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HIGH COURT DECISION
6 AUGUST 2015

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Case Nos: CO/5538/2014 & CO/1442/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2015

Before:

Mr Justice Lindblom

Between:

Roger Wood

Claimant

- and -

(1) Secretary of State for Communities and Local Government
(2) The Broads Authority

Defendants

Mr Daniel Stedman Jones (instructed by **Leathes Prior**) for the **Claimant**
Mr Gwion Lewis (instructed by **the Government Legal Department**) for the **First Defendant**
Mr William Upton (instructed by **Norfolk Public Law**) for the **Second Defendant**

Hearing date: 19 May 2015

Judgment Approved by the court for handing down

Mr Justice Lindblom:

Introduction

1. On Thorpe Island in Norwich there is a basin joined by a short channel to the River Yare. The site is now owned by the claimant in this case, Mr Roger Wood. Boats are being moored in the basin. These proceedings, under sections 288 and 289 of the Town and Country Planning Act 1990, arise from enforcement action taken by the second defendant, the Broads Authority, against the use of the basin for mooring and other development said to have taken place in breach of planning control. Mr Wood appealed against the enforcement notice to the first defendant, the Secretary of State for Communities and Local Government. The first decision on that appeal, in which the inspector allowed it in part, was quashed by consent. The appeal was re-determined by another inspector, Mr Phil Grainger, in a decision letter dated 20 October 2014. Again it partly succeeded, and planning permission was granted for the mooring of no more than 25 boats in the basin. Mr Wood now challenges that decision. The court's task is to decide whether it was lawfully made.

2. On 15 April 2015 H.H.J. Robinson, sitting as a deputy judge of the High Court, ordered a "rolled-up" hearing of the application for permission under section 289 and, if permission were granted, the appeal itself, to be fixed on the same day as the hearing of the application under section 288.

The applications for an extension of time and to amend

3. On 28 November 2014, within the statutory period of six weeks for making an application to the court under section 288, but before counsel had been instructed on his behalf, Mr Wood issued a claim for judicial review. He should, of course, have filed a Part 8 claim form. He also failed to issue, within 28 days of the inspector's decision (i.e. by 17 November 2014), the appellant's notice required for an appeal under section 289. On 16 December 2014 the Broads Authority made an application to strike out the section 288 application as disclosing no arguable case. On 2 February 2015 the grounds on which Mr Wood now wishes to rely were lodged with the court, but it was only on 20 March 2015 that he filed an application for permission to appeal under section 289. He therefore requires not only the court's permission for an extension of time to bring the section 289 application before the court (see paragraph 26.1 of Practice Direction 52D), but also permission to amend the grounds of his application under section 288 to conform to the grounds of his intended appeal under section 289.

4. Neither the application for an extension of time nor the application for permission to amend is resisted by Mr Gwion Lewis for the Secretary of State. Both, however, are opposed by Mr William Upton on behalf of the Broads Authority. On behalf of Mr Wood, Mr Daniel Stedman Jones acknowledges that Mr Wood – acting without the benefit of legal advice, which he was unable to afford at the time, and unfamiliar with the procedural complexities involved in cases such as this – failed to launch his challenge to the inspector's decision in the right way, and failed to articulate his grounds as he should have done (see the judgment of Mr Charles George Q.C., sitting as a deputy High Court judge in *Islam v Secretary of State for Communities and Local Government* [2012] EWHC 1314 (Admin), at paragraphs 21 to 31). Mr Stedman Jones submits, however, that any prejudice to the Broads Authority and to the public interest is insignificant. The application under section 288 was lodged

within the statutory time limit, though in a procedurally incorrect way, and the challenge was promptly and appropriately refined once Mr Wood had taken legal advice. Mr Upton submits that Mr Wood should not be given the opportunity he seeks to prolong the process, and that, as may be inferred from witness statement of the Broads Authority's Chief Planner, Ms Cally Smith, dated 28 April 2015, an extension of time for the section 289 proceedings in this case would prejudice not only the Broads Authority as a party defending the proceedings but also, more importantly, the public interest in the swift and effective enforcement of planning control (see the judgment of Sullivan J., as he then was, in *R. (on the application of Wandsworth London Borough Council) v Secretary of State for Transport, Local Government and the Regions* [2004] 1 P. & C.R. 32, at paragraphs 16, 23 and 28); and that although the court has the power to allow an amendment to the grounds of the section 288 application, the implication in costs for the Broads Authority should not be ignored (see the decision of the Court of Appeal in *San Vicente v Secretary of State for Communities and Local Government* [2014] 1 W.L.R. 966).

5. In my view, any prejudice to the Broads Authority and to the public interest in allowing Mr Wood's challenge to proceed on the amended grounds would not be significant. This is not, as I see it, a belated attempt to introduce an entirely new or additional claim (see the judgment of Brooke L.J. in *Thurrock Borough Council v Secretary of State for the Environment, Transport and the Regions* [2011] 1 P.L.R. 94, at p.100). The section 288 proceedings, albeit not in a Part 8 claim form, were begun in time. And the amended grounds have, as Mr Lewis accepts on behalf of the Secretary of State, "brought focus to these proceedings". The Broads Authority's stance as local planning authority is understandable. But I am not persuaded that I should refuse either the necessary extension of time for the section 289 application or permission to amend the grounds of the application under section 288. The consequences in costs can be dealt with, if need be, at the conclusion of the proceedings.

The issues for the court

6. There are three issues for the court to decide. They are:

   (1) whether the inspector erred in law in his conclusions on the ground (c) appeal (ground 1);
   (2) whether he was wrong to limit the mooring use of the basin to 25 vessels (ground 2); and
   (3) whether his decision was irrational (ground 3).

The site's planning history

7. In the 1960's, Jenners of Thorpe Ltd., a company which was hiring out boats from another site nearby, sought to expand its operation on to Thorpe Island. It made several applications for planning permission, some of which are not directly relevant to the issues in these proceedings.

8. On 6 September 1965 Jenners made an application to Norfolk County Council for outline planning permission (application no. BF7642) for the construction of a basin and other development related to boatyard use, including wet and dry boathouses and a clubhouse. In

the box on the application form where the location of the application site is to be given, three sites are referred to, the third of which is:

"(c) Island site bounded by River Yare and New Cut (see drawing no. A770-12A.)".

In the box where a description of the proposed development had to be provided, it was stated:

"SEE ACCOMMODATION SCHEDULE ON DRAWINGS."

The drawings have not been retained in the Broads Authority's records. But a planning officer's report on this scheme has survived, in which the proposed use of the "Island" is described in this way:

"(i) Construction of mooring basin,
(ii) Erection of Wet and Dry boathouses,
(iii) Erection of Club House …
…
as illustrated on Plan Nos. A.770/12A, A 770/11A and A 770/10A."

9. On 23 February 1966 Jenners submitted to Norfolk County Council an application for development on the island site, for the construction of a basin (application no. BF8095). In the box for the description of the proposed development in the application form the proposal was described in this way:

"FORMATION OF BASIN
PLEASE REFER TO DRAWING 770-15A."

Drawing A770-15A shows the proposed basin, indicating its precise siting and dimensions, with an inset drawn to a larger scale showing the detail of the proposed piling in the basin and along a stretch of the riverbank either side of the cut. The legend on the drawing states:

"JENNERS
THORPE
(PHASE 1 STAGE 1)

PROPOSED REDEVELOPMENT
at YARMOUTH ROAD, THORPE
for JENNERS OF THORPE LTD
ISLAND SITE

…".

10. Outline planning permission for the development proposed in application no. BF7642 was granted by Norfolk County Council on 4 April 1967. The particulars of the development given in the decision notice were:

"Residential and Commercial Development consisting of 3 sites:
(1) 22-26 Yarmouth Road, (2) Site of Thorpe Hall,
(3) Island bounded by River Yare and New Cut."

The permission was stated to be for:

> "... the development shown on the plan(s), and/or particulars deposited with the Blofield & Flegg Rural District Council on the 6th day of September 1965 ..."

with this clarification in an asterisked note:

> "and as subsequently amended on the 16th day of March, 1967, by the withdrawal of that part of the application involving the demolition of Thorpe Hall and the redevelopment of the site (No.2)."

The outline planning permission was granted subject to two conditions. The first required the submission and approval of the reserved matters before any development took place. The second clarified the scope of the reserved matters.

11. Also on 4 April 1967 full planning permission was granted on application no. BF8095. In the particulars of the proposed development in the decision notice the proposal was described as:

> "Formation and Construction of Basin".

The grant or permission was in these terms:

> "In pursuance of their powers under the above-mentioned Acts and Order, the Norfolk County Council HEREBY PERMIT the development as shown on the plan(s) and/or particulars deposited with the Blofield and Flegg Rural District Council on the 24th day of February 1966".

No conditions were attached to that planning permission.

12. On 31 October 1967 planning permission was granted for the erection of a wet boathouse over the basin (on application no. BF9478). On the same day planning permission was also granted for the erection of a dry boathouse (on application no. BF9598). That proposal was later amended, and a further planning permission granted for it on 29 May 1968.

13. On 6 December 1967 another application was made for planning permission for the erection of a wet boathouse over the basin (application no. BF9789). The development was described in the application form as:

> "ERECTION OF WET BOATHOUSE OVER BASIN."

One of the drawings submitted with this application, drawing A770-22F, dated "2.8.67", shows the proposed wet boathouse partly covering a basin, with different dimensions from the basin shown on drawing A770-15A. The legend on the drawing states:

> "JENNERS
> THORPE
> Proposed redevelopment
> at Yarmouth Road, Thorpe

For Jenners of Thorpe LTD
Island site
...".

The revisions listed on the drawing include revision B, which states:

"LENGTH OF BASIN REVISED".

Planning permission for this development, described in the decision notice as "the erection of a wet boathouse", was granted on 30 January 1968. No conditions were attached to that planning permission. A further permission for an amended proposal, described in the permission as "Amended plans for the erection of a wet boathouse", was granted on 26 March 1968. Again, no conditions were attached.

14. On 30 July 1968 planning permission was granted for the erection of a bridge over the River Yare (on application no. BF10278).

15. Some of the development approved in that series of planning permissions was built, including the basin, the wet and dry boathouses and the bridge. Other elements of it, including the clubhouse, were not.

16. Jenners left the site in 1970. Within a few years of their departure, all of the buildings which had been constructed under the planning permissions granted in the 1960's, except the basin and the bridge, had been demolished.

17. On 5 March 1985 planning permission was granted by the Broads Authority (on application no. 84.0447) for residential development on land adjacent to Thorpe Old Hall, which is on the other side of the river, opposite the island site. The development was subject to a planning agreement made, on the same day, under section 52 of the Town and Country Planning Act 1971. Recital (5) to the agreement stated that the Broads Authority was "concerned to ensure that ... (b) the island site ... is used for private moorings only". Clause 4 contained a covenant by the then owners of the site, Carningle Ltd., that "they [would] not cause or permit the island site to be used for any purpose other than the mooring of private boats and in particular but without prejudice to the generality of this restriction that no hiring or sale of boats shall take place from the site". Clause 5 made the covenants in the agreement binding on the parties' "respective successors and assigns ...".

The enforcement notice

18. The enforcement notice was issued on 7 November 2011. It alleged several breaches of planning control at the site, including "the construction and installation of two jetties ..." and "the change of use of the site for the mooring of boats". The reasons for the issuing of the notice included these:

"...
The construction and installation of the jetties has taken place in the last 4 years.
...
The use of the site for mooring has taken place in the last 10 years.

> The development and use of the site for a mooring basin and buildings under planning permission BF 8095 dated 4th April 1967 has been abandoned.
> ...
> The Authority does not consider that planning permission should be granted since planning conditions could not overcome the material planning objections."

The requirements of the notice included, within specified periods, the cessation of "the use of the basin for the mooring of boats", the removal of the boats from the basin, the removal of all the jetties, and the restoration of the land to its previous condition.

19. Mr Wood appealed against the enforcement notice on 17 November 2011. In June 2012 an inspector appointed by the Secretary of State allowed the appeal under ground (a) in section 174(2) of the 1990 Act – "that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted ...". That decision was quashed by the court in June 2013 and the appeal was remitted to the Secretary of State for re-determination. The second inspector, Mr Grainger, held a hearing into the appeal on 8 July 2014. In his decision letter – dated, as I have said, 20 October 2014 – he dismissed Mr Wood's appeal on ground (c) ("that [the matters stated in the notice] (if they occurred) do not constitute a breach of planning control"), but allowed the appeal on ground (a), granting planning permission for the mooring use and for the "jetties" – or, as he described them, "pontoons" – subject to a number of conditions. The enforcement notice was otherwise upheld, with corrections and variations.

The inspector's decision

20. By the time of the hearing in July 2014 the two grounds in Mr Wood's appeal against the enforcement notice which remained live were those in section 174(2)(a) and (c). An appeal under ground (d) – "that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters" – was withdrawn.

21. In paragraph 9 of his decision letter the inspector identified three "main matters for consideration" in the appeal:

> "(i) whether the mooring that is taking place in the basin constitutes development requiring planning permission;
> (ii) if permission is required, whether the various permissions granted from 1967 onwards should be construed as granting it;
> (iii) if not, and it therefore becomes necessary to consider the planning merits of the development, the main issues would be the effects, if any, on the character and appearance of the Thorpe St Andrew Conservation Area; the setting of the nearby listed buildings; and the living conditions of local residents."

22. The inspector dealt with the ground (c) appeal in paragraphs 10 to 36.

23. In paragraphs 11 to 14 he referred to the present use of the basin. He said in paragraph 11 that the boats currently moored in the basin had "not stopped briefly during the course of navigation", that their owners, "all apparently private individuals, use the basin as their 'home base' ...", and that mooring of this sort was "materially different to short term

mooring during the course of a single journey or between closely spaced journeys". He went on to say, in paragraph 14:

> "... [Whether] or not any boats are being lived in, mooring in this manner and on this scale means that the basin and its surroundings now have a character that is very different from the semi-natural state that they had acquired. Taking all this into account I conclude that the mooring that is taking place amounts to development that, on its face, constitutes a material change of use."

24. The question the inspector had to decide in the ground (c) appeal is identified in paragraph 17, where he said this:

> "Returning to the mooring which is being attacked in the enforcement notice, there are no 'permitted development' rights to moor boats in the manner that is occurring which amounts to a permanent, not a temporary, use even if some of the boats involved change over time. In addition, no ground (d) appeal is now being pursued. Accordingly whether there has ... been a breach of control turns on whether the use has planning permission as a result of one or more of the planning permissions that have been granted in respect of the land."

25. The rival cases on that issue are summarized in paragraph 18:

> "... Put at its simplest, the appellant considers that the permission granted for the construction of the basin also authorised its use for any type of mooring; that a use permitted in this way cannot be abandoned simply through non-use; and that accordingly the mooring that currently takes place is authorised by that permission. In contrast, the Authority argued initially that the use of the basin had been abandoned. Latterly they have argued that in any event the mooring that currently takes place is materially different to that for which the basin was designed."

26. Dealing with the site's planning history, the inspector referred, in paragraph 19, to the four applications made by Jenners in the late 1960's. He said in paragraph 20 that the outline planning permission granted on application no. BF7642 "was implemented only in part, if at all, and that the basin and wet boatshed were constructed pursuant to separate full permissions". The evidence suggested that the development envisaged in BF7642 was, "in effect, being brought into existence through the later full applications". The inspector continued in paragraph 21:

> "Not all of the proposed development had taken place when, in the face of changing circumstances, Jenners vacated the site. The basin had been constructed and the wet boatshed erected over most of it. The dry boathouse (but not the slipway to it) had also been built, as had the bridge across to the north bank of the river. However, the clubhouse was never built. Moreover, within a few years of Jenners vacating the island site all the buildings that had been erected on it were demolished leaving only the basin itself and the bridge."

27. Next, in paragraphs 22 to 31, the inspector considered the full planning permission granted for construction of the basin on application no. BF8095, and for the wet boathouse on application no. BF9789, I must quote these paragraphs in full:

"22. Returning to the permissions referred to earlier, up to the hearing, that for the formation and construction of the basin (BF8095) had, not unreasonably, been the centre of attention. This was an application for operational development, not a change of use. However, what is now s75(3) of the Town and Country Planning Act 1990 indicates that, if no use is specified, a permission for the erection of a building shall be construed as including permission to use it for the purpose for which it was designed. [In a footnote the inspector added: "Although the basin is not a building in the normal meaning of that word, the parties consider that for the purposes of s75(3) it can be regarded as a building and I see no reason to disagree."] In this context, 'designed' is generally taken to refer to what the building was intended for, not matters of architectural detailing.

23. In the case of BF8095 I have found nothing in the limited material that has survived and been made available to me that plainly states how the basin was to be used. Nor does the permission granted impose any conditions restricting the use. Given this, and as BF8095 was a full application not formally linked to BF7642, the appellant considers that the basin could have been used for mooring of any type and that, but for the planning obligation that I deal with later, it still could.

24. For my part I accept that even if at the time BF8095 was being considered everyone understood that the basin was intended to form part of the overall development envisaged in BF7642 that would be of no significance if the permission granted was clear and unambiguous on its face. I also accept that the basin as it exists is physically capable of and suitable for various types of mooring. Moreover, whilst 'mooring' is a broad term (and indeed not even mentioned in BF8095), I do not consider that this in itself introduces sufficient ambiguity to justify reference to extrinsic material.

25. That said, cases that have followed [*R. v Ashford Borough Council, ex parte Shepway District Council* [1999] P.L.C.R. 12] indicate that in respect of full planning permissions like this it is permissible to refer to the plans as well as the decision notice as part of the permission and indeed that this is to be expected. In this case the relevant drawing is no. A770.15A. Reference to it reveals that it includes the following wording: *Jenners Thorpe (Phase 1 Stage 1) Proposed Redevelopment of Yarmouth Road, Thorpe for Jenners of Thorpe Ltd Island Site.*

26. In my view, although these words make clear that the basin was not intended to be a stand alone facility, they introduce an element of ambiguity and uncertainty as an understanding of the nature of the larger scheme may be needed in order to establish the scope of the permission granted by BF8095. Unfortunately nothing in the documents that I have seen relating to BF8095 sets out what the larger scheme was. In such circumstances I consider that a reasonable reader of the permission, together with the drawing, would refer to the factual context of the application.

27. In this case the context is that an outline application (BF7642) which was made by the same applicant and included a basin as well as other works was being considered at the same time and was approved on the same date. The two applications were not formally linked in the way that outline and reserved matters submissions would be. However, that would not have been possible given that BF8095 was submitted before BF7642 was approved and the absence of such a formal linkage is not sufficient to demonstrate that the basin permitted by BF8095 was not that envisaged in BF7642.

28. It might be expected that the relationship between the developments envisaged in BF7642 and BF8095 would have been made clear at the time in some way. However, if it was, no documentary evidence has survived the passage of time or at least none has been found and made available. Even so, I consider that in the specific factual context of BF8095 the logical interpretation of the permission and drawing is that the basin was intended to be an integral part of the commercial boatyard that Jenners were seeking to develop on the island. The fact that further full applications were made later for other elements of the overall scheme envisaged in BF7642 reinforces that conclusion without being essential to it.

29. In any event, reference to drawing no. A770.15A also shows that the basin that exists today is not of the form approved under BF8095. The entrance from the river is not symmetrically positioned and, whilst I have been provided with no detailed measurements, the basin appears to extend appreciably further east than is shown on drawing no. A770.15A. As discussed at the hearing, the basin more closely resembles that shown on one of the plans for BF9789, the amended wet boathouse permission. This plan, drawing no. A770.22F, also includes a note 'length of basin revised'. All this suggests that if the present basin has the benefit of planning permission this could not derive simply from BF8095 but from BF9789 or a combination of the two permissions. [In a footnote here the inspector added: "If the basin in its present form is unauthorised by any planning permission, the structure itself would have become immune from action with the passage of time. However, s75(3) would not come into play."].

30. Moreover, erection of the boathouse seems to have followed on quite quickly from the construction of the basin and to have been envisaged from the outset. Once it was roofed over the basin would not have had the character of a free-standing all-purpose mooring facility. Whilst 'home base' mooring (or visitor mooring) could take place in such a basin it would be most unusual and arguably unattractive. A covered, or partly covered, basin would be far more characteristic of a boatyard or similar facility.

31. Taking all these matters into account, I conclude that the permission granted for the basin (if it benefits from permission at all) was for a facility that was an integral part of the boatyard or hire boat base that was being developed on the Island site (in conjunction with the land north of the river). The permitted use of such a facility would have been as part of that boatyard use; it would not have been some independent all-purpose mooring use that amounted to a primary use in its own right. [In a footnote to this paragraph the inspector said: "I do not regard this as inconsistent with the principles established in [*I'm Your Man Ltd. v Secretary of State for the Environment, Transport and the Regions* (1999) 77 P. & C.R. 251]. A description may not restrict the manner in which a use is carried out but it may still clarify what the nature of a use is. In any event, in this case no use is mentioned in either the permission or the application."]".

28. In paragraphs 32 to 34 the inspector considered the question of whether the boatyard use had been abandoned or lost in some other way:

"32. There is no dispute that the boatyard use has been abandoned. Even if demolition of the boatsheds did not have that effect, the undertaking made in 1985 under the precursor of s106 prohibits use of the island site for commercial purposes including hire of boats. In my view, there is little point in speculating why that agreement was

considered necessary. Even if at that time the Local Planning Authority felt that permission for commercial use remained extant they could have been wrong. Moreover, whilst provision now exists for appeals against such undertakings, that was not the case when this one was made. Notwithstanding the arguments put forward by the appellant, I conclude that, at the time it was made, this undertaking was intended to ensure the permanent cessation of all commercial activity on the appeal site.

33. By entering into the undertaking, which would run with the land and be binding on their successors, I consider that the then owners were clearly indicating that the former boatyard use was not merely in abeyance but was being brought to an end. Taken together with the demolition of the former boatyard buildings on the Island I consider that this can properly be regarded as a positive act or acts that made any continuing right derived from the original permission(s) to use the basin for boatyard purposes incapable of implementation. Moreover, if the boatyard use had been abandoned or otherwise 'lost' any mooring use that was incidental or ancillary to that use would have died with it. That the basin has remained physically capable of some sort of mooring use cannot alter this.

34. Furthermore, although the undertaking did not prohibit private mooring, it would not have the effect of authorising such mooring unless permission for this already existed. Mooring of private boats would therefore only be lawful if it were covered by the permissions mentioned earlier. Whatever the then Local Planning Authority may have thought in 1985 I have, for the reasons given above, concluded that that was not the case."

29. In paragraphs 35 and 36 the inspector set out his conclusions on the ground (c) appeal:

"35. I conclude that the use of the basin that was permitted by virtue of BF8095 and BF9789 was specifically for commercial mooring of a hire boat fleet as an integral part of a boatyard operation. Even if that boatyard use had not been abandoned, the private mooring that is currently taking place is materially different in character. Amongst other things, it has given the appeal site (particularly the land adjoining the basin that is included in the notice) a somewhat domesticated character with residential paraphernalia (not all of which involve operational development) that would not be expected with a commercial boatyard.

36. Accordingly I conclude that the use that is taking place does not have planning permission and constitutes a material change of use for which permission is required. Moreover, there is no dispute that the operational development referred to in the notice required, and does not have, planning permission. The ground (c) appeal therefore fails."

30. In paragraph 37 the inspector mentioned the withdrawn ground (d) appeal, which he said "would have failed" had it remained to be considered.

31. He dealt with the ground (a) appeal in paragraphs 38 to 69, concluding (in paragraph 69):

"... that, subject to appropriate conditions, a modest level of mooring would not harm the character or appearance of the Conservation Area or the setting of any listed buildings. In addition, it would not materially harm the living conditions of local

residents and would not conflict with any of the general policies dealing with these matters. ...".

32. In paragraphs 70 to 83 he considered the conditions he thought should be imposed on the planning permission for the mooring use. He concluded that "[to] ensure that the visual impact is acceptable, the number of boats needs to be restricted; only boats that are capable of navigation should be allowed; wrecked or sunken boats should be removed; and mooring should take place only in accordance with an approved scheme ..." (paragraph 71). The relevant condition is condition 1, which states:

> "The mooring use hereby permitted shall be restricted to private moorings only and no more than 25 vessels, all of which shall be capable of moving under their own power and shall be in possession of a current navigation toll, shall be moored within the basin at any one time. This permission does not relate to any other mooring or storage use of vessels within the basin or its access channel."

Ground (1) – did the inspector err in law in his conclusions on the ground (c) appeal?

33. Mr Stedman Jones submits that the inspector misinterpreted the relevant planning permissions for development on the site. In the enforcement notice the Broads Authority had asserted not only that there had been a change of use of the site, within the last 10 years, to a use for the mooring of boats and that this change of use was without planning permission, but also that the "development and use of the site for a mooring basin and buildings under planning permission BF8095 ... had been abandoned". It was therefore necessary for the inspector to focus on the question of abandonment. He was wrong to conclude that the mooring use of the basin which was lawful under planning permissions granted in the late 1960's had been abandoned. Mr Stedman Jones argues that the unrestricted use of the basin for mooring was effectively granted in 1967, has never been abandoned, and may lawfully be undertaken today. He makes three main submissions. First, the inspector misconstrued the planning permission for the basin granted on application no. BF8095. That planning permission was not unclear or ambiguous on its face. There was no need for the inspector to resort to any extrinsic evidence as an aid to its interpretation, and he was wrong to do so. Secondly, the inspector erred in construing that planning permission as not permitting an independent all-purpose mooring use. As designed, the basin was plainly suitable and intended for several kinds of mooring use. This is clear from the details of its proposed construction – in particular the piling shown in the inset on drawing A770-15A, which would have been suitable for mooring boats. Both physically and lawfully it could be used for private moorings, and not merely for mooring associated with the operation of a commercial boatyard. Thirdly, the inspector failed to take into account – as was common ground between the parties – that the use of the site for mooring, as opposed to its use as a commercial boatyard, had never ceased.

34. Mr Lewis and Mr Upton submit that the inspector was right to approach the interpretation of the full planning permission granted on application no. BF8095 for the building of a "basin" in the way that he did. He was right to use the application itself, including drawing A770-15A, as an aid to its interpretation and to understanding the purpose for which it was designed within the meaning of section 75(3); and right to take from the note on the drawing, and the context of Jenner's proposals as a whole, that such mooring use as was lawful under this planning permission was for the "commercial mooring of a hire boat fleet

as an integral part of a boatyard operation". Mr Lewis points out that, as the inspector found (in paragraph 29 of his decision letter), the basin, as constructed, more closely resembles that shown in drawing A770-22F, which was submitted with application no. BF9789, for the wet boathouse. But in any event the proposition that the basin was designed for an all-purpose mooring use finds no support in the decision notices themselves, in the applications, or in the circumstances in which the proposal for the commercial boatyard was submitted. As is plain on a fair reading of this part of the decision letter – in particular, paragraph 35 – the inspector's conclusion on the ground (c) appeal did not depend on a finding that the use of the basin approved under the planning permissions granted for Jenner's proposals had been abandoned or otherwise lost.

35. I cannot accept Mr Stedman Jones' argument here.

36. The issue the inspector had to decide on the ground (c) appeal was whether or not the matters stated in the enforcement notice, if they had occurred, constituted a breach of planning control. He resolved that issue very clearly in paragraph 36 of his decision letter, concluding that the present use of the basin constituted a material change of use, for which planning permission was required and had not been granted. This conclusion confirmed the view he had earlier expressed in paragraph 14 – that the mooring now taking place in the basin appeared to be a material change of use. It reflected the Broads Authority's argument, recorded by him in paragraph 18, that "the mooring that currently takes place is materially different to that for which the basin was designed". The operational development also lacked the necessary planning permission. In paragraph 35 he contrasted the present use of the basin with the use "permitted by virtue of" the planning permission granted for its construction on 4 April 1967, on application no. BF8095, and the permission granted some nine months later, on 30 January 1968, on application no. BF9789 – followed on 26 March 1968 by the permission granted for an amended proposal. The private mooring currently taking place in the basin was, he said, "materially different in character" from that use. The difference between the two uses was evident, in his view, in the "somewhat domesticated character" of the appeal site, which was not what one would expect to see in a commercial boatyard. It was for these reasons that the ground (c) appeal failed.

37. As I understand Mr Stedman Jones' submissions, he does not dispute, and in my view it cannot be disputed, that a change of use of the basin from a lawful use of the kind the inspector described to its use for private moorings would indeed constitute a material change of use for which planning permission would be required. Rightly in my opinion, it is not suggested that such a conclusion would be unsound either in principle as a matter of law, or in the particular circumstances of this case as a matter of fact.

38. Nor is it in dispute that any lawful use of the basin for private mooring could only conceivably have come from the planning permissions granted on application no. BF8095 and application no. BF9789. As the inspector said in paragraph 17 of the decision letter, the question of whether there had been a breach of planning control in this case turned on whether the private mooring use of the basin attacked by the enforcement notice "[had] planning permission as a result of one or more of the planning permissions that have been granted in respect of the land". Later, in paragraph 34, having now considered the effect of the section 52 agreement entered into in 1985, he said that the mooring of private boats in the basin would "only be lawful if it were covered by the permissions mentioned earlier". Mr Stedman Jones does not contend to the contrary.

39. The inspector's first task, therefore, was to ascertain the true nature of the use which was lawful under those planning permissions. He did that. And in doing so, in my view, he adopted the right approach to the construction of a grant of full planning permission. His interpretation of the relevant planning permissions was, I think, accurate. He was right to conclude that the use against which the Broads Authority had enforced was not authorized by those permissions. I reject Mr Stedman Jones' submissions to the contrary.

40. The guiding principles on the interpretation of planning permissions are clearly established in the relevant case law. The proper interpretation of a planning permission is a matter of law for the court (see the judgment of Keene L.J., with whom Sir Anthony Clarke M.R. and Toulson L.J. agreed, in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, at paragraph 28).

41. In *Ashford Borough Council*, the case to which the inspector referred in paragraph 25 of the decision letter, the court had to construe an outline planning permission. Keene J., as he then was, identified (at pp.19 and 20) five "legal principles applicable to the use of other documents to construe a planning permission". In summary: first, "[the] general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions ..." (see *Slough Borough Council v Secretary of State for the Environment* (1985) J.P.L. 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196); secondly, it is not appropriate to refer to the planning application itself and "other extrinsic evidence" unless the application is incorporated into the permission by reference, the reason for this being "that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application" (see *Slough Borough Council v Secretary of State*, *Wilson v West Sussex County Council* [1963] 2 Q.B. 764, and *Slough Estates Ltd. v Slough Borough Council* [1978] A.C. 958); thirdly, if the application is to be incorporated into the permission by reference, the words governing the description of the development permitted must make it clear that the application forms part of the permission (see *Wilson* and *Slough Borough Council v Secretary of State*); fourthly, "[if] there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity ..." (see *Staffordshire Moorlands District Council v Cartwright* (1992) J.P.L. 138); and fifthly, "[if] a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue ..." (see *Slough Borough Council v Secretary of State*, and *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P. & C.R. 223 and (1981) 42 P. & C.R. 1).

42. In *Barnett* the court had to interpret a full planning permission. The second of the five principles referred to by Keene J. in *Ashford Borough Council* was considered in this context. In his judgment at first instance Sullivan J., having pointed out (in paragraph 23) that in *Ashford Borough Council* the court had been considering an outline planning permission, went on (in paragraph 24) to contrast that exercise with the interpretation of a full planning permission:

> "If it is plain on the face of the permission that it is a full permission for the construction, erection or alteration of the building, the public will know that, in addition to the plan which identifies the site, there will be plans and drawings which will describe the building works which have been permitted precisely because the

> permission is not, on its face, an outline planning permission. In such a case those plans and drawings describing the building works were as much a part of the description of what has been permitted as the permission notice itself. It is not a question of resolving an 'ambiguity'. On its face, a grant of full planning permission for building operations is incomplete without the approved plans and drawings showing the detail of what has been permitted. In the absence of any indication to the contrary, those plans and drawings will be the plans listed in the application for permission. If the local planning authority does not wish to approve the plans submitted with the application and wishes to approve amended plans, then it can include a statement to that effect in the decision notice. Absent any such statement, the reasonable inference, against the statutory background provided by section 62 of the [1990] Act and the 1988 Regulations, is that a grant of full planning permission approves the application drawings."

In the Court of Appeal, Keene L.J. (in paragraph 21 of his judgment) endorsed those observations. He confirmed that what he had said in *Ashford Borough Council* "was not intended to apply to the interpretation of a full detailed planning permission". This was because, as Sullivan J. had said (in paragraph 29 of his judgment), such permissions "do not purport to be a complete and self-contained description of the development that has been permitted", and "[any] member of the public reading such a decision notice will realise that is incomplete, indeed quite useless without the approved plans and drawings which are a, if not the, vital part of [the] permission".

43. When it is necessary to do so, it is permissible to consider extrinsic evidence beyond the available relevant documents as an aid to the interpretation of a planning permission. Such evidence may relate to the way in which the permission was actually implemented. In *R. (on the application of Campbell Court Property) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 102 Sullivan J., faced with the need to construe a planning permission whose full meaning was not apparent from the decision notice itself, was prepared to consider the application for permission, the site plan and the relevant planning officer's report. But having done that, he said (in paragraph 58 of his judgment) that he did not see why the consideration of extrinsic evidence should be confined to documentary evidence, and (in paragraph 59) that, in the circumstances of the case before him, he did not see why it should not be possible to have regard to what had taken place on the ground. He went on to say (in paragraph 60):

> "I realise that what takes place on the ground cannot be conclusive and agree with [the] submission that caution has to be exercised because landowners may choose not to implement the whole of a planning permission, and may carry out development in breach of planning control. But if the documentary evidence is sparse, I do not see why the purported implementation of a planning permission on the ground, if done without any complaint over many years, should be altogether ignored."

44. Nothing in the inspector's approach to the interpretation of the planning permissions in question here seems in any way inconsistent with the well established principles in the cases to which I have referred. He adopted the pragmatic approach endorsed by the court in *Barnett* and *Campbell Court Property*. He considered the two planning permissions approving the construction of the basin in their own terms, and in the light of the applications for those permissions and the relevant drawings. But to enable himself to gain a full and accurate understanding of the nature of the development approved by those two permissions and, in particular, the nature of the use authorized by them, he also took into

account the series of permissions granted in 1967 and 1968 for individual elements of Jenners' development and the outline planning permission granted on 4 April 1967, on application no. BF7642, for the whole development.

45. I do not accept that the inspector was wrong to use this material in the way he did. When he said in paragraph 26 of his letter that the note on drawing A770-15A referring to "Phase 1 Stage 1" of the proposed redevelopment of the island site "[introduces] an element of ambiguity and uncertainty …", he was, in effect, acknowledging that one would have to understand the "larger scheme" if one were to discern, with the necessary clarity, the true meaning and scope of the planning permission granted on application no. BF8095. It was for this reason, rightly in my view, that he resorted to the "factual context of the application". This was, I think, an entirely legitimate exercise of the kind envisaged in the relevant case law. Mr Stedman Jones' submissions to the contrary are mistaken.

46. The inspector also considered what had happened on the ground when the development was constructed. He noted, in paragraph 20 of his letter, that the basin and wet boatshed were constructed under separate planning permissions, and that the development approved by the outline planning permission granted on application no. BF7642 was brought into existence under full planning permissions granted subsequently; in paragraph 21, that, by the time Jenners left the site, the basin and wet boatshed had been constructed, as had the dry boathouse and the bridge; and, in paragraph 30, that the boathouse had been erected "quite quickly" after the basin was constructed, and that this seems to have been "envisaged from the outset". None of those findings of fact is challenged in these proceedings.

47. I do not think the inspector went beyond the limits of a proper investigation into the meaning of the planning permissions he had to construe. He was seeking to identify the lawful use of the relevant planning unit under the several permissions granted and implemented for the boatyard development almost 50 years ago, in the late 1960's, and so ascertain the lawful use of the basin deriving from those planning permissions. It would have been artificial, when doing that, to confine his attention only to the permissions granted specifically for the wet boathouse and basin. He was, in my view, entitled to consider all of the publicly available documents and drawings comprised in the several applications for planning permission which together formed the proposal for the commercial boatyard, as well as the decision notices themselves. The surviving documentary evidence was relatively thin, but, properly understood, it yielded the true meaning of the planning permissions granted for the wet boathouse and basin. I think the inspector was also entitled to have regard to the development which had in fact been carried out on the island site. This was in the circumstances a sensible thing for him to do, and entirely appropriate. It served to confirm the interpretation he had made of the planning permissions themselves.

48. As Mr Lewis submits, Mr Stedman Jones' argument gains nothing from the authorities on the interpretation of planning conditions to which he refers – in particular, the decision of the Court of Appeal in *Fawcett Properties v Buckinghamshire County Council* [1961] A.C. 636 and the line of cases following from that decision, including the judgment of Singh J. in *R. (on the application of St John's School Northwood) v Hillingdon London Borough Council* [2012] J.P.L. 693 (at paragraphs 48 to 51). In this case the court is not considering whether conditions attached to a planning permission are void for uncertainty because they can be given "no sensible or ascertainable meaning" (as Lord Denning M.R. put it in his judgment in *Fawcett Properties,* at p.680). The question here is whether the inspector

ventured further than he should have done to establish the meaning of the planning permissions he was considering. As I have said, in my view he did not.

49. As he said in paragraph 22 of his decision letter, the development approved in the planning permission granted on application no. BF8095 was for operational development, and not explicitly for any use or change of use. He added, in his footnote to paragraph 31, that neither the application for planning permission nor the permission itself mentioned any use, and the same could be said of the planning permission granted for the wet boathouse on application no. BF9789, which approved an amended proposal for the basin. And, as he said in paragraph 23, none of the surviving documents indicated how the basin was to be used, and no conditions had been imposed on the planning permissions limiting the use of the basin in any particular way.

50. Given that the planning permissions he was dealing with were for operational development, not a change of use, the inspector considered the purpose for which the basin had been "designed" in the sense of section 75(3) of the 1990 Act – to which he referred in paragraph 22 of the decision letter.

51. Section 75 of the 1990 Act provides:

> "(1) Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it.
>
> (2) Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used.
>
> (3) If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed."

Section 336(1) of the 1990 Act defines a "building" as including "any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building". As the footnote to paragraph 22 of the decision letter confirms, it was common ground between the parties, and the inspector accepted, that the basin could be regarded as a "building", thus defined. That, I believe, was right.

52. The purpose for which a building is "designed" has been taken by the court to mean the purpose for which the building was intended, rather than architecturally designed. In *Wilson v West Sussex County Council* Diplock L.J., when considering the meaning of section 18(3) of the Town and Country Planning Act 1947, the statutory ancestor of section 75(3) of the 1990 Act, said this (at p.783 of his judgment):

> "... ["Designed"] in the subsection cannot have a different meaning according to whether the permission is an outline permission granted before architectural designs are in existence or a final permission granted after architectural designs have been prepared. In the subsection, in my view, it bears the first meaning set out in the Concise Oxford Dictionary (3rd ed.): "Set apart for", "destine" or "intend"."

(see also the judgment of Danckwaerts L.J. at p.780).

53. The inspector applied his mind to the purpose for which the basin was "designed" – in the sense of section 75(3) – in the light of his interpretation of the relevant planning permissions. He concluded that the use of the basin which was lawful under the planning permissions, and the purpose for which it had been "designed", was not for private moorings, but to provide a facility that was a vital part of the commercial boatyard. It was proposed and built to serve that enterprise.

54. There are five salient findings in the inspector's consideration of the relevant planning permissions. First, the basin whose construction was approved initially in the planning permission granted on application no. BF8095 was part of the comprehensive development for which outline planning permission was granted on application no. BF7642 (paragraph 24 of the decision letter). It was "not intended to be a stand alone facility" (paragraph 26) but "an integral part of the commercial boatyard" which Jenners were seeking to develop on the island site (paragraph 28). Secondly, individual elements of the composite scheme for a commercial boatyard had emerged in applications for full planning permission, in parallel with application no. BF7642 (paragraph 27). Thirdly, if the basin was constructed under a planning permission, this was not done, or at least not solely done, under the permission granted on application no. BF8095, but under the permission granted on application no. BF9789 for the wet boathouse, "or a combination of the two permissions" (paragraph 29). Fourthly, the "erection of the boathouse seems to have followed on quite quickly from the construction of the basin and to have been envisaged from the outset", and "[once] it was roofed over the basin would not have had the character of a free-standing all-purpose mooring facility". A "covered, or partly covered, basin" of the kind constructed here was "far more characteristic of a boatyard …" than what the inspector called "home base" mooring, or mooring for visitors (paragraph 30). And fifthly therefore, in granting planning permission for the basin the local planning authority had deliberately approved a facility that was an "integral part of the boatyard or hire boat base …". The "permitted use" of the basin inherent in that planning permission would have been "as part of that boatyard use; … not … some independent all-purpose mooring use that amounted to a primary use in its own right" (paragraph 31).

55. Those five findings make perfectly good sense, and, in my view, they are beyond criticism in these proceedings. The inspector brought them together in paragraph 35 of the decision letter, where he said that the use of the basin "permitted by virtue of" the planning permissions was "specifically for commercial mooring of a hire boat fleet as an integral part of a boatyard operation". On a true construction of those permissions, the purpose for which the basin and wet boathouse were designed was their use in connection with the operation of a commercial boatyard, and not, as Mr Stedman Jones submits, some wider use embracing mooring of any and every kind – commercial mooring, private mooring and mooring for visitors included. It followed that the private mooring use of the basin against which the Broads Authority had enforced was not the purpose for which the basin had been designed. It was a use "materially different in character" from that use – and hence, as the inspector concluded in paragraph 36, "a material change of use" for which planning permission was required.

56. That conclusion, together with the conclusion that the operational development referred to in the enforcement notice also required planning permission, was sufficient to dispose of the ground (c) appeal. It is, in my view, entirely secure in law. In so far as it was based on the inspector's interpretation of the planning permissions, that conclusion was correct. In so

far as it was based on findings of fact, those findings were quintessentially the inspector's responsibility as a finder of fact and, in my opinion, there is nothing unlawful about them.

57. I should add that in my view the inspector was also right to conclude, as he said in his footnote to paragraph 31, that his interpretation of the planning permissions was not inconsistent with the court's decision in *I'm Your Man Ltd.*. As he acknowledged in that footnote, it may be that a planning permission does not specify, in its description of the development permitted, the use of the building approved, but the nature of the use which may lawfully be carried on within the scope of the permission may nevertheless be clear. That was plainly so in this case, even though no use of the wet boathouse and basin was mentioned either in the applications for planning permission or in the permissions themselves. It was held in *I'm Your Man Ltd.* that, in the absence of a condition requiring the cessation of a use approved by a planning permission within the period specified in the application, the continuation of the permitted use beyond the end of that period would not for that reason constitute a material change of use. In *R. (on the application of Altunkaynak) v Northamptonshire Magistrates Court* [2012] EWHC 174 (Admin) the Divisional Court was prepared to accept and apply that principle. As Richards L.J. said in paragraph 38 of his judgment, "[the] decision [in *I'm Your Man Ltd.*] has stood for over 10 years without comment one way or the other either in case-law or in commentaries, at least so far as was disclosed by the researches of counsel" (though in *Jeffery v First Secretary of State* [2007] EWCA Civ 584 both Jacob L.J., in paragraph 37 of his judgment, and Hughes L.J., in paragraph 38 of his, refrained from endorsing it). The principle was, as Richards L.J. described it in paragraph 39, "a general one": that "if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition". It extends beyond limitations of a "temporal" nature (as in *I'm Your Man Ltd.*), and applies to "substantive" limitations as well. But it does not displace the effect of section 75(3). It cannot enlarge the true scope of a grant of planning permission for the construction of a building so that the permission can be taken to authorize the use of that building for a purpose other than that for which it is designed. The absence of a condition precluding a use materially different in character from the building's use for the purpose for which it is designed cannot serve as approval for that materially different use. This, it seems to me, is the force of what the inspector said in his footnote to paragraph 31.

58. The inspector could quite properly reach the conclusions he did in paragraphs 35 and 36 of the decision letter, the conclusions on which the ground (c) appeal turned, even if the lawful use of the basin under the permissions for the boatyard had not been abandoned or otherwise lost. And it is absolutely clear that this is what he did. That is why he took care to begin the second sentence of paragraph 35 with the words "Even if that boatyard use had not been abandoned ...". His conclusion that the private mooring use currently taking place was "materially different in character" from the boatyard use would patently have been the same, regardless of the idea that the boatyard use had or may have been abandoned or lost. His decision on the ground (c) appeal did not rest on the concept of abandonment in planning law.

59. In his skeleton argument, at paragraph 32, Mr Stedman Jones says that "[the] possibility that the boatyard use has been abandoned is not accepted". This seems difficult to reconcile with the apparent consensus on this question at the hearing. At that stage, as the inspector recorded in the first sentence of paragraph 32 of the decision letter, there was "no dispute that the boatyard use has been abandoned", which seems to indicate that Mr Wood, the Broads Authority and the interested parties were all agreed that this was so.

60. In any event, leaving aside for the moment the inspector's essential reasoning and conclusion on the ground (c) appeal – which, as I have said, does not depend on the concept of abandonment – I do not accept that anything he said in paragraphs 32 to 34 conflicts with the jurisprudence on that concept.

61. The relevant law is well established and clear.

62. In *Pioneer Aggregates (U.K.) Ltd. v Secretary of State for the Environment* [1985] A.C. 132 Lord Scarman, with whom of Lord Fraser of Tullybelton, Lord Roskill, Lord Bridge of Harwich and Lord Brandon of Oakbrook all agreed, said (at p.145F-G) that "[there] is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned". That proposition is familiar and not in doubt. It rests ultimately on the fundamental principle, which Lord Scarman emphasized (at p.141A-D), that planning law is a comprehensive statutory code, imposed by Parliament in the public interest. Lord Scarman (at p.143B to p.145D) identified three classes of case. The first – for example, *Hartley v Minister of Housing and Local Government* [1970] 1 Q.B. 413 – was "concerned not with planning permission but with existing use" and had "nothing whatever to do with the extinguishment of a planning permission". In *Hartley* the court had upheld a decision on an appeal in which it was found as a matter of fact that the resumption of a car sales use where there had previously been two uses – use for car sales and use as a petrol-filling station – was, after a period of four years in which there had been no car sales, a material change of use. The previous use had been abandoned, and its resumption required planning permission. The second class of case – such as *Prosser v Minister of Housing and Local Government* (1968) 67 L.G.R. 109 – involved existing use rights being lost because the character of the planning unit has been altered by the physical fact of new development sanctioned by a grant of planning permission. And the third class of case – exemplified in *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527 – was concerned not with existing use rights, but with two mutually inconsistent planning permissions for the same land, where the carrying out of one of the two developments has made it impossible to carry out the other. In a case of that kind both planning permissions would be on the public register, and one would therefore be able to see by examining their terms and inspecting the land whether development had been carried out which made the implementation of one or other of the two permissions impossible.

63. Mr Lewis also refers to the decision of Court of Appeal in *Cynon Valley Borough Council v Secretary of State for Wales* (1987) 53 P. & C.R. 68, which acknowledged "a significant qualification to Lord Scarman's classification in [*Pioneer Aggregates*]" (see the judgment of the court, given by Balcombe L.J., at p.77). In that case the Court of Appeal adopted the approach indicated by Watkins L.J. in *Young v Secretary of State for the Environment* (1984) 47 P. & C.R. 165 (a decision affirmed by the House of Lords: [1983] 2 A.C. 662) in this passage of his judgment (at p.184):

> "There is ample and powerful authority for the proposition ... that, when land ceases to be used for a lawful purpose for a period of time, it is a question of fact whether the right to use the land for that purpose has been abandoned so that resumption of that use amounts to development requiring planning permission. ... There is [no authority] to which we were referred or we have been able to find that allows of the application of the concept of abandonment to a situation in which, without interruption, one use follows another.

> The use of the word "abandonment" in such a circumstance is inappropriate and potentially misleading. The position which has then arisen is simply that the later use, whether unlawful or rendered lawful by the operation of article 3 of [the General Development Order 1977], has in fact supplanted the former, which cannot be revived without an operation of law, for example [section] 23(9) [of the Town and Country Planning Act 1971], or the grant of planning permission. A lawful use becomes attached to the land; it enures for the benefit of it: see section 33(1) of the [1971] Act. It remains ... attached to that land only so long as it is not supplanted by the introduction of another use or is detached by some other process such as abandonment following interruption of use."

As Balcombe L.J. said in *Cynon Valley Borough Council* (at p.75) the court accepted that the decision of the House of Lords in *Young* had effectively endorsed that passage of Watkins L.J.'s judgment in the Court of Appeal (see the speech of Lord Fraser of Tullybelton, with whom Lord Elwyn-Jones, Lord Lowry, Lord Roskill and Lord Brightman all agreed, at p.670C-D).

64. In *Staffordshire County Council v Challinor* [2007] EWCA Civ 864, in paragraph 56 of his judgment, Keene L.J., with whom Rix and Hughes L.JJ. agreed, endorsed as correct and consistent with relevant authority the proposition expressed by H.H.J. Mole Q.C., sitting as a deputy judge of the High Court in *M & M (Land) Ltd. v Secretary of State for Communities and Local Government* [2007] EWHC 489 (Admin) (at paragraph 20 of his judgment) that "[a] use permitted can be abandoned ... " (see also the observations of Wilkie J. to similar effect in *James Hay Pension Trustees Ltd. v First Secretary of State* [2005] EWHC 2713 (Admin), at paragraphs 39 to 45 of his judgment – a decision overturned by the Court of Appeal on other grounds ([2006] EWCA Civ 1387); and cf. the judgment of Langstaff J. – to whom the Court of Appeal's decision in *Challinor* seems not to have been cited in argument – in *Stockton-on-Tees Borough Council v Secretary of State for Communities and Local Government* [2010] EWHC 1766 (Admin)).

65. In this case, as a matter of undisputed fact, after the planning permissions for the operational development comprised in the commercial boatyard had been granted and implemented, two supervening events occurred, both of which the inspector regarded as significant – as he explained in paragraphs 32 to 34 of the decision letter. First, the commercial boatyard itself ceased to exist. Jenners vacated the site. The boatsheds were later pulled down. All the buildings and structures on the site were removed, apart from the basin and the bridge. Secondly, in March 1985, when residential development on land on the other side of the river was granted planning permission, a restriction was imposed on the use of the island site in an agreement made under section 52 of the 1971 Act. The first of those two events had a physical and practical effect – nothing less than the transformation of the island site. The demolition of the boatyard buildings ended their use for the purpose for which they had been designed. The second event, the section 52 agreement, had a legal effect. It was, as the inspector said in paragraph 32 of his letter, "intended to ensure the permanent cessation of all commercial activity on the appeal site". As he recognized in paragraph 33, it thus became impossible to use the basin "for boatyard purposes" under the planning permissions originally granted for its construction. For a commercial boatyard to be recreated on the island site and that use of the site revived, a fresh grant of planning permission would have been required. Even if such permission were now to be granted, the use of the basin for any purpose other then "the mooring of private

boats" would be prevented by the section 52 agreement. And, as the inspector added in paragraph 34, the section 52 agreement did not itself, and could not, have the effect of granting planning permission for a private mooring use.

66. I do not see anything in those three paragraphs of the decision letter (paragraphs 32, 33 and 34) that is incompatible with the jurisprudence on the circumstances in which lawful use rights may be lost. In any event, on a fair reading of this part of the decision letter, it is clear that the inspector did not attempt to reach a firm and concluded view on the question of whether, in the peculiar circumstances of this case, the commercial boatyard use had been lost. What he said in the penultimate sentence of paragraph 33 is, I think, telling. He contemplated there the possibility of the commercial boatyard use having been lost, but only in tentative terms – "if the boatyard use has been abandoned or otherwise 'lost' …". And the language in the second sentence of paragraph 35 is similar – "Even if that boatyard use had not been abandoned …".

67. He did not have to resolve these evident doubts about the boatyard use having been lost. He was able to determine the ground (c) appeal without doing that. By March 1985 the commercial boatyard was long since defunct, the boathouses had gone, and any further commercial activity on the island site had been precluded by the section 52 agreement. But in any case the use of the basin for private mooring against which the Broads Authority had enforced was, as the inspector found, a very different use from the one that was inherent in the planning permissions under which the boatyard had been built. This was, as he saw it, simply a matter of fact and degree, which meant that the ground (c) appeal had to fail in any event. If the use of the basin that was lawful under the planning permissions had actually been lost, this could only have reinforced that conclusion, but it was not necessary to it. Irrespective of the question of the commercial boatyard use having been lost, the private mooring now taking place in the basin represented a material change of use from the use that was lawful under the planning permissions granted for the construction of the basin. This material change of use, as the inspector said in paragraph 36 of his letter, did not have planning permission, and it was, therefore, a breach of planning control.

68. There is no error of law in the path the inspector took to that conclusion and his consequent decision on the ground (c) appeal.

69. Ground 1 of Mr Wood's challenge therefore fails.

Ground 2 – the restriction of the mooring use

70. On this ground Mr Stedman Jones submits that if the inspector fell into error in his determination of the ground (c) appeal it must follow that he was also wrong to determine the ground (a) appeal by granting planning permission for the mooring use of the basin subject to a condition limiting the number of boats to "no more than 25 vessels". The basin could lawfully be used for mooring on an unrestricted basis under the planning permissions granted for its construction, and that lawful use subsisted.

71. Mr Lewis and Mr Upton submit, and indeed Mr Stedman Jones accepts, that this ground succeeds or fails with ground 1. It is based on the same proposition: that the inspector erred in law to reject Mr Wood's ground (c) appeal against the enforcement notice.

72. As I have held, the inspector did not fall into any error in rejecting the ground (c) appeal. He was right to conclude that the material change of use at which the enforcement notice was directed was indeed a material change of use without the benefit of planning permission and, in particular, that it was not permitted by the planning permissions granted for the construction of the basin.

73. It was therefore necessary for him to consider Mr Wood's appeal on ground (a).

74. I can see nothing wrong in law with his assessment of the planning merits of the unauthorized mooring use and associated operational development – the pontoons – in paragraphs 38 to 69 of his decision letter. That assessment led him to conclude that planning permission could be granted subject to certain conditions. He was not persuaded by the evidence and submissions presented to him on behalf of Mr Wood that the private mooring use for which he was granting planning permission should be unrestricted. He concluded that there should be a condition restricting that use to no more than 25 vessels. His conclusion that that condition should be imposed was founded on his planning judgment. And that exercise of planning judgment cannot be criticized or undone in these proceedings.

75. For those reasons ground 2 of the challenge also fails.

Ground 3 – irrationality

76. Mr Stedman Jones submits the section 52 agreement demonstrates that under the planning permission for the construction of the basin granted on application no. BF8095 both commercial and private mooring use was lawful, and that the parties to the agreement believed this to be so. Otherwise, they would not have gone to the trouble of entering into it. They did so with a view to preventing the continuation of commercial mooring but allowing private mooring to go on. Yet the inspector simply treated the agreement as evidence that the planning permission had been abandoned. That, submits Mr Stedman Jones, was irrational. He says this submission finds support in the decision of the Divisional Court in *Emma Hotels Ltd. v Secretary of State for the Environment* (1980) 41 P. & C.R. 255 (see, in particular, the judgment of Donaldson L.J., with whom Hodgson J. agreed, at pp.259 and 260). That case, he says, shows that there must be some rational connection between the considerations relied upon by an inspector and the decision he makes. If an inspector relies on a consideration which, properly understood, is equally or more consistent with a contrary decision, he acts irrationally.

77. In my view that argument is untenable.

78. There was nothing at all amiss in the inspector's understanding of the section 52 agreement, or irrational in the conclusions he reached in the light of it. He grasped its meaning, and understood its effect. I need not repeat the relevant parts of my discussion of ground 1.

79. As Mr Lewis and Mr Upton submit, the section 52 agreement was not in itself evidence that the commercial boatyard use of the island site, or any use, was still extant at the time when it was entered into.

80. Nor does it bear on the proper interpretation of the planning permissions granted many years earlier for the boatyard development. Its terms do not require a different construction of those permissions from the one the inspector adopted.

81. As he said in paragraph 32 of his decision letter, even if the Broads Authority had believed, when it entered into the section 52 agreement, that the commercial use "remained extant", it "could have been wrong". And that observation does not cast doubt on his finding, at the end of paragraph 32, that the agreement was "intended to ensure the permanent cessation of all commercial activity on the appeal site". This was, self-evidently, the purpose of the section 52 agreement. And in my view there can be no dispute that it was effective to achieve that purpose. The inspector was also right, in my view, to say in the first sentence of paragraph 33 that by entering into the agreement the landowner at the time was "clearly indicating that the former boatyard use … was being brought to an end". To have read anything more into it than he did, or anything less, would have been a mistake.

82. I see nothing irrational in the inspector's conclusions here. They were, in my view, both logical and in the circumstances entirely reasonable.

83. Ground 3 of the challenge must also, therefore, be rejected.

Conclusion

84. For the reasons I have given, whilst I am prepared to grant permission for Mr Wood's section 289 appeal to be argued, both that appeal and his application under section 288 must be dismissed.