

JERSEY / JUDGMENT

Fauvel v Minister for Environment [2023] JRC 193 (21 October 2023)

[2023] JRC 193

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judgment

the commissioner:

Introduction

1. This judgment contains my reasons for allowing an appeal by Mr and Mrs Fauvel ("the Appellants") against part of a decision of the Assistant Minister, Deputy Jeune, ("the Assistant Minister") on behalf of the Minister for the Environment ("the Respondent"). The Ministerial Decision was signed on 22 June 2023 when the Assistant Minister decided ("the Ministerial Decision") to allow an appeal in part and refuse an appeal in part by the Appellants in relation to an application for planning permission concerning a property known as Secret Garden, Les Ruisseaux, St Brelade ("Secret Garden"). Details of the Ministerial Decision are set out later in this judgment. I was informed during the course of oral submission that the Ministerial Decision was taken by the Assistant Minister because the Minister is a Deputy for the St Brelade electoral district.

Background

2. The Appellants live at Le Picachon, 5 Cowdray Drive. This is a detached house at the end of Cowdray Drive on higher ground immediately to the north of Secret Garden. There is no direct access between the two properties. 3. Secret Garden was built on land forming part of Les Ruisseaux House following the grant of planning permission in 2015 (application number 2015/0261) ("the 2015 Decision"). There had been a number of previous applications to construct a house between 2004 and 2009 which had been granted, but it is not necessary to refer to these for the purposes of this appeal. 4. Following the 2015 Decision, construction of Secret Garden commenced. 5. In 2021, revised plans were submitted under application number 2021/0410. The application was to "Block up first floor window and install cladding to south elevation. Construct first floor bridge to north elevation and alter fenestration throughout". Permission for the application in 2021 was originally granted on 20 August 2021. However, following a third party appeal by the Appellants, the appeal was allowed on 10 March 2022 and permission refused ("the 2021 Refusal"). 6. The 2021 Refusal followed a

report by an inspector, Mr McGurk, who at paragraph 4. of his report stated: "The most significant of these and the focus of this appeal are proposed alterations to the first floor of the part built dwellings north elevation. This elevation faces towards the side of the neighbouring property located on Cowdray Drive and referred to in this report as 'Le Picachon'." 7. At paragraph 45, he described the main issue in the case as being "the effect of the proposed development on the living conditions of the occupiers of number 5 Cowdray Drive (referred to in this report as Le Picachon) with regards to overseeing noise and disturbance, outlook and sunlight". 8. At paragraphs 50 to 52, Mr McGurk stated the following: "50. Topographically, Le Picachon sits above the appeal site and Les Ruisseaux House, as land falls away to the south. This provides for an attractive open outlook looking south from Le Picachon and despite the relatively dense layout of built development in the area and the very close proximity of the appeal site to its southern boundary, affords a considerable sense of spaciousness to Le Picachon's patio area. 51. During my site visit, I observed the sense of openness and spaciousness from Le Picachon's main internal living area - which has patio doors opening out onto the small patio area; and from the patio area itself. I noted in particular, that the relatively low height of the boundary fence between Le Picachon and the appeal site, together with the low height of the part-built dwelling - due to a combination of its design and much lower ground floor level than Le Picachon - combine to make a significant contribution to these attributes.

52. I also noted during my site visit that, due to the immediate proximity of the part-built dwelling to Le Picachon's south-facing ground floor windows and patio area, any activity associated with the northern elevation of the part-built dwelling would be very keenly felt by the occupiers of Le Picachon. The ground floor of Le Picachon looks directly across to the upper part of the first floor elevation of the part-built dwelling, which appears to be and is, in very close proximity to the side of Le Picachon." 9. In his conclusions, started at paragraph 55, Mr McGurk stated as follows: "55. Essentially, the Island Plan recognises that a policy of achieving higher densities across the Built-up Area means that a degree of harm in respect of the living conditions of neighbouring occupiers is something to be expected and accepted. The policy test is whether any such harm is so great as to be unreasonable." 10. In applying this test, he stated the following at paragraphs 56 to 62 leading to his conclusion at paragraph 63 as follows: "56. As a consequence of the identified relationship between the two properties, the proposed window, door and bridge of the part-built dwelling are clearly visible from and appear to be in the immediate proximity of, Le Picachon. As such, I find that these features would draw attention to themselves as prominent additions to a first floor facade that would otherwise be notable for an absence of openings. 57. Indeed, the door and the bridge leading from the Secret Garden would appear so close to Le Picachon as to almost give the impression that they could provide for immediate access between the two dwellings. Occupiers of the Secret Garden could stand at the door, on the bridge, or on land accessed by the bridge and look directly over Le Picachon's patio and into Le Picachon's lounge from extremely close by. I find that this would severely erode the privacy currently enjoyed by the occupiers of Le Picachon's lounge and terrace.

58. Both the Department and the applicant refer to "normal" relationships between properties in the area, such that it is expected that there will be some degree of overlooking. However, I find that the relationship between the appeal property and Le Picachon is unique to those two properties such that it does not conform to what might generally be considered to be the "norm." (emphasis added)
59. Le Picachon's southerly aspect from within the dwelling and from the patio area is a characteristic of that dwelling important to the occupiers' enjoyment of it. For the reasons set out above, the proposed development would result in harm the privacy of Le Picachon's occupiers. In addition to this, the proposed development would, due to its immediate proximity to an area where the occupiers of Le Picachon might reasonably expect to enjoy their patio doors and patio area in relative privacy, give rise to significant scope for overhearing
- and I find that this would lead to a further erosion of the sense of privacy currently enjoyed by the occupiers.
60. In the above regard, I am mindful that Le Picachon's southerly outlook - from its lounge patio doors and from its patio - does not correspond to the "normal" relationships referred to. Rather, the patio area in particular is an established and important outdoor living space to the side of Le Picachon and it is enjoyed by that property's occupiers for its identified attributes. The patio comprises an especially sensitive area that is not, for example, directly comparable to an area between two houses commonly used for say, access, storage and little else. 61. Further to this, I observed during my site visit that the very close proximity to Le Picachon of the proposed window, door and bridge, and the immediate proximity of the garden land accessed by the bridge, would mean that even modest noise levels arising from these areas of the appeal property would be clearly audible to occupiers of Le Picachon when occupying the patio area, or its ground floor rooms adjacent to the appeal site, when doors or windows are open. 62. Also, I find that the level of harm arising in the above respect would be exacerbated as a result of an inevitable increase in the scope for noise and disturbance. It is reasonable to expect that the doorway, bridge and garden area would generate use by the occupiers of the Secret Garden and such use would take place in a location where any activity would be very keenly felt by the occupiers of Le Picachon, due to the immediate proximity and sightlines associated with these features. 63. Consequently, I find that the proposed development would give rise to noise and disturbance and that this would detract from the ability of the occupiers of Le Picachon to enjoy their property. I find that the level of harm arising would, when combined with the identified harm to privacy, amount to unreasonable harm." 11. During the appeal, a suggestion was made of the Appellants' increasing the height of their fence to prevent overlooking, leading to the following observations at paragraphs 68 to 71: "68. Taking the above into account, I find that the specific characteristics of this part of Le Picachon are such that a taller fence would appear as a dominant feature, detracting from the patio's qualities and drawing attention to what would be an awkward relationship between Le Picachon and the Secret Garden.

69. In this regard, I am especially mindful that the sensitive design of the original 2015 permission respected the qualities of the space and southerly outlook to the side of Le Picachon. 70. By way of contrast, I consider that the introduction of a tall fence to the boundary between the two properties in order to prevent overlooking would result an undue sense of enclosure. It would radically alter an area notable for its open and spacious qualities by creating a patio that would appear tightly constrained, hemmed in and to some considerable degree, claustrophobic. (emphasis added) 71. Taking all of the above into account, I find that the proposed development would result in a level of harm to the living conditions of the occupiers of Le Picachon, with regards to privacy, noise and disturbance, outlook, and sunlight that would amount to being unreasonable." 12. The Assistant Minister, Deputy Guida agreed with the recommendation of the inspector and set aside the original grant of permission, giving the following reason: "1. The proposed development would be likely to result in an unacceptable impact upon the amenities of nearby residents as a result of noise, general disturbance, loss of privacy and effect upon outlook and sunlight provision. The proposal is, therefore, contrary to Policy GD1 of the Adopted Island Plan 2011 (Revised 2014)." 13. The application, the subject matter of the present appeal, was made under number 2022/0558. 14. The application was as follows: "REVISED PLANS to P/2015/0261 (Construct 1 No. four bed dwelling to the North- East of site): Install solar panels to roof plane and air source heat pump to Northeast elevation. Alter external stairs to East elevation. Install timber cladding to North elevation. Various internal and external alterations." 15. The application was granted by the Chief Officer subject to standard conditions and subject to the following specific condition in relation to the application for an air source heat pump. The reason given for the grant was as follows: "The proposed development is considered to be acceptable having due regard [to] all of the material considerations raised. In particular, the development has been assessed against Policy GD1 and GD6 of the 2022 Bridging Island Plan. Notably, the relationship with the Northern neighbour has been specifically considered in relation to possible overlooking and generation of noise nuisance. In this case, the proposed works are regarded as acceptable due to the marginal impact it would have on the Northern neighbouring property." (The appellants' house is the "Northern neighbouring property".) 16. The Appellants brought a third party appeal against the Chief Officer's decision pursuant to Article 108 of the Planning and Building (Jersey) Law 2002 ("the Planning Law"). Mr Hainsworth was appointed as the inspector and produced a report dated 4 November 2022. 17. In relation to the solar panels, the inspector's report stated the following at paragraphs 7 to 12: "7. The approved development includes the installation of thirty-seven solar panels on the mono-pitched roof of Secret Garden, which would take up most of the roof plane. They would be installed in three rows of nine panels (one row at the top and two rows at the bottom) and two rows of five panels in the middle (grouped around the roof lights).
8. Solar panels operate most efficiently in the northern hemisphere when they are angled towards the south. The applicant has sought to compensate for the roof's slope to the north by mounting the panels on triangular frames that would lift the northern edges that face Le

Picachon to about 0.4m above the level of the roof. 9. Policy SP1 "Responding to climate change" of the Bridging Island Plan seeks to reduce carbon emissions and lessen the impact of climate change by encouraging the use of efficient forms of development that minimise energy demand and maximise energy efficiency and by supporting renewable energy schemes. The policy therefore encourages and supports the installation of the solar panels but, as with all proposals, the acceptability of the installation should be considered in the light of the provisions of Policies GD1 and GD6 and a balanced judgment reached. 10. Policy GD1 states that development will only be supported where it will not unreasonably harm the amenities of nearby residents by creating a sense of overbearing or oppressive enclosure. Policy GD6 indicates that development will be supported where it can be demonstrated that the design successfully addresses certain key principles, which include its relationship to existing buildings, having regard to its layout, form and scale, and its impact upon neighbouring uses and the public realm. 11. All of Secret Garden's roof is visible at close proximity from Le Picachon. The solar panels would dominate the outlook when they were viewed from the sitting-out area at the side of Le Picachon and from Le Picachon's side windows. They would also be an intrusive feature when viewed from the front forecourt of Le Picachon and for a considerable distance northwards along Cowdray Drive. I consider that the extent of the panels' coverage of the roof plane together with the height and appearance of their mounting frames would make them unreasonably overbearing and oppressive contrary to Policy GD1 and would fail to address successfully the key principles in Policy GD6 set out above. [Emphasis added]

12. In the exceptional circumstances that arise in this instance, these factors in my opinion outweigh the considerations arising under Policy SP1. The appeal should therefore succeed as regards the solar panels." 18. The Assistant Minister agreed with the recommendations of the inspector, apart from his conclusions in respect of the proposed solar panels. The Ministerial Decision stated the following: "The Assistant Minister decided to: 1. Allow the appeal in part and refuse part of planning permission, reference RP/2022/0558, in respect of the proposed installation of the air source heat pump and; 2. Dismiss the appeal in part and grant part of planning permission, reference RP/2022/0558, in respect of the proposed installation of solar panels, external stairs, timber cladding and to changes to the ground-floor window and door arrangements, the repositioning of a rooflight and the repositioning of internal walls, doors and staircases, subject to conditions: 3. The Minister further resolved that the date of this decision constitutes a revision to the date of the planning permission for the purposes of establishing a start-date for any time-related conditions or requirements of the permission or of the Planning and Building (Jersey) Law 2002." 19. The reasons for the Ministerial Decision included the following:- ".... In respect of the proposed solar panels, the Assistant Minister noted that Policy SP1 of the bridging Island Plan - Responding to climate change- seeks to reduce the carbon impact of new development by requiring development to optimise land use through efficient forms of development which minimise energy demand, maximise energy efficiency and which utilise renewable forms of energy. The Assistant Minister considered that the benefits of the proposed solar panels in

helping to achieve a meaningful and long-term reduction in carbon emissions will out-weigh the potential impact on the outlook from the neighbouring property, particularly if the appearance of the supporting structure is satisfactorily improved so that any impact is not unreasonable." 20. In the schedule of conditions and reasons for refusal, the Assistant Minister imposed condition 3 as follows: "3. Prior to the commencement of the installation of the solar panels and supporting structures, details of means of softening the appearance of the supporting structure of each row of panels as viewed from Le Picachon shall be submitted to and approved by the Regulation section of the Department of Infrastructure and Environment. Such means shall be implemented within one month of the solar panels being installed and shall, thereafter, be maintained. Reason: To ensure that the mounting structure does not present an overbearing or intrusive feature when viewed from the adjacent property, in accordance with the provisions of policies GD1 and GD6 of the adopted bridging Island Plan 2022." 21. The Appellants' appeal is against the decision of the Assistant Minister in relation to the solar panels. The Applicant has not appealed the other parts of the Assistant Minister's decision. The Notice of Appeal 22. The Notice of Appeal states as follows: "The appeal is brought on the following points of law in relation to the solar panels: 1. Failure to give adequate reasons and, in particular, to meet the requirements of Article 116(4)(b) of the Law; 2. Apparent bias of the Assistant Minister; and

3. Inadequacies as to the condition imposed on the Permission which lacks certainty and is unfair." 23. The central issue at the determination of this appeal concerns the obligation on the part of the Respondent to give "full reasons" for a decision where the Respondent decides to determine an appeal other than by giving effect to an inspector's recommendation. This obligation is contained in Article 116 of the Planning and Building (Jersey) Law 2002 . Article 116(1) provides as follows:
 - (1) Having considered the inspector's report under Article 115, the Minister shall determine the appeal, and in so doing shall give effect to the inspector's recommendation unless the Minister is satisfied that there are reasons not to do so." 24. Article 116(4), which contains the obligation to give full reasons, states as follows: "(4) The Minister shall make reasonable arrangements for access by the persons mentioned in paragraph (3) to the inspector's report under Article 115, and the notice given by the Minister under that paragraph shall include -
 - (b) if and to the extent that the Minister does not give effect to the inspector's the full reasons for the Minister's decision ." [Emphasis added]

Submissions

25. Advocate Steenson for the Appellants made the following written and oral submissions. 26. Firstly, the Assistant Minister was not clear what she was allowing the Applicants to do. In particular, it was not clear in the reasons of the Ministerial Decision what was meant by "satisfactorily improved" in relation to the solar panels. In condition 3, what was referred to was "means of softening the appearance of the supporting structure of each row of panels".

Advocate Steenson contended that this appeared to refer the panels themselves because of the words used without any clarification about what was meant by softening. The condition had to be capable of being understood so it could be enforced. The lack of clarity was also unfair because it deprived the Appellant of the right to challenge the condition. 27. Leaving matters to the regulation section was a wrongful delegation when it was for the Assistant Minister to decide whether or not to give effect to the inspector's report. If the Assistant Minister was imposing a condition, then she had to take that decision, not leave it to others. 28. He was also critical of the Respondent's skeleton for suggesting that what was meant by softening was the planting of a hedge. However, there was no reference in the Ministerial Decision, the reasons for it, or in the condition to the planting of a hedge. The concept of a hedge could not also have been contemplated in relation to condition 3 because what was required were means to soften the appearance of the supporting structure as viewed from Le Picachon. If a hedge was inserted, then the panels would not be visible. 29. If the Assistant Minister's decision was that a hedge should be planted, then the Ministerial Decision should have stated this expressly. The fact that it did not means that full reasons had not been given and the Ministerial Decision could not stand. In addition because the language used in the Ministerial Decision referred to softening the structures, i.e. the solar panels, and not the planting of a hedge, the Appellants now faced a different reason than that referred to in the Ministerial Decision. For this reason also, the Ministerial Decision had to be set aside. 30. He also contended that the report of Mr McGurk was inconsistent with the Assistant Minister's decision and that the Assistant Minister had not evaluated his conclusions reached at paragraphs 68 to 71 about the imposition of a fence. Those conclusions applied equally to the erection of a hedge as they did a fence. 31. The Assistant Minister had also failed to explain why she was not following paragraph 11 of the inspector's report which described the instruction of solar panels as being "unreasonably overbearing and oppressive". It was not enough simply for her to say that she preferred Policy SP1 without explaining why she had reached a different view to that of the inspector. This was particularly important because in stating in the reasons for decision "If the appearance of the supporting structure is satisfactorily improved so that any impact is not unreasonably", this implied an acceptance on behalf of the Assistant Minister that otherwise the impact of the solar panels was unreasonable. The Assistant Minister therefore appeared to be accepting that the solar panels were overbearing and oppressive which was why she introduced the requirement for softening. She did not explain why the softening condition was reasonable to address the findings of the inspector. 32. In addition, in relation to the requirement for softening, this was not considered by the inspector. It was only referred to in contentions filed in reply by the Applicant, where the Applicant stated as follows: "Finally in this regard, the Applicant will be planting a hedgerow that will be grown to a height 2m high from Le Picachon's raised patio level in accordance with the High Hedge Law, and which will bring it to 800mm above Le Picachon's existing fence. This will effectively completely screen the partly-built building, the solar panels and the slightly projecting roof lights from Le Picachon's southern patio and will also serve as a useful buffer against any usual noise associated with the domestic use of the property. Moreover, this hedge will

replace the hedge that was originally planted along this boundary." 33. The Appellants were not invited by the inspector to respond to this suggestion and no further evidence was adduced before the inspector. Nor did the Assistant Minister invite any submissions from the Applicants on the erection of a hedge by the Applicant. This lack of evidence meant that the Assistant Minister could not give full reasons for her decision as she did not have any evidence underpinning her decision to do so. 34. In relation to the reasons for the decision, all the Assistant Minister was doing was quoting the policy. The reason did not amount to full reasons sufficient to comply with Article 116(4)(b) . 35. In relation to the suggestion that the impact of the proposed solar panels outweighed the potential impact on the outlook, there was no evidence of the benefits of the proposed solar panels for this particular property, apart from the angle of which the solar panels would have been located. While the Assistant Minister was entitled to say that Policy SP1 was more important, when not following the decision of an inspector she had to say why and why the benefits outweighed the inspector's conclusions. 36. Regarding the final part of the reasons for decision requiring the appearance to be satisfactorily improved, Advocate Steenson described this reasoning as circular because it failed to describe how the Applicant was required to improve the structure and there was no analysis as to how this would improve the appearance of the structure so as to allow the Minister to give precedence to Policy SP1. 37. In relation to interpreting a planning permission, he referred me to paragraphs 26 and 27 of *Hillside Parks Limited v Snowdonia National Park Authority*

[2022] 1 WLR 5077 : "26. The scope of a planning permission depends on the terms of the document recording the grant. As with any legal document, its interpretation is a matter of law for the court. Recent decisions of this court have made it clear that planning permissions are to be interpreted according to the same general principles that apply in English law to the interpretation of any other document that has legal effect. The exercise is an objective one, concerned not with what the maker of the document subjectively intended or wanted to convey but with what a reasonable reader would understand the words used, considered in their particular context, to mean: see *Trump International Golf Club Scotland Ltd v Scottish Ministers*

[2016] 1 WLR 85 , paras 33-34 (Lord Hodge JSC) and para 53 (Lord Carnwath JSC); *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government*

[2019] 1 WLR 4317 , paras 15-19.

27. Differences in the nature of legal documents do, however, affect the scope of the contextual material to which regard may be had in interpreting the text. Because a planning permission is not personal to the applicant and enures for the benefit of the land, it cannot be assumed that the holder of the permission will be aware of all the background facts known to the person who applied for it. Furthermore, a planning permission is a public document on which third parties are entitled to rely. These characteristics dictate that the meaning of the document should be ascertainable from the document itself, other public documents to

which it refers such as the planning application and plans and drawings submitted with the application, and physical inspection of the land to which it relates. The reasonable reader of the permission cannot be expected to have regard to other material such as correspondence passing between the parties. See e g *Slough Estates v Slough Borough Council* (No 2) [1971] AC 958, 962 (Lord Reid) ; *Trump International Golf Club* , para 33 (Lord Hodge JSC). In this case, we are concerned with grants of full planning permission, in relation to which it is to be expected that a reasonable reader would understand that the detailed #5086 plans submitted with the application have particular significance: *Barnett y Secretary of State for Communities and Local Government*

[2009] JPL 243 , para 24 (Sullivan J) ; affirmed

[2009] JPL 1597 , paras 17-22 (Keene LJ) ; *R Harwood, Planning Permission* (2016), para 28.9." 38. In relation to the decision of *Regina (Hayes) v Wychavon District Council* [2019] PTSR 1163 , while he accepted the principle in that decision, if the issue which led to a condition had not been consulted about then the principle in *Wychavon* did not apply and the imposition of a condition was unfair. 39. In relation to the relief that I should grant, Advocate Steenson contended that I should simply quash the decision which meant that the application for planning permission was refused. If the Applicant wanted solar panels, then he would have to make a fresh application and start again. 40. In relation to Ground 2 of the Notice of Appeal, namely bias, it was the lack of explanation in the Ministerial Decision that had led the Applicants to doubt the whole process and to try to rationalise the basis for the Assistant Minister's decision. It was her background in green energy that had led the Applicants to conclude that the Assistant Minister had allowed her political views to influence the decision which had met the threshold for apparent bias. 41. Advocate Rondel, for the Respondent, contended that the reasons were intelligible and adequate, there was no real possibility of bias, and that the condition imposed was neither uncertain nor unfair. 42. He referred me to paragraph 225 of *Francis v JFSC*

[2018] (1) JLR 106, where the Court stated as follows: "225 What is more difficult is to determine the level of reasoning required. A helpful recent authoritative statement of the position in England and Wales in the context of appeals against decisions by planning inspectors is to be found in the unanimous decision of the House of Lords (delivered by Lord Brown) in the case of *South Bucks. D. C. v. Porter* (16) where Lord Brown said this (

[2004] 1 WLR 1953 , at para. 36): "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer

only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision." 43. He also referred me to paragraph 226 which quoted an observation of Bingham MR in the case of *Clarke Homes v Environment Secretary* quoted in the *South Bucks* case, which included the following remark: "...the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why." 44. He contended that the reference to softening in Condition 3 was a reference to erecting a hedge. However, he could not explain why, if that was what the Assistant Minister meant, she did not simply refer to the erection of a hedge. 45. He also contended that it was appropriate for the detail to be left to plans submitted to the regulation section. 46. In relation to construction of conditions, he referred me to *Trump International Golf Club Scotland Limited v Scottish Ministers*

[2016] 1 WLR 85 . The key point was found at paragraph 55 of the judgment where it was stated that "incompetent drafting should not prevent the Court from giving the condition a sensible meaning if at all possible". 47. In response to a question raised by the Court, that there were no plans showing a hedge that were before the inspector or the Minister. Advocate Rondel fairly accepted that these plans were only produced by the Applicant in response to the appeal. 48. In relation to the report of Mr McGurk, he contended that a decision in relation to the fence was different from erection of a hedge. 49. In relation to bias, he reminded me of the test as set out in *W E (Jersey) Limited v Minister for the Environment*

[2022] JRC 160 at paragraphs 50 to 52: "50. The issue of pre-determination was considered in the case of *Kerley v the Minister for Planning and Environment and Another*

[2008] JRC 199 where the Court said this at paragraph 64: "64. As submitted by the Solicitor General, there is a difference between predisposition, which is consistent with a preparedness to consider and weigh relevant factors in reaching a final decision and predetermination, which involves a mind which is closed to the consideration and weighing of relevant factors. It is for the appellant to demonstrate that, in all the circumstances, a fair-minded and informed observer, having regard to the identified facts, would conclude that there was a real possibility of bias or predetermination on the part of the Minister (see *Porter v Magill* [2002] 2 AC 367. In *Condrón v National Assembly for Wales* 92006) EWCA Civ. 1573, the English Court of Appeal made reference Paragraph 43) to a number of English cases drawing the distinction between the legitimate predisposition towards a particular outcome and an illegitimate predetermination of the outcome."

51. The English Court of Appeal decision in *Condron* was concerned with a remark made by the Chairman of the Planning Decision Committee in a chance meeting with a member of the public before the hearing that he was "going to go with the Inspector's report". Reference was made at paragraph 38 of the judgment of Richards LJ to the judgment of Scott-Baker LJ in *Flaherty v National Greyhound Racing Club Ltd*
- [2005] EWCA Civ 1117 at paragraph 27: "The test for apparent bias involves a two stage process. First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly, it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased ... An allegation of apparent bias must be decided on the facts and circumstances of the individual case The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing ... "
52. Richards LJ explained at paragraph 45 that it was necessary to bear in mind the context in which words were spoken, in that case in a short and rather tense conversation following a chance encounter without preparation or warning. Remarks made in circumstances such as this need, he said, to be treated with a considerable degree of caution. The Court concluded that in these circumstances, there was no real possibility that the Chairman was biased. In the wider context, this brief remark by the Chairman provided an insufficient basis for the suggestion that the decision was approached with a closed mind and without impartial consideration of all the relevant planning issues (paragraph 57)." 50. In the present case, the test was not what the Applicants thought but what a fair minded and informed observer would conclude. 51. He also referred me to the Ministerial Code of Conduct and the obligation in principle 4 to avoid conflicts of interest. This was why the matter had been determined by the Assistant Minister rather than the Minister because the Minister was Deputy for St Brelade. 52. He also relied on the *Wychavon* case as support for the proposition that the condition was within the band of reasonable decisions the Assistant Minister could take and therefore the Applicant could not re-open that condition. Discussion and decision 53. As a preliminary point, it is firstly right to record that in support of their appeal, the Appellants filed two affidavits, one from Mr Fauvel and one from Ms Stephanie Steadman, a planning and environmental consultant retained by the Applicants. 54. Her affidavit set out the full planning history and exhibited various documents obtained from the Planning Register. In my view, as these were public documents, nothing turns on this affidavit and I allowed it as it represented no more than the history of the Secret Garden site and planning applications relating to it, all of which were available to the Assistant Minister. 55. In relation to the affidavit of Mr Fauvel, this attached to it photographs of the existing site, together with photographs which were a visual study of the Applicants' property to demonstrate the anticipated effect of the proposed solar panels. Advocate Rondel took objection to this evidence as it was not before the inspector or the Minister. I concluded that, insofar as Mr Fauvel was exhibiting photographs of his property, then these could be admitted because they were an alternative to a site visit. However, in relation to the

photographs that looked to demonstrate the anticipated effect of the solar panels, I excluded these because they were not evidence that was before the inspector and they were not evidence that the Assistant Minister had considered. I wish to stress that had such evidence been put before the inspector, he could have considered the same, as could the Assistant Minister. The position is however different on an appeal on a point of law when the Court is looking at material that led to an inspector's conclusions and the Assistant Minister's report. Any material created subsequently is not therefore relevant to the question the Court has to determine. While I had seen the photographs, I disregarded them for the purposes of this decision. Both parties were comfortable with this approach. 56. It is also right to record as an observation that the Applicants had filed a response to the grounds of appeal. While no party took any objection to the Applicants' response, the parties have not followed the procedure required by Part 15B of the Royal Court Rules 2004 As Amended , which deals with appeals under the Planning and Building (Jersey) Law 2002 . In particular, it does not appear that either a directions hearing took place as required by Article 15A/2(6) or, at the very least, agreed directions were not presented to the Master on behalf of the Judicial Greffier for approval. Such directions would have addressed whether additional evidence could have been filed and a timetable for the filing of submissions. 57. Turning now to the grounds of appeal set out at paragraph 22 above, it is convenient to take Grounds 1 and 3 together because the submissions made in relation to them overlapped. 58. I start with the approach in law required for appeals brought under Article 116(5) which provides that no further appeal shall lie with the Minister's determination under the Article except in the Royal Court on a point of law. The approach to be taken by the Royal Court was set out in *Therin v Minister for the Environment and Warwick*

[2018] (2) JLR 1 at paragraph 9 which states as follows: "9 As far as I am aware this is the first occasion on which there has been an appeal to the court under the new appeal arrangements which were adopted in 2014. As provided by art. 116(5), the appeal to the court is on a point of law. It is not only not a full merits appeal, which was the appeal to the Minister carried out by the inspector, but it is not even an appeal along the lines of *Planning & Environment Min. v. Hobson* (5), an appeal brought under the previous procedure which required the Royal Court to form its own view of the merits of the application before, allowing the Minister a margin of appreciation, it considered whether the Minister's decision had been unreasonable. The revised appeal provisions which allow an appeal to the Royal Court on a point of law only therefore now classically engage the GCHQ principles of illegality, impropriety and irrationality (*Council of Civil Service Unions v. Minister for Civil Service* (2))." 59. It is right to note that this appeal is slightly different because the criticism of the Appellants is a failure to give full reasons as required by Article 116(4)(B). In my judgment and, as far as I am aware, this is the first time Article 116(4)(B) has been considered, the requirement to give full reasons goes beyond the Minister simply reaching a different view. The requirement for full reasons is so that the party whose arguments have not been accepted by the Minister understands the reasons why that is the case. This requires the Minister to address expressly the findings of an

inspector and to set out the reasons why the Minister has reached a different conclusion.

60. These observations do not mean that a Minister is not entitled to attach different weight to one policy in the Island Bridging Plan compared to another. As was noted in *Kerley v Minister for Planning and Environment* at paragraph 38: "The Minister, in determining an application, must take into account all material considerations (Article 19(1) of the Planning Law), but the weight to be attributed to such considerations is a matter for him (*Bolton Metropolitan Borough Council v Secretary for the Environment* (1991) 61 P. & C. R. 343)." 61. While the decision in *Kerley* pre-dates the introduction of the regime of appeals to inspectors and the consequent more limited rights of appeal to the Royal Court, the above principle still applies. 62. Where however the attack is on the adequacy of reasons given by the Minister where those reasons are different to the conclusions reached by an inspector, the Minister must explain the weight attributed to each consideration. It is not enough, as the Assistant Minister did in this case, for the Minister to simply to form a different view. Advocate Steenson was therefore correct in his criticism that the reasons for the Ministerial Decision did not go far enough because the Assistant Minister had not explained why the benefit of the proposed solar panels outweighed the impact on the outlook from the neighbouring property. 63. I have concluded that it was important for the Minister to do so. This is firstly because the inspector had expressly stated at paragraph 10 that the erection of the solar panels would be "unreasonably overbearing and oppressive". For the Minister to say that the proposed plans outweighed this requires her to set out why she reached that conclusion. It also appears that the Assistant Minister accepted that the panels were otherwise overbearing or intrusive because, in requiring means of "softening the appearance of the supporting structure", this appeared to be to ensure that the mounting structure did not present an "overbearing or intrusive feature". Given the apparent acceptance by the Assistant Minister that the solar panels were "overbearing or intrusive", Article 116(4)(B) requires her to explain why the solar panels outweighed the impact on the outlook from the neighbouring property, either in principle or on the basis of some form of "softening". She did not do so.

64. I also accept Advocate Steenson's criticism that what is meant by "softening" is not clear. The wording used both in the reasons for the Ministerial Decision and in Condition 3 appear to refer to softening of the supporting structure, i.e. the solar panels themselves. In the reasons for decision what was required was some form of improvement to the supporting structure. In Condition 3, what was required were means to soften "the appearance of the supporting structure of each row of panels". There is no reference to any form of hedge in either the reasons for the decision or in Condition 3 or to any other form of screening. 65. The criticism of Advocate Steenson that the Respondent in its skeleton argument at paragraph 42 now asserts that screening means the planting of a replacement hedge is also problematic in a number of respects. 66. Firstly, it is a different reason than that given in the reasons for the decision and in Condition 3. Given that the Respondent is now advancing different reasons from those set out in the Ministerial Decision, it follows that the Minister cannot have given full reasons in the Ministerial Decision and therefore is in breach of Article 116(4)(B). 67. Secondly, the concept of a

hedge was not explored by the inspector. The inspector does not make any reference to the impact of a hedge or to screening. If the Assistant Minister had had in mind the erection of screening as is now contended, then she should have considered referring that discreet issue back to the inspector under Article 116(2)(B) which gives the Minister power to refer an appeal back to an inspector for "further consideration of such issues as the Minister shall specify" . 68. This is important because as was noted in the Wychavon decision, where a condition is imposed which requires further details, consultation does not generally take place at such a stage. The reason for this was explained in Wychavon at paragraph 15 as follows: "This is because the subject matter of the conditions will usually have been consulted upon at the stage of the initial application. Here, the claimant and other neighbours have already expressed their concerns on drainage and disposal of manure. It is the responsibility of the planning authority to determine the detail of the drainage and manure disposal schemes proposed by the applicant, having due regard to any concerns earlier expressed. I find no support in the statute, the Circular or the common law requirements of fairness for the claimant's submission that it was unlawful for the defendant to impose conditions for post-permission approval of details relating to drainage or manure disposal on the ground that the claimant was thereby deprived of an opportunity to comment on the details proposed." 69. In this case, the Applicants had not been consulted on the condition and had not had any opportunity to express their concerns on the effect of the screening to the inspector dealing with the appeal. 70. There are other problems with the reasons of the Assistant Minister. The approach to be taken in relation to interpreting a planning permission, including the Ministerial Decision, is that set out in *Hillside Parks Limited v Snowdonia* referred to at paragraph 37 above, in particular "What a reasonable reader would understand the words used considered in their particular context to mean" . I do not interpret this passage as saying anything different from the passage set out in *Francis v JFSC* set out at paragraph 42 above. Requiring reasons to be given in full does not mean that such reasons cannot be brief, as long as they can be understood and do not give rise to a substantial doubt as to whether the decision maker erred in law. What is required for a court to set aside a decision, adopting the words in the *South Bucks* case referred to at paragraph 226 of *Francis* , is a genuine doubt as to what has been decided and why. 71. In this case, if what the Assistant Minister meant was the erection of a hedge, because this was referred to in contentions in reply filed by the Applicant, the proposal in that quotation was to plant a hedge which would be grown to a height of two metres high from the raised patio on the property of the Applicants. However, the Applicants' plans attached to the same document, Case Centre reference G177 and G178, show that the ground level on the Applicants' property where the hedge would be planted is below that of the revised patio. Accordingly, the erection of a hedge, which is more than two metres above the ground level where the hedge is planted, gives the owner of domestic property a right to complain to the Minister for the Environment and to ask the Minister to issue a remedial notice under Article 7 of the *High Hedges (Jersey) Law 2008* . The Assistant Minister's reasons do not explain at all how she could give permission to the Applicant to erect a hedge which would immediately give the

Appellants the right to ask the same Minister to reduce the height of that hedge to below two metres. Given that the Applicant suggested that the hedge had to be two metres above the Appellants' patio, a reduction in the hedge to two metres from the ground level of the Applicants' property would not provide a screening and therefore would not address the solar panels being overbearing or oppressive. 72. The next issue with the lack of reasons is the danger of an inconsistent decision. In the inspector's report leading to the 2021 refusal, the inspector in that case also emphasised the relationship between the appeal property as being as set out at paragraph 58 of the inspector's report quoted at paragraph 10 above. When dealing specifically with the question of the fence, he reached the conclusion that the introduction of a tall fence "would result in an undue sense of enclosure. It would rapidly alter an area noted for its open and spacious qualities by creating a patio that would appear tightly constrained, hemmed in and to some degree claustrophobic". 73. The Assistant Minister has not addressed why a hedge would not have the same effect. 74. The final area of criticism advanced by Advocate Steenson concerns the lack of evidence as to why the benefits of solar panels would outweigh the potential impact on the outlook from Le Picachon. While I do not accept the implication from Advocate Steenson's submissions that the Assistant Minister should have had evidence about the benefit of solar panels generally, it does not appear that the Assistant Minister, from the material available to me, had any evidence on the benefits that solar panels would bring to this particular property in terms of its overall consumption of electricity compared to other sources. 75. For all these reasons, I was therefore satisfied that the Appellants had established Grounds 1 and 3 of their appeal. I address below the effect of this. 76. Before I do so, it is firstly necessary to deal with the question of bias which was Ground 2. 77. In relation to this ground, I agree with Advocate Rondel that the test is that set out in *W. E. Jersey Limited v Minister for the Environment* cited at paragraph 49 above. This is the test I have applied. 78. In relation to the present case, it should be remembered that the Assistant Minister made this decision because the Minister is a Deputy for St Brelade. While it is not necessary for me to express a view on whether the Minister was right to step aside, this decision does highlight that the Minister and Assistant Minister recognised the importance of a decision being seen to be unbiased. 79. Secondly, the Assistant Minister has made a declaration of interest which states as follows: "Hilary Jeune consultancy - My consultancy is under a sole-trader license. I do not employ anyone else. I am currently in a contract with the OECD that runs until the end of 2022. I then do not propose to take on any new clients while I am a States Member. The work I have offered as a consultant is delivering meta-assessment, policy analysis and research on a number of thematic areas; Advises on political, advocacy and campaign strategies; Provides insight and intelligence on multilateral institutions and processes (United Nations, Development Finance Institutions, European Union, OECD, G20). Total interest declared under this section exceeds 25% of total annual income in the previous 12 months." 80. I concluded that I did not regard this work as one where a fair minded and informed observer would conclude that there was a real possibility of bias when considering the effect of Policy SP1 and a particular application for planning permission and the installation of solar panels.

Her previous work was high level policy advice rather than about solar panels in particular and there is no evidence that she any commercial interest in such a business. 81. The Assistant Minister was also under an express obligation to avoid conflict of interest as set out in Code 4 of the Code of Practice for Ministers and Assistant Ministers which provides as follows: "4. Avoiding Conflict of Interest Ministers and Assistant Ministers must identify and actively address any actual or perceived conflict of interest between their ministerial responsibilities and their private interests, or any other public role they hold, including their role as a constituency representative, ensuring that any conflict does not compromise their judgement, the conduct of government, or place themselves under an improper obligation." 82. Thirdly, while I have criticised the lack of reasoning of the Assistant Minister, a lack of reasoning does not mean as a consequence that the threshold, in the W. E. Jersey case of there being a real possibility of bias, is met. Regrettably, in this jurisdiction and elsewhere, there are many juris decisions where decisions of public officials have been set aside because of errors of law, including a lack of reasons. Such findings do not normally lead to the conclusion that the decision maker is biased. 83. In the present case, the Assistant Minister was looking to give preference to Policy SP1, in particular the obligation to reduce the carbon impact of new development. Although she has expressed her own views on climate change as an election candidate, the decision she reached, although lacking reasoning, was looking to apply a policy approved by the States. I add that the Island Bridging Plan, in discussing responding to climate change, expressly noted that "The carbon neutral strategy was lodged and adopted by the States Assembly in February 2020" . 84. For all these reasons, the Appellants' reliance on Ground 2 therefore fails. Remedy 85. In light of my findings in relation to Ground 1 and 3, Article 116(5)(B) of the Planning Law gives the Royal Court the following powers: "(5B) On hearing the appeal the Royal Court may -

- (a) confirm the determination of the Minister wholly or in part;
- (b) quash the determination of the Minister wholly or in part;
- (c) remit the determination, wholly or in part, to the Minister to be retaken." 86. In my judgment, these powers are not mutually exclusive. This is firstly clear from reading Article 116(5)(B) on its face. There is nothing in the language used which makes options (b) and (c) mutually exclusive. I am confirmed in this conclusion by the approach taken in the Therin decision to which I have already referred where, at paragraph 93, Sir William Bailhache concluded that the decision of the Minister could not stand, that the permission should be set aside, and the issue returned to the Minister for further adjudication, setting out what the Minister needed to consider. My reading of Therin therefore is that the Royal Court both quashed the decision and remitted it back to the minister for further determination. 87. This approach is also consistent within the current appeals regime looked at as a whole. Where an appeal is made under the Planning Law leading to the appointment of an inspector under Article 113, the inspector then produces a report pursuant to Article 115(5). However, it is clear from Article 116(1) that it is for the Minister to determine an appeal and to give effect

to the inspector's recommendation, unless the Minister is satisfied that there were reasons not to do so. 88. Where a Minister has not agreed with an inspector but the Ministerial decision is quashed, in my judgment it will ordinarily for the Minister to then determine whether he then wishes to accept the inspector's recommendation or to reach some other conclusion. I say that because Article 116(5)(B) is not quashing the inspector's recommendation but only the Minister's determination of the appeal by reference to that recommendation. 89. It is also right to make clear that in some cases the Royal Court will simply quash the Minister's decision. Such a scenario would only seem to me to be possible to occur where any decision of the Minister would amount to an error of law with the result that there was only one possible outcome to an appeal. 90. That will not be the case in many cases where there are matters of judgment to be exercised. It is certainly not the case in the present appeal. It therefore remains open to the Minister (or the Assistant Minister) to reach a different decision to that of the inspector provided that the Minister and the Assistant Minister addresses the lack of reasoning and other issues raised by this judgment. 91. I have further reached this conclusion because the alternative advanced by Advocate Steenson that the Applicant would have to start again is not attractive and potentially disproportionate. As mentioned at paragraph 67 above, the Minister has the power to remit matters back to an inspector under Article 116(2)(B) if further evidence is required to assist the Minister in deciding whether to accept the inspector's recommendation or to reach a different conclusion. While it is ultimately a matter for the Minister, given the difficulties referred to in this judgment as to what is meant by softening and the lack of significant material before the inspector in relation to screening and / or hedges, this could well be an appropriate course for the Minister to take if the Minister wished to test further whether or not to depart from the inspector's report. 92. I will deal with the issue of costs when these reasons are handed down to the parties. Authorities Planning and Building (Jersey) Law 2002. Royal Court Rules 2004. Hillside Parks Limited v Snowdonia National Park Authority

[2022] 1 WLR 5077 . Regina (Hayes) v Wychavon District Council [2019] PTSR 1163 . Francis v JFSC

[2018] (1) JLR 106. Trump International Golf Club Scotland Limited v Scottish Ministers

[2016] 1 WLR 85 . W E (Jersey) Limited v Minister for the Environment

[2022] JRC 160 . Therin v Minister for the Environment and Warwick [2018]

(2) JLR 1. Page Last Updated: 27 Oct 2023 Back to top About JLIB Accessibility Contacts
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