# *507 R. (on the Application of Wandsworth LBC) v Secretary of State for Transport Local Government and The Regions and O2 UK Ltd

**Positive/Neutral Judicial Consideration**

**Court**
Queen's Bench Division (Administrative Court)

**Judgment Date**
29 January 2003

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[2003] EWHC 622 Admin
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Queen's Bench Division Administrative Court

( Sullivan J. ):

January 29, 2003 [1]

Enforcement notices; Estoppel; Extensions of time; Legitimate expectation; Permitted development; Res judicata; Solicitors; Telecommunications masts

H1 *Town and country planning—Telecommunications mast—Permitted development—Prior approval given—Mast including headframe over 15m—Enforcement notice served—Inspector holding that local planning authority estopped from not treating mast as permitted development—Local planning authority challenge decision under s.288 of 1990 Act—Solicitor error—Whether court should extend time under s.289(6) given error—Whether res judicata estoppel survives decision in Reprotech*

H2. A telecommunications company applied to the claimants for a determination as to whether their prior approval was needed to the sitting and appearance of a telecommunications mast described by them as a tower having an overall height of 15m. Permitted development rights existed to erect apparatus excluding any antenna which did not exceed a height of 15m above ground. The claimants, by a written notice, determined that its prior approval would not be required or the development. The mast was erected. In due course the claimants brought enforcement proceedings against the development on the basis that it was not covered by the prior determination because it exceeded 15m in height. The company appealed against the enforcement notice on several grounds including ground (a) that planning permission ought to be granted in any event, and ground (c) that express planning permission was not needed. On appeal, the defendant's Inspector decided that the apparatus installed on the site comprising a standard 15m pole with separate headframe over 2m high exceeded the permitted development tolerance. However, he considered that the fact that the headframe exceeded the 15m height limit should have been obvious from the drawing that the company had submitted with the application and held that the installation was the same as that for which the claimants had issued the prior approval determination. He said that the claimants were estopped from claiming that the installation was not permitted development and upheld the appeal on ground (c). He did not address ground (a). The claimants challenged the decision in the High Court under *508 s.288 of the Town and Country Planning Act 1990 , arguing amongst other things that, as a matter of law, the estoppel identified by the Inspector could not operate so as to prevent the claimant's exercise of its enforcement powers, relying on the intervening decision of *R. v East Sussex County Council, Ex p. Reprotech (Pebsham)* . The company argued that estoppel and legitimate expectation could still operate. On a procedural point, they argued that the challenge should have been

 

commenced under s.289 of the 1990 and that no extension of time for making such an application should be allowed.

H3. Held, allowing the claim, applying *Reprotech* , that estoppel including the kind akin to *res judicata* no longer has any place in planning law. However, it is open to apply the public law principles of legitimate expectation but the circumstances in which it will be appropriate to find a legitimate expectation in the planning field are limited. Where it was unclear as to which section of the Town and Country Planning Act 1990 Act to commence a High Court challenge, the correct approach was to use both ss.288 and 289 . When considering whether or not to extend time to make a challenge under s.289(6) , the court should take account of whether or not the public interest would be served by extending time. Decisions on enforcement notices are not to be equated with private litigation.

H4 Cases referred to:

(1) *Antoniades v Secretary of State for the Environment Transport and the Regions [1999] EWHC Admin 55*
(2) *Henry Boot Homes v Bassetlaw District Council [2002] EWCA Civ 983*
(3) *Newbury District Council v Secretary of State for the Environment [1981] A.C. 578*
(4) *Lever Finance Ltd v Westminster City Council [1971] 1 Q.B. 222*
(5) *R. v Caradon District Council, Ex p. Knott [2000] 3 P.L.R. 1*
(6) *R. v East Sussex County Council, Ex p. Reprotech (Pebsham) [2002] 4 All E.R. 58*
(7) *R. v Leicester City Council, Ex p. Powergen UK Ltd [2000] J.P.L. 629*
(8) *Wells v Minister of Housing and Local Government [1967] 2 All E.R. 1041*
(9) *Western Fish Products Ltd v Penwith District Council [1981] All E.R. 204*
(10) *Ynys Mon Borough Council v Secretary of State for Wales (1992) P.L.R. 1*

H5. Claim by Wandsworth London Borough Council against a decision of an Inspector appointed by the Secretary of State for Transport, Local Government and the Regions whereby he quashed an enforcement notice served by them upon O2 UK Ltd in respect of a telecommunications mast which had been erected under permitted development rights. The facts are set out in detail in the judgment of Sullivan J. below.

Representation

David Wolfe instructed by ASB Law for the claimants.
Sarah Jane Davies instructed by the Treasury Solicitor for the defendant.
Guy Roots, Q.C. and Christopher Boyle instructed by Lawrence Graham for the interested party. ***509**

JUDGMENT

Sullivan J.:

1. This is a challenge by the claimant local planning authority to an Inspector's decision to quash an enforcement notice served by the authority upon the interested party. The enforcement notice alleged that the interested party had erected a telecommunications mast in breach of planning control because it exceeded the 15m height limit upon masts that can be erected as permitted development under the Town and Country (General Permitted Development) Order 1995 .

2. Pt 24 of Sch.2 to the 1995 order grants planning permission for certain forms of telecommunications equipment including, subject to various conditions, masts of the kind with which this case is concerned. Condition A.1 of Pt 24 states that—

 

> "Development is not permitted by Class … if —
>
> (a) … the … apparatus … excluding any antenna, would exceed a height of 15 metres above [the] ground …"

Condition A.2 (4) sets out a procedure—before beginning development the developer must apply to the local planning authority for its determination as to whether the authority's prior approval to siting and appearance will be required. The application must be accompanied by, amongst other things, a written description of the proposed development. If the authority indicates that its prior approval will be needed then prior approval must be sought. If the authority does not so indicate then after an appropriate period the developer can proceed to erect the mast. In the present case the interested party applied on September 11, 1997 under Pt 24 for a determination as to whether prior approval would be required for the mast in question. The form describing the proposed structure said:

> "Type of Structure (eg tower, mast etc): Tower overall height 15.00 metres."

The application was accompanied by plans and drawings which showed a "proposed 15m monopole" mast. The legend on the plan said "do not scale". In response to that the council, by notice dated October 9, 1997, determined that its prior approval would not be required for the development in question, that is to say, the—

> "erection of 15 metre monopole, three dual polar antennae, two dish antennae and three radio equipment cabinets."

The determination referred to the drawings submitted with the application.

3. In due course the council brought enforcement proceedings against the development on the basis that it was not covered by the prior determination because it exceeded 15 metres high. The council issued an enforcement notice on May 22. The enforcement notice alleged that the mast was detrimental to metropolitan open land and to land in the vicinity. The interested party appealed against the enforcement notice. An Inspector was appointed to determine the appeal which was dealt with by way of written representations. The Inspector determined the appeal in a decision letter dated February 1, 2002. He noted that the appeal was proceeding on grounds (a), (c) and (g) in s.174 (2) of the Town and Country Planning Act 1990 ("the Act"). Under ground (c) it was contended that the ***510** matters alleged in the notice did not constitute a breach of planning control. The decision letter is, on its face, simply concerned with the appeal on ground (c). In paragraph 1 of the decision letter the Inspector referred to para.24 of Sch.2 and to the determination of October 9, 1997. In para.2 he referred to the facts that the 15m monopole mast had been erected upon a plinth and that a headframe supported the antennae. The council contended that as a result of these two matters the 15m height limit was exceeded. The Inspector rejected the council's contentions in respect of the plinth but accepted them in respect of the headframe.

4. In the final sentence of para.11 of his decision letter the Inspector said:

 

"… I am in no doubt that the apparatus installed on the appeal site, comprising a standard 15 metre pole with separate headframe over 2 metres high, exceeds the height limit in Class A.1 (a) of Part 24 of the GPDO ."

He went on in para.12 to say:

"12 Nevertheless, just as the drawings submitted as part of the prior notification in 1997 showed the concrete plinth and the height of the base of the mast, so too they showed the headframe. From my inspection the mast and headframe have been installed as shown on the submitted drawings. The Council states that the height measured from the rugby field to the top of the headframe is 17.64 metres. The height shown on the 1:100 scale drawing [reference given] is 17.6 metres. The difference of 0.04 metres is insignificant bearing in mind the total height and that comparison is being made with a scale drawing. The Council maintains that the apparatus installed is materially different from that considered under the prior notification procedure, but I do not agree. I am satisfied that the existing installation is the same as that subject of the Council's prior notification dated 9 October 1997.

13 I accept that further appeal decisions have examined subsequently the question of whether the headframe should be included in the Part 24 height limit. The Leeds decision in particular was not made until February 2000. Nonetheless, I do not consider it would be right to set aside a formal determination previously issued by the Council on which the appellant has acted in good faith. The fact that the headframe exceeded the 15 metre height limit, which the Council now argues is a material difference between what was notified and what has been erected, should have been obvious from [the drawing].

14 It follows that the Council is estopped from arguing now that the installation is not permitted under Part 24 of the GPDO . The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. The courts have examined this principle in relation to the exercise by local planning authorities of their statutory enforcement powers. In *Western Fish Products Ltd v Penwith District Council [1981] All E.R. 204 the Court of Appeal* held that where an officer with ostensible authority makes a formal determination on behalf of his authority, it may be bound by it. This is known as estoppel by representation. In this case the determination on 9 October 1997 in response ***511*** to the appellant's prior notification under Part 24 of the GPDO was issued under the signature of the Borough Planner as a formal determination on behalf of the Council. The appellant company was entitled to take the view that he had the authority to issue that determination. It acted on it by carrying out the development in accordance with the prior notification.

15 The application of estoppel was further examined in *R v Caradon District Council ex parte Knott [2000] 3 PLR 1* , in which it was held that where parties have conducted dealings on one basis it would be wholly unjust for the Council to subsequently proceed in a different manner. This is known as estoppel by convention. In this case it was accepted for a considerable period that the development subject of the 1997 prior notification application … was permitted development under Part 24 of the GPDO . A complaint was made to the Local Government Ombudsman regarding the installation and in a letter dated 24 June 1999 in connection with this complaint the Council's Chief Executive stated that the application … concerned a proposal that was permitted under Part 24 of the GPDO . Further, the Council refused to grant prior approval on 4 June 1999 on a prior notification concerning a proposal to replace the existing equipment cabins and antennae on the installation subject of this appeal. In issuing that refusal the Council did not

 

> state that the mast was not permitted by the GPDO . It was not until 22 August 2000 that the Council wrote to the appellants stating that the installation was not permitted development. The Council is not at liberty now to go back on its previous opinion, which has been expressed to neighbours and other bodies and upon which both the Council and the appellant have previously proceeded."

5. The Inspector set out his conclusions in paragraph 16:

> "16 I therefore conclude that the apparatus installed on the appeal site exceeds 15 metres in height and hence does not come within the scope of Part 24 of the GPDO . Nonetheless, the apparatus that has been installed is that for which the Council issued a determination on 9 October 1997 stating that prior approval to the siting and appearance of the development was not required. Consequently, the Council is now estopped from pursuing enforcement action and I shall therefore quash the notice."

His formal decision was:

> "17 In the exercise of the powers transferred to me, I allow the appeal and direct that the enforcement notice be quashed."

6. It will be noted that the decision letter does not purport to deal with the appeal that had been made on ground (a). That was unnecessary if the enforcement notice was quashed on ground (c). Nor was there any consideration of the deemed application for planning permission. No planning permission for the retention of the mast was granted. The claimant challenged the Inspector's decision in a claim form under CPR Pt 8 received in the Administrative Court Office on March 14, 2002. The claim form said this:

> "The claimant seeks an order quashing the decision of an Inspector appointed by the Secretary of State dated 1 February 2000, dismissing the appeal against ***512** an enforcement notice served by the council and upholding the enforcement notice. Details of the claim are set out in the attached 'Grounds of Appeal and Skeleton Argument.'"

 

7. The first paragraph of the grounds of appeal and skeleton argument said:

> "Wandsworth wishes to appeal pursuant to section 288 of the Town and Country Planning Act 1990 against a decision of the Secretary of State, by his Inspector, dated 1 February 2002 allowing an appeal under section 174 of the 1990 Act by the 2nd Respondent against an enforcement notice issued by Wandsworth under section 172 of the 1990 Act."

8. The grounds then set out the factual background to the claim and contended that the Inspector's decision was wrong in law for two reasons. First, in summary, that the Inspector had misdirected himself in law as to the meaning of "determination" given what was said in the application about the overall height of the structure and the fact the plans expressly said that they were not to be scaled. Secondly, it was said:

> "The Inspector erred in law in deciding Wandsworth was 'estopped' from bringing enforcement action against the mast as built."

Reasons were then given as to why the Inspector was not entitled to rely upon estoppel. The second ground concluded with the proposition that as a matter of law the estoppel identified by the Inspector could not operate to prevent Wandsworth's exercise of its enforcement powers.

9. In subsequent correspondence both the Treasury Solicitor, on behalf of the first defendant, and the interested party's solicitors drew the council's solicitors' attention to their view that the challenge should have been made under s.289 of the Act rather than s.288 . Applications under s.288 must be made within six weeks of the decision letter. The court has no power to extend that period. This application was made within the period of six weeks from the Inspector's decision letter. Appeals under s.289 require permission. An application for permission to appeal must be made within 28 days of the decision letter, but the Court has power to extend time for making such an application under Section 289 (6) . The fact that an appeal against an enforcement notice may be made on ground (a)—that planning permission should be granted—and that there is a deemed application for planning permission, both of which may result in a grant of planning permission, is not infrequently a source of some confusion for local planning authorities wishing to challenge adverse Inspectors' decisions in enforcement notice cases. In my experience they are frequently unclear as to whether to challenge such decision letters under s.288, s.289 or both. The correct answer in such cases is, in my judgment, both. But it is unnecessary to resolve that issue on the facts of the present case. Here it is plain that the Inspector did not even consider, much less did he decide, the appeal under ground (a). Nor did he even refer to the deemed application for planning permission. He quashed the enforcement notice purportedly under ground (c) and ground (c) alone. Thus the council's challenge should have been made under s.289 and not s.288 . Apart from altering 8 to 9 in para.1 of the grounds of appeal, minimal and purely formal amendments would be required in order to convert the application into an application for permission to ***513** appeal under s.289 . It is important to recognise that no alterations of substance would be required. Unfortunately, the council's solicitors did not take the hint following the correspondence from the Treasury Solicitor and the interested party, and simply seek permission to amend. There seems to have been a degree of amour propre on their part in attempting to defend the decision to proceed under s.288 rather than s.289 . But, in any event, in a supplementary skeleton argument dated 13 June it was made plain on behalf of the council that, if necessary, permission would be sought to amend and for the necessary extension of time—14 days.

 

10. The other event of consequence which should be mentioned as part of this chronology is the decision of the *House of Lords in R. v East Sussex County Council Ex p. Reprotech (Pebsham)* . Their Lordships' speeches were published on *February 28, 2002 and are now reported in [2002] 4 All E.R. 58* . In *Reprotech the House of Lords* had to consider the extent to which estoppel could operate so as to prevent a local planning authority from carrying out a statutory duty. Having reviewed the authorities, Lord Hoffmann, with whom the remainder of their Lordships agreed, said in para.[29] of his speech:

> "It is, I think, clear from this brief summary that a determination is not simply a matter between the applicant and the planning authority in which they are free to agree on whatever procedure they please. It is also a matter which concerns the general public interest and which requires other planning authorities, the Secretary of State on behalf of the national interest and the public itself to be able to participate."

11. He then considered the cases of *Wells v Minister of Housing and Local Government [1967] 2 All E.R. 1041* and *Western Fish Products Ltd v Penwith District Council [1981] 2 All E.R. 204* . In para.[33] of his speech he said:

> "… I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment [1981] AC 578* … estoppels bind individuals on the ground that it would be unconscionable for them to deny what they represented or agreed. But these concepts of private law should not be extended into 'the public law of planning control, which binds everyone.' (See also Dyson J in *R v Leicester City Council, ex p Powergen UK Ltd [2000] JPL 629* …"

12. Having referred to the conflicting judgments in *Wells* and also to the decision in *Lever Finance Ltd v Westminster (City) London Borough Council [1971] 1 Q.B. 222* , he said in para.[35]:

> "In the *Western Fish the Court of Appeal* tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the *Powergen* case … It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet." ***514**

13. Lord Mackay in para.[6] of his speech expressly agreed with Lord Hoffmann that:

 

> "… the time has come for public law in this area to stand upon its own two feet. If it does so, I believe greater clarity will result than if it is treated as standing upon some less discrete base."

14. The matter came before me for directions in June because the parties were contending that it would be a sensible use of the court's time to occupy an entire day dealing with the procedural issue: whether the appeal should have been made under s.288 or s.289 and, if the latter, whether time should be extended. I gave the following directions:

> "1. The hearing on 4 July should not be restricted to procedural points alone. It would be a waste of the court's time to devote a whole day to procedural wrangling when it is tolerably clear that:
>
> (i) The Inspector, rightly or wrongly, allowed the appeal against the enforcement notice under ground (c) alone. His decision letter does not consider ground (a). He did not grant planning permission under ground (a) or on the deemed application for permission.
>
> (ii) It follows that the appeal should have been made under section 289, not section 288.
>
> (iii) The Council needs permission to appeal under section 289, but the court has power to extend time for making the necessary application, and power to allow the minimal amendments which would be required to the form of the present 'Grounds of Appeal'.
>
> (iv) The issue of substance would remain the same. The Inspector's approach to estoppel would now have to be considered in the light of the *House of Lords' decision in Reprotech* .
>
> (v) I fail to see why the procedural issues, including any application to amend the Notice of appeal and for an extension of time, should not be considered at the outset, followed immediately by the hearing of an appeal under section 289 if any extension of time and permission to appeal was granted."

15. In the light of that direction I confidently expected that with a degree of common sense all round a consent order would be prepared granting the necessary extension of time for an appeal to be made under s.289 , quashing the Inspector's decision, and remitting the matter to him for re- determination. Had that course been taken then it is probable the matter could have been re-determined by now. Sadly, my confidence was misplaced, common sense did not prevail and the parties have chosen to subject themselves to the costs and delays of today's hearing. On behalf of the Secretary of State Miss Davies opposed the application by Dr Wolfe to extend time under s.289 (6) notwithstanding the fact that it became clear during the course of her submissions that if an extension of time was granted the Secretary of State would be conceding that there was no ground upon which the Inspector's decision letter could be defended. On behalf of the interested party Mr Roots Q.C. did not so concede. ***515***

 

16. It is convenient therefore to consider at the outset the merits of the council's challenge to the Inspector's decision because, save in cases of significant delay or where there is significant hardship or prejudice, it will almost always be sensible to consider an application for an extension of time in the context of at least a preliminary assessment of the merits of the substantive case which the would-be appellant seeks permission to advance. In the light of the *House of Lords' decision in Reprotech* , I have no doubt whatsoever that the Secretary of State was entirely correct to concede that the approach set out in the Inspector's decision letter could not be defended. Quite apart from the *House of Lords' decision in Reprotech* , there is the further problem which is identified in Dr Wolfe's skeleton argument on behalf of the council, that is to say, the Inspector purported to allow the appeal on ground (c). Under ground (c) an appeal succeeds if there has been no breach of planning control but the Inspector expressly found, and his finding is not challenged, that there had been a breach of planning control because the apparatus, that is to say, the mast together with the headframe, did exceed 15m in height. Appeals against enforcement notices are dealt with in a comprehensive statutory code, and if one follows the approach of the *House of Lords in Reprotech* , there cannot be any extra-statutory jurisdiction to allow an appeal simply on the ground of estoppel.

17. Considerations relevant to estoppel might well form part of a decision to allow an appeal on the planning merits under ground (a). But, as I have said, it is plain from the decision letter that that was not the basis of this decision.

18. Thus for these two reasons—(a) the *House of Lords' decision in Reprotech* and (b) the basis upon which appeals can lawfully be allowed under ground (c)—it is plain, subject to Mr Roots' submissions to which I now turn, that this decision letter must be quashed.

19. On behalf of the interested party Mr Roots submitted, first, that the Inspector could have reached the same decision without reference to estoppel upon the basis that the council in its determination must be taken to have decided, as a question of fact, that the headframe formed part of the antennae rather than the mast, and so did not count against the 15m height limit. Secondly, that in any event the Inspector in concluding that there was an estoppel relied upon the "first exception" in *Western Fish* which survives notwithstanding the *House of Lords' decision in Reprotech* . In *Western Fish the Court of Appeal* recognised two exceptions to the general rule that a statutory body could not be estopped from performing its statutory duties. The first exception was where a local planning authority delegated to its officers power to determine specific questions. Any decisions they make cannot be revoked. Megaw L.J., giving the judgment of the Court said at 219 that "This kind of estoppel, if it be estoppel at all, is akin to res judicata." Thirdly, that in any event if one applied public law principles of legitimate expectation to the facts found by the Inspector the same conclusion would be reached—there had been a lawful promise and it would be most unfair now to allow the council to resile from it.

20. Those arguments, cogently though they were advanced, are of no avail to the interested party because, whether he might have been able to reach the same conclusion by a different route, the fact remains that the Inspector did not adopt the approach referred to in Mr Roots' ground 1, and make the necessary findings of fact, in order to reach his decision. That is not surprising because the argument ***516** advanced by Mr Roots was not advanced in the representations before the Inspector. Indeed, it was not even foreshadowed in the interested party's skeleton argument, and was advanced for the first time by Mr Roots in his submissions before me. The Inspector was invited to, and did rely squarely upon, estoppel.

21. I do not accept the proposition that the first exception in *Western Fish* survives *Reprotech* . Mr Roots submitted that the *House of Lords did not expressly overrule Western Fish* . I have set out the relevant passages above. In my judgment the House of Lords could not have made it more plain that estoppel no longer has any place in planning law. The observations of Lord Hoffmann and Lord Mackay apply with equal force to a "kind of estoppel [that] is akin to res judicata." 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* . The Inspector decided the matter on the basis of estoppel by representation, not *res*

 

*judicata* . In any event he did not simply rely upon the first exception in *Western Fish* . He relied also upon estoppel by convention and, perhaps more importantly, he relied upon what he saw as the basic principle of estoppel, namely that a person who, by some statement or representation of fact, causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later even though it is wrong. It is readily understandable that as at February 1, 2002 the Inspector should have thought that such a basic principle was of general application in the field of planning law: The *House of Lords in its decision in Reprotech* has made it plain that it is not.

22. Turning to the proposition that the same decision could be reached by applying public law principles of legitimate expectation, I accept it is entirely possible that the same decision might be reached. But it is plain from the decision of the *Court of Appeal in Henry Boot Homes v Bassetlaw District Council [2002] EWCA Civ 983* that the circumstances in which it will be appropriate to find a legitimate expectation in the planning field are limited, and the decision taker is engaged in a task that is very different from an attempt to decide whether or not there is an estoppel in private law. That task, for reasons which are obvious, was not conducted by the Inspector. The proper course is not for this court to conduct that exercise—it is not the primary fact finder—but for the Inspector's decision to be quashed so that this, and the other submissions now made by Mr Roots can be considered by an Inspector who can make the necessary findings of fact. Mr Roots submitted that there was no evidence from the council to explain what harm was done by the mast. As I have mentioned, the enforcement notice contended that the mast was detrimental to metropolitan open land and to land in the vicinity. Whether or not that is so is a matter which can be considered when the ground (a) appeal comes to be looked at by an Inspector. This Inspector expressed no view whatsoever about the planning merits of the appeal.

23. Against this background I turn to whether it would be right to extend time under s.289(6) . Although it is submitted on behalf of the Secretary of State that the delay is a significant one, I do not accept that submission. The delay is approximately two weeks. There may well be circumstances in which even such a relatively short delay may be significant, for example, because the parties may have changed their positions on the strength of a belief that an enforcement notice had been quashed. But no such considerations arise in the present case. Indeed the main thrust of the Secretary of State's case on delay appeared to be that because the delay was due to ***517** an error on the part of the council's solicitors in choosing the s.288 route rather than the s.289 route, this, in some way, reinforced his argument that an extension of time should not be granted. I respectfully disagree. There is no question here of delay being used as part of a deliberate attempt to string out proceedings. The error is not an infrequent one and it is understandable given the lack of clarity in the Act.

24. Miss Davies referred me to two authorities. In the case of *Antoniades v Secretary of State for the Environment Transport and the Regions [1999] EWHC Admin 55 (transcript dated January 25, 1990)* Mr Nigel Macleod Q.C., sitting as a Deputy Judge of the Queen's Bench Division, said, when refusing an application for permission to appeal under s.289 and for an extension of time in which to do so,

> "The application for leave therefore should not succeed. As for the extension of time, the time limits must be regarded strictly (see *Ynys Mon Borough Council v The Secretary of State for Wales (1992) PLR 1* ) and this, allied to a substantive application without merits, leads me to conclude that an extension of time should not be granted."

It is of considerable significance that the judge had already concluded that there was no arguable case. In the circumstances it is not surprising that he was not prepared to grant an extension of time. Insofar as he considered that the *Ynys Mon* decision established a general principle that time limits must be regarded strictly, that proposition should be regarded with a degree of caution.

 

25. *Ynys Mon* was relied upon by Miss Davies and Mr Roots, both of whom submitted that the present case was on all-fours with it. In *Ynys Mon* a local authority wished to challenge an Inspector's decision quashing a number of its enforcement notices. The council's solicitor wrongly believed that the time limit for making such a challenge was the six-week period prescribed by s.288 rather than the four-week period prescribed by s.289 . The application for permission to appeal under s.289 was made one day late. Rose J., as he then was, refused the application to extend time. Both Miss Davies and Mr Roots drew attention to this passage in his reasoning (emphasis added):

> "There are, as it seems to me, certain not immaterial differences between the contents of those two affidavits. That sworn on November 26 asserts that there was due and appropriate diligence on behalf of the applicants in instructing counsel, in the light of the inaccurate belief that the time for appeal was six weeks rather than 28 days. The affidavit of November 27 shows that there was a conversation between Mrs Williams and counsel's clerk on November 6. It also shows that counsel was not instructed to settle the notice of appeal until November 25. Mr Griffiths reiterates the apology of Mrs Williams for misunderstanding the position with regard to the time for appeal. *In my judgment, it is the job of legal advisers either to know or to find out the law. If they do not do so, certain consequences may follow. One consequence which, in my judgment, should not follow is that their ignorance should attract judicial dispensation* . I am wholly unpersuaded that Mrs Williams' misappreciation of the time-limit for appeal is a reason why time should be extended. Indeed, in so far as it is material, I am wholly unpersuaded that the chronology of events which appears in the affidavits shows due diligence on her part." ***518**

26. I say that one should exercise caution before seeking to extract any point of general principle from that case for these reasons. Rose J. made it plain that the case turned upon its own particular facts. Indeed, he said in terms:

> "An application by the council to extend time in those circumstances is not surprising and, in the ordinary way, the probability is that the application would have succeeded."

27. What were the factors which caused him to depart from the ordinary way? The answer is to be found in the particular circumstances of the respondents to the appeal:

> "There is no doubt, in my judgment, from the affidavit of Mr Lewis, who acts for numbers 2 to 9 of the respondents, and from the affidavit of Mr Parry, who acts on behalf of the 18th respondents and on whose behalf Mr Albutt appears before me, that there are very special circumstances in this case which would give rise to prejudice of a substantial kind if I were to extend the period , as I am asked to do. The material before me shows that, for the last two years, or possibly longer, the second to 17th respondents have been residing, with a question mark hanging over their ability to continue residing, in the structures which were the subject of enforcement notices. Each of those respondents, on the material put before me, is of retirement age and many, if not all of them, are

 

in poor health." (my emphasis).

28. That, in my judgment, is very far from the facts of the present case. It will be noted that in that case Rose J. considered that the prejudice was so great that it was unnecessary for him to give any consideration, even in a preliminary way, to the merits of the substantive application. Thus, he was not refusing to extend time in a case where either the Secretary of State had conceded, or he had concluded, that it was at least arguable that the decision letter was not defensible as a matter of law. Whilst the decision is readily understandable upon its particular facts it must be borne in mind that decisions on enforcement notices are not to be equated with private litigation between the local planning authority, the Secretary of State and the appellant against the enforcement notice. The public interest is engaged. It is in the public interest that if a Secretary of State's decision on an appeal is erroneous in law, that error should be corrected. That is a factor which should always be borne in mind and it may well be that it will override any conclusion that an error on the part of legal advisers should be penalised.

29. The delay here was of short duration. There is no suggestion that it has caused any prejudice whatsoever. No party has altered his position in reliance upon the decision. It is plain for the reasons I have given that the Inspector's decision proceeded on an entirely erroneous basis in the light of the *House of Lords' decision in Reprotech* . I would wish to make it clear that this is not intended as any criticism of the Inspector. He faithfully responded to the representations which were put to him. It is understandable the case proceeded in the way that it did prior to *Reprotech* , but, post- *Reprotech* , it simply cannot stand.

30. For these reasons I extend time for the council to appeal under s.289 . ***519** I permit the necessary formal amendments to the claim form so that it is an appeal under s.289 . I allow that appeal and remit the matter to the Secretary of State for reconsideration.

Reporter—Megan Thomas.

*Claim allowed. Time extended to allow claim under s.289 of the Town and Country Planning Act 1990 to be pursued. Matter remitted to Secretary of State for reconsideration.*

**Footnotes**

1 Paragraph numbers in this judgment are as assigned by the court.

 