

JERSEY / JUDGMENT

JK Ltd -v- Minister for Planning [2011] JRC 169 (31 August 2011)

[2011] JRC 169

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judgment

the commissioner: 1. This is an application for directions in relation to a planning appeal brought by the appellant against the decision of the respondent dated 16 th December, 2010, to refuse the appellant permission to construct 25 dwellings at De la Mare Nurseries, La Rue a Don, Grouville. 2. An earlier application by the appellant in respect of the same site had been refused on 12 th November, 2009. An appeal against that refusal was stayed pending the outcome of the application currently under appeal. 3. On 25 th May, 2011, the Master determined that the planning appeal should proceed by way of the modified procedure pursuant to Rule 15/3A of the Royal Court Rules and the planning appeal is due to be heard on the 19th September, 2011. An appeal against the decision of the Master was dismissed on 16 th August, 2011 (

[2011] JRC 160A). 4. The appellant seeks the following directions:- "1) The respondent shall file an affidavit dealing with the allegations of inconsistency and delay raised in the appellant's affidavit and this affidavit shall be filed no later than 2 weeks prior to the hearing. 2) The respondent shall at the same time disclose all relevant material (to include the material sought at paragraph 37 of the skeleton). 3. That all deponents of affidavits filed in this matter shall make themselves available for cross examination. 4. That each party may call an expert and if possible that the experts shall meet to agree a report or to agree points of agreement and points of disagreement and exchange of the reports shall take place no later than 2 weeks prior to the hearing." 5. The issue of expert evidence was left over because the appellant had not identified an expert and was not able to say what evidence it was intended he or she would give. If the matter is to be pursued, then the appellant will need to provide both so that the application can be considered properly and in the light of the principles set out in Trump Holdings Limited-v-Planning and Environment Committee

[2004] JLR 16 that normally the Court would not hear evidence which was not before the respondent in the initial application as that would be tantamount to hearing an original application. Mr Sharp, for the respondent, gave notice that any such application would be opposed. 6. The documents to be used by the Court on an appeal against an administrative decision are governed by Rule 15/3 of the Royal Court Rules 2004 which is in the following terms:- "15/3 Documents for use of the Court

- (1) Within 28 days after receiving notice of appeal, the respondent must lodge with the Greffier and serve on the appellant an affidavit setting out -
 - (a) A statement of the decision from which the appeal is brought; and
 - (b) The facts material to the decision and the reason for it and exhibiting all documentary evidence relating thereto. (1A) When paragraph (1) has been complied with in relation to a planning appeal Rule 15/3A shall apply to the remaining procedural steps in the appeal. (1B) When paragraph (1) has been complied with in relation to High Hedges Law appeal, Rule 15/3E shall apply to the remaining procedural steps in the appeal.
- (2) Within 21 days after service of the affidavit on the appellant in accordance with paragraph (1), the appellant must lodge with the Greffier and serve on the respondent an affidavit in response.
- (3) The respondent may, within 14 days after service of the appellant's affidavit in accordance with paragraph (2), lodge with the Greffier and serve on the appellant an affidavit in reply thereto." 7. Pursuant to Rule 15/3(1), the respondent has lodged an affidavit by Jonathan Gladwin, a senior planner at the Ministry of Planning and Environment. Pursuant to Rule 15/3(2) the appellant has lodged an affidavit by Jonathan Giles Stratford, a director and beneficial owner of the appellant. 8. Mr Taylor, on behalf of the appellant, did not argue that Rule 15/3(1) imposed upon the respondent an obligation to file an affidavit personally and agreed that the rule should be interpreted as requiring an affidavit to be sworn by or on behalf of the respondent, pursuant to Rule 15/3(1) or by or on behalf of the appellant pursuant to Rule 15/3(2). Thus, in a routine appeal against an administrative decision, Mr Taylor accepted that it was appropriate for the affidavit to be filed by a civil servant on behalf of the decision maker concerned. However on the facts of this case Mr Taylor submitted that the appellant had grounds for requiring the respondent personally to provide an affidavit and to be available for cross examination should leave be granted; pursuant to RC 05/25 and RC 06/03 leave to cross examine a deponent under both the ordinary and modified procedures will only be granted in exceptional circumstances. 9. The decision which is appealed was not made by the respondent personally but by the Planning Applications Panel ("the Panel"), pursuant to powers delegated under Article 9A of the Planning and Building (Jersey) Law 2002 . It was the Panel that had also refused the earlier application. 10. On the face of it, therefore, the respondent had no personal involvement in the decision to refuse the application; nor indeed did he appear to have any personal involvement in the decision to refuse the earlier application. 11. The only evidence of the respondent's personal

involvement produced by the appellant is a letter written on 17 th September, 2007, by Mr P. C. F. Thorne, Director of Planning which is in the following terms:- "I am responding to your letter of 3 July, 200,7 and apologise for the delay in replying. I have spoken further to Senator Cohen, and he remains of the view that he would not grant permission for the development of [De La Mare Nurseries] in advance of the Island Plan Review, notwithstanding Policy C20 of the 2002 Plan." 12. I was not shown the letter of 3 rd July, 2007, and cannot therefore see the context in which this letter was written, but the appellants interpret the letter as attributing to the respondent firstly an intention to delay the application until the Island Plan Review and an acknowledgement that but for that review, he would have granted permission. 13. In the draft Island Plan, De La Mare Nurseries has been designated for category A housing, something which if approved by the States Assembly would in the opinion of the appellant have been a political coup for the respondent. The glasshouses are described as redundant which is inconsistent with the view taken by the Panel. The draft Island Plan was due to be debated by the States Assembly in October 2010 but was delayed for six months, leaving the respondent, so the appellant would argue, with no option but to make a decision and furthermore to make a decision refusing the application so as to keep his political ambition to have the site categorised for Category A housing open. 14. Although Mr Taylor couched the appellant's allegations in a more restrained manner, the following is, in my view, a fair distillation of the allegations made in the affidavit of Mr Stratford. The contention is that the decision to refuse was not a genuine decision. Through either express or implied directions given by the respondent both to the Planning Department and to the Panel, the decision was first delayed to allow the draft Island Plan to be considered by the States Assembly in October 2010 and when that debate was itself delayed, the application was refused in order to preserve the respondent's political ambition to have the site approved by the States for Category A housing. 15. It is clear that, apart from the letter written in 2007, which attributes views to the Minister in a context which is not clear, there is no evidence to support an allegation of such improper conduct, not only on his part but on the part of the Planning Department and the individual members of the Panel, hence the importance of the appellant's request for discovery as set out in paragraph 37 of its skeleton argument. In summary the appellant wishes to have full disclosure of the relevant files of the Planning Department, including its electronic files, and of the respondent's files in respect of the draft Island Plan, so far as it relates to the De la Mare site. 16. In response, Mr Sharp makes the following points:- (i) Both the 2008 and 2010 applications were considered and rejected by the Panel and not the respondent. The respondent was not present or involved in that process and therefore can give no evidence in relation to the decision from his personal knowledge. The request for him to file an affidavit and for him to be available for cross examination is in reality an attempt to embarrass the respondent and does not assist the Court in determining the issues relevant to the appeal. The logical conclusion of the appellant's allegations is that the Panel members were corrupted by the respondent and yet no application is made for their attendance. (ii) The application for disclosure is misconceived. The allegation about delay is merely a device to enable the appellant to obtain full disclosure of all the Planning Department's files, something they would not ordinarily

receive during the course of this sort of action. An application for disclosure in the hope that something might turn up is an illegitimate exercise. He drew my attention to paragraph 16-068 of De Smith's Judicial Review 6th edition as follows:- "In practice, unless the claimant can show a prima facie breach of public duty, disclosure will not usually be granted. Where the challenge is on the ground of Wednesbury irrationality, standard disclosure of the type which is a matter of routine in private law proceedings will seldom be ordered. Applications for disclosure "in the hope that something might turn up" are regarded as an illegitimate exercise, at least in the absence of a prima facie reason to suppose that the deponent's evidenced is untruthful." (iii) None of the documents requested go to the real issue in the case, which is the correct application of the C20 policy. (iv) The statement made in the draft Island Plan in relation to the glasshouses is irrelevant. The minutes of the Panel meeting show that the Panel considered that statement but reached its own view. It is the Panel's decision which is under the appeal, and not the statement made in the draft Island Plan. The issue is whether the Panel's decision was reasonable. (v) The delay in processing the application, even if not excusable, is irrelevant to the question of whether the Panel's decision was reasonable unless it is going to be alleged that the respondent had corrupted the Panel members, an allegation for which there was no evidence. In essence, to give the directions sought is going to detract the Court from its true task. Decision 17. I am persuaded by the arguments put forward by Mr Sharp. There is no basis for requiring the respondent personally to file an affidavit. Although the refusal dated 16 th December, 2010, was issued in the name of the respondent, the decision was taken by the Panel on the basis of a Planning and Environment Department report dated 3 rd December, 2010, and the submissions made by those who spoke at the public hearing. Following the test laid down in *Token Limited-v-PEC*

[2001] JLR 698 the task of the Court is to decide whether the decision of the Panel was so mistaken as to be unreasonable. 18. To make a breach of public duty on the part of the respondent (and others) an issue in the appeal, requires more than the bare assertion of such misconduct. There must in my view be sufficient evidence to show a prima facie case of such misconduct before disclosure can be ordered and the respondent, or indeed other persons required to file affidavits responding to the same and being available, subject to leave, for cross examination. 19. In this case the evidence upon which the appellant relies falls well short of establishing a prima facie case of misconduct. The application for disclosure is an application made "in the hope that something might turn up" which will lend support to the appellant's contentions and as such is not a legitimate exercise. Save as set out below, I decline to order the disclosure requested or that the respondent personally file an affidavit. 20. In addition to considering the reasonableness of the decision, the Court on an appeal will be concerned with the proceedings of the respondent in relation to the application and whether the same are in general sufficient and satisfactory (see *IDC-v-Fairview Farm*

[1996] JLR 306). In paragraph 35 of his affidavit Mr Gladwin gives very brief reasons for the delays that would appear to have taken place in respect of this application. It was clear from the submissions of Mr Sharp that further information is available to explain the same. The relevance of the delay will be a matter for the Court at the appeal hearing but as it forms part of the process, I consider that a further affidavit should be sworn by the respondent or someone on his behalf explaining in much greater detail how the application was processed by the Planning Department and the reasons for the delay. Pursuant to rule 15/3(1)(b), such an affidavit must exhibit all documentary evidence relating thereto. 21. In summary:- (i) I decline to order the respondent personally to file an affidavit or to give the disclosure as sought in paragraph 37 of the appellant's skeleton argument. (ii) The appellant's application for experts to be called is left over. (iii) The respondent, or someone on his behalf, shall file an affidavit within 14 days explaining in much greater detail how the application was processed by the Planning Department and the reasons for the apparent delay and exhibiting to that affidavit all documentary evidence relating thereto. (iv) There shall be liberty to apply. 22. To allow for the filing of this further affidavit and for the subsequent filing of statements pursuant to Rule 15/3(4), the 19th September, 2011. will be vacated and a new date fixed for the hearing of the appeal. Authorities Royal Court Rules 2004. Trump Holdings Limited-v-Planning and Environment Committee

[2004] JLR 16 . Planning and Building (Jersey) Law 2002. De Smith's Judicial Review 6th edition. Token Limited-v-PEC

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