A arbitrator or quasi-arbitrator ought to exercise care. I prefer to say that, short of fraud, he cannot be sued if he fails to perform that part of his duty.

This however is not quite the end of the matter. The plaintiff may succeed as against the first defendant in setting aside the existing valuation. If so, there might have to be a fresh valuation. Accordingly, the plaintiff seeks an order against Cassons, in that event, directing them to revalue the shares. Mr. Muir Hunter, for the plaintiff, agreed that Cassons could B only be called upon to make the fresh valuation if they were in fact the current auditors of the company at the time when the new valuation came to be made. Otherwise they would not be the correct persons to carry out the valuation according to the agreement between the parties, nor would they have the necessary access to the company's books of account. They might also, for perfectly proper reasons, relinquish their C office as auditors before any such order had been complied with. However, leaving aside these difficulties, it appears to me that such an order would, in effect, be an order for specific performance of a contract for services and therefore an order which the court does not normally make. Mr. Muir Hunter did not refer me to any authority to support his submission that it would be possible or proper for the court to make a mandatory order of this sort in the present case; I do not think that it would be. D In my judgment this is a clear and obvious case in which the statement of claim discloses no cause of action against the second defendants. I shall therefore direct that the statement of claim be struck out as against the second defendants and that the action be dismissed as against them.

Order that statement of claim be struck out and action dismissed as against second defendants.
Leave to appeal refused.

E

Solicitors: *Malcolm Slowe & Co.; Reynolds, Porter & Co.*

F

T. C. C. B.

[QUEEN'S BENCH DIVISION]

G

* BURDLE AND ANOTHER *v.* SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER

1972 June 20; 22 Lord Widgery C.J., Willis and Bridge JJ.

Town Planning—Development, meaning—Material change of use— H *Land used as car breaker's yard and sale of salvaged vehicle parts—Building on land adapted for sale of new car parts and camping equipment—Enforcement notice served requiring discontinuance of use of land as shop—Secretary of State varying notice to refer only to building—Whether building separate planning unit—Tests to be appplied to determine planning unit*

[Reported by KUTTAN MENON ESQ., Barrister-at-Law]

In 1963, land, on which there were a number of buildings including a lean-to annexe attached to a house, was used as a scrap metal and car breaker's yard and salvaged vehicle parts were sold from the site. There was also a limited sale of car parts obtained from other sources. In 1965, the present occupiers purchased the land and, although continuing the use of the land, substantially reconstructed the annexe and changed its use from an office to a place where they displayed and sold new vehicle parts and camping equipment. The local authority, acting as agents of the local planning authority, served on the occupiers an enforcement notice alleging the use of the premises as a shop and requiring the restoration of the premises to their condition before the development took place. The occupiers appealed to the Secretary of State and, at the inquiry, the occupiers and the local authority presented their case on the basis that all the land was affected by the enforcement notice. The inspector in his conclusions expressed the view that, whether the appropriate planning unit was the whole site or the annexe, there had been a material change of use. The Secretary of State took the view that the site could not be considered as a shop for the purposes of the Town Planning legislation and, accordingly, amended the enforcement notice to refer only to the annexe.

On appeal by the occupiers:—

Held, that, although parts of a single unit of occupation could be considered as separate planning units, the test to be applied was whether there were two or more physically separated and distinct areas which were used for substantially different and unrelated purposes and, since the Secretary of State had not applied that test in deciding that the annexe was the appropriate planning unit, the case would be remitted for the Secretary of State to appply the correct test to determine what was the appropriate planning unit to be considered as a matter of fact and degree.

Observations on the appropriate criteria to determine the planning unit to be considered when deciding whether there had been a material change of use (post, p. 1212c–G).

The following case is referred to in the judgment:

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

The following additional cases were cited in argument:

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

Hawkey v. *Secretary of State for the Environment* (unreported) March 26, 1971, D.C.

APPEAL

On February 3, 1971, the New Forest Rural District Council, as agents for the local planning authority, Hampshire County Council, served on the occupiers, Derek Stanley Burdle and Dennis Williams, an enforcement notice alleging that there had been a breach of planning control at their premises, New Forest Scrap Metals, Ringwood Road, Netley Marsh, Hampshire. The breach of planning control was stated to be the use of the "premises . . . as a shop for the purpose of the sale inter alia of motor car accessories and spare parts" and the notice required the discontinuance of the use of the premises as a shop.

The occupiers appealed to the Secretary of State for the Environment against the enforcement notices. At an inquiry, the occupiers and the local council agreed that the enforcement notice referred to the whole site, which

had an existing use as a scrap metal and car breaker's yard and from which salvaged parts of cars had been sold, but the occupiers contended that there had been no material change of use although they had altered a lean-to annexe to a house known as "Fern Bank" and, thereafter they had displayed and sold car accessories, new car spare parts and camping equipment in the annexe. The Secretary of State allowed the appeal to the extent of amending the enforcement notice by deleting the word "premises" and inserting "the annexe adjoining the west side of the dwelling known as 'Fern Bank.'"

The occupiers appealed to the court on the ground, inter alia, that on the findings of fact in the inquiry there was shown to be an established use in accordance with section 17 of the Town and Country Planning Act 1968 and that the Secretary of State was wrong in law to uphold the enforcement notice.

The facts are stated in the judgment of Bridge J.

Roland Roddis for the occupiers.
Gordon Slynn for the Secretary of State.
Alan Fletcher for the local authority.

Cur. adv. vult.

LORD WIDGERY C.J. I will ask Bridge J. to give the first judgment.

BRIDGE J. This is an appeal under section 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment given in a letter dated January 7, 1972, upholding, subject to variation, an enforcement notice which had been served by the New Forest Rural District Council as delegate of the local planning authority on the occupiers. They occupy a site at Ringwood Road, Netley Marsh in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and upon which there stand a dwelling house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the occupiers' predecessor in title, a Mr. Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breaker's yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited scale of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breaker's yard business.

The lean-to annexe adjoining the dwelling house was used by Mr. Andrews as an office in connection with the scrap yard business. In 1965 the occupiers purchased the property; whereas Mr. Andrews had carried on business under the modest title of "New Forest Scrap Metals," the occupiers promptly changed the title to the more grandiose "New Forest Autos." They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia, they provided it with two external display windows. They started to use that building for retail sales on a substantial scale for vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the occupiers had themselves been appointed stockists by the manufacturers.

They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows, if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase "New accessories and spares shop now open."

Those activities prompted the local planning authority to serve on February 3, 1971, the enforcement notice which is the subject of the appeal to this court. That notice recites:

> "... That it appears to the council: that a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act 1962."

The steps required to be taken by the enforcement notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that enforcement notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, uses the perhaps ambiguous expression "premises" to indicate the unit of land to which it was intended to apply. We were told in the course of argument by Mr. Alan Fletcher, who appeared for the local authority, that the authority's intention was to direct that notice at the whole of the occupiers' site; it alleged a material change of use of the whole site. It seems to have been so understood by the occupiers, and when the matter came before an inspector of the department, following the appeal to the Secretary of State by the occupiers against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The local authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, Mr. Fletcher has submitted before us that that is still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so Mr. Fletcher said, the enforcement notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the occupiers their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The occupiers' case at the inquiry was in essence that as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

"The legal implications of the above facts are matters for the

A consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrap yard, grew out of the then proprietor's specialisation in the Austin 7, an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survived, the combination of advertising with improved facilities for display, and B the emphasis on new items in that display, all now support the [occupiers'] claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than January 1, 1964. Whether or not notice A "—which is the use notice—" is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d)."

C I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site on the one hand, or on the other hand the lean-to annexe, but he took the view that whichever unit one considered, there had been a material change of use, and accor- D dingly he thought the enforcement notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion; he said in the decision letter:

E " Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B "—that is the notice relating to the building operations—" relates to the building called variously the annexe or learn-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted F in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc. The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis."

G The Secretary of State then went on to ask himself the question, has there been a material change of use of the lean-to annexe, and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the H argument of Mr. Roddis for the occupiers, I cannot accept that the Secretary of State in any way exceeded his jurisdiction in ordering that the scope of the enforcement notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the enforcement notice in favour of the occupiers.

But the real complaint and grievance of these occupiers is that the Secretary of State has for insufficient or incorrect reasons directed his mind

to the wrong planning unit and thereby deprived them of a consideration and decision by the Secretary of State, as opposed to the inspector, of the real question which the occupiers say should have been considered, namely, has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of " shop " in the Town and Country Planning (Use Classes) Order 1963 or the ordinary dictionary meaning of " shop," it is really an absurdity to describe the whole of this site as a shop, but what I cannot accept is that the accident of language which the local planning authority choose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, where Diplock L.J. said, at p. 513:

> " What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a ' material change in the use of any buildings or other land '? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose."

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another

use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

It may well be that if the Secretary of State had applied those criteria to the question, what was the proper planning unit which fell for consideration in the instant case, he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question, what is the appropriate planning unit here to be considered as a matter of fact and degree? Accordingly I reach the conclusion that the appeal should be allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

WILLIS J. I agree.

LORD WIDGERY C.J. I entirely agree for the reasons so fully and clearly given by Bridge J.

Appeal allowed.
Secretary of State to pay occupiers' costs.

Solicitors: *Heppenstall, Rustom & Rowbotham, Lymington; Solicitor, Department of the Environment; Sharpe, Pritchard & Co. for F. R. Appleby, Lyndhurst.*

[CHANCERY DIVISION]

* PICKWICK INTERNATIONAL INC. (G.B.) LTD. *v.* MULTIPLE SOUND DISTRIBUTORS LTD. AND ANOTHER

PRACTICE NOTE

1972 June 8, 12, 13, 14; 27 Megarry J.

Practice—Chancery Division—Motion ex parte—Appearance of counsel for party moved against—Order for costs

MOTION

The plaintiffs, Pickwick International Inc. (G.B.) Ltd., who published and sold gramophone records under the brand name of "Top of the Pops," gave notice of motion in this action, seeking an interim injunction