of cases. Their effect is accurately summarised by Browne L.J. in the passage from his judgment which I have already quoted. *Prossor's* case was approved by the Court of Appeal in *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15 and by the Divisional Court (Lord Parker C.J. presiding) in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112. It has never, however, been applied—so far as G the researches of counsel have been able to ascertain—to a change of use case. In every case the permitted development which has been held to begin a new planning history has been operational in character: i.e., it altered the physical nature of the land by building, mining, or other engineering works.

Mr. Widdicombe for the company submitted at the outset of his H argument—and at that stage he was supported by Mr. Newey for the Minister—that the principle in *Prossor's* case, 67 L.G.R. 109, is not applicable to a "change of use" case, where there is no building or other physical operation covered by the planning permission. Clearly it

will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist, as at a later stage in the argument counsel for the Minister was able to show: e.g., where permission is granted to change the use of residential premises in single occupation to a multi-occupation use. There is in such a case a wholly new departure, a new chapter of planning history. It would be a negation of sound planning if the conditions attached to the multi-occupation use could be avoided merely because prior to such use the premises had the benefit of an existing residential use in single occupation. I conclude, therefore, that *Prossor's* principle is of general application where it can be shown that a new planning unit has been brought into existence by the grant and exercise of a new planning permission. But, where *Prossor's* case does not apply, the grant of an unnecessary planning permission does not preclude a landowner from relying on an existing use right.

Upon the facts of this case, it is, however, not possible to apply the *Prossor* principle. Planning-wise, upon the facts as found by the inspector and accepted by the Minister, there was no departure from the previous use substantial enough to justify the inference that a new unit had been created or a new planning history begun. I, therefore, reject the submission to the contrary made on behalf of the council.

The validity of the condition

My Lords, it is strictly unnecessary for me to express a view on the validity of the condition. But the House has heard full argument on the point, and I have reached the clear conclusion that the Minister's decision that the condition was invalid cannot be said to be incorrect in law. I think it right, therefore, to state briefly the reasons for my conclusion.

The Divisional Court agreed with the Minister. But the Court of Appeal upheld the enforcement notice, ruling that the condition for the removal of the hangars was valid. In their view, it fairly and reasonably related to the permitted development, i.e. the temporary use of the hangars as warehouses for the storage of synthetic rubber.

The Court of Appeal was entitled to reverse the Minister only if he could be shown to have made an error in law: section 246 of the Act. The law is, I think, well settled save for one small area of doubt. Mr. Widdicombe, opening the appeal, suggested that the law requires three tests of validity, all of which, he submitted, must be satisfied. Mr. Newey for the Minister agreed with him. Mr. Boydell for the council suggested that there were really only two. The difference between them is semantic not substantial. The three tests suggested are: (1) The condition must fairly and reasonably relate to the provisions of the development plan and to planning considerations affecting the land, (2) it must fairly and reasonably relate to the permitted development, and (3) it must be such as a reasonable planning authority, duly appreciating its statutory duties, could have properly imposed. As Mr. Boydell said, test (3) is almost

A invariably wrapped up in the first two: but it is possible, though unusual, that a condition could in an exceptional case satisfy the first two tests but fail the third.

My Lords, I accept the appellant's submission that there are these three tests. The legal authority for the tests is to be found in the statute and its judicial interpretation. Section 29 (1) of the Act, substantially re-enacting section 14 (1) of the Act of 1947, provides as follows:

B "(1) Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, C 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (*b*) may refuse planning permission."

Though the subsection speaks of "such conditions as they think fit," its opening words impose a limitation on the powers of the local planning authority including the discretionary power to impose conditions. In D dealing with the application for permission, it shall have regard to the development plan "so far as material to the application, and to any other material considerations." I construe "material considerations" in the context of the subsection as a reference to planning considerations.

The subsection therefore expressly mentions the first two tests. The third test arises from the application to the planning law of the reasonableness test as enunciated by Lord Greene M.R. in *Associated Provincial* E *Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

This view of the subsection and its predecessor has been accepted by a line of authoritative judicial decisions, the most notable of which are *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* when in the Court of Appeal [1958] 1 Q.B. 554 and *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636. In the *Pyx* F *Granite* case at p. 572 Lord Denning said that "conditions . . . must fairly and reasonably relate to the permitted development." In *Fawcett's* case this House, in effect, adopted the three tests. Lord Cohen (pp. 660, 662) considered that the relevant questions which the court must answer were, as Mr. Megarry Q.C. had submitted, whether the scope of the condition was "unrelated to the policy declared in the outline plan or to any other sensible planning policy." Lord Denning G repeated his formula in the *Pyx Granite* case, adding, at p. 678, with a reference to the *Wednesbury* case, that "they [i.e. the local planning authority] must produce a result which does not offend against common sense." Lord Jenkins, at pp. 684–685, quoted Lord Denning's formulation in the *Pyx Granite* case with approval.

Fawcett's case [1961] A.C. 636 renders it unnecessary to cite further H authority, though there is plenty in the books, to establish the three tests. They have been recognised and adopted by the courts and this House.

The small area of doubt which remains is whether a condition for the removal of existing buildings can ever satisfy the tests if the

permitted development is limited to a change of use. The doubt is whether in such a case the condition could *ever* be said fairly and reasonably to relate to the permitted development. Indeed, the Court of Appeal has interpreted the Minister's decision as based on the view that in law no such condition can be imposed upon a "change of use permission." Browne L.J. put their view of the Minister's decision succinctly . . . [1978] 1 W.L.R. 1241, 1253: ". . . it is a holding of law that such a condition can *never* [emphasis supplied] be valid. . . ."

My Lords, if the Minister really did base his decision upon this view of the law, I would agree with the Court of Appeal that he erred in law. The point is not covered by any clear authority. But I would reject such a view of the law as being wrong in principle. First, the acceptance of an inflexible rule would, so far as it extends, preclude the application in change of use cases of the three recognised tests of validity. There would be substituted a rule of thumb for the exercise of the Minister's judgment upon the facts of the appeal.

Secondly, so various are the circumstances and interests affected by a planning permission that I would think it wrong, in the absence of an express statutory prohibition, to assert that, as a matter of law, a condition requiring the removal of buildings already in existence can never fairly or reasonably relate to a permission limited to a change of use. And the statute contains no express prohibition: for section 29 (1) leaves the imposition of conditions to the discretion of the local planning authority (and to the Minister on appeal). The validity of a condition must, therefore, depend in all cases upon the application of the three tests to the particular facts. If the permitted change of use is unlimited in time, it may well be fair and reasonable to require the removal of some existing buildings as a condition of the permission. But, if the permitted change of use should be for a limited period, the reasonableness of the condition may be more difficult to establish. In either case, the planning history, the situation of the land, the circumstances of all those interested in the land, and the existence of other statutory powers to achieve the same planning purpose would be relevant considerations.

In his decision letter the Minister gave the following reasons for holding the condition invalid. He said, in paragraph 8:

> "It is considered however in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable. It is therefore concluded that the condition was invalid."

These words do not suggest to me that the Minister committed himself to the view of the law which the Court of Appeal has attributed to him. He noted that permission was sought "merely for a change of use of existing substantial buildings": he considered that the removal condition was "not sufficiently related to the change of use" and was unreasonable. With the greatest respect, the Court of Appeal has

misinterpreted the Minister's reasons. He did not hold that a condition for removal of buildings attached to a "change of use permission" could never be valid. He held that in the circumstances of this case the condition was not sufficiently related to the permitted change of use. The condition certainly related to the development plan and to planning considerations and so satisfied the first test. But did it satisfy the second test? Was it fairly and reasonably related to the permitted development, i.e. a temporary change of use? This was for the Minister in the light of all the circumstances to decide; and he decided it. I would comment only that the Minister, being the ultimate authority on planning questions arising in the enforcement of planning control, is the appropriate authority to determine whether a condition "sufficiently," i.e. fairly and reasonably, relates to the permitted development.

The Court of Appeal was led into error by their belief that the Minister based his conclusion upon a statement to be found in the Ministry of Housing and Local Government Circular 5/68. Lord Denning M.R. put it thus [1978] 1 W.L.R. 1241, 1247:

> "The present view of the ministry is contained in a circular which was issued in 1968 and is numbered 5/68, 'The Use of Conditions in Planning Permissions.' It is to the effect that, when an applicant applies for permission to *change the use of an existing building*, the local planning authority, when granting permission, can impose a condition limiting the period of time during which the building may be so used: but cannot impose a condition requiring the building to be *removed* at the end of that time. The crucial sentence in the circular is: 'A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected.'"

I agree that the circular has no legal effect and that, if in the sentence quoted it purports to lay down a rule of law, it is wrong. But how can it be said, as Lord Denning M.R. said, that this sentence in the circular represents "the present view of the Ministry upon the law"? The answer has to be—only if the Minister's letter of decision is to be read as saying so. But, my Lords, it says nothing of the sort.

I conclude, therefore, that the Minister made no error of law. That being so, his view—that a condition requiring the removal of existing substantial buildings was not sufficiently related to the temporary change of use for which permission was granted in this case—is unappealable: see section 246 of the Act.

My Lords, for all these reasons I would allow the appeals. I agree with the order for costs proposed by my noble and learned friend Viscount Dilhorne.

LORD LANE. My Lords, R.A.F. Station Membury was a wartime airfield built on requisitioned farming land. There were, apart from the usual concrete runways, perimeter tracks, hardstandings and so on, two hangars in which repair and maintenance of aircraft could be

carried out. The last aeroplane left Membury in about 1947. The hangars have since then had a chequered history. They are now (albeit functionally useful) an eyesore in otherwise pleasant countryside and, if aesthetic considerations were the only criterion, ought to be removed. The local planning authority (now Newbury District Council) contend that that is also the position in law, and the Court of Appeal have upheld that contention. They have decided that the present owners, the International Synthetic Rubber Ltd. (I.S.R.) are in law obliged to remove the hangars.

The history of the site, so far as it is known and material, is as follows. From 1947 to 1953 the hangars were used as a food storage depot by the Ministry of Agriculture, Fisheries and Food. For brief periods in 1953 the U.S.A.F. and in 1954 the R.A.F. used the airfield for purposes which are not known. From 1955 to 1959 the Home Office stored civil defence vehicles, fire-pumps and suchlike in the hangars. In 1959 planning permission was given for the use of the hangars for storage of agricultural products, subject to the condition that the hangars should be removed by a date later extended to December 31, 1970. In May 1962 permission was granted to I.S.R. as follows: "Use of two hangars on Membury Airfield as warehouses." That was qualified by two conditions:

> "(1) The buildings shall be removed at the expiration of the period ending December 31, 1972. (2) The use shall be confined to storage and no materials shall be stored which give rise to offence by reason of smell." For this reason: "(1) To accord with the local planning authority's policy regarding industrial development in rural areas. (2) To safeguard the amenities of the area."

The freehold title of the site was vested in the Crown until 1961. On November 30, 1961, the site was sold to the former owner and then leased back to the Crown for a period of 40 years. In July 1962 (i.e. after receipt of the permission) the lease was assigned and the hangars were sold to I.S.R. The terms of the particulars of sale imply, surprisingly, that the hangars were being treated as chattels, distinct from the realty. Nothing now turns on that point because the parties are all agreed that the hangars were and are, as one would expect, part of the realty.

Since then I.S.R. has used the hangars continuously for the storage of synthetic rubber. In November 1970 they applied for a postponement of the removal date to 2002. That was refused. By December 31, 1972, I.S.R. had taken no steps to comply with the condition by removing the hangars. In November 1973, therefore, the local authority served an enforcement notice. I.S.R. appealed under section 88 of the Town and Country Planning Act 1971. An inquiry was held in January 1975. The Minister's decision letter was published in July of that year. He allowed the appeal on the grounds that the condition imposed by the local authority was ultra vires and void. He further decided that the condition could not properly be severed from the permission and that the planning permission as a whole was void. If this conclusion is right, there is nothing at present to stop I.S.R. continuing

A to use the hangars as warehouses. This is because they started to use them as warehouses before 1963, and section 87 (1) of the Act of 1971 provides them in these circumstances with immunity. The Minister's view of the matter was upheld by the Divisional Court. The Court of Appeal, however, held that the condition was not ultra vires, that the enforcement notice was lawful and should be obeyed.

The issues are these. First, was any planning permission necessary B in 1962, that is, was there an existing use which absolved I.S.R. from the need for permission to use the hangars as warehouses? Secondly, if such was the case, are I.S.R. debarred from asserting that that is so? This has been referred to as the "blowing hot and cold" point. Thirdly, was the condition requiring the removal of the hangars outside the proper powers of the local planning authority and therefore void? C If the first two questions are decided in favour of the appellants, the third, although remaining important, would not affect the outcome whichever way it was decided.

Existing use

The use which I.S.R. assert was sufficient to render planning permission unnecessary in 1962 was the Home Office's storage of civil D vehicles from 1955 to 1959. That is the basis on which the case has been fought throughout.

The Town and Country Planning (Use Classes) Order 1950 provides by paragraph 3 (1) as follows:

> "Where a building . . . is used for a purpose of any class specified in the Schedule to this Order, the use of such building . . . for any E other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

Class X of the Schedule is "Use as a wholesale warehouse or repository for any purpose."

The present use is undoubtedly as a wholesale warehouse. If the previous use was as a "repository for any purpose," it follows that no F permission was necessary because permission is only required for development and if the change was only from one Class X use to another there was no development.

All those who have hitherto considered the matter have come to the conclusion that the use by the Home Office as a store for Civil Defence vehicles was not use as a "repository." That being so, one naturally hesitates to differ, but I fear I must. The first meaning of the word G given in the *Shorter Oxford English Dictionary* is "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited or stored." The hangars fell plainly within this definition. The Court of Appeal held that a repository means "a place where goods are stored away, to be kept for the sake of keeping them safe, as part of a storage business." If those last six words properly form part of the definition H then the Home Office use did not constitute the building a repository. But are those words justified? Their origin is probably to be found in a judgment of Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810 "'Repository,' I think, means a building wherein goods are kept

or stored, and I think it must be in the course of a trade or business." No reasons are given for this conclusion. The same view was expressed (obiter) by Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 and reiterated by him in the present case. As to the other point of view, exemplified by the *Oxford English Dictionary*, Lord Denning M.R. said this [1978] 1 W.L.R. 1241, 1249–1250:

> "The one answer I can give to this argument is that it is a matter of impression—depending on the meaning one gives to the word 'repository' in one's own vocabulary. My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber."

No doubt there are few people, however conversant with the English language, who would use the word "repository" at all. The question is, what does it mean in the Order of 1950? The word "store" might perhaps have been employed, but that would have led to confusion because the word is now commonly used to mean retail shop (e.g., "village store"). To my mind repository simply means a storage place. If there were any real doubt about the matter it would, I think, be resolved by the words which follow, namely "for any purpose." It is difficult to see how those words can possibly mean "for any purpose provided it is a business purpose." That is what the contention of the local authority entails. In my opinion I.S.R. had an existing use right under Class X and no planning permission was necessary.

Blowing hot and cold

The local authority contends further that even if the use made of the hangars by the Home Office fell within Class X of the Order of 1950, nevertheless it is not open to I.S.R. to rely on that existing use by reason of their applying for, receiving and using the planning permission of May 1962. In short they cannot now assert that no planning permission was necessary in the face of their 1962 actions.

This contention has been put in a number of different ways. Lord Denning M.R. put it thus [1978] 1 W.L.R. 1241, 1250–1251:

> "The truth is that, back in 1962, they had two inconsistent courses open to them. One was to apply for a grant of planning permission; the other was to rely on any existing use rights that might be attached to the site. Once they opted for planning permission—and accepted it without objection—they had made their bed and must lie on it. No doubt they did not know of the past history, but that was only because they did not choose to rely on it. They should not be allowed to bring it up again now."

Lawton L.J. found it unnecessary to decide the point. Browne L.J. felt unable to agree with the dictum of the Master of the Rolls on this aspect of the case, except insofar as it applies to circumstances where a new planning unit has been created. Nor does Mr. Boydell seek to

argue that the doctrine is of any more than narrow application. He contends, on the strength primarily of the decisions in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109 and *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1. that where planning permission is "sought, granted and implemented" (as he puts it) the planning history starts afresh and any previous existing use must be ignored. Alternatively the planning history starts afresh where "the acceptance and implementation" of the planning permission is inconsistent with reliance on earlier existing right. It is inconsistent here, because the permission together with the condition as to removal of the hangars cannot live with the existing use right. In *Prossor's* case, 67 L.G.R. 109, the local planning authority granted permission for the rebuilding of a petrol station with a condition prohibiting any retail sales other than of motor accessories. The appellant nevertheless displayed second-hand motor cars on the site. An enforcement notice was served but the appellant claimed that the site had existing use rights for the sale of second-hand cars. The Minister upheld the enforcement notice. On appeal to the Divisional Court Lord Parker C.J. had this to say, at p. 113:

> "... assuming that there was at all material times prior to April 1964 an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964 the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site ... seems to me to begin afresh on April 4, 1964 with the grant of this permission, a permission which was taken up and used, and the sole question here is: has there been a breach of that condition?"

The facts in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1 were very similar to those in *Prossor's* case. Browne L.J. in delivering the judgment of the court said, at p. 10:

> "Mr. Payton made some criticism of *Prossor* v. *Minister of Housing and Local Government* ... but ... there is nothing to throw any doubt on the actual decision in that case, which was that where (as in the present case) there has been an application for a new planning permission and a grant of permission subject to an express condition prohibiting a previous established use, and the new permission has been acted on, the previous use is extinguished."

Taken out of context, those words seem to widen the scope of *Prossor's* case. They must, however, be read against the facts of the case which show that this was an extensive development involving not only the original site but the addition of two adjoining sites and the creation of access to the highway from the two new sites. It was, in short, the classic *Prossor* situation of a new planning unit being born.

The other cases relied on by Mr. Boydell all tell the same story. *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15 was

another rebuilding case. *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 concerned planning permission to erect a building upon an area of open land, a cleared bomb-site. Widgery L.J. in the course of his judgment in the Divisional Court said at p. 1117:

> "For my part I also think that it [*Prossor's* case] was entirely correctly decided, but I think that in extending and applying it we should tread warily and allow our experience to guide us as that experience is obtained . . . but I am quite confident that the principle of *Prossor's* case can be applied where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land. Where that happens . . . one gets an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved."

Those words seem to me to express precisely and accurately the concept underlying *Prossor's* case, 67 L.G.R. 109. The holder of planning permission will not be allowed to rely on any existing use rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site to an end and to start a new one. It may not always be as easy as it was in *Petticoat Lane Rentals* to say whether that has happened. There will no doubt be borderline cases difficult to decide, but that does not affect the principle. We were asked by Mr. Newey to say that the principle can only apply where the permission granted is to build or rebuild or the like and can never apply to cases where the permission is simply to change the use. I do not consider that any such limitation would be proper. It is not the reason for the break in planning history which is important. It is the existence of the break itself, whatever the reasons for it may have been. No doubt it will usually be a case of permission to build which will attract the doctrine, but I myself would not altogether rule out the possibility that in some circumstances the permitted change of use might be so radical as to fulfil the criteria of *Prossor's* case.

In the present case there is no such break in the history. The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended. I.S.R. succeed on this point.

Was the condition void?

The Town and Country Planning Act provides:

> " 29 (1) . . . where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan . . . and to any other material considerations, and—(*a*) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit. . . .

A "30 (1) Without prejudice to the generality of section 29 (1) . . . conditions may be imposed on the grant of planning permission thereunder—. . . (*b*) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period . . ."

Despite the breadth of the words "subject to such conditions as B they think fit," subsequent decisions have shown that to come within the ambit of the Act and therefore to be intra vires and valid a condition must fulfil the following three conditions: (1) it must be imposed for a planning purpose; (2) it must fairly and reasonably relate to the development for which permission is being given; (3) it must be reasonable; that is to say, it must be a condition which a reasonable local authority properly advised might impose. The first test arises directly C from the wording of the material sections of the Act. The second test comes from the same sections as interpreted by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 and approved in this House by Lord Keith of Avonholm and Lord Jenkins in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 and by Lord Reid and Lord Guest in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735. The D third test is probably derived from *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, and ensures that the Minister, if he is asked to review the actions of a local authority, may, even if tests (1) and (2) are quite satisfied, nevertheless allow an appeal on much broader grounds, if the effect of the condition would be to impose an obviously unreasonable burden upon E the appellant. Decisions of the local planning authority should not, however, lightly be set aside on this ground. As Lord Guest said in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 760–761:

"There should, however, in my view be a benevolent interpretation given to the discretion exercised by a public representative body F such as the appellants in carrying out the functions entrusted to them by Parliament. Courts should not be astute to find they have acted outside the scope of their powers."

In the present case there is no doubt that the removal of these hangars by 1972 together with their use meantime as a wholesale warehouse was the fulfilment of a planning purpose. The idea was in G accordance with the development plan and amply fulfilled the first test.

It is on the second test, whether one treats it as part of test (3) (as Mr. Boydell suggests one should) or as a matter to be considered separately, that difficulty arises. The Court of Appeal has, unlike the Divisional Court, found that the obligation to demolish the hangars after 10 years did truly relate to the permitted development. Since H the permitted development consisted not in permission to build but in a change of use of the hangar to the purpose of a warehouse, it is at first sight hard to see how the conclusions of the Divisional Court can be faulted. As Robert Goff J. said in his judgment, 75 L.G.R. 608, 616:

"I cannot see how a condition that the buildings be removed related to the permitted development in the present case, which was the use of the building as a warehouse for synthetic rubber."

The Court of Appeal took the view that the application by I.S.R. should be interpreted as an application for temporary use of the two hangars as warehouses; and that the permission should be read as permission for temporary use. So interpreted, it is said, a condition which specified a period of temporary use and a condition which required removal of the hangars at the end of that period both related to the permitted development. Assuming that those glosses upon both the application and permission are legitimate, it still seems to me, with respect to the reasoning of the Court of Appeal, that a condition requiring the hangars to be demolished cannot fairly be said to relate to the use of the hangars as warehouses. The fact that the use is to be temporary does not bring the requirement to demolish into any closer relationship with the permitted development. In my opinion the Minister arrived at the correct conclusion, namely that the condition did not relate to the permitted development, was void and therefore failed, taking with it the permission to which it was annexed.

It is not altogether clear on what precise basis the Minister reached his decision. We have been shown a circular emanating from the Ministry in 1968 containing certain guidelines which it suggests should be observed by local planning authorities when considering applications for planning permission. Paragraph 9 of that document states as follows:

"*Is the condition relevant to the development to be permitted?* Unless it can be shown that the requirements of the condition are directly related to the development to be permitted, the condition is probably ultra vires. . . . The condition must be expedient having regard to the development which is being permitted; and where the condition requires the carrying out of works, or regulates the use of land, its requirements must be connected with the development permitted on the land which forms the subject of the planning application."

So far there can be no criticism. These suggestions are simply an amplification of the second test. At the end of paragraph 9, however, come the following words:

"A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected."

That is too sweeping a proposition. No doubt a condition requiring the removal of a building will usually relate to the permission only if the permission has been to erect a new building. There may however be exceptional cases, and some possibilities were suggested in argument, where a requirement to remove could properly be said to

relate to a mere permission to change the use. In short, the test is, does the condition fairly relate to the permission?; not, does the condition spring directly from the fact that a new building is to be erected? It is not clear which test the Minister applied here. The decision at which he arrived was correct whichever test he applied.

Since the decision was correct, the provisions of R.S.C., Ord. 94, r. 12 (5) do not require this House to remit the matter to the Minister for rehearing.

I would allow the appeal and restore the order of the Minister.

I agree with the order for costs proposed by my noble and learned friend, Viscount Dilhorne.

Appeals allowed.

Solicitors: *Treasury Solicitor; Herbert Smith & Co.; Sharpe, Pritchard & Co.*

J. A. G.

[HOUSE OF LORDS]

RANK XEROX LTD. . . . . RESPONDENTS

AND

LANE (INSPECTOR OF TAXES) . . . . . APPELLANT

1979 July 10, 11; Oct. 25

Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Russell of Killowen and Lord Keith of Kinkel

Revenue — Corporation tax — Allowance of charges on income — Company's rights to payments from overseas company pursuant to agreements executed under seal — Disposal by distribution to shareholders—Whether payments "due under a covenant"—Whether "annual payments"—Whether company relieved from liability on notional gain arising from distribution of its rights to payments—Finance Act 1965 (*c.* 25), *Sch.* 7, *para.* 12 (*c*)

Paragraph 12 of Schedule 7 to the Finance Act 1965 provides:

> "No chargeable gain shall accrue to any person on the disposal of a right to . . . (*c*) annual payments which are due under a covenant made by any person and which are not secured on any property."

In 1956 an English company and one of its subsidiaries agreed with an American corporation, X, to engage in a joint venture for the world wide exploitation, outside the United States of America and Canada, of a reproduction process called xerography. Pursuant to the agreement the taxpayer company was formed and X transferred to it all patents, patent applications and licence rights relating to the process. Following two further agreements under seal in 1964 and 1967, in