

JERSEY / JUDGMENT

Manning v AG [2000]

JRC 165 (16 August 2000)

[2000] JRC 165

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 14th April, 2000, the appellant was convicted before the Magistrates Court of one charge of contravening Article 8(1) of the Island Planning (Jersey) Law 1964. The charge read as follows:- "The said David Ronald Manning, with having between the 1 March 1999 and 24 September 1999, at the premises known as Field 1007, La Grande Route de St. Jean, in the Parish of St. John, acted in contravention of Article 8(1) of the Island Planning (Jersey) Law 1964, as amended, by displaying and advertising items for sale from the car parking area without the consent of the Planning and Environment Committee, thus rendering himself liable to the penalties set forth in Article 8(1) of the said Law." The appellant has appealed against his conviction. The Court allowed the appeal on 13th August, and we now give our reasons. 2. The essential facts, as they emerged from the evidence given before the Magistrate, are not disputed and can be shortly summarised. Following the decision of the States in his favour, the appellant submitted an application for development permission in August, 1996. The application was to build a two-storey house, a single-storey garage and a storage building on part of Field 1007, St. John. The proposed use of the storage building was described in the application as "commercial store". 3. On 15th May, 1997, the Planning and Environment Committee ("the Committee") issued an amended development permission for the proposal. Conditions 9 and 11 of the development permission were as follows:- "9. That no storage of goods, materials or plant shall occur outside the storage building and that all commercial vehicles shall be parked and loaded within the storage building. 11. That the new shed shall be used for storage only and there shall be no sale of goods from the premises." We should add that all parties are agreed that the expression "the new shed" meant the storage building referred to elsewhere in the development permission. Furthermore all parties were agreed that the expression "the premises" in Condition 11 referred to the whole of the area covered by the application. 4. On 14th March, 1998, the appellant wrote to the President of the Committee asking for Condition 11 to be cancelled. He explained that the purpose of the storage building was to accommodate the business which he had previously carried on in Cannon Street, which business included the sale of goods. He pointed out that Condition 11, which prohibited the sale of any goods, meant that he could not carry on that part of his business. On 23rd March, 1998, Mr. N. Fagan, a Senior Planner, replied to that letter in the following terms:- "Condition 11 does not forbid the ancillary sale of goods associated with your

business. It does prevent the establishment of a separate retail use. You are, therefore free to run your business in its entirety from your new building at the above site." 5. Mr. Fagan was therefore saying that, despite the apparently clear and unambiguous wording of Condition 11, the sale of goods was permitted if it was ancillary to the appellant's business, which was that of a haulage and removals contractor. As was accepted by all parties, the appellant had often sold items which he had removed as part of his business and which were no longer required by the customer. The statement that the appellant was free to run his business in its entirety can only be a reference back to the business previously undertaken at Cannon Street and we were informed by counsel for the Attorney General that this was indeed the intention of the Committee. 6. This was followed by a letter dated 2 nd December, 1998, from Mr. P. Thorne, Director of Planning. He said as follows:- "For the avoidance of doubt I should make it clear that Condition No. 13 (this should have been 11) of your permission not only prevents the establishment of a separate retail use at your shed, but equally limits the extent to which you yourself can sell goods. Your applications and the decisions made on them describe the proposed use of the new building as "storage". Following receipt of your letter of 10 March you informed us that limited retailing activities had taken place at Cannon Street and thus Mr. Fagan, having discussed the matter with me, wrote to you in March to say, perhaps not as explicitly as he might, that it was acceptable for the continuance of the sale of goods as a limited and ancillary part of your Fetch and Karrie business." Whilst purporting to clarify Mr. Fagan's letter, it in fact did little other than to repeat it. 7. The appellant replied to this letter on 9 th December, when he said as follows:- "I would also state that my letter of th March, 1998, did not say limited retailing had taken place at Cannon Street as I bought and sold anything that was available at the right price - including cars at times. Therefore the word limited does not apply." 8. Mr. Fagan replied on 26 January 1999 as follows:- "Mr. Thorne, in his letter of 2 nd December, 1998, made it clear that since your application and the decisions made on them describe the proposed use of the new building as "storage", you are only entitled to a limited sale of goods to the extent that they are an ancillary part of your Fetch and Karrie business." This amounted to no more than a repetition of what had been said in the letters of rd March and 2 nd December. 9. In March, 1999, it came to the attention of officers of the Committee that the appellant was displaying certain items for sale in the car parking area near the storage building. As a result Mr. Gerald Bisson, the Enforcement Officer of the Committee, wrote to the appellant on 6 th April, 1999, in the following terms:- "I refer to our meeting last Thursday concerning the display of items for sale on the above property. I would reiterate what Mr. Thorne and Mr. Fagan have said to you in their letters, the limited sale of items which is ancillary to your Fetch and Karrie business is permitted. However the display of such items anywhere outside the storage shed is not permitted. Where you have been displaying them on an area between the parking area and the pavement, does constitute an unauthorised change of use of land and could be deemed as contravening Condition 11 of the Development Permit dated 15 May 1997. You are, therefore, requested to cease displaying items for sale outside the shed forthwith. Failure to comply with this request may result in formal action being taken against you." 10. On 24 th September, 1999, three cars were seen being displayed for sale on the parking area outside the storage building. One was the appellant's daughter's car and no point is taken in relation to that car. The other two had "for sale" signs on them. The appellant admitted

that one was sold; the other was apparently not, although it had been offered for sale. The evidence was not clear but it seems that he obtained these cars from a hotel. The charge before the Magistrates Court was brought as a result of the appellant's activities in relation to these two cars. 11. Mr. Clarke raises two grounds of appeal. He says, first, that the charge was too imprecise and did not relate to the

facts.

Article 8(1) of the 1964 Law is a general provision, the relevant part of which provides:- "If any person develops, or causes or permits to be developed, any land without the grant of permission required in that behalf under this law, or if any person bound to comply with any conditions subject to which any such permission was granted fails to comply with that condition, he shall... be guilty of an offence..." 12. There are therefore two quite separate offences, namely development without permission and breach of a condition attached to a permission.

Unauthorised development can, of course, arise by means of an unauthorised change of use. The charge did not make clear under which limb the appellant was being charged. As indicated in Mr. Bisson's letter, the facts alleged might have laid the ground for a charge of unauthorised change of use or they might have laid the ground for breach of a condition. It is not clear from the charge itself which aspect was being relied upon by the prosecution. In fact, as appears from his decision, the Magistrate treated the matter as a breach of Condition 11. However, nowhere in the charge is Condition 11 mentioned. Furthermore, says Mr. Clarke, Condition 11 prohibits the sale of goods whereas all that the charge alleged was the "displaying and advertising (of) goods for sale". 13. Mr. Yates, on behalf of the Attorney General, accepted that the charge was unfortunately worded, but says that the appellant was not deceived or misled by any such deficiency.

Accordingly any technical breach should be overlooked. 14. We do not agree. A reading of the transcript shows that there was considerable debate about what was and was not permitted and adjournments had to be granted in order to obtain further evidence. A charge under Article 8(1) must make clear whether the prosecution is alleging development without permission or breach of a condition attached to a development permission. Where the latter is alleged, the charge must specify which condition is said not to have been complied with and the material respects in which there has been non-compliance. These aspects are essential so that the defendant knows the case which he has to meet. Any deficiency can often be remedied by amendment during the course of the proceedings but that did not occur here. We think that, because of the lack of the required particularity in the charge, the defendant was not given sufficient warning of the case against him and on that ground alone we would allow this appeal. We think that, in a contested case, it would be preferable for the case to be presented by a legally qualified prosecutor. 15.

However Mr. Clarke also relied on a second ground. Because it was fully argued and raises a point of some importance, we think that we should give our conclusions on it. Mr. Clarke accepted that Condition 11 was, on the face of it, unambiguous and prohibited the sale of any goods from any part of the premises, which would include both inside and outside the storage building. However, he said that the condition had been varied by the subsequent correspondence with the officers whereby they had made it clear that, despite the apparently clear wording of Condition 11, a sale

which was ancillary to the Fetch and Karrie business was permitted. He said that the letters from Mr. Fagan and Mr. Thorne did not draw a distinction between inside and outside the storage building. He accepted that the letter from Mr. Bisson did so but the appellant was entitled to rely on what had been said by the senior planning officers. Any ambiguity in the correspondence should be construed in the appellant's favour because one was dealing with a criminal offence. Furthermore the correspondence had to be construed in the light of the history of the matter. The intention was that the appellant should be able to carry on from the developed part of Field 1007 the business that he had previously carried on at Cannon Street and this included the sale of cars. In short, Condition 11 had been varied and any ambiguity in the terms of that variation should be construed in the appellant's favour. Nothing he had done had been proved beyond reasonable doubt to have been done in breach of Condition 11 as so interpreted. The Magistrate had erred in accepting the distinction relied upon by the planning officers between the inside and the outside of the storage building. 16. Mr. Yates adopted a different approach. He accepted that a condition in a development permission issued by formal act of the Committee could not be varied by a letter written subsequently by an officer of the department. However he submitted that the letters written by the various officers were merely "interpretations" of Condition 11. Properly construed, Condition 11 did not prohibit the sale of goods if such sales were ancillary to the appellant's business and effected inside the new storage building. What was prohibited was any sale which was not ancillary to the business or any sale which was ancillary to the business but was effected outside the new storage building. He said that that should have been clear to the appellant. The letters from Mr. Fagan and Mr. Thorne, when read carefully, referred only to sales from the storage building. What may only have been implicit from these letters was subsequently made explicit in Mr. Bisson's letter of 6 April and the appellant should have been in no doubt thereafter. 17. The Court does not accept either of these arguments. In our judgment it is quite impossible to accept the Crown's argument that the words in Condition 11 "that there shall be no sale of goods from the premises" can be interpreted to mean something along the lines that sales which were ancillary to the Fetch and Karrie business and were effected inside the new storage building were permissible but any other sales were not. In our judgment the words of Condition 11 are clear and unambiguous. 18. Neither can we accept Mr. Clarke's contention that officers can, by letter, vary the conditions attached by decision of the Committee to a development permission. A condition can only be varied by a further act of the Committee (or by a delegate if duly authorised in accordance with the relevant statute) with an amended development permission being issued thereafter. 19. In our judgment the true legal position is as follows. Condition 11 means what it says. No sale is permitted from the premises. It is therefore the case that the admitted sale of one car by the appellant amounted technically to a breach of that condition. However that is not the way in which the prosecution put its case and it would be wrong to uphold the conviction on a basis quite different from that put forward before the Magistrates Court. 20. What is the effect of the letters written by the officers to the effect that sales which were ancillary to the Fetch and Karrie business were not in breach of Condition 11. In our judgment, where the Committee, through its officers, represents to a person that a particular course of action is lawful and in compliance with a condition, and that person relies upon that representation, it would usually (although not invariably) amount to an abuse of process for that

person then to be prosecuted for acting in accordance with the representation made to him by or on behalf of the Committee. 21. However, once it is realised that erroneous advice has been given, then it is open to the Committee to correct the position. Assuming that the position is one which is capable of rectification, any person who, after being given reasonable opportunity to do so, fails to rectify the position and continues to act in breach of a condition can then be prosecuted and such a prosecution would not amount to an abuse of process. 22. In this case, no evidence was adduced by the prosecution to the effect that the sale of these cars was not ancillary to the Fetch and Karrie business. It has therefore to be assumed in the appellant's favour that they were so ancillary. In the circumstances we are of the clear opinion that it was an abuse of process to prosecute for sales which, on a reasonable interpretation of the letters, officials had said were perfectly lawful. The prosecution are not entitled to say that, in a criminal matter, the appellant should have accepted Mr. Bisson's letter as overriding the more general letters of Mr. Thorne and Mr. Fagan. We therefore allowed the appeal on the second ground as well as on the first ground. 23. Where does this leave the parties? Condition 11 remains in force. It means what it says. It does not and cannot carry the meaning put on it by the officers. There is therefore a blanket prohibition on sales from inside or outside the new storage building. However, in the light of the letters from the officers, it would be an abuse of process for a prosecution to be brought in respect of any ancillary sales before the appellant has been given reasonable notice that the Committee proposes to revert to the correct interpretation of Condition 11. If, after expiry of a reasonable period of notice given to the appellant by the Committee, the appellant insists on selling goods in breach of Condition 11, he may be prosecuted. 24. The appellant's remedy is to apply forthwith to the Committee for a formal variation of Condition 11. The Court was informed by counsel for the Attorney General that the Committee accepted that the appellant sold cars as an ancillary aspect to his Fetch and Karrie business when in Cannon Street and therefore had no objection to his continuing similar sales at the new premises. As indicated earlier, the intention was that Mr. Manning should be able to carry on broadly the same business at the new premises as he had carried on at Cannon Street. The difficulty is that Condition 11 does not reflect that intention. It is to be inferred from what we have been told that the Committee would be likely to agree to vary Condition 11 so as to reflect what was always intended and to permit sales which are ancillary to the Fetch and Karrie business. The Committee will also have to consider from which part of the premises (i.e. inside or outside the new storage building), it is willing to permit these ancillary sales to take place. It will need to consider any representations of the appellant in this respect but the final decision is that of the Committee to be taken on normal planning grounds. Whatever its decision, the Committee must, in any revised development permission, make clear what activities the appellant can undertake and whereabouts on the premises he can undertake them. 25. Finally, we would add this. This case has shown the highly unsatisfactory nature of the procedure followed by the Committee in this case. It was obviously realised at a comparatively early stage that Condition 11 was drawn too tightly, in that it prohibited all sales, whereas it was apparently always intended that the appellant should be able to conduct ancillary sales. The correct course would have been for the Committee, on the application of the appellant, to have varied the condition attached to the development permission so as accurately to reflect the desired position. A revised development permission should then have been issued. Had that

occurred, none of the problems in this case would have arisen and all the parties would have known where they stood. What in fact happened was that the letters from the officers purported to authorise the appellant to carry out activities which the development permission itself prohibited. Such letters were beyond the power of the officers (and the Committee) and led of course to a conflict between the terms of the development permission and the terms of the letters, which in turn led to the difficulties faced by the prosecution in this case. We trust that in future the correct approach will be followed. *Authorities Rushton -v- A. G.* (16 th October, 1989) Jersey Unreported. *Little -v- A. G.* (12 th September, 1989) Jersey Unreported. Page Last Updated: 02 Nov 2015 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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