GAZELLE PROPERTIES LIMITED

FULLERS EARTH SITE

JOINT OPINION

Introduction

1. We are instructed to advise Gazelle Properties Ltd. ("**Gazelle**") whether the determination by the Secretary of State in a decision letter dated 1 August 2003 that a site comprising part of the former Fuller's Earth Works, Combe Hay, Bath extending to 3.38 hectares ("**the 2002 site**") benefits from a right to B2 use is an issue which is now *res judicata* and accordingly cannot be revisited in further enforcement proceedings either by Bath and North East Somerset Council ("**BANES**") or the Secretary of State on appeal.

2. We are asked for this advice in the context of an enforcement notice having been served which alleges a change of use of an area comparable to the 2002 site (with minor differences in extent)[1] to a mixed B2/B8 use. Neither the enforcement notice, nor the reports which preceded its authorisation, acknowledges the existing of the lawful B2 use or nor does the notice allow for reversion to B2 use across the whole site. Rather, BANES acknowledges only that an area marked "area A" is not to be the subject of enforcement.

3. In our opinion, the Secretary of State's decision of 2003 unequivocally determined that by the beginning of 1964 there was an established B2 use across the whole 3.38 hectares which was not abandoned subsequently. Consequently, use for B2 purposes across the whole 3.38 hectares is now lawful and that issue is now *res judicata* and may not now be lawfully revisited in any enforcement action[2].

---

[1] The enforcement notice area includes the area of two dwellings adjacent to the 2002 site. Visibility splays marked on the application site in 2002 do not form part of the area enforced against.

[2] The acquisition and preservation of immunity by virtue of use pertaining prior to 31 December 1963 is explained in ***Panton & Farmer v Secretary of State for the Environment, Transport & the Regions and Vale of White Horse District Council*** (1999) 78 P. & C.R. 186 at 193

4. This conclusion has two significant consequences. First, the Inspector considering the forthcoming appeal against enforcement notices must use his powers within section 176 of the Town and Country Planning Act 1990 to amend the enforcement notices so as to permit reversion to B2 use across the whole of the 3.38 hectares which were the subject of the 2003 decision. Secondly, given that the question whether the established use is *res judicata* is clearly not a matter to which the Council has squarely directed its mind before, still less acknowledged in making its decision, it should consider withdrawing the enforcement notices.

5. The view expressed above may also demonstrate that the Council's action in taking enforcement action was unreasonable in that it did so without understanding or taking into account the true legal position with regard to the lawful B2 use.

6. We consider below

   (1) what the Secretary of State decided was the extent of the established B2 use in his 2003 appeal decision; and

   (2) the application of the principle of *res judicata* to the findings in that decision.

Analysis

The Secretary of State's Decision

7. The Secretary of State's decision dated 1 August 2003 ("**DL**") was a determination of a "called-in" application pursuant to section 77 of the Town and Country Planning Act 1990. The decision was to refuse the application. It departed from the recommendation of an Inspector in an Inspector's report ("**IR**") to grant planning permission subject to conditions for a scheme comprising 3,186 metres of B1 floorspace and 19 live/work units.

8. An issue decided by the Secretary of State in the DL was that the entire 3.38 hectare site benefitted from a lawful B2 use. As we explain further below, in our view that this issue was so determined is clear both on the face of the decision and when the decision is read in context. Indeed, the Council has twice been advised by counsel (including leading counsel) that this is the proper interpretation.

The Council's new interpretation

9. However, it is necessary to examine the Secretary of State's decision in some detail here because BANES' interpretation of this decision has recently changed. BANES now asserts that the Secretary of State did not take the view that a B2 use pertained over the entire site, but rather that he considered there to be a fallback B2 use over an area

of the site which was limited to the buildings and hardstanding. This area has been labelled "area A" on enforcement notices dated 30 May 2012. The enforcement notices exclude this area from enforcement on the basis that the Council accepts the activities within this area are B2 uses[3]. It is therefore apparent that BANES does not dispute the existence of a lawful B2 use, but that it disputes the geographical extent of the B2 use right and, implicitly, whether the DL finally determined that the entire 2002 site benefits from that lawful use right.

Analysis of the Secretary of State's Decision

10. In the DL, the Secretary of State (at DL 28-9) disagreed with the Inspector's recommendation that the proposal did not conflict with Green Belt policy objectives, noting that the proposed development would have an urban feel to it and would not safeguard the countryside from encroachment.

11. The Secretary of State stated at DL 30 that he agreed with the Inspector's conclusions at IR 427-436 regarding the existence of a fallback position. The Secretary of State then went on to consider whether any very special circumstances outweighed the harm to the Green Belt he had identified. At DL 35 he considered the weight to be attributed to various fallback options which had been presented by the Applicant:

> "Preclusion of the Fallback Positions: The Inspector identifies three fallback positions (IR 435) and the Secretary of State agrees that these are theoretically available. As to the first (B2) use, the Secretary of State accepts that there is a real prospect of the B2 use **of the site** continuing (IR455-6) though he has insufficient evidence to assess the likely extent of type of B2 use...
>
> ... the Secretary of State is not satisfied on the basis of the evidence before him that the **entire site** will be used for B2 use under the fallback position" [emphasis supplied]

12. On the face of the DL, it is clear that the Secretary of State was accepting that in law it was available to a landowner to use the entire 3.38 hectare site for B2 purposes. However, he considered that to be unlikely to occur. This in our view is the only reasonable interpretation available on the face of the decision. Furthermore, it is also the only reasonable interpretation when the decision is read in the light of the Inspector's report and indeed when other contextual material is considered.

13. The reference in DL 35 back to IR 455-6 is important. Here, the Inspector, like the Secretary of State, considered what weight to attribute to possible fallback scenarios. The Inspector stated (emphases added):

> "*Preclusion of fallback position:* I have already concluded that in the event that the

---

[3] See BANES' statement of case paragraph 4.6

> proposal not proceeding [*sic*], there is a real prospect that the B2 use of the site would continue. The companies that have shown most interest in moving onto the site are those at the dirtier end of the range of prospective general industry uses. They include aggregate reprocessing, concrete batching and vehicle body repair businesses. Such businesses are likely to be associated with the erection of outside plant and other structures such as crushers and new silos which are likely to be visually intrusive. They are likely to be associated with the outside storage of materials and vehicles. They are also likely to give rise to a requirement for floodlighting and other outside lighting. The activities carried out by such businesses often generate noise and dust and give rise to heavy goods vehicle movements (102, 103 and 249).
>
> As there is no requirement for planning permission to be sought for the continuation of the use of the site for general industry, there would be no control over external or internal activities. There would also be no requirement for the buildings to be renovated or for the site to be tidied. The continuation of the B2 use, in my assessment would be highly damaging to the setting of the World Heritage Site and the visual amenities of the Green Belt. It would adversely affect the setting of the adjoining AONB, a matter I discuss further when I deal with the landscape impact of the proposal

14. In our opinion there is no question that the Inspector was there considering fallback scenarios relating to the whole 2002 site - i.e. the application site which was before him and not a smaller or more limited part of the 2002 site. No other interpretation is consistent with the four references to "the site".

15. Furthermore the contemplation of "outside plant and other structures" such as crushers and silos, as well as of outside storage of materials and floodlighting, is inconsistent with anything other than meaning a use of the entire site. It is in our view obvious that the Inspector was not contemplating B2 uses which were restricted to the extant buildings and the hardstanding around them. There was no disagreement between the Secretary of State and the Inspector as to the extent of the established B2 use; the disagreement was in their respective evaluations of the extent of any *prospective* B2 use. This is clarified further by DL 59 in which the Secretary of State stated -

> "the Secretary of State has considered the preclusion of the fallback position- continuing B2 use- but does not accord this much weight as he does not think the site's full return to B2 use is likely".

16. If the Secretary of State had taken the view that the entire site did not benefit from an established B2 use, he would not have had to, or logically have been able to consider the site's *full return* to B2 use even as a theoretical possibility and the question of its likelihood would have been irrelevant.

17. It is plainly necessary to distinguish (as BANES failed to do in authorising enforcement action) between the findings that:

(1) There was a lawful B2 use of the whole site; and

(2) There was not a reasonable prospect of that whole site being returned to that lawful use, which is a finding with regard to the intentions of the site owner/operator at the time (the fallback position).

18. It is also noteworthy that the inspector anticipated in the final sentence of IR 436 that he will discuss the impact of such a fallback position when he comes to deal with landscape impacts. This he did at IR 493 where he stated

> "Regard must be had to what would happen in the fallback position. There would be no requirement to remove the rusting silos or to carry out the wholesale renovation of the existing buildings. Some of the industrial uses that could come onto the site if there was a continuation of a general industrial use, such as aggregate recycling and concrete batching could lead to the erection of new silos, the introduction of tall stockpiles of materials and the introduction of tall plant and equipment. There would also be no control over lighting. It is likely that some of the uses may require the erection of floodlights to allow them to operate early in the morning or late at night"

19. The Inspector thus anticipated (presciently) that the fallback uses could result in the introduction of tall stockpiles of materials. Self-evidently tall stockpiles of materials could not build up on the "area A" which BANES now asserts was in contemplation when the fallback positions were considered. As we have noted, BANES does not properly distinguish between the issues of the fallback position and the extent of the lawful B2 use.

Contextual Material

20. The Statement of Common Ground agreed between the Council and the Applicant for the 2002 call-in inquiry stated at paragraph 1.1 that "the site is approximately 3.38 hectares in area and consists of a collection of linked buildings in various states of disrepair, open land associated with the buildings..." and at paragraph 6.1 of the SOCG it was agreed that "the existing use of the site is industrial processing which falls within Class B2..."

21. In our view there is nothing to indicate that the Secretary of State or the Inspector departed from that position of common ground, and that if they had intended to do so, that would have been expressly stated given that it was an important issue and was relevant to the fallback position.

Previous Examination of the B2 Use Issue by the Council

22. BANES has on two previous occasions obtained Counsel's advice that there is a lawful B2 use over the whole site, and such advice has expressly rejected the contention that BANES now advances that the B2 use is limited to "area A". Peter Towler's advice of 5th

May 2004 expressly rejected his previous view (in an advice of 23 December 2003) that there was an arguable case that the Secretary of State's findings were limited to a finding that the B2 use extended only to the buildings and hardstanding. He advised instead that it would be "wholly inappropriate for the Council to take enforcement action in respect of any B2 use of the site" (for the avoidance of doubt, he meant the whole 3.38 hectares).

23. The Council subsequently sought leading counsel's advice as to whether it was expedient to enforce against a B2 use. In an opinion dated 12 May 2006 Timothy Straker Q.C. explained that planning enforcement powers do not bite in relation to breaches occurring before the end of 1963. Mr Straker Q.C. advised at paragraph 17:

> "It follows that the clear sequence of events is:
>
> (i) By the early 1960s a B2 use by way of processing minerals
>
> (ii) No abandonment of the B2 use by the time of the inquiry in 2002
>
> (iii) The start of an aggregates recycling business in 2002
>
> (iv) Accordingly, any change which occurred in 2002 did not require permission as a use undertaken in 1963 and, in any event, not abandoned by 2002 was replaced by a use in the same class of the Use Classes Order"

24. His conclusion was that *"if an enforcement notice were issued on the information available to me a successful appeal could be maintained on the basis of a B2 use having occurred by 31 December 1963"*. We agree.

25. For the sake of completeness, we note that BANES acted according to the advice it obtained until an unexplained change of opinion. Thus:

(1) the Council wrote to Gazelle on 21 May 2004 to confirm that the Council accepted the site had a B2 use throughout the entire site;

(2) Development Control officers confirmed to the Development Control sub committee on 2 June 2004 that "legal advice has confirmed that the fallback permission for B2 (general industrial) uses applies to the whole of the 3.38 ha site not just the original buildings and hardstandings";

(3) On 25 August 2004 Officers further advised that "It is considered that the principal activity of recycling construction and demolition waste falls within Use Class B2 and can continue in this prominent location without the need for a further grant of planning permission";

(4) on 17 June 2005, a report to the development control subcommittee again advised that "the site as a whole benefits from a Class B2 use";

(5) The Council's proof of evidence in the course of the inquiry into the local plan in 2005 stated "It is the Council's view that the B2 fallback permission applies to the entire 3.38ha site and that the text of para C4.54 should reflect that;

(6) On 27 March 2008 an Ombudsman's Report was fiercely critical of the Council, fining it for maladministration. The extent of the historic B2 use was addressed at paragraphs 80-93;

(7) Thereafter various legal action has been pursued including a successful claim for judicial review by Gazelle Properties Ltd against BANES in which the above history was explored in detail; and

(8) Correspondence from Gazelle Properties Ltd's representatives has repeatedly reminded the Council of this history (for example Ashford's letter of 27 April 2012).

26. BANES has failed to give any reasonable explanation for its change of approach or whether such approach has the support of counsel's opinion. It is possible that it was wholly an officer inspired change and was done without proper consideration for the legal issues. It is clear from the successful judicial review[4] of the earlier enforcement notices that BANES does not have a good track record in terms of properly applying the law with regard to this site and that in that instance officers took a decision without referring the issue back for proper consideration to members.

The Council's Change of Position

27. Indeed, on 9th January 2012, an officer report presaged a change of position by BANES which has led to the current enforcement proceedings. At paragraph 3.05 of that report, the issue of the extent of the B2 use was again rekindled. Officers advised:

> "It is agreed that a B2 use existed prior to 1963, and that this wasn't abandoned, but it is the extent of that use on the site that is in dispute.

28. Officers then asserted (at paragraph 3.011) that it was not clear from the Inspector's findings that he was saying a lawful B2 use was established over the entire 2002 site. The officer then cited various other passages from the Inspector's report in support of the view. When turning to DL 35 (above) he commented *"even if the Inspector has considered that the B2 use should extend to the whole of the application site the decision of the Secretary of State that was given as a result of that call in inquiry came to a different view at paragraph 35"*. It appears from the officer's use of emphasis in

---

[4] ***R. (Gazelle Properties Ltd) v Bath and North East Somerset Council*** [2011] J.P.L. 702

quoting parts of paragraph 35 of the DL that he misinterpreted the Secretary of State's view as to the *likely* extent of a *prospective* B2 use as being a comment on the extent of the *existing* lawful B2 use. This was a basic confusion between the two issues we have referred to above, namely the extent of the lawful use and the existence of a fallback position which do not turn on the same considerations. It is on the basis of this misunderstanding of the decision letter that BANES has now reverted to an interpretation which is contrary to the advice it has twice been given by both junior and leading counsel and upon which it has itself acted on numerous occasions. It is not explained why officers consider themselves to be in a better position to interpret the IR and DL than counsel, given that this is a matter of law[5].

29. Ultimately, this significant change of position to the one that the Secretary of State's decision established a B2 use over only a small part of the site was one of reasons that led to the authorisation and issue of the current enforcement notices.

30. In our view this is not a case of viable rival interpretations of the DL. BANES' latest interpretation of the DL and the IR as to the extent of the lawful B2 use is wrong. We have set out the correct interpretation of the Secretary of State's decision above noting that it accords with the advice received by BANES itself.

Whether *Res Judicata* applies to the Secretary of State's Decision Letter

31. The leading case on the application of *res judicata* to determinations in enforcement appeals is ***Thrasyvoulou v. Secretary of State for the Environment*** [1989] 2 A.C. 273. The decision in ***Thrasyvoulou*** is that *res judicata* applies so as to give finality to determinations:

    (1) in enforcement appeals whenever the determination of the ground decided in favour of an appellant on an appeal against one enforcement notice can be relied on in an appeal against a second enforcement notice which is in the same terms and is directed to the same alleged development as the first (see Lord Bridge at 296B-C); and

    (2) in relation to issue estoppels arising from a successful appeal against an earlier enforcement notice which was effect to defeat the enforcement notice (per Lord Bridge at 296D).

32. Lord Bridge's judgment in ***Thrasyvoulou*** makes clear that the principle applies to a

---

[5] The judgment of the Supreme Court in ***Tesco Stores Ltd. v. Dundee City Council*** [2012] 2 P. & C.R. 9 has emphasised the fact that issues of the interpretation of planning documents (even policy) are matters of law, not planning judgment.

determination by the Secretary of State of whether an existing use of land is lawful. The Secretary of State conceded before the House of Lords in ***Thrasyvoulou*** that a determination pursuant to section 88B(1)(c) of the Town and Country Planning Act 1971 was final and was effective to defeat an enforcement notice directed against a use of land resumed in reliance on the determination (see page 293E-F). Lord Bridge held that concession was rightly made (at page 294D). Section 88B(1)(c) of the 1971 Act corresponds to part of what is now section 177(1)(c) of the Town and Country Planning Act 1990 which provides that the Secretary of State may, on deciding an enforcement appeal -

> "determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which planning permission was granted was lawful..."

33. At page 293H- 294, Lord Bridge held in ***Thrasyvoulou*** that:

> "The purpose of section 88B(1)(c) can only be understood in the light of section 23(9) of the Act of 1971 which provides:
>
> > "Where an enforcement notice has been served in respect of any development of land, planning permission is not required for the use of that land for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out."

34. Section 23(9) of the 1971 Act has been re-enacted in the same form in section 57(4) of the Town and Country Planning Act 1990. Lord Bridge held that the effect of this provision is as follows:

> "The effect of this subsection is that when an owner or occupier of land discontinues a use of land in compliance with the requirements of an enforcement notice, it is not enough to entitle him to resume the immediately preceding use to show that, before the unauthorised change, that use was immune to enforcement procedure, having been begun before 1964; he may only resume a previous use which was itself begun lawfully, i.e. without any breach of planning control: Young v. Secretary of State for the Environment[1983] 2 A.C. 662. In these circumstances, it is obviously desirable that an owner or occupier of land who is to be required by an enforcement notice which the Secretary of State upholds to discontinue an existing use of land should be entitled to ascertain what, if any, previous use of the land he may safely resume without being subject to enforcement proceedings directed against that use. But this would not be an issue arising for determination in the appeal against the notice unless express provision authorising its determination were made, as it is, by section 88B(1)(c). It would be futile to provide for such a determination unless it was intended to protect the owner or occupier of land from enforcement proceedings when he resumed the use determined to be lawful; so the concession in this regard is rightly made. But it would surely be a bizarre result that a decision by the Secretary of State dismissing an appeal against an enforcement notice requiring discontinuance of the existing use of land and determining that a previous use might lawfully be resumed should effectively protect that use against future enforcement proceedings, but that a decision allowing

the appeal on the ground that the existing use was itself lawful should not."

35. Lord Bridge accordingly went on to hold that the same principle also applied to a determination by the Secretary of State on appeal of any of the 'legal' grounds of appeal, then set out in section 88(2)(b)-(e) of the 1971 Act.

Application of Res Judicata to the Present Appeal

36. The important matter for the present appeal is therefore that section 57(4) of the Town and Country Planning Act 1990 provides that -

> "where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out".

37. This means that the Council in issuing the enforcement notice was obliged, and the Secretary of State considering the appeal is obliged, to consider for what purpose the land could lawfully have been used but for the allegations contained in the notice (assuming those allegations of breach can be substantiated).

38. Section 177(1)(c) of the Town and Country Planning Act 1990 gives the Secretary of State power on appeal to determine what lawful purposes the land the subject of the enforcement notice is. The Secretary of State will be obliged on the forthcoming appeal to make such a determination and to make such amendments to the enforcement notice as are necessary (or to quash it) so as to ensure that the use for the purpose for which the land could lawfully have been used is not infringed. Put in this context, the Secretary of State will need to consider what the extent of the pre-1964 B2 use was and make any necessary amendments to the enforcement notices to preserve those accrued use rights.

39. In our view, for the reasons set out above, the question of the extent of the lawful B2 use right has in fact already been asked and determined by the Secretary of State in the 2003 DL. The issue is whether the matter is therefore now *res judicata.* There are a number of potential points of distinction as between the current circumstances and those under consideration in ***Thrasyvoulou*** which should be considered in reaching a conclusion.

40. First, the prior determination in 2003 was not a determination of the whole matter on the application. It was the determination of an issue which was part of the application. However, that was also the case in the Olivers' appeal considered by the House of Lords in ***Thrasyvoulou***. In that appeal, the Olivers sought to rely on the contention that the determination in an earlier enforcement appeal that the use being made of land was an

established (pre-1964) use rendered that issue *res judicata* for the purposes of a subsequent enforcement appeal. Lord Bridge held that the House was concerned not with a "cause of action estoppel", but with an *issue* estoppel, and that each was capable of giving rise to *res judicata* (see p. 296-7 of the judgment). In the Olivers' appeal, Lord Bridge held that the matter giving rise to the issue estoppel was a finding "by necessary implication" that the use at the date of service of the first enforcement notice was an established use, albeit that finding was an "essential foundation" of the first appeal decision, and not merely incidental or ancillary to it.

41. In our view, there is a close analogy between the current appeal and the Olivers' appeal. In the current appeal, the determination that there was a lawful B2 use over the whole 3.38 hectares was not a determination of the application, but it was a determination of an essential foundation of one of the issues on the application. The lawful use of the whole site was a logically prior question to be determined before the nature of the possible fallback scenarios could be determined - which were thus essential to the question whether it was appropriate to grant planning permission for the proposed scheme.

42. The context in which the B2 use issue was determined was on a 'called-in' inquiry rather than as part of an enforcement appeal (as in the ***Thrasyvoulou*** cases), and it might be argued that this is a relevant distinction. However, the specific matter for determination was not a question of planning judgment but was a question of law concerning the lawful use rights which applied in the event of planning permission being refused. It would be odd indeed if the question of *res judicata* were determined not by the substance of the issues but by the procedure applied.

43. In our opinion, therefore, the issue required a determination of the legal rights enjoyed over the land and were determinations which fall within the scope of the doctrine of *res judicata.*

44. Lord Bridge in ***Thrasyvoulou*** explained the rationale for the principle of *res judicata* at page 289C in terms which are applicable whether they arise in the first place from an enforcement determination or some other planning decision, i.e. the public interest in finality and the principle of not requiring a person to establish the same issue twice:

> "The doctrine of *res judicata* rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the

> presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

45. In our opinion, the nature of the determination in this case is that the existence of a legal right was established and that the Secretary of State's decision imposes finality on that determination. The mere fact that this determination took place in the context of a decision by the Secretary of State on a planning appeal rather than in an enforcement appeal is not in our view a relevant distinction in this case. This was not simply a case where an application for planning permission was determined on the merits but a decision which also involved a finding as to existing lawful use rights. Contrast Lord Bridge in ***Thrasyvoulou*** dealing with a decision simply made on the planning merits at p. 290F-H. On the lawful use issue in 2003, there was no right for the public to object, but merely to put forward relevant factual information or to object where the planning merits were relevant.

46. The implication of our view is therefore that any enforcement action which is taken must preserve the legal right to revert to B2 use across the whole 2002 site pursuant to section 57(4) of the Town and Country Planning Act 1990. Consequently, in our view, BANES' interpretation of the extent of the B2 use established by the Secretary of State's DL is not only an erroneous premise for enforcement action, it has also resulted in enforcement notices which unlawfully fail to preserve the B2 use rights enjoyed across the 3.38 hectares considered in the 2003 DL.

47. In order to rectify this, the Inspector is in our view obliged to use his powers within section 176 of the Town and Country Planning Act 1990 to amend the notice so as to permit reversion to B2 use across the 3.38 hectares which were the subject of the 2003 decision.

48. Our analysis receives support from the decision in ***Williamson v. Mid Suffolk District Council*** [2006] EWLands LCA 73 2002. The decision is a useful illustration of the broader application of *res judicata* to a decision of a Minister of State within the field of planning, but unrelated to enforcement. The Minister's decision in question whether to confirm a discontinuance order under section 102 of the Town and Country Planning Act 1990 was a matter of judgment on the planning merits to which the principle of *res judicata* could not attach, but it was held that *res judicata* did apply to an issue of law as to the construction of a planning permission which arose as a component of the Minister's decision. The analogy with the instant case is direct: in each case the 'main' Ministerial decision from which the issue estoppel arose was one relating to planning

judgments and could not itself have given rise to an issue estoppel, but in each case an essential foundation of that main decision was a determination of a subsidiary issue of law. In each case the determination of that subsidiary issue gave rise to an issue estoppel which was binding on subsequent proceedings.

Exceptions to the *Thrasyvoulou* principle

49. We do not consider that any relevant exceptions to the ***Thrasyvoulou*** principle are applicable here, but we consider the issue for the sake of completeness.

50. In ***Watts v. Secretary of State for the Environment and South Oxfordshire District Council*** (1991) 62 P. & C.R. 366, Graham Eyre Q.C. sitting as a Deputy Judge held at 385:

> "In my judgment, in order that an earlier decision upon the evidence or admission by a party can operate as an "issue estoppel" in relation to a subsequent issue in subsequent proceedings, certain conditions should be fulfilled.
>
> 1. Where the issue involves a mixture of fact and law the whole matter must be fairly and squarely before the tribunal.
>
> 2. The tribunal must fully address that matter.
>
> 3. The tribunal must make an unequivocal decision on that matter.
>
> 4. The fact that the first three conditions are fulfilled should be clear on the face of the decision.
>
> That such conditions are fulfilled where an issue involves matters of fact and law is especially important in cases where the tribunal has no legal qualifications as is the usual situation where an inspector is appointed to determine appeals under the planning legislation"

51. The Deputy Judge's "conditions" should not in our view be treated as rigid statutory rules, but are useful in identifying whether there is any good reason to distinguish ***Thrasyvoulou***.

52. As to the first, second and fourth of these 'conditions', the extent of the established B2 use was predominantly a question of law, but also, to a limited extent one of fact. It is true to say that the issue was one upon which there was a statement of common ground between the Council and the Applicant, but is trite that a planning Inspector is not bound by a statement of common ground, and it is in our view plain on the face of the decision that considerable attention was paid to the extent of the established B2 use by the Inspector and the Secretary of State. Indeed, the lawful use of each and every building was considered in detail and the nature and extent of a fallback use was the subject of evidence and submissions from both main parties and these are summarised in the IR.

53. As to the third of these considerations, where the determination relied on as establishing res judicata is ambiguous, that may prevent the doctrine from applying: see for example ***Keevil v. Secretary of State for Communities and Local Government*** [2012] EWHC 322 (Admin). However, we have already expressed the view that the Secretary of State's decision in 2003 was unequivocal. The mere fact that the Council has advanced a different (and misconceived) interpretation does not render the decision equivocal. See also the special circumstances found in ***R. (Wandsworth LBC) v. Secretary of State for Transport Local Government and The Regions and O2 UK Ltd*** [2004] 1 P. & C.R. 32, where the information was insufficiently clear.

54. In ***R (Exmouth Marina Ltd) v. First Secretary of State*** [2004] EWHC 3166 (Admin) HHJ Rich QC considered *obiter* whether *res judicata* could arise in respect of a decision as to whether there was "a real likelihood of the fall-back permission being implemented" and it was held that if the matter had arisen, a second Inspector would have been entitled to revisit the issue notwithstanding the decision of a previous Inspector. However, this case is not comparable to the instant case: what was being considered was whether *res judicata* arose in respect of a matter of judgment as to the *likelihood* of a fallback being implemented. This in our view would obviously be something which could not be *res judicata* since the likelihood of such a matter would depend on all the circumstances pertaining at a given time and is therefore a matter requiring fact-sensitive and time-sensitive judgment. This was a decision on the second of the issues we refer to above at paragraph 17, not the first. Further, and in any event, the matter there being considered was whether *res judicata* could apply on a remitted enforcement appeal in respect of a quashed decision of the previous Inspector.

55. A further exception which has arisen is that where a determination of an enforcement appeal in an appellant's favour arose because of a failure by the local authority to provide any evidence in support of its case, no estoppel arose in respect of a subsequent enforcement notice. It was implicit in the concept of cause of action estoppel that a matter had been adjudicated not that the court or tribunal had been unable to adjudicate upon an issue because of a complete lack of information. This does not apply in these circumstances where the issue had plainly been considered and cases advanced to the Inspector and Secretary of State.

56. ***Porter and another v Secretary of State for Transport*** [1996] 3 All E.R. 693 established that res judicata cannot arise from a decision on an application under section 18 of the Land Compensation Act 1961 because such a determination was not of a type to which *res judicata* could apply: it was akin to a determination of whether to grant planning permission on the merits (as to which, see Lord Bridge in ***Thrasyvoulou*** at p. 290,

above). Furthermore, it lacked the necessary element of finality. This does not affect our view of the issue estoppel in this case which does not relate to a determination of the planning merits.

57. The principle in ***Thrasyvoulou*** is limited to establishing that *res judicata* can be raised in respect of determinations in the planning sphere. It carries no implication as to the application of other forms of estoppel to planning. The House of Lords judgment in ***R. v East Sussex CC Ex p. Reprotech (Pebsham) Ltd*** [2003] 1 W.L.R. 357 is regarded as having laid to rest the application of estoppels in planning decisions other than estoppel *per rem judicatam*. However, it casts no doubt upon the decision in ***Thrasyvoulou,*** which remains authority for the continued application of estoppel *per rem judicatam* as a distinct form of estoppel. The rationale for this distinction was explained by Moore-Bick J. (as he then was) in ***Stancliffe Stone Co Ltd v. Peak District National Park Authority*** [2005] Env. L.R. 4 at paragraph 34:

> "In seeking to confine Lord Hoffmann's comments to estoppel by representation Mr Corner relied on the fact that in the *Reprotech* case their Lordships cast no doubt on the correctness of the decision in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 A.C. 273 in which the House held that another form of estoppel, estoppel per rem judicatam, could operate to prevent the re-opening of a decision made by a public body under a self-contained statutory code unless the statutory provisions themselves demonstrated an intention to exclude the principle. However, I do not think that a parallel can be drawn between *res judicata* and other forms of estoppel. As Lord Bridge pointed out at p. 289, the rationale which underlies the doctrine of *res judicata* is fundamentally different from that which underlies estoppel by representation, or, for that matter, estoppel by convention. One of the principles on which estoppel per *rem judicatam* rests is that the public interest demands that there be finality in decision-making. The other, also a principle of public policy, is that no one should be put to the trouble of dealing with the same matter twice. Together these principles as expressed in the doctrine of estoppel per *rem judicatam* provide a basis for ensuring that the decision-making process operates in an orderly and effective way. The continued applicability in the area of public law of the doctrine of *res judicata* provides no basis in my view for holding that other forms of estoppel based on different principles still have a part to play."

58. Moreover, *res judicata* is based on the principle that the issue has already been properly decided by a competent authority within the normal planning process[6] whereas other forms of estoppel (e.g. by representation or convention) would tend to undermine the planning code by allowing issues to be determined without a decision according to normal planning processes (including public consultation).

59. We have not therefore addressed other forms of estoppel. Thus, although the Council has repeatedly accepted that the entire 3.38 hectares enjoy a lawful B2 use, the Council's reiteration of its position in these respects, and any detrimental reliance by

---

[6] Note for example, that a lawful development certificate under s. 191 or 192 of the 1990 Act can only be re-opened in the limited circumstances specific in s. 193(7) - effectively fraud or deliberate omissions.

Gazelle do not give rise to an estoppel. That is not to say that the inconsistency in the Council's conduct would not be relevant in other ways, not least in relation to assessing the reasonableness of its conduct for costs purposes in the enforcement appeal, but its conduct does not give rise to an estoppel or *res judicata.*

60. As Sullivan J (as he then was) held in ***R. (Wandsworth LBC) v. Secretary of State for Transport Local Government and The Regions and O2 UK Ltd*** [2004] 1 P. & C.R. 32 at paragraph 21:

> "If a matter is *res judicata* there is no need for an estoppel, if it is not there is no longer any scope for estoppels which are akin to *res judicata*".

61. We have, in preparing this opinion, seen the draft evidence of Mr Kendrick. He has examined the available evidence and concluded that the Inspector and Secretary of State were correct both on the evidence available, and in the light of further evidence now available, to find that a B2 use was established across the whole site by the beginning of 1964 and not abandoned subsequently, such that the site enjoys immunity.

62. While it is prudent and unavoidable that the Appellant has had to instruct the preparation of such evidence, given the approach of BANES criticised above, it is strictly irrelevant to the legal issue of whether the Secretary of State's determination of the question is *res judicata*. The very purpose of the doctrine of *res judicata* is to avoid a person having to prove again an issue which has already been established.

Conclusions

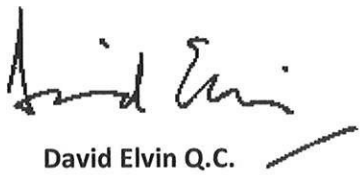
63. The latest attempt by BANES to re-interpret the Secretary of State's 2003 decision is in our view no different to the similar attempt in 2004 on which the Counsel received counsel's advice, and again in 2006.

64. BANES has repeatedly accepted that its latest interpretation is in substance wrong. It was right to do so. It is wrong and unreasonable for it to now revert to the earlier position. The basis for res judicata explained by Lord Bridge in ***Thrasyvoulou*** resonate loudly: BANES seeks to avoid finality to this matter and Gazelle Properties has not only been twice "vexed" in the same cause by BANES, it has been repeatedly so vexed and threatened over many years. The mischief which *res judicata* seeks to address is apparent. The principle applies in this instance so as to prohibit, as a matter of law, the visitation of the issue of the lawful use right again.

65. Consequently, the Appellant at the enforcement appeal should not be put to the necessity of re-proving this issue: the enforcement notices must be amended or

quashed so as not to traduce the lawful use right enjoyed over the whole site. Moreover, in the light of its inconsistent and unreasonable conduct, based on a misunderstanding of the law and the DL, BANES should, as a matter of public law duty and proper administration, consider the withdrawal of enforcement notices.

66. We have nothing to add as presently instructed.



David Elvin Q.C.

Alex Goodman

Landmark Chambers,
180 Fleet Street,
London EC4A 2HG

7 January 2013