[2012]JRC008

ROYAL COURT
(Samedi)

6 January 2012

Before : **W. J. Bailhache, Q.C Deputy Bailiff, and Jurats Clapham and Marett-Crosby.**

Between	**Ruette Pinel Farm Limited**	**Appellant**
And	**Minister for Planning and Environment**	**Respondent**

Advocate M. T. Jowitt for the Appellant.

H. Sharp, Esq., HM Solicitor General for the Respondent.

JUDGMENT

THE DEPUTY BAILIFF:

Preliminary

1. In 2010 the appellant submitted to the respondent an application to demolish the existing restaurant at Zanzibar, Le Mont Sohier, St Brelade, to construct a dwelling and to refurbish the existing cottage. The planning officer concerned with considering the matter and preparing a report for consideration by the Minister identified that the site address fell within the built-up area, and formed part of the green backdrop zone on the Island Plan. It was also identified that the existing cottage (Mimosa Cottage) was a building of local interest. The planning officer noted that Policies G2 (General Development Considerations), G3 (Quality of Design), G13 (Buildings and Places of Architectural and Historic Interest), G15 (Replacement Buildings), BE10 (Green Backdrop Zone), and H8 (Housing Development within the Built-Up Area) all applied to this particular application. The papers before us show the planning officer noted the site did not lie within the designated shoreline zone.

2. The officer reported that the architecture of the proposed dwelling was innovative and competent, maximising the potential for views out to sea from almost every element of the new building. He added:-

> *"However, the grain and general style of development along this part of St Brelade's Bay is of a more intimate form, with relatively modest units set within reasonable curtilages with no single property standing out from its neighbours. The proposed new dwelling, at 22, 000 square feet occupies the majority of the site and would be set over three stories above ground level stepping up the slope towards the road from the promenade. The series of bold, rectangular volumes, set in a staggered pattern along the site axis, would present a strong dominant image, particularly when viewed from the seaward side but also in more distant views from the western and eastern arms of the bay. The Department does not consider this size and form of development to be appropriate to this particular site within the sensitive St Brelade's Bay area. Moreover, there are issues relating to diminution of neighbour amenity and impact upon the character and setting of the registered cottage, Mimosa".*

3. The officer's recommendation was for a refusal of the application and the application was duly refused, notwithstanding that before the application was submitted, the appellant had apparently undertaken pre-planning consultations with both the Minister and the planning and environment department about the proposed scheme and no objections had been raised. It is clear however that when notice of the application was published, a number of objections were lodged by members of the public, principally from neighbours of the site.

The Second Application

4. Following that set-back, the appellant procured that a revised scheme be produced which addressed the objections. The changes resulted in the size of the building being reduced to approximately 18,500 square feet; the proposed building was reduced to a 2 storey property with a flat roof, and a considerable amount of the mass of the building lowered into the landscape resulting in just under 50% of the area of the property being underground. Other steps were taken to ensure that the building was considerably lower than the design of the 2010 application and indeed the proposed development was lower than the ridge height of the existing Mimosa Cottage. Other changes were made to the design in the light of the objections received.

5. The appellant then arranged for a meeting to take place between its representatives and former Senator Cohen, the Minister for planning and environment at that time, Mr Peter Thorne, the then director of planning at the planning and environment department and Mr David Cox, the planning and environment department architect (the

"department architect"). The meeting took place at the department's offices and the purpose of the meeting was to discuss the various projects of the company Dandara Jersey Limited. The revised scheme was produced and apparently was received extremely positively by the Minister and the officers of the department who were present. The Minister is alleged to have said that he was very pleased to see there had been a significant reduction in the scale and mass of the proposed scheme. He apparently said that he thought the application process would be helped by having the existing and proposed models available to show changes in the design.

6. The appellant then arranged for its representatives to meet Senator Ferguson, who is a near neighbour, and former deputy Jeune on site to present the revised scheme, and subsequently other near neighbours of the Zanzibar site. The revised plans were shown and we are told that the appellant's impression was that the changes which were proposed were now viewed positively by the neighbours at the site meeting. Changes were made to the proposals to accommodate a couple of the concerns which the neighbours expressed.

7. A further meeting took place on 11th February, 2011, between representatives of the appellant, the Minister, the department's director of planning, the department architect and Mr Marcus Binney, the Chairman of the Jersey Architecture Commission. This meeting took place at the offices of Dandara in St Helier. The department architect and Mr Binney then went to the site and in particular viewed it from the beach. Mr Binney suggested revisions to the south elevation of the proposed building to make the roof line of the building fall in line with the eaves line of adjoining properties. We are told these revisions were incorporated into the design and the proposed scheme as revised, including a revision which introduced a green roof-scape to the building by the introduction of a bio-diverse roof to the property, was submitted on 3rd March, 2011.

8. On 9th March, representatives of the appellant met again with the Minister and with the department architect at Dandara's office in St Helier. Again the meeting had been arranged to discuss various projects which Dandara was pursuing. The changes to the scheme for the Zanzibar site arising from the consultations which had taken place were shown to the Minister. The appellant's representatives thought the meeting was extremely constructive. The department architect confirmed that he was now satisfied with the scheme and that he supported the architectural style. The Minister is alleged to have said that if the Jersey Architecture Commission and Mr Binney in particular were supportive of the modified scheme, then it would make his decision very much easier.

9. A meeting of the Jersey Architecture Commission apparently took place on 4th April, 2011, and was attended by the appellant's representatives. The revised scheme was presented in detail. The appellant's representatives were informed that the Jersey Architecture Commission considered the revised scheme to be extremely good, and a good response to the refusal of the earlier scheme. Mr Binney is alleged to have wished the appellant's representatives good luck with the development and stated that he looked forward to the building being built.

10. The 2011 application was advertised in the usual way and it appears that there were seven objection letters received by the department as a result. A common theme amongst the objections was the scale and mass of the development, what was alleged to be an over development of the site, and a design that was too modern for the context in which it would be sited.

The Public Hearing

11. The Minister held a public hearing on 10th June, 2011, for the purposes of considering the planning application submitted by the appellant. The Minister had before him a report from the same planning officer who had prepared the report in relation to the first application, details of which are given above, this report being dated 24th May, 2011. The summary/conclusion starts in this way:-

> *"The architecture of the proposed dwelling is innovative and competent, maximising the potential for views out to sea while minimising the building's impact when viewed from the road or promenade/beach. The bespoke nature of the proposal pays due regard to the amenities of neighbouring residents and should not result in an unreasonable degree of overlooking or general loss of privacy. Although the overall structure remains relatively large, the majority of the building's bulk is along its side flanks and not on the more visible northern and southern elevations.*
>
> *The series of bold, rectangular volumes, set in a staggered pattern along the site axis, presents a strong, dominant form which was commended by the Architecture Commission."*

12. There is no reference to any comment in relation to this part of St Brelade's Bay containing relatively modest units set within reasonable curtilages with no single property standing out from its neighbours, nor is there any mention of potential impact on the character and setting of the registered building of local interest, Mimosa Cottage.

The recommendation was for the application to be approved, analysis being made of the same Island Plan policies as had been mentioned on the earlier application, although in terms of zoning, it was now mentioned that the site address fell within the water pollution safeguard area, and contained a potential listed building.

13. The minutes of the Ministerial hearing of 10th June then go on to say that a site plan, drawings and models were displayed. After a presentation from the architect, with comments by the department architect, who considered the proposal to represent a fine piece of contemporary architecture, there were comments from the public – the Connétable of St Brelade, representing both parishioners and neighbouring property owners commented that the building was still considered to be too large, the architecture incompatible with its surroundings, and inadequate provision had been made for parking. Deputy Jeune, as she then was, referred to her amendments to the draft Island plan and considered that there should be no change of use from commercial to residential. The deputy also expressed concern about a lack of parking. Two neighbours then spoke to indicate that the proposal was too large and out of character with St Brelade's Bay. Deputy Tadier spoke to indicate that there was a need to examine the Bay in a holistic way. He considered the present proposal was out of character with the existing pattern of properties in the Bay and was far too large. Senator Ferguson, who was of course not only a Senator but a neighbour was concerned at the potential loss of light and overlooking which would occur, and she was concerned about the contemporary design proposed, which she thought was out of character with the area, as well as expressing other concerns.

14. After receiving comment from the appellant's architect, the minutes conclude:-

> *"The Minister indicated that he particularly took into account the views expressed by the Connétable of the parish, which he considered was an important factor in such applications. Although the scheme was considered by the Minister to be a fabulous piece of architecture, he stressed that great architecture did not always lead to permission being granted. Whilst it might be considered inevitable that a significant house would ultimately be constructed on this seaside site, in view of the level of political opposition to the present application, the Minister refused it accordingly."*

15. These minutes are not dissimilar from the notes made by one of the appellant's representatives who thought the Minister said this:-

"Whilst my views on the importance of the Constable have been criticised in the past, it will again be contentious today.

With the presence of the Constable of St Brelade's the Minister acknowledged that his views were of utmost importance as the acting father of the parish. The role of the Constable is an historical post which was material to him.

With the political representation and Constable on show and sat so close to him today was like the pincers of a bull-horn from Zulu! Where they quickly gather round and close out.

Whilst it is a great design by a great architect, it won't be today! On that basis I am refusing this application."

16. It is noted that the Minister himself made an entry on his Twitter page the same day where he stated:-

"Planning hearing today. Refused Zanzibar as lots of objections from Connétable and Deputies. Good architecture doesn't guarantee a consent."

The Reasons

17. That the Minister gave an immediate decision to refuse the application notwithstanding the planning officer's recommendation for approval must have come as something of a surprise to the planning officers because the established protocol was that if the Minister were minded to go against a recommendation of his officials, which he was absolutely entitled to do, there would be a reservation of the decision so that he could at least have the opportunity of further discussions with them as to his reasons prior to the decision being given.

18. On 24th June the appellant's architects received the formal refusal notice. That came under cover of a letter signed by the applications officer and dated 13th June. Annexed to the letter was the formal refusal notice which was dated 10th June and gave three reasons for the refusal:-

"(i) The proposal represented an unacceptable scale and mass of development within a restricted plot width being likely to unreasonably affect the character and amenity of the area. The

proposed dwelling would fill a significant proportion of the site, leaving very little space between the dwelling and the site boundaries, thereby substantially altering the form and urban grain of this part of St Brelade's Bay which retains a loose and relatively intimate scale and grain of development. The Department considers that the proposal is, therefore, contrary to the provisions of policies G2, G3, G15 and H8 of the Jersey Island Plan 2002.

(ii) The proposed development is likely to have an unreasonable impact on the amenities of nearby residents by virtue of overlooking and by presenting an overbearing appearance. The proposal is, therefore, considered to be contrary to the provisions of policies G2 and H8 of the Jersey Island Plan 2002.

(iii) On the Jersey Island Plan, 2002, the site lies within the Green Backdrop Zone and it is considered that the scale and mass of the proposed building development relative to open space and natural vegetation on this prominent site in the Bay would unreasonably harm the character and amenity of the area and would be contrary to the provisions of policy BE10 of the Island Plan."

19. It is immediately to be noted that these reasons for refusal do not appear to be in quite the same terms as the reasons expressed by the Minister on the day.

20. The formal refusal notice was, we are told, dated 10th June, 2011, because that was the date on which the Minister decided to refuse the application. In fact it was drafted shortly after the hearing by the planning officer who on 16th June presented the draft reasons for refusal to the Minister for his approval before the issuance of a formal decision notice. We are told the Minister refused to approve the reasons as drafted because he had, he said, refused the application because of the level of political pressure and not because of inappropriate design. The officer's file note is as follows:-

"Minister stated that the reasons were not his reasons and that he didn't agree with them. AC asked what reasons should be given and the Minister said just to say that 'He had given in to political pressure'. AC stated that this isn't a proper reason for refusal, but the Minister said that it is!!

AC asked Principal Planner for guidance who then put it to the Director."

21. The draft reasons which were put before the Minister at that time were very similar to those which were ultimately issued, but both the first and third reasons now referred to problems over the scale and mass of the proposed development whereas the draft referred to an over development of the site with the size extent bulk and layout within a restricted plot width being likely to affect unreasonably the character and amenity of the area and amount to over dominance of the building development relative to open space.

22. As a result of the planning officer's discussion with the Minister, the director of development control sent an e-mail to the Minister on 22nd June. In it he said:-

"As I understand the situation, [A] drafted some reasons for refusal which you were not happy with. It was suggested to me that you wanted to refuse the application for 'political' reasons. I assume that this message cannot be correct because I know that you are aware that the Planning and Building Law requires you to take into account material planning considerations in arriving at a decision and does not permit you to consider matters which are neither material, nor planning considerations.

Can I assume that this was an error of communication and that we may proceed to issue the refusal notice on the drafted basis…"

23. The copy of the e-mail shows a manuscript record of a telephone conversation between the director, development control and the Minister the same day some 15 minutes later when the Minister clarified that it was the "scale and mass" of the development which he wished reflected in the reasons for refusal, hence the form of notice which was issued, presumably that day, and received by the appellant's architect two days later.

24. If that were not confusing enough as to the reasons for the decision which had been taken, the Minister wrote to the appellant's architect on 4th July:-

"At the public hearing of 10th June, 2011, I refused the Zanzibar application due to the level of objection from the Connétable and Deputies present. I specifically stated that my

primary reason for refusal was the level of political objection on this prominent site. I must add that the scheme would benefit from a little breaking up of the massing.

During the Island Plan debate period it would seem that a refusal was issued by the Department and that the main reason stated in the refusal related to design, massing and scale. This I think occurred as the usual procedures for checking significant written determinations were under pressure due to the intensity of the debate. I wish therefore to record that the scheme is a highly competent piece of architecture.

As my resignation is being announced tomorrow I wanted to clarify the position with regard to the reasons for my refusal".

25. The second paragraph of this letter indicates that the refusal notice which was actually issued was sent out at a time when the usual procedures for checking significant written determinations were under pressure due to the intensity of the debate on the Island Plan. It is not clear whether that meant that the Minister regarded the reasons contained in the formal refusal notice to be accurate or not. The appellant's representative wrote back to the Minister the same day to indicate an assumption from the Minister's letter that, but for the level of political objection, he would have been minded to grant the permission sought either absolutely or subject to conditions. The Minister was put on notice that the appellant was considering an appeal.

26. The Minster responded as follows:-

"I must answer honestly as you have raised the question.

The political objection was the most significant factor in my decision. The Constable personally made a strong representation and this was supported by Deputies and a Senator.

It was not the only factor as when I saw the model I did feel that the massing would have been improved by breaking the roof of the main building a little.

To a certain extent the question is hypothetical as had there not been political representation there could feasibly have been private objections as private potential objectors may have felt adequately represented by the political representatives."

27. The Minister went on to say that he was impressed with the proposed architecture. The appellant asked the Minister to confirm that the "breaking up the roof of the main building a little" was not a reason for refusing the scheme and could have been dealt with as a condition to the permit, but the Minister responded to say he had nothing further to add.

The grounds of appeal

28. The appellant brought the appeal on two grounds:-

(i) The decision was fundamentally flawed on planning merits. It was one that was so unreasonable that it could not stand.

(ii) There was marked procedural unfairness. The irregularities were that the decision had not been reached on genuine planning grounds, but instead had been reached on political grounds. It was alleged that notwithstanding irrelevant matters had governed the decision, ex post facto the planning officials had attempted to invent some reasons which were capable of being defended. This obfuscation of the true position was said to be made worse by misleading dates on both the refusal notice and the covering letter. It was said that in effect the appellant, which was entitled to receive a planning decision on its application, had in fact not received any decision at all because no proper consideration had been given to it.

29. We take these two grounds of appeal in reverse order, as they were taken in that way by the appellant at the hearing. The appeal has not been taken under the modified procedure but was listed for a full hearing, and that indeed has taken place.

Process

30. It is right to start by saying that in argument, and indeed in the skeleton lodged with the Court, the Minister accepted that the procedure in the case was unsatisfactory to the extent that the Royal Court was entitled to intervene. In particular, it was accepted that there were difficulties arising from the fact that the Minister had personally provided the appellant with pre-application advice on four occasions in 2011, which apparently encouraged the applicant, and then the Minister himself sat at the public hearing in order to take the final decision. It was furthermore conceded that while the factual

circumstances are not entirely clear, the evidence reveals a real risk that the Minister took into account non-planning considerations when he reached his decision.

31. In our judgment, these concessions were very properly made. We have set out the facts of what took place in some detail because we consider that there are important lessons to be learned by those responsible for planning decisions and those advising them. We note that in his second affidavit, the former Senator Cohen maintained the view that political representation is capable of being a valid consideration for a planning Minister to take into account.

32. The starting point is that, subject to any delegations properly made, the Planning and Building (Jersey) Law 2002 ("the Law") charges the Minister with the grant or refusal of planning permission. Article 19 of the Law sets out how the Minister – and this applies also to his delegates – is required to go about the consideration of an application for planning permission:-

> ***"(1) The Minister in determining an application for planning permission shall take into account all material considerations.***
>
> ***(2) In general the Minister shall grant planning permission if the proposed development is in accordance with the Island Plan.***
>
> ***...."***

33. The Island Plan contains a written statement of the policies in respect of the development and use of land together with a reasoned justification of each of those policies. It is approved by the States. The policies which the plan contains must support the purposes of the law as set out in Article 2. The reference in Article 19(2) of the Law which requires the Minister to grant planning permission if the proposed development is in accordance with the Island Plan shows that political representations, of themselves, could not possibly, on any view, be material considerations. It is obvious that there may from time to time be politicians who do not agree with what is in the Island Plan, which is after all approved by the States by a majority. It could not ever be material to the Minister's consideration of an application that a representation was made by a politician that no approval ought to be given. To say that the fact a representation was made politically was a factor that could be taken into account could

therefore be a step on the way to departing from what Article 19(2) of the Law requires. Furthermore, to accept such a proposition would be to accept that a Minister could have regard to the possibility of keeping or losing his ministerial post in deciding whether or not to grant an application which under the Law is his function to consider. That function is entrusted to him and his delegates under the terms of the Law and he can only and must perform that function within the four corners of the Law.

34. It is therefore not a material consideration that representations are made by politicians as opposed to other members of the public, whether those politicians be Senators, Deputies or the Connétable of the parish where the application site lies. For the avoidance of doubt, the Connétable has no special status to which respect should be given by the Planning Minister. If he gives voice to invalid planning considerations, they remain invalid and should be disregarded, just as a clamour of immaterial considerations raised by members of the public, his constituents, should be disregarded.

35. Of course, nothing we have just said indicates, either, that the Minister is to ignore representations from politicians any more than he should ignore representations from members of the public. His duty is to consider all representations to the extent that they contain material planning considerations, but otherwise to ignore them.

36. In this case, it is at best wholly unclear, as the Solicitor General has conceded, as to whether the Minister took into account the fact that the representations were made by politicians as a significant factor in his decision taking process. The formal grounds of the refusal do not indicate that to be so. The correspondence from the former Minister suggests that at least some of the formal grounds of refusal may have played a part in the decision taking process. But on the other hand, the reasons which he announced at the time, his posting that day on his Twitter site and, most significantly, his maintaining the view as late as November 2011 in his second affidavit that political representation is capable of being a valid consideration, particularly when coupled with the internal file note of the planning official on 16th June indicate to us that there is a very grave risk that immaterial considerations were taken into account and this would amount to a serious irregularity.

37. We think the position is worse than that, however. Where the Minister takes a decision personally on a planning application, which under the Law he is entitled to do, he has to have regard to the purposes of the Law and the public interest considerations which arise out of the Law and the application of the policies in the Island Plan. That will sometimes involve adjudicating on competing representations made by the applicant contrasted with objections from members of the

public. It is not the job of an adjudicator to give advice to one of the parties on how best to secure adjudication of the application in favour of that party. It is wrong in principle for the Minister to have private meetings with a developer or applicant prior to the application being submitted. It is no answer to this to say that the Minister may depart from whatever he has said in such private meeting. It may not be the case, as a matter of law, that he is easily permitted to depart from a view which he expresses in a private meeting of that kind. On many occasions, the applicant may incur expense directly as a result of the comments which the Minister has made and it would be unfair to the applicant not to hold the Minister to account for the indications which he has given. Even by his silence, the Minister may at such a meeting indicate lack of opposition or even approval, and it is hard to see how in practice a Minister would expect not to make a contribution when shown a particular plan and asked for his view. In this case, it was yet worse because it appears that the Minister did not always see the applicant at his own offices in the planning department. The basic point however, is that the Minister is adjudicating on where the public interest lies as between applicant and objector and it is not right that he should see either of them on his own and give them advice.

38. This was not appropriate conduct by the Minister and both he and his planning officials should in our judgment have known better than to permit this to happen. It was a serious irregularity.

39. We have other procedural concerns. We do not understand why the formal report of the planning official that the first application should indicate that "the grain and general style of development along this part of St Brelade's Bay is of a more intimate form, with relatively modest units set within reasonable curtilages with no single property standing out from its neighbours" and yet omit that statement – which appears to us to be significant – from the report of the second application which proposed approval. It clearly cannot have been forgotten because the language of the second application "substantially altering the form and urban grain of this part St Brelade's Bay which retains a loose a relatively intimate scale and grain of development" appears in both the draft refusal notice which was originally unacceptable to the Minister and in the final refusal notice which was sent out and received by the applicant company on 24th June. Furthermore, the comments made by the Minister at the time the application was refused would seem to indicate that it was the level of political opposition which was the basis for refusal. If that were so, as it certainly appears it might, it would have been no part of a planning officer's job to attribute to the Minister different reasons in the formal grounds for refusal of the application than those which actually governed his decision. We have not heard from the planning officers in question other than by their affidavit evidence, and as their

reasons for their various actions have not been identified, it would be wrong to attribute improper motives to them. Nonetheless, there is enough which is of concern on a matter which is fundamentally important to the administration of government in this Island that we emphasise that any civil servant can and should advise his Minister, whether in a planning context or otherwise, of material legislation and good practice which governs the taking of a ministerial decision; and can and should in advance of the decision being taken set out reasons on the merits why the decision might be taken in one way or another. Once the Minister has taken his decision, the reasons for the decision are those of the Minister and the Minister alone and he should stand or fall by them. If those reasons are illegal or unreasonable or indefensible, the decision may be struck down and the Minister will have to carry the political criticism that may flow from that course of action. That is a necessary part of systemic good government. If it were the case here – and we make no finding because we have not heard all the evidence directly – that a planning recommendation to the Minister was tailored in advance to what the Minister wanted to decide or that reasons for the ministerial decision were dressed up after the event to give an appearance of legitimacy, that would be wholly unacceptable conduct by officials.

40. We deal with one further matter which Advocate Jowitt raised namely as to the dates on the various documents. We understand why the date on the formal refusal notice is given as the date when the Minister announced the refusal in open session. That seems to us to be quite understandable. The date should reflect the date of the refusal, just as the reasons should reflect the reasons which he gave. As to the date of the letter by which the formal refusal notice was transmitted, we think that there was nothing sinister in that being dated some seven days before it was actually sent, although we do think that it was sloppy. We have assumed that the letter was prepared on the basis that the refusal notice would be ready in short order, and when there was a delay in settling the terms of the refusal notice, the letter should have been re-dated but was not.

41. Planning decisions are nearly always very important both for the applicant and for those in the immediate vicinity. They can sometime carry great value, whether positively or negatively both for the applicant or for those in the immediate vicinity. For these reasons, proper process is vital. It is essential that the process is transparent, is objective and is reasonable. We are not satisfied that the process which has been adopted in the case of this application meets any of those criteria.

42. Article 109 of the Law lays down:-

> ***"(1) An appeal under chapter 2 may only be made to the Royal Court on the ground that the action taken by or on behalf of the Minister was unreasonable having regard to all the circumstances of the case."***

43. That includes an appeal in relation to a refusal to grant planning permission. We come on to consider the nature of the appeal in relation to the merits later in this judgment, but we note that serious procedural irregularity has been treated as vitiating a decision under Article 109 of the Law and under its predecessor Article in the Island Planning (Jersey) Law 1964 which was in similar terms. This is unsurprising because if there is a serious procedural irregularity, it cannot be said that the decision of the Minister was reasonable in all the circumstances. Reasonableness includes a proper and regular process in dealing with an application.

44. We come to the consequences of irregularity later in this judgment, but we now turn to the merits.

The merits

45. Before we turn to detailed consideration of the submissions put to us in this case, it is right to reiterate the legal test which we must apply, having regard to the terms of Article 109 of the Law. We apply the test as set out in Island Development Committee-v-Fairview Farm Limited [1996] JLR 306 as elaborated by the passages in the Royal Court's decision in Token Limited-v-Planning and Environment Committee [2001] JLR 698, as approved by the Court of Appeal in Planning and Environment Committee-v-Le Maistre [2002] JLR 389 and by the majority of the Court of Appeal in Trump Holdings Limited-v-Planning and Environment Committee [2004] JLR 232.

46. First of all, we cannot escape the responsibility of forming our own view, as so directed by the Fairview Farm case. Having formed that view, we must consider then whether the Minister's decision was unreasonable in all the circumstances.

47. If we approached the matter upon the basis that the reason for the Minister's decision was the fact of political as opposed to any other objections, then it is clear that we would not regard the decision as reasonable. For the purposes of the appeal on the merits, we have assumed the reasons to be as set out in the formal notice sent on or about 22nd June to the appellant's architect. We think it is helpful in any event to do this in the light of the decision which we have reached, and which will be set out in more detail later in this judgment, to remit the matter to the Minister for his consideration. In

doing so, we do not intend to constrain the Minister, neither do we intend to usurp his decision taking function. Our comments will be limited, but nonetheless we think may be helpful.

48. If this particular refusal of permission had been firmly grounded in the reasons which are set out in the notice of refusal, we would not have allowed the appeal on the ground that the Minister's decision was unreasonable. In our judgment, a decision to refuse this particular application – and we emphasise we are not saying that the Minister ought to refuse it, because that is entirely a matter for him – can be justified by the reasons which are contained in the formal notice of refusal dated 10th June, 2011. We have reached that conclusion because we have had regard to all the papers put before us including the artist's impression of what the proposed building would look like, and the model which has been prepared. In our view, a conclusion by the Minister – if he were to make it and that is entirely a matter for him – that the proposed development is of a size and mass which is out of proportion to the size of the site and to the area, and in effect amounts to an over-development of the site, would fall within the parameters of reasonable decision taking by a Minister charged under the Law with a function of taking a decision. We do not say that the proposed building is too big or that the mass is too great or that this is an over-development of the site but we do say that it is not unreasonable to reach that view, were the Minister to reach it.

49. We think it would be helpful also to put the matter the other way around. If the Minister had granted the application and we were dealing with an appeal by third parties, the question would be whether the Minister's decision to grant the application would be unreasonable in all the circumstances of the case having regard to the legal tests which we have mentioned. In our judgment this is a closer call, and we prefer not to express any firm conclusion on it. But there is no doubt that the proposed building is very dominating of the area. There is in our view no doubt that the parking provision which has been made is surprisingly little, particularly if that is to be shared with Mimosa Cottage. We note that an 18,000 square foot house taking up the entirety of this site, or very nearly, would make a huge impact on the area.

50. The vibrancy of the objections in this case which we are told included one or more of the neighbours taking advice as to whether or not to join in to the appeal leads us to think that if we were to express no view on the merits, further costly and potentially wasteful appeals might be made. Nonetheless, at the end of the day, it is for the applicant to determine whether the existing application is the application it wishes to have considered by the Minister or whether it

wishes to make further revisions to accommodate any of the comments which are made in this judgment.

51. In the light of the fact that the Minister is a corporation sole and in the light of the former Senator Cohen's approval of the modernity and style of the design, supported as it was by the Jersey Architecture Commission and the states architect, we would be surprised if design and modernity were to be a feature in any objections which are made in the future, and we think it might be difficult to justify as reasonable any refusal of permission based on these grounds particularly because we do not understand the notice of refusal of 10th June to set out these grounds as relevant to the refusal at that time.

52. Of course, any fresh consideration of an application is going to take place having regard to the Island Plan approved in 2011 rather than the Island Plan of 2002 and we cannot be sure what differences, if any, between the two plans might be significant as we have not been addressed on it, although we are told by the appellant that there are no changes of significance to this application. However, we would be surprised if objections relevant to the policies underlining the Green Backdrop Zone in the 2002 Plan would lead to any refusal of permission, and it might well be that it would be unreasonable to view the application which was refused in June 2010 as being contrary to the provisions of policy BE10 of that plan. It does not appear to us that the scale and mass of the proposed development really has an impact on the undeveloped part of the Bay which lies within the Green Backdrop Zone. It is the scale and mass vis-à-vis the neighbours which appears to us to be more significant.

The remedy

53. As we have indicated, we intend to remit this matter to the Minister for fresh consideration, having quashed the decision which has been taken. We need now to explain our reasons as a matter of law as to why we think we are able to do this, and also as to why we have exercised our discretion in the way we have.

The Law

54. Article 113(3) of the Law provides:-

> ***"On the appeal the Royal Court may –***
>
> ***(a) Confirm the decision of the Minister; or***

(b) Order the Minister to grant the permission, amendment or certificate sought subject to such conditions as the Royal Court may specify.

(4) The Minister shall comply with an order made under paragraph 3(b).”

55. These provisions were considered by the Royal Court in Premier Tour Limited-v-Planning and Environment Minister [2007] JLR 286. At paragraph 23 of the Royal Court’s judgment, Commissioner Clyde-Smith said this:-

“It would appear, for example, that under Art 113(3) of the Planning Law, the Royal Court would have no power to quash a decision of the Minister and remit the matter back to him where it had found procedural error. We comment on this below. Whether the Royal Court has an inherent power to do so (i.e. by way of judicial review), notwithstanding the provisions of Article 113(3) was not a matter that was argued before us.”

56. Earlier at paragraph 20 of the judgment, the Commissioner had said that Article 113(3) of the Planning Law restricted the Royal Court to two options, either confirming the decision of the Minister or ordering the Minister to grant the permission subject to such conditions as the Court specified. At the end of the judgment, the Commissioner indicated that the Court was very concerned with the limitations placed upon it by Article 113(3) and recommended that these provisions of the Planning Law be reviewed and the Planning Law amended.

57. By contrast, in Dunn-v-Minister for Planning and Environment and Dandara Jersey Limited [2009] JRC 237, the Royal Court, differently constituted, was dealing with a decision which was attacked on mixed grounds of inadequate process and the effect of that process on the merits. The Court determined that the appeal by the third party succeeded, and remitted the matter to the Minister for further consideration. The powers of the Court under Article 114(8) of the Law when dealing with a third party appeal do not seem to include a power to remit to the Minister any more than those powers conferred by Article 113(3). Although strictly the Court was dealing with a different type of appeal, brought under different articles of the Law, the underlying point seems to us to be the same and we therefore have decisions of the Court going in different directions in the two

cases. We add however that in the Dunn case, the Court does not seem to have been addressed at all on whether or not there was power to remit. The basis for the remittal appears to have been that the Court did not feel it had sufficient information available to it to be comfortable in making a judgment on the acceptability of the applicant's proposals.

58. Respectfully, we will depart from the decision of the Royal Court in Premier Tour Limited-v-Planning and Environment Minister [2007] JLR 286 and we now give our reasons for doing so.

59. First of all it is absolutely right to note that the appeal in the Premier Tour case was dealt with under the modified procedure. That means that the time for the appeal was necessarily short albeit that it was extended. It is clear that the Court was not given any detailed argument of whether there was a power to remit. At paragraph 22 of its judgment, the Court indicated that:-

> ***"In the short time available for this hearing, we were unable to explore with counsel the policy considerations that lay behind the decision of the legislature to give the Royal Court wider powers when dealing with an appeal against the grant of a planning permission than with an appeal against a refusal. In particular, the Royal Court was not therefore shown the history of the legislative amendments which led to the current position, and, as the Solicitor General put it, the relevant point of law crept up on the parties and no doubt on the Court."***

60. It is also right to note that it is not as if the Court reached an obviously unreasonable conclusion. The terms of Article 113(3) do appear to give the Royal Court two options, and it is a normal principle of construction that if the legislature includes particular provisions, then it intended to exclude other provisions. So on an abbreviated appeal, with the point creeping up at short notice, it is entirely unsurprising that the Royal Court reached the view in the Premier Tour Limited case that it did.

61. We think there are several reasons why this construction however is incorrect. As one of the less important signals in Article 113(3), we note that the terms are permissive and not mandatory. If the language used had been that the Royal Court "shall", there would have been a strong argument for saying that the Royal Court had to do either one or the other. It does not say that.

62. If there were to be judicial review of a planning decision, the remedy for a successful applicant would normally be a quashing of the decision and a reference back to the Minister. In Steenson-v-Minister for Planning and Environment [2009] JLR 427 at paragraph 26, the Court noted in passing that there must be some doubt as to the extent to which judicial review was available in terms of challenging a planning decision in Jersey. The reason for that comment lay in the policy of not permitting judicial review where there is an alternative remedy, and the ground of appeal under Article 109 of the Law would seem to cover most bases on which judicial review might otherwise be considered – it would certainly seem to cover any decision which was irrational or procedurally irregular, and in our view if a decision were illegal it must also be unreasonable. So we have approached the present problem against the background that the Court will be dealing with challenges to administrative planning decisions pursuant to Article 109 and Chapter 2 of the Law and not by way of judicial review. Furthermore it would be intrinsically undesirable to have different remedies available depending upon the different form of action that was adopted.

63. There is no doubt that under the Island Planning (Jersey) Law 1964, where the grounds for appealing the decision of the Island Development Committee were the same as the grounds for appealing a decision of the Minister, the Court exercised a power to remit the matter to the Committee on many occasions when allowing an appeal. There is equally no doubt that on occasion the Court directed the Committee to grant a consent subject to such conditions as the Court thought fit. To say that Article 113(3) removes the Court's power to remit a matter to the Minister is to construe these permissive provisions as prohibitive of anything else. We do not consider that in principle to be the basis upon which the undeniable jurisdiction which the Court has previously exercised can be construed to have been removed, and we think it would take express terms in the statute to do so.

64. Next, we have regard to the practical consequences which would flow from the construction of the legislation so as to preclude remitting a case to the Minister. Suppose there were an extreme example where there was evidence to show that a neighbour had bribed the Minister with a significant sum of money to refuse a permission to an application where there was every reason under the policies in the Island Plan to refuse it, but the neighbours simply wished to make sure. On the appeal by the applicant, the corruption is revealed. Clearly it would seem wrong that the Court should be considering ordering the Minister to grant the permission which was inconsistent with Island Plan policies. Equally for the Court to confirm the decision of the Minister and thereby apparently to approve the corruption

which had taken place would be equally unthinkable. Similar examples could be given in relation to the powers on a third party appeal under Article 114(8) which also exclude, on the face of it, any power to remit the matter to the Minister.

65. Another example of the difficulties which the narrow construction might provide would be if the Minister acted clearly unreasonably on the face of the record but in such a way that it is impossible to identify any underlying reasons of substance for the decision. He refuses the application on the grounds that the applicant has red hair. We cannot think that the legislature intended in those circumstances that in allowing the appeal, the Royal Court should inevitably become the adjudicator of a planning application *de novo*, although there might be occasions when in the exercise of its discretion, the Royal Court might nonetheless be prepared to take a substantive decision because the matters which faced it were so clear.

66. In Attorney General-v-Gerald Smith [2004] JRC 168A, the Royal Court was deciding a matter of statutory interpretation when there were two possible constructions. At paragraph 14 of the judgment, Birt, Deputy Bailiff said:-

> ***"Furthermore it is a long-standing principle of statutory construction that the Court will seek to avoid a construction which produces an absurd result. This principle is summarised in Section 312 of Bennion – Statutory Interpretation (4th Edition) as follows:-***
>
> ***"(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.***
>
> ***(2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example where it appears that Parliament really intended it or the literal meaning is too strong."***

Maxwell on Interpretation of Statutes (12th Edition) at 201 states:-

> ***"Where possible a construction should be adopted which should facilitate the smooth working of the scheme of legislation established by the Act which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results.""***

67. In our judgment these are all very strong reasons why we should adopt a purposive approach to the construction of Article 113(3), and indeed by implication why the Court was right in the Dunn case to apply a purposive approach, if by implication, to Article 114(8).

68. Although we do not need to do so, the legislative history behind these provisions takes us very firmly to the same point. When the Law was originally passed, the proposal was that the Royal Court would no longer hear appeals but instead a new Planning Appeals Commission was to be created. The commission would comprise members who were experts in planning matters, and would be a specialist appellant tribunal. It was almost certainly intended that, for the purposes of avoiding conflicts of interest, such specialism would be recruited from outside the Island, which no doubt was one of the reasons why ultimately the proposal was abandoned. At all events, the proposal for a specialist Appeal Tribunal led to the removal of the test of unreasonableness that had defined the appeal process pursuant to the 1964 Law.

69. Of course the proposed new Planning Appeals Commission needed to be given suitable powers and Article 113 when first adopted referred to the Planning Appeals Commission rather than the Court. There was no need for the commission to quash a decision or remit the matter to the Minister because the appeal was a *de novo* appeal which would lead the commission to deciding the appeal on its merits. When the changes were adopted in 2005, the relevant proposition lodged by the then planning committee stated that:-

> *"The main purpose of the amendment is to reinstate the Royal Court as the appellate body – that is, to maintain the current appeals system."*

70. On the second amendment introduced in 2005, the test of reasonableness on appeals was reintroduced. At that point the planning committee noted in the report and proposition that:-

"It would be appropriate to reinstate, in the right of appeal contained in Article 113(2) of the 2002 Law the same provisions as appear in Article 21 of the 1964 Law".

71. It does seem clear that the States of Jersey envisaged that the Royal Court would continue to hear appeals in the same way it always had, and therefore that it presumably would remit suitable cases to the Minister, just as it always had.

72. As we indicated, we have had the benefit of argument from the parties on this particular point of construction, which was not something which was available to the Court in Premier Tour-v-Planning and Environment Minister. In the light of the arguments which we have heard, we have no doubt that the purposive construction is the correct one and that the Court has power to remit the matter for consideration by the Minister and indeed in doing so can indicate the legal rules which ought to be applied by the Minister when he comes to reconsider the matter so remitted, if the Court thinks fit.

Decision

73. We now turn to the exercise of discretion. The procedural irregularities were serious and the decision of the Minister simply cannot stand. In the circumstances of this case, we think it is better to remit the matter to the Minister rather than seek to take a decision ourselves using either of the powers in Article 113(3). This is for the following reasons:-

(i) There is a sufficient doubt as to what the reasons of the Minister were for refusing the application of the appellant in June. Advocate Jowitt contended that the appellant was entitled to a decision, having paid his planning applications fee. For that reason and on principle in any event, the appellant is entitled to know, as the public are entitled to know, what the reasons for the Minister's decision really are.

(ii) Although it is true that the neighbours could have sought leave to join in the appeal by the appellant under Articles 106 and 107 of the Law, none have done so and indeed although they applied for a copy of the relevant papers these were not provided by consent. It follows that to allow the appeal and grant a consent would potentially deprive the neighbours of their rights to bring a third party appeal against an approval which had been given by the Minister.

(iii) In our judgment, having looked carefully at the merits of the case, there clearly remains some work to be done in connection with the necessary conditions which should apply to protect the building of local interest, Mimosa Cottage. It appears that the Minister or his

officials considered this could be done by an appropriate condition. We do not feel we have enough information available to us to attach appropriate conditions whether in this respect or indeed generally, and, in relation to a development of this size that is a basically unsatisfactory platform from which to launch any grant of permission under Article 113(3)(b), even if we had been otherwise minded to do so.

(iv) As will probably be clear from the comments made above, this Court would not itself have granted the application in its present form on grounds of size and mass. Yet simply to refuse the appeal on the ground that the Minister's decision on the merits, to the extent that it can be ascertained, was not unreasonable would be unfair to the appellant which would not know what might be acceptable to the Minister. We emphasise that the test on appeal is not to assess what the Court would have done, had it been the Minister, but whether the Minister's decision was unreasonable. It is better the Minister makes his decision and doubtless that decision and the reaction of the appellant and neighbours to it will be informed by the views we have expressed.

74. For the reasons we have given we therefore allow the appeal, quash the refusal of the application and remit the matter to the Minister for further consideration.

Authorities

Planning and Building (Jersey) Law 2002.

Island Planning (Jersey) Law 1964.

Island Development Committee-v-Fairview Farm Limited [1996] JLR 306.

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

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

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

Premier Tour Limited-v-Planning and Environment Minister [2007] JLR 286.

Dunn-v-Minister for Planning and Environment and Dandara Jersey Limited [2009] JRC 237.

Steenson-v-Minister for Planning and Environment [2009] JLR 427.

Attorney General-v-Gerald Smith [2004] JRC 168A.