JUDGMENT : MR JUSTICE KEITH: High Court : Administrative Division : 23rd March 2004

1. When foot and mouth disease broke out early in 2001, the Ministry of Agriculture, Fisheries and Food ("the Ministry") wanted to identify and establish sites which could be used as holding and disposal sites for animal carcasses as part of its programme for containing and eradicating the disease. One of the sites offered to the Ministry was Westlake Farm, Oakford, Tiverton, Devon. It was owned by Richard and Lorraine Stevens. The Ministry accepted their offer, and carried out large-scale engineering operations in connection with the construction of an animal carcass holding area. Over 20,000 tons of tarmac and hard core were laid over an area of about 5.5 hectares, and new vehicular access to a local road was formed.

2. Unfortunately, contractual problems arose between Mr Stevens and the Ministry. These were not resolved, and the Ministry was required to leave the site. Since it had no legal interest in the land, the Ministry had to comply. The site was never used for its intended purpose. Since then the Department of the Environment, Food and Rural Affairs ("DEFRA"), which has taken over the Ministry's functions, has assured Mr and Mrs Stevens that it is willing to undertake the restoration of the site at its own expense, but it has not been possible to agree terms to compensate Mr and Mrs Stevens acceptable both to them and DEFRA.

3. In due course, representatives of DEFRA met representatives of the local planning authority, Mid-Devon District Council ("the Council"), to discuss what could be done to break the deadlock. The Council decided to issue enforcement proceedings, and enforcement notices dated 19th March 2003 under section 172(1) of the Town and Country Planning Act 1990 ("the 1990 Act") were duly served on Mr and Mrs Stevens. Mr and Mrs Stevens responded by issuing an enforcement notice appeal dated 25th April 2003. The appeal was heard at an inquiry by the Inspector on 16th September 2003, and by a decision dated 29th September 2003 he allowed Mr and Mrs Stevens' appeal and quashed the enforcement notices. The Council now appeals under section 289 of the 1990 Act against the Inspector's decision, permission to appeal having been granted by Harrison J.

4. The appeal to the Inspector turned on the application and effect of section 294(1) of the 1990 Act, which provides: *"No enforcement notice shall be issued under section 172 in respect of development carried out by or on behalf of the Crown after July 1, 1948 on land which was Crown land at the time when the development was carried out."*

   By the time of the inquiry, it was common ground that the site had not been Crown land when the development had been carried out (or at any material time before or since, for that matter). Section 293(1) defined "*Crown land*" as *"land in which there is a Crown interest"*, and it defined "Crown interest" as *"an interest belonging to Her Majesty in right of the Crown or belonging to a government department or held in trust for Her Majesty for the purposes of a government department."* At no stage did the Ministry or DEFRA have any legal or equitable interest in the land. At the time of the development, contractors engaged by the Ministry had the right to go on to the land to carry out the operations, but such a licence did not amount to an interest in land.

5. The operations carried out at the site were uncontestably a "*development carried out on behalf of the Crown.*" The argument advanced by Mr and Mrs Stevens to the Inspector was that "*terms similar to section 294(1) must apply equally to development carried out by, or on behalf of, the Crown on land which was not Crown land at the time the development was carried out"* (see paragraph 13 of the Inspector's decision). The Inspector agreed with that argument. He concluded that it did not matter that the development had not been carried out on Crown land. The fact that it was development which had been carried out by the Crown was sufficient to enable Mr and Mrs Stevens to rely on the immunity from enforcement proceedings created by section 294(1). Relying on Circular 18/84 issued by the Department of the Environment on 3rd August 1984 ("the Circular") and on some dicta in the speech of Lord Keith in Lord Advocate v Dumbarton District Council [1990] 2 A.C. 580, the Inspector concluded that: *"Section 294(1) in practice confers immunity on the development carried out because it was development carried out on behalf of the Crown (ie by [the Ministry])..."*

6. The Council contends that the Inspector's approach was wrong. The First Secretary of State, who was the first respondent to the Council's appeal, agrees with the Council. He did not oppose the grant of

permission to appeal, and he accepts that the Inspector's decision should be quashed for the reasons advanced by the Council. The terms of a consent order were agreed between the Council and the First Secretary of State, but the appeal has had to proceed because Mr and Mrs Stevens, as the second respondents to the appeal, do not agree that the Inspector's decision should be quashed.

7. Mr and Mrs Stevens did not appear and were not represented at the hearing at which permission to appeal was granted. They have not appeared, nor are they represented, today. However, both they and their solicitors sent faxes to the Administrative Court Office yesterday. Those faxes do not in terms ask for an adjournment of the hearing of the appeal. The fax from the solicitors enclosed a copy of the solicitors' letter to the Council's solicitors asking the Council to agree to an adjournment. The fax from Mr and Mrs Stevens made a number of points, but on the question of an adjournment it merely asked the judge who was to hear the appeal to bear in mind that they had not received the Council's counsel's skeleton argument. However, I thought it right to address the issue whether the hearing of the appeal should be adjourned.

8. There is nothing in the point about the non-receipt by Mr and Mrs Stevens of the skeleton argument. It added nothing of substance to the grounds of appeal attached to the appellant's notice. The point made in the solicitors' letter to the Council's solicitors relates to Mr and Mrs Stevens' claim for compensation against DEFRA. It is said that DEFRA has agreed in principle to this claim being the subject of mediation, and in those circumstances the determination of this appeal is premature. The only thing which is holding up the restoration of the site, namely the failure to agree the compensation, if any, to be paid by DEFRA to Mr and Mrs Stevens, will hopefully be determined by mediation.

9. I did not think that it was appropriate for the hearing of the appeal to be adjourned. The request for an adjournment (if it can be so characterised) came very late in the day, when the time of the court had already been allotted to the hearing of the appeal, and the Council had committed itself to instructing counsel for today's hearing. There is no certainty that mediation would result in an agreement on compensation which would result in the current deadlock on the restoration of the site being broken, and in that case an adjournment of the hearing would have served no purpose. Finally, the hearing of the appeal raises a short and discrete point of law, and there was no reason why that should not be determined now, even if a subsequent agreement on compensation were to render the question of whether the enforcement notices should stand academic.

10. Against that background, I turn to the Council's case on this appeal. Unsurprisingly, the Council relies on the language of section 294(1). If the Inspector was right, and if the immunity from enforcement proceedings created by section 294(1) applies to development carried out by or on behalf of the Crown whether on Crown land or not, a fundamental redrafting of section 294(1) would be required so as to delete the words *"on land which was Crown land at the time when the development was carried out."* Section 294 in terms applies only to land which was Crown land at the time when the development was carried out. That is not only apparent from the terms of section 294(1) itself, but also from the facts (a) that section 294 is in Part XIII of the 1990 Act which is headed *"Application of Act to Crown Land"*, and (b) that the heading to that part of Part XIII in which section 294 is to be found is *"Application of Act as respects Crown land."*

11. In the **Dumbarton** case, Lord Keith accepted at p. 598A the correctness of the principle stated by Diplock LJ (as he then was) in British Broadcasting Corporation v Johns [1965] Ch 32 p. 79: *"The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication."*

Thus, the Crown is immune from the regime of planning control established by the 1990 Act unless there is an express statutory provision removing its immunity, or its immunity should be treated as removed by necessary implication. Since the Crown is immune from planning control, section 294(1) must be regarded as providing an immunity to persons or bodies other than the Crown, but only if the three conditions prescribed by section 294(1) have been satisfied. They are that (1) the development was carried out by or on behalf of the Crown, (2) the development was carried out after 1st July 1948,

and (3) the development was on land which was Crown land at the time when the development was carried out.

12. This line of thinking seems to me to be entirely consistent with what Lord Keith said in **Dumbarton** about the effect of section 253(3) of the Town and Country Planning (Scotland) Act 1972, which is, in all material respects, similar to section 294(1) of the 1990 Act. At p. 602E Lord Keith said: *"Subsection (3) is concerned with land which was Crown land at a time when development was carried out on it by or on behalf of the Crown, but which has ceased to be such land. Ex hypothesi the development would have been carried out without planning permission, and but for this provision the Crown's successor in title would be subject to an enforcement notice requiring him to undo the development."*

In other words, the section was intended to immunise from enforcement proceedings only a limited type of development, namely, a development which the Crown carried out on land which was at the time of the development, but subsequently ceased to be, Crown land. Otherwise, the Crown's successor-in-title, as Lord Keith observed, *"would be subject to an enforcement notice requiring him to undo the development."* What section 294(1) does not do is to confer an immunity from enforcement proceedings upon private persons such as Mr and Mrs Stevens in respect of development carried out, admittedly on behalf of the Crown, but on land which was not Crown land at the time.

13. The Inspector relied on a later passage in Lord Keith's speech in Dumbarton at pp. 602F - 603A. Lord Keith said: *"These provisions, read as a whole [in other words the provisions of section 253 of the 1972 Act], make it clear that the whole Act proceeds on the assumption that the Crown is not subject to any requirement of planning permission for development carried out by it. It is true that the ordinary contemplation is that any development carried out by the Crown would be carried out on Crown land. It may be doubted whether Parliament could ever have envisaged that the Crown might carry out development anywhere but on Crown land. There would be no need for the Crown to seek planning permission for development on land which it was proposing to acquire in the future, because once it had acquired the land it could carry out the development without planning permission. So I do not consider that there can be any question of a Parliamentary intention that the Crown should be subject to the requirements of planning control in relation to land other than Crown land."*

In my opinion, the Inspector's reliance on that passage was misplaced. The passage addresses the question of the Crown's immunity. It deals with whether the Crown is immune from enforcement proceedings in respect of development carried out by it, whether on Crown land or on land which was not Crown land. It does not deal with the immunity from enforcement proceedings of persons or bodies other than the Crown. Such limited immunity as is afforded to them is that set out in section 253(3), and that, like section 294(1) of the 1990 Act, only applied to land which was Crown land at the time of the development.

14. The passage in the Circular on which the Inspector placed some reliance is paragraph 21. His quotation from it reads as follows: *"Since the Crown is not subject to planning legislation any use of land which it institutes is a lawful use and can be continued without risk of enforcement."*

However, the passage in full reads: *"Since the Crown is not subject to planning legislation, any use of land which it institutes is a lawful use and, subject to what is said in paragraph 1 of Part II of this memorandum, can be continued by a third party, eg a purchaser of land or the freeholder of land of which the Crown is a lessee, without risk of enforcement."*

When the passage is read in full, it is plain that what the passage is addressing is land which was Crown land, or land in which the Crown had an interest, at the time of the original use of it. The Circular itself applies only to Crown land, its title is "Crown Land and Crown Development", and it purported to provide advice "on the management and disposal of Crown land."

15. There is one final point I should mention. Section 296(1) of the 1990 Act provides, so far as is material: *"Notwithstanding any interest of the Crown in Crown land, but subject to the following provisions of this section -*

(c) any restrictions or powers imposed or conferred by... Part VII [in which section 172(1) is to be found]... shall apply and be exercisable in relation to Crown land, to the extent of any interest in it for the time being held otherwise than by or on behalf of the Crown."

The effect of that provision is that private interests in land which is also Crown land are subject to the enforcement regime in Part VII of the 1990 Act. It would be odd if the owners of completely private land, on which the Crown had carried out a development, were not subject to enforcement proceedings (which is what Mr and Mrs Stevens contend is the effect of section 294(1)), whereas the owners of land in which the Crown had only a partial interest at the time of the development were subject to enforcement proceedings (which is the effect of section 296(1)).

16. For all these reasons, therefore, this appeal must be allowed. Since the Inspector's view on the effect of section 294(1) meant that the appeal to him had to be allowed, he did not consider the other grounds of appeal relied upon by Mr and Mrs Stevens. There will have to be a remission of the appeal to the Inspector to consider those grounds. I will hear from counsel as to the precise form of the order I should make.

17. **MISS RICHARDS**: My Lord, I am content for the order to take the form drafted by the first respondent, with a moderate amendment. So, it is page 112 of the bundle --

18. **MR JUSTICE KEITH**: Yes, I have the consent order.

19. **MISS RICHARDS**: The decision of the first respondent's Inspector, made by letter dated 29th September 2003, be remitted for rehearing and redetermination.

20. **MR JUSTICE KEITH**: We have to say that the appeal should be allowed. So, let us start off then.

21. **MISS RICHARDS**: (1) the appeal should be allowed.

22. **MR JUSTICE KEITH**: (1) that the appeal be allowed.

23. **MISS RICHARDS**: Then (2) --

24. **MR JUSTICE KEITH**: The decision of the first respondent's Inspector, made by letter dated 29th September 2003, be remitted for rehearing and redetermination for the reasons given in the judgment of the court.

25. **MISS RICHARDS**: Yes. Then (3), that the first respondent do pay the reasonable costs of the appellant in respect of this appeal to be assessed if not agreed, which, as your Lordship has seen, the first respondent has agreed to.

26. **MR JUSTICE KEITH**: Yes, that should be by consent. So that part of the order will be by consent.

27. **MISS RICHARDS**: Yes. My Lord, just one other minor matter for the benefit of the shorthand writer. I think your Lordship's judgment did not give the citation for the Dumbarton case. It is **Lord Advocate v Dumbarton District Council [**1990] 2 A.C. 580.

28. **MR JUSTICE KEITH**: My judgment did.

29. **MISS RICHARDS**: I am sorry, my Lord. I was so busy trying to take a note of your Lordship's judgment.

30. **MR JUSTICE KEITH**: Yes. There will be a transcript of it in due course.

31. **MISS RICHARDS**: I am grateful.

32. **MR JUSTICE KEITH**: Thank you very much, Miss Richards.

MISS J RICHARDS (instructed by NABARRO NATHANSON) appeared on behalf of the CLAIMANT

THE DEFENDANTS DID NOT APPEAR AND WERE NOT REPRESENTED