[2007]JRC063

ROYAL COURT
(Samedi Division)

12th March 2007

Before : **Sir Philip Bailhache, Kt., Bailiff, and Jurats Allo and Liddiard.**

Between	**Patrick Joseph McCarthy**	**Appellant**
And	**Minister for Planning and Environment**	**Respondent**

Advocate F J Benest for the Appellant.

S C Nicolle QC, Solicitor General, for the Respondent.

JUDGMENT

THE BAILIFF:

1. This is an appeal by Patrick Joseph McCarthy ("the Appellant") against a decision of 22nd August 2006 of the Minister for Planning and Environment ("the Minister") refusing permission for the construction of two houses on Field 263A in Grouville. The reason given by the Minister for his decision was that –

> *"The site lies within a designated Important Open Space wherein there is a presumption against the loss of such spaces. The development of this site for 2 houses as proposed would result in the loss of part of that area of open space and would unreasonably affect the character and amenity of the area. Therefore the application fails to satisfy the requirements of policies BE8, H8, G2 and G3 of the Jersey Island Plan 2002."*

The Minister has however conceded that the reference to policies H8 and G3 (housing development within the built-up area and quality of design respectively) were erroneous.

2. The relevant policies upon which the Minister defends his decision are BE8 (Important Open Space) and B2 (General Development Considerations). The Island Plan policy BE8 provides –

> ***"There will be a presumption against the loss of important open space as designated on the Island and Town Proposals Maps. In order to better understand the function and role of open space, the links between spaces and to identify areas of need or shortfalls in space provision, the [Minister] will initiate the preparation of an open space strategy."***

Field 263A is zoned in the Island Plan as Important Open Space.

3. The grounds of appeal against the Minister's decision are, in essence, first that the decision was inconsistent with earlier decisions of the Minister's predecessor, the Planning and Environment Committee, and that the Appellant had a legitimate expectation that development permission would be granted, and secondly that the Minister's decision was, in all the circumstances, unreasonable.

Background

4. The factual background to the decision is a little tangled. The site in question forms part of Field 263A, measures approximately 0.9 vergées, and was until recently in agricultural use. To the north and east of the site is a row of dwellings bordering La Rue des Près. The remaining part of Field 263A to the south is destined to be acquired by the public for Grouville School. Field 263 to the west is now in public ownership and has become, in part at any rate, playing fields for the school.

5. Under the 1987 Island Plan the site was in the Sensitive Landscape Area of the Agricultural Priority Zone wherein there was a presumption against new development. Under the 2002 Island Plan the site falls within an area designated as Important Open Space.

6. In 1983 the then Island Development Committee had proposed that Field 263 and 263A be zoned for States' loan or rental housing, but that proposal was defeated. In 1989 the Committee made the same proposal, but that was eventually withdrawn. Between 1989 and 1990 the Appellant received development permission to convert properties adjoining Field 263A and to create additional dwelling accommodation. In 1994 he was refused development permission to construct a single dwelling on the northern part of Field 263A on the ground that the development would be contrary to the Island Plan.

7. In 1998 the Education Committee decided to seek additional land for playing fields for Grouville School, and in 2000 Fields 263 and 263A were identified as being the most suitable. In January 2002 the States adopted a proposition of the Planning and Environment Committee and re-zoned the whole of Fields 263 and 263A for school playing fields. In July 2002 the States approved the Island Plan in which Fields 263 and 263A, in common with other school playing fields and parks, were designated as Important Open Space.

8. During 2002 negotiations began between the Property Services Department (then part of the Planning Department) and the Appellant for the acquisition of Field 263A. In July 2002 the Committee apparently agreed, as part of the land valuation exercise, that it would, but for the decision to acquire the land for playing fields, have included the Field in the Built-Up Area. This significant decision was taken without any reference to the States or any notification to adjoining owners. We state "apparently" because the Committee's minute of 4th July 2002 does not record the decision, but the affidavit of Mr Webster, a principal planner in the Planning Department, states that the decision was clear to all the officials attending the meeting. It was certainly the basis of a valuation of Field 263A which led in October 2003 to an agreement between the Appellant and the Committee upon a consideration of £310,000 for the whole of Field 263A. On 12th November 2003 a proposal to acquire the field at that price was however rejected by the Finance and Economics Committee on budgetary grounds. The Education Committee was requested to reconsider, and to seek to acquire only Field 263 and the southern part of Field 263A, *i.e*. the land actually required to meet the needs of Grouville School.

9. On 22nd January 2004 the Planning and Environment Committee (hereinafter referred to as "the Committee") met to consider the matter in the light of the decision of the Finance and Economics Committee. The Appellant had advised the department's officers that he would be prepared voluntarily to relinquish the southern part of Field 263A for the use of the school if development permission were granted for housing on the northern part. The minute of the Committee's discussion records –

> *"Having considered the situation and viewed related plans, the Committee agreed that some development to the north would be acceptable to provide a planning gain for the southern part for Grouville School."*

Mr Webster's affidavit amplifies this decision by stating that in planning terms the Committee's view was that the acquisition of the

southern part of Field 263A for a playing field would leave the northern part as an isolated remnant unsuitable for agriculture and of no value as open space. That was, as we have stated, not actually recorded on the minute.

10. The Committee had nonetheless agreed the principle of development on the northern part of Field 263A in the absence of any formal application and without any notice to any adjoining landowners or consultation with affected bodies. The agreement in principle was equally inappropriate in that (a) the planning decision had become mixed up with the land valuation exercise in July 2002; (b) it appeared to contemplate the granting of development permission as a *quid pro quo* for an agreement to transfer other land to the school, which was not a valid planning consideration; and (c) in the absence of any re-zoning, Field 263A was still designated as Important Open Space. Be all that as it may, the Appellant was notified of the decision by letter of 23rd January 2004 and invited to submit a planning application. The letter does not make it clear whether the Appellant was notified of the commitment in principle to "some development" but does refer to "our ongoing discussions with regard to the above field". The Appellant asserts, and we accept, that he was informed at that time of the decision.

11. In March 2004 preliminary sketch plans were submitted seeking pre-application advice. The planning official charged with the responsibility for this part of the Island Plan ("the Case Officer") replied on 29th April 2004 giving advice and stating "Like you, I understand that the Committee has agreed to the principle of some residential development in the northern part of this field …". He continued, however, that "The site itself however has not been formally re-zoned".

12. Application for the construction of three dwellings was submitted in May 2004 but was later withdrawn following the comments of the Case Officer. At the conclusion of his letter of 19th May 2004 the Case Officer wrote –

> *"I must however point out that as always these comments are offered in the hope of helping you achieve a scheme which is likely to be recommended for approval before it is put to the Committee. My advice is not however binding upon the Committee in making their decision. You do therefore have the opportunity to make an application on the basis of these drawings if you do not wish to take this advice."*

13. In September 2004 a revised application for the construction of 2 dwellings was submitted and notice of the application was duly published. Six letters of objection were received from neighbouring owners pointing out, *inter alia,* that the site was zoned as Important Open Space. A report of the Planning Department dated 22nd November 2004 concluded –

> *"Although a designated Important Open Space, the Committee has previously accepted the principle of some development allied to the use of the adjacent land by Grouville School. Improvements to the houses are still recommended, but these are positioned and laid out to address the impact on adjoining properties.*
>
> *<u>Recommendation</u> That amendments be required, and satisfactory access achieved. Provided each of these are met satisfactorily, APPROVE."*

The matter was considered by the Planning Sub-Committee on 1st December 2004 at which meeting a number of objectors and political representatives as well as the Appellant were present. The Sub-Committee was concerned about the principle of development, and referred the application to the full Committee.

14. The full Committee considered the application on 20th January 2005. The Committee received a report from the Planning Department which contained the same summary conclusion placed before the Sub-Committee, namely that "Although a designated Important Open Space, the Committee has previously accepted the principle of some development allied to the use of the adjacent land by Grouville School." The Committee was recommended to approve the application subject to the resolution of some design issues. The minute records the Committee's decision in the following way –

> *"The Committee recalled that the Sub-Committee had advised that the field was designated an Important Open Space as the decision had been made by the Committee as previously constituted to utilise the land for the adjacent school. For this reason, the boundaries of the Island Plan had been altered so that the field was not included in the Built-Up Area. However, there was now no intention to utilise the field for school playing fields.*

The Committee was informed that the officer advice in regard to this site had originally been to approve the development, subject to the satisfactory resolution of highway issues, including visibility problems. However, as the applicant had no control over the land surrounding the site, such a resolution was now deemed by the Department to be highly unlikely.

In light of the highway issues, and with concern as to the size and style of the proposed development, the Committee decided to not to approve the application. The Committee agreed however that it was not fundamentally opposed to the concept of development on this site."

15. The notice of refusal issued on 1st February 2005 gave two reasons for the refusal, *viz* inadequate visibility splays for traffic and unsympathetic design. The notice was accompanied by a letter from the Case Officer to the Appellant which elaborated upon the design issues and concluded –

"The Committee accepted however that, provided you agreed and facilitated the extension of the school playing field onto the southern part of Field 263A, the principle of some development on this northern part may be acceptable provided the issues noted in the refusal were addressed."

We note in passing that this letter once again confused planning issues with extraneous considerations, i.e. the acquisition of land for Grouville School.

16. By letter of 23rd February 2005 the Appellant sought a reconsideration of the decision. The Deputy of Grouville also interceded on behalf of the neighbouring owners, and sought clarification of the alleged "deal" involving planning permission for the northern part of Field 263A in exchange for the transfer of the southern part to Grouville School. The Chief Planning Officer replied by email of 18th February 2005 stating –

"The Environment and Public Services Committee was therefore asked by the owner, in January 2004, to consider whether it would be willing to accept some development on the north part of the field if the southern part were then to be made part of the school grounds. It was decided to invite an application, without prejudice to its later decision. There is no "deal", as you

put it, but I imagine that the owner would be less inclined to treat with the States in respect of the southern part of the field, if permission was refused."

On 26th May 2005 the Committee conceded that the first ground of refusal, namely the inadequate visibility splays, could no longer be sustained. The minute of the Committee's decision also stated in relation to the principle of development –

"The committee expressed dissatisfaction with the current position, and was of the opinion that the advice provided to the applicant and action taken by previous Committees in this regard had been less than ideal. The committee was reluctant to allow anyone to construct dwellings on Important Open Space, but was bound by previous decisions in this particular case. The Committee was minded that at some point in the future it might be advisable to consider the development of a projet intended to remove the Important Open Space designation of this area, in order to avoid a damaging precedent in respect of development. At the current time, however, the Committee reserved its position on that matter. The Committee directed officers to continue research into the matter."

Mr Webster's affidavit explains that the last two sentences of that extract were erroneous. The Committee did not "reserve its position" but resolved to lodge a proposition seeking the approval of the States to the removal of the Important Open Space designation from the northern part of Field 263A.

17. That proposition was duly lodged on 7th June 2005. The Committee sought the removal of the designation on the grounds that –

(i) it had no intrinsic value on its own as open space;

(ii) the previous Committee had indicated that it would have included the site in the Built-Up Area; and

(iii) the site had been effectively blighted by the decision not to acquire it.

The Committee indicated that it was prepared to grant development permission. This proposition was however rejected by the States by a substantial majority on 28th June 2005.

18. On 15th June 2005 the Appellant submitted the application, the rejection of which is the subject of this appeal. A letter of objection was received from the owners of five neighbouring properties making a number of points including the point that they had acquired their properties in good faith and in the expectation that the designation of the field in the Island Plan first as Sensitive Landscape Area and then as Important Open Space would be respected. They contended that the grant of development permission against that background and in the knowledge of the States' refusal to amend the designation would destroy the credibility of the Island Plan itself. A number of further submissions were made during the ensuing months but they add nothing of substance to the history already related. The Planning Applications Panel met on 16th August 2006 and concluded that the application should be refused. In accordance with their established practice they referred the application to the Minister who made the decision recorded in paragraph 1 above.

Preliminary Conclusions

19. It is hard to avoid the immediate conclusion that the history of this application is not a model of how planning procedures should be conducted. In so stating we do not imply any criticism of the current Minister whose approach has been principled and straightforward. His predecessors in office, however, have allowed a situation to evolve in which the Appellant has been clearly given to understand that development permission will be forthcoming for the construction of dwellings on the northern part of Field 263A. That approval in principle was given without any due process in the sense that it was given in the absence of a formal application and in exchange for some form of promise that the southern part of Field 263A would be transferred to the Public for the use of Grouville School. The result of the lack of due process has been that neighbouring owners and Parish representatives have been able to voice their objections only at a stage when the Planning Department was advising the Planning and Environment Committee that the decision in principle had already been taken.

20. In defence of the Planning Authorities (if we may use that neutral term) it can only be said that they were seduced into their fateful decision of 22nd January 2004 at the instigation of the Appellant whose suggestion it was that the southern part of the field might be relinquished if planning permission were granted for the northern part.

The submissions of the Appellant

21. Mr Benest submitted, as adumbrated in paragraph 3 above, (1) that the refusal to grant development permission was inconsistent with

previous decisions and indications of successive Planning and Environment Committees, and therefore unreasonable, and (2) that the proposed development of two houses would not result in any significant loss of open space so as to affect the character and amenity of the area, and that the Minister's refusal was unreasonable on that ground too. We deal first with the arguments relating to inconsistency and prior indications that development permission would be given.

22. Counsel referred us to previous decisions of this Court where there had been a permission in principle or other indication that development permission would be forthcoming. In Scott v Island Development Committee [1966] JJ 631 the appellant had purchased a cottage separating two parcels of land which he owned in Rue de Galet, St Lawrence in reliance upon a letter from the Planning Office. The letter stated in relation to commercial development proposals that the Committee had decided "to approve the project, in principle, and subject to Mr Scott purchasing the intervening cottage which it considered necessary to the projected overall development". Three years later the appellant had been able to acquire the cottage and did so. Two years after that the appellant applied for development permission but the application was refused, the Committee having decided that it would sanction only a residential development. The Court held that "permission in principle" was not a "permission" in the true sense of the word. The granting of a permission in principle was nonetheless relevant to the reasonableness of the Committee's decision. The Court found the decision to have been unreasonable and upheld the appeal.

23. Although neither counsel referred expressly to the case, the judgment in Scott referred to an earlier appeal in Wightman v Island Development Committee [1963] JJ 315 where the appellant argued that a form issued by the Committee inviting the submission of detailed drawings in relation to an application amounted to a form of conditional permission. The Court did not find it necessary to determine that question, but stated at page 321 that "to invite members of the public to incur the expense of having complete drawings prepared, in triplicate, and two copies of the specification drawn, against the possibility that no building will be allowed at all, does not conform to our ideas of rational and fair administration …".

24. Mr Benest then referred to Le Maistre v Island Development Committee [1980] JJ 1 where the appellant appealed against the Committee's refusal to allow him to build an agricultural shed in the Green Zone in St Ouen. The Planning Office had written in relation to an earlier application to state that "the Committee has expressed the opinion that possibly favourable consideration could be given to a

small tastefully-designed agricultural building …". After discussions between the appellant's political representative and the Committee, the appellant was invited to produce "more sophisticated information" to show details of vehicular access and a tree-planting scheme and sectional drawings to demonstrate the impact on the landscape. All that was done, and the appellant obtained an agricultural loan to acquire the land and to pay for the shed, and bought the land from his father. The Committee then refused the application on the ground, *inter alia*, that the proposed works "would represent a substantial extension of building development in a prominent position in the Green Zone". The Court found that the Committee had agreed in principle at the meeting with the political representative to the erection of the agricultural shed, and that its subsequent change of mind was unreasonable. The appeal was allowed.

25. Counsel referred to Binet v Island Development Committee [1987-88] JLR 514. In that case the appellant had been granted a planning permission in principle to construct an agricultural shed and house on a field in St Brelade subject to a number of design considerations. The appellant acknowledged that this permission was a non-statutory approval but submitted nonetheless that it was not open to the Committee to refuse to grant development permission unless it could be shown that there was some change of circumstance justifying the refusal, which did not include a change of policy. The appellant further submitted that he had acted to his detriment by electing to continue farming the field rather than selling it. The Court rejected the latter submission, but allowed the appeal on the basis that the Committee had acted inconsistently and unreasonably. The Court stated –

> ***"In the present appeal, there is no question but that the consent in principle, conveyed by the Committee, was one which it was entitled to grant. The words of the Committee, even though they may not be binding and may be subject to revocation, must be given due weight and, once they are pronounced, an applicant must be entitled to rely on them."***

26. Next, counsel referred to Coopers & Lybrand Deloitte v Island Development Committee [1992] JLR 70. That case concerned a town house constructed in about 1810 with a "frontage of townscape importance" which, if situate in England would, according to the Committee's expert adviser, have been listed as of special architectural or historic interest. Consent for demolition would only have been granted if it could be shown to be impractical to keep the building. The design of the building had arguably been influenced by a celebrated British architect, Sir John Soane. The President of the

Committee nonetheless regarded it as an "architecturally uninspiring building" and, in informal discussions with the appellant's representatives, had stated that it could be demolished. That statement was reinforced in a letter from a planning officer stating that "The Committee resolved … to accept in principle the demolition of Colomberie House and erecting in its place a new purpose-built office complex with associated parking/servicing and amenity area". The appellant was encouraged to submit detailed plans. Subsequently the Committee received further expert advice and many representations underlying the architectural and historic importance of the building, and refused permission for its demolition and replacement. The appeal was allowed on the basis that the Committee had the power to grant a consent in principle notwithstanding that there was no statutory basis for it, and that the Committee had acted unreasonably, given the positive encouragement from the President of the Committee, in refusing development permission for the demolition and reconstruction of the building.

27. Next, counsel relied on a passage from the judgment in Token v Planning and Environment Committee [2001] JLR 698 where the Court stated that a "legitimate expectation" was essentially an expression of the requirement for consistency and fairness in relations between the individual and the State.

28. Lastly, counsel referred to Trump Holdings Ltd v Planning and Environment Committee [2004] JLR 232 at 251 where the Court of Appeal, having considered Token, adopted from an unreported judgment of Scott-Baker J the summary of requirements to be met if a substantive legitimate expectation was to be established –

> ***"(i) that a clear and unequivocal representation had been made;***
>
> ***(ii) that the expectation is confined to one person or a few people, giving the representation the character of a contract;***
>
> ***(iii) that it is reasonable for those who have the expectation to rely upon it and that they do so to their detriment; and***
>
> ***(iv) that there is no overriding public interest that entitles the Representor to frustrate that expectation".***

29. Mr Benest submitted that all these requirements were satisfied. First, there had been clear and unequivocal representations to the Appellant that development on the site would be acceptable. Secondly, the representations had clearly been made to the Appellant himself. Thirdly, the Appellant had relied upon those representations in making an application for development permission and incurring the expense of having different sets of drawings completed to satisfy the various concerns of the Committee. Counsel also submitted that the Appellant had lost the opportunity to develop other options in relation to his land and property, although these options were not specified. Fourthly, it was submitted that there was no overriding public interest which ought to frustrate the Appellant's reasonable or legitimate expectation.

The Submissions of the Minister

30. We have set out the submissions of counsel for the Appellant *in extenso* because the Solicitor General contended that some of the decisions relied upon by Mr Benest could not survive the endorsement by the Court of Appeal of the Court's approach in Token, and were no longer good law. In Token the Court stated at paragraph 9 –

> ***"The Solicitor General submitted that the decision in Fairview Farm did not entitle the court to find that the Committee's decision was reasonable but quash it because the court had reached an equally reasonable but different decision. We agree. The court might think that a Committee's decision is mistaken, but that does not of itself entitle the court to substitute its own decision. The court must form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a qualitative difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the court thinks to be mistaken becomes so wrong that it is, in the view of the court, unreasonable."***

That statement of the legal test was endorsed by the Court of Appeal in Planning and Environment Committee v Le Maistre [2002] JLR 389 at 398 where Smith JA stated "I endorse and adopt that elaboration of the Royal Court's role on an appeal to that Court of the present kind". In Trump Holdings the same Judge of Appeal again endorsed

the test at paragraph 10 of the judgment and Southwell JA added at paragraph 69 –

> ***"In my judgment, the statement of the test under article 21 of the Island Planning (Jersey) Law 1964, as amended, contained in the Bailiff's judgment in Token (10) ([2001] JLR 698 at paragraph 9) is the correct statement of the test. It materially differs from the statement in this court in Fairview Farm (5) ([1996] JLR at 317). The difference is not merely a semantic one. The statement of the test in Token is the one which, in my judgment, should be followed by the Royal Court in cases arising under article 21 of the Planning Law, and the statement in Fairview Farm should no longer be followed."***

31. If that test were applied to the facts in Binet and in Coopers & Lybrand Deloitte we agree with the Solicitor General that it is difficult to see how the appeals could have been allowed. We do not think that these cases should any longer be regarded as good law.

32. The Solicitor General went on to contend that the doctrine of legitimate expectation should not be regarded as applicable to planning matters other than in exceptional circumstances. She relied upon two English cases in support of this contention, the latter of which was drawn to the attention of the Court in Trump Holdings.

33. The first English case was R (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC [2003] 1 P.&C.R. 5. It is unnecessary to relate the facts except to the extent that reliance was placed by respondent upon a statement by the County Planning Officer that planning permission was not required for a particular change of use; it was submitted that the counsel was estopped from taking a contrary stance. Lord Hoffmann stated at paragraphs 33 and 34 of his judgment –

> ***"In any case, 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] A.C. 578, 616, estoppels bind individuals on the ground that it would [be] unconscionable for them to deny what they have 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 U.K. Ltd [2000] J.P.L. 629, 637.)***

> ***There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see R. v North and East Devon Health Authority Ex p. Coughlan [2001] Q.B. 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see Coughlan's case at pp 254-255) while ordinary property rights are in general far more limited by considerations of public interest: see Alconbury."***

34. The second English case was R. v Leicester City Council Ex P. Powergen U.K. Ltd [2000] 80 P.&C.R. 176 (QBD) and [2001] 81 at P.&C.R. 47 (CA). In 1995 Leicester City Council had granted a planning permission to Powergen for the redevelopment of a large site for various commercial purposes subject to time-limits for the approval of various reserved matters. Powergen failed to comply with certain of those time-limits but contended that letters written by the Council's officers had waived or varied those limits so as to permit part of the development to be commenced even though other reserved matters were still outstanding. It was said that those representations by the Council's officers could be relied upon under the doctrine of legitimate expectation. Dyson J rejected that argument on the ground that the planning officers had no delegated power to vary or waive conditions to which the planning permission was subject. That decision was confirmed by the Court of Appeal.

35. Neither of these cases is directly in point, but they do indicate a reluctance of the English courts to apply the doctrine of legitimate expectation to the prejudice of public rights, even if representations have been made by officials of the relevant public authority. We agree with the Solicitor General, for the reasons set out in more detail below, that the doctrine of legitimate expectation has only a very limited application in the context of planning appeals. The question for the Court is whether the decision of the Minister was unreasonable in a Token sense.

Conclusions

36. In Trump Holdings Southwell JA stated at paragraph 69 (iv) –

> ***"Finally, I wish to make this general observation on the relevance of English planning case law to Jersey. In this small Island, with a rich but already diminished heritage of buildings of architectural, historical and scenic value, a decision to demolish such a building has greater impact than a similar decision in the larger jurisdiction of England and Wales. This is one reason why the Jersey authorities and courts may need to develop their own case law, and not merely follow the English cases."***

We respectfully agree, and we think that the time has come, as submitted by the Solicitor General, to re-appraise some of the earlier decisions of this Court in relation to planning appeals.

37. In our judgment public attitudes to the development of land have changed substantially in the last 60 years. Before the German Occupation there was no planning control. Triennial regulations introducing some controls on the development of land were enacted in 1947 and 1950. However, even after the enactment of the Preservation of Amenities (Jersey) Law 1952 and the Island Planning (Jersey) Law 1964 ("the 1964 Law") which replaced it, the attitude that a man's home was his castle, and that he ought to be free to do as he pleased with his own property was difficult to displace. Planning controls were an interference with rights of property. The judicial approach in the early cases was to regard planning appeals as giving rise to an issue between the appellant and the Committee. If the Committee had been inconsistent, or had erred procedurally, it would be overruled and the usual result was that development would proceed. The wider public interest was not given any significant weight.

38. The enactment of the Planning and Building (Jersey) Law 2002 ("the 2002 Law"), which came into force in most respects on 1st July 2006, seems to us to mark a watershed of which the courts should take cognisance. Its long title provides that it is a law "to provide the means to establish a plan for the sustainable development of land and to control development in accordance with that plan …". Article 3 imposes a duty on the Minister to prepare and present to the States for approval an Island Plan. The Island Plan is a significant document. Article 19(2) of the Law provides that "In general the Minister shall grant planning permission if the proposed development is in accordance with the Island Plan", although article 19(3) also confers a discretion to grant permission that is inconsistent with the Plan if satisfied that there is sufficient justification for doing so. The unwritten corollary is that applications inconsistent with the Island Plan will not generally be granted permission. Article 19(4) empowers

the Minister (for the first time) to grant planning permission in outline, and to reserve specified matters for subsequent approval.

39. The 2002 Law also imposes upon the Minister a wide duty of consultation with interested bodies and persons. An amendment to the 2002 Law recently adopted by the States will provide for appeals against the Minster's decision by third parties in certain circumstances. All this serves to emphasise that in a crowded Island it is now recognized that there are a number of stakeholders in the planning process. Unless there has been a due process, and the Minister has reached a considered decision, he should not be held to indications by officials or other informal promises or hints that a planning permission will be granted. Once land has been developed, its natural state has almost invariably been lost to the community for ever. None of this means that the Minister and his department can conduct themselves carelessly with impunity. If even an outline planning permission is revoked or modified the Minister will be liable to pay compensation.

40. The decision which gives rise to this appeal was made after the coming into force of the 2002 Law. Mr Benest contended however that the Appellant ought to have been granted development permission long before that date, and would have been granted permission but for an error on the part of the Committee. That contention was based upon the Committee's refusal to grant permission, noted at paragraphs 14 and 15 above, on 20th January 2005, on two grounds. On 26th May the Committee had conceded that the first ground of refusal relating to access could not be sustained. The second ground of refusal related to the scale and design of the houses. But by letter of 10th June 2005 the Case Officer had written to the Appellant stating that the Director of Planning had agreed to waive the fee payable on the application "in this particular case on the basis that had the access issue been resolved prior to the refusal of the application, then the Department would have negotiated the design details rather than refuse the application on that basis". It followed, counsel submitted, that but for the Committee's mistaken refusal on grounds relating to access to the site, development permission would have been forthcoming on 20th January 2005.

41. We cannot accept that contention because it ignores the fact that the land was still zoned as Important Open Space. It is clear from the Committee's consideration of the matter on 26th May 2005 that this factor was regarded as important. The Committee had accordingly resolved to take the matter to the States. Even if, hypothetically, the two issues which had formed the grounds for refusal on 20th January 2005 had been resolved at that time, the Committee would still have wanted to take the issue of zoning under the Island Plan back to the

States. It would not, in our judgment, have granted development permission in January 2005.

42. Nonetheless, because this matter has been drawn out over such a long period, and because the Minister's decision was made only seven weeks after the coming into force of the 2002 Law, we have also considered what the Appellant's position might have been under the 1964 Law. In our judgment, the decisions in Token and Trump Holdings make it clear that the court was already moving in the direction of the conclusion at which we have arrived in paragraph 39 above. In Token the court stated that "sensible administration would be paralysed if the Committee were to be precluded from giving any indication as to the likelihood of development permission being forthcoming by the fear that it would be held strictly to the last letter of its indication. Equally it would be very unfair upon neighbours and others with a legitimate interest in the application if an indication were to be construed as decisive of a subsequent formal application". The Committee was wrong, as recorded in the minutes of 26th May 2005, to have regarded itself as "bound by previous decisions".

43. How then are these principles to be applied to this case? As we indicated at paragraphs 19 and 20 above, the procedures adopted by the Committee left a great deal to be desired. It confused its planning function with its desire to assist the acquisition of land for the benefit of Grouville School. This was not, as it erroneously determined, a "planning gain". It was not a planning consideration at all. The result of this error was to give a clear impression to the Appellant that some form of development would be permitted on the northern part of Field 236A. Yet at that stage there had been no formal application, and consequently no opportunity for neighbouring owners or other interested parties to voice their objections. When those objections were voiced at the meeting of Planning Sub-Committee on 1st December 2004 and at the meeting of the Full Committee on 20th January 2005, officials were advising the Committee that the principle of some development had already been accepted. That was not fair to the objectors. It was a parody of due process. If the principle of development had already been decided, what was the point of hearing the objectors?

44. The Minister (as successor to the Planning and Environment Committee) has undoubtedly behaved inconsistently. Has this caused such unfairness to the Appellant that the Minister's decision should be regarded as Token unreasonable? In our judgment the answer to that question is no. First, the Appellant has not in any real sense acted to his detriment in reliance upon the indication that development permission would be forthcoming. He has incurred the expense of drawing up a number of applications and plans (and we revert to that

below) but that cannot be regarded as a serious detriment. Importantly, he did not purchase the land in question in reliance upon the indication. Secondly, the error into which the Committee fell on 22nd January 2004 was instigated by the Appellant himself. That does not excuse the Committee, but equally the Appellant must bear some responsibility for making a suggestion which the Committee could not properly accept.

45. The Minister clearly paid careful regard to the indications given to the Appellant in early 2004. The affidavit of Mr Webster establishes that the Minister was clearly embarrassed by the unsatisfactory nature of the planning process. He was aware of the indications given to the Appellant on several occasions that the Committee had approved the principle of some development on the northern part of the field. He weighed those matters in the balance against the clear imperative of the relevant policy under the Island Plan and the other representations which he had received, and determined that the application should be refused. We cannot find that the Minister's decision was unreasonable on the ground that it was unfairly inconsistent with the "permission in principle" or earlier indications that development permission would be granted.

46. We turn to the second main ground of appeal, namely that the Minister's decision was unreasonable because the proposed development of two houses would not result in any significant loss of open space so as to affect the character and amenity of the area. In support of that ground of appeal, it is clear that the view of some of the officials in the Planning Department was that the loss of open space was not significant. There is some evidence, although it is not entirely clear, that at one stage prior to the interest of Grouville School in the area for playing fields there was a suggestion that it should be zoned as part of the Built-Up Area. On the other hand the power to grant planning or development permission is vested not in officials but in the Minister. The Minister had also to weigh in the balance all the considerations set out in paragraph 45 above. Applying the Token test we cannot find that the Minister's decision was unreasonable, and the appeal must accordingly be dismissed.

47. We feel constrained to add, however, that the Appellant has legitimate cause to feel disappointed. Mr Webster's second affidavit indicates that, in the event that the appeal is dismissed, the Minister would be prepared to consider a claim in respect of the Appellant's abortive expenses in pursuing his application. This appears to us to be an entirely appropriate reaction, and we express the hope that, in all the highly unusual circumstances of this case, the Minister will see fit to make a suitable *ex gratia* payment in that respect.

Authorities

Jersey Island Plan [2002] BE8 and B2.

Scott v Island Development Committee [1966] JJ 631.

Wightman v Island Development Committee [1963] JJ 315.

Le Maistre v Island Development Committee [1980] JJ 1.

Binet v Island Development Committee [1987-88] JLR 514.

Coopers & Lybrand Deloitte v Island Development Committee [1992] JLR 70.

Token v Planning and Environment Committee [2001] JLR 698.

Trump Holdings Ltd v Planning and Environment Committee [2004] JLR 232.

Planning and Environment Committee v Le Maistre [2002] JLR 389.

R (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC [2003] 1 P.&C.R. 5..

R. v Leicester City Council Ex P. Powergen U.K. Ltd [2000] 80 P.&C.R. 176 (QBD) and [2001] 81 P.&C.R. 47 (CA).

Preservation of Amenities (Jersey) Law 1952.

Island Planning (Jersey) Law 1964.

Planning and Building (Jersey) Law 2002.