

JERSEY / JUDGMENT

Minister for Planning and Environment - V- Dorey [2009] JCA 219 (19 November 2009)

[2009] JCA 219

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judgment

Smith JA: This is the judgment of the Court. 1. Mr and Mrs Dorey are the owners and occupiers of a dwelling house and premises known as and situate at Crow's Nest, Le Mont les Vaux, St Brelade. In April 2008, Mr Dorey sought permission from the Minister for the construction of a vehicular access running from the house to the road. By a notice dated 4 th September, 2008, permission was refused, the Minister giving the following reasons:- "The proposed works would necessitate substantial engineering operations upon, and the partial loss of, a very prominent vegetated bank which is in the Green Zone and also forms part of the 'Enclosed Valleys' landscape character type. Such works will not be sympathetic to the local character and accordingly, the proposal is considered to be contrary to the provisions of Policies C2 and C5 of the Jersey Island Plan, 2002." 2. The Doreys requested that the Minister reconsider the refusal but the Minister maintained the decision to refuse and the notice to this effect dated 19 th February, 2009, sets out exactly the same reasons. The Doreys appealed to the Royal Court on foot of Article 113(2) of the Planning and Building (Jersey) Law 2002 ("the Law"). By virtue of Article 109(1) the only permissible ground for appeal is that " the action taken by or on behalf of the [Minister] was unreasonable having regard to all the circumstances of the case." The appeal was duly heard by the Royal Court, F. C. Hamon, Esq., OBE, Commissioner, presiding, and in a reserved judgment handed down on 28 July, 2009, the Royal Court allowed the appeal and ordered the Minister to grant the permission sought subject to three conditions, to one of which we shall make reference later in this judgment. 3. In turn, the Minister appealed to this Court. Although the Notice of Appeal lists nine grounds they can, for convenience, be grouped under three headings:- (i) The Royal Court did not apply the correct test for unreasonableness and its material findings did not meet the test; (ii) The Royal Court did not give any or adequate consideration to the applicability of the Island Plan, particularly Policy C5 of the Plan; (iii) The effect of the Royal Court's decision would be to grant permission for development materially different from that sought in the application. 4. We deal with heading (ii) first as it helps to illuminate the other two. Article 3(1) of the Law provides for the preparation of an "Island Plan" by the Minister and its approval by the States. Although the Minister may grant planning permission that is inconsistent with the Plan this must not be done

unless the Minister is satisfied that there is sufficient justification for doing so (Article 19(3)). The material area including Crow's Nest is within the "Green Zone" as defined in the Plan. It states that the "landscape character types" of this zone "have been created mainly through human intervention and their quality and distinctiveness makes them particularly sensitive to the effects of intrusive development. Accordingly, there will be a strong presumption against any new development to retain this quality and distinctiveness and to ensure that the character of the zone remains intact." 5. Policy C5 applies to the Green Zone. It provides that:- "The areas designated as Green Zone ... will be given a high level of protection and there will be a general presumption against all forms of new development for whatever purpose " but that "The [Minister] recognises ... that within this zone there are many buildings and established uses and that to preclude all forms of development would be unreasonable. Thus, the following types of development may be permitted but only where the scale, location and design would not detract from, or unreasonably harm the visually sensitive character and scenic quality of this zone: Domestic extensions and alterations In all cases, the appropriate tests as to whether a development proposal will be permitted will be its impact on the character of this zone and whether it accords with the principles of sustainability which underwrite the Plan ..." 6. There are two passages in the judgment of the Royal Court that articulate its reasons for allowing the appeal. In paragraph 10 it is stated that:- " ... though it is strongly argued by the Minister that this is a " very prominent vegetated bank " we cannot see but that within a very short space of time (if replanting is carried out) there will be nothing to make the new bank any different from the old bank and, having visited the site, the learned Jurats cannot tell where the main part of Mr Lane's [Mr Lane is a neighbour] driveway lies because it is entirely shaded with vegetation. This is not a pedestrian road; only cars travelling up and down Mont les Vaux will see the affected area." And the material part of paragraph 16 reads:- "The Court, as we have said, has visited the site and listened most carefully to the arguments but we have little doubt but that the decision of the Minister was wrong, particularly in the light of the development permission [granted in 2008 permitting the Doreys to construct a pitched roof on the existing bungalow to create further habitable space] which was 'adjudged to improve the appearance of the dwelling'. Additionally, anyone crossing the road, including the Appellants and their family, is in peril. The Court has examined most carefully Mr Lane's property and his driveway cannot be seen from the road and while the appellants are prepared to replant and re-seed the bank, the Minister could impose conditions on replanting. There is no reason, as far as the Court can see, why within twelve months it would not be difficult, if not impossible, to see the access road. As the officer reporting to the Applications Panel said ' the proposal would, inevitably, result in the loss of some vegetation, including trees. However it was noted that several of the trees likely to be affected are dead or dying already. ' We do not conclude that this particular section of the bank is ' very prominent' as claimed in the reason for the refusal." 7. In support of the argument that the Royal Court did not give any or adequate consideration to the application of the Plan or the policy, Crown Advocate Sally Sharpe, who appeared for the Minister before us (but not in the court below), focussed on the statement at para 17 of the judgment that " we cannot see that Policy C5 is relevant for the purposes of the new proposed driveway ". Taken literally, this statement is patently incorrect; on any view the plan and policy were highly, indeed crucially, relevant. But

what was said must be seen in context; it is incumbent on us as an appellate court to construe, if we can, the judgment of the court appealed from in a way that favours the endorsement of its decision. The judgment sets out the material parts of both Plan and policy. The visual impact of development is what these seek to ameliorate, if not prevent. In our opinion, the remarks quoted should be interpreted as references to the provision in C5 permitting an exception to be made and as explaining the Royal Court's view that it was unreasonable for the Minister not to have made it. 8. Going back to the test for unreasonableness to be applied by the Royal Court and whether its findings met that test, we note that the Royal Court adverted to the relevant authorities, in particular the remarks of Bailhache, Bailiff, in *Token Ltd-v-Planning and Environment Committee*

[2001] JLR 698 , 703 dealing with the equivalent provision in the 1964 Planning Law which also included the requirement as to a finding of unreasonableness before the Royal Court could overrule the decision of the planning authority. The Bailiff said:- "The court might think that a Committee decision is mistaken, but that does not, of itself entitle the court to substitute its own decision. The court must form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a quantitative difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the court thinks to be mistaken becomes so wrong that it is, in the view of the court, unreasonable." These remarks were approved by this Court in *Planning and Environment Committee-v-Le Maistre* [2002] JLR 389 , 398, 399 and 405. They are just as applicable to the current legislation as they were to the 1964 Law. 9. So it is reasonable to infer from the judgment that the Jurats were properly directed as to what the test was that had to be satisfied before the Royal Court could allow the appeal. But did its material findings meet the test to the extent of permitting the Royal Court to overrule the Minister? 10. The Royal Court was faced with two conflicting points of view as to the impact on the site of the construction of the new access. Mr Roger Norman, a design consultant acting for the Doreys, had argued that although the proposed driveway would initially be prominent and alter the contours of the existing roadside bank it would soon become overgrown by vegetation and the existing character would be retained. In addition there was a letter before the Court from the neighbour, Mr D. K. Lane, who said in it that when he had done similar work on his property about 20 years earlier he found that the application of top soil to the affected area, followed by the planting of appropriate bushes and grass seeding, resulted in its restoration to a natural state in a surprisingly short time. On the other hand the officer who reported to the Applications Panel stated that although it might be possible to replant following any works " the effect would not be the same owing to the new bank profile . " 11. No oral evidence was given at the Royal Court hearing and the judgment does not clearly indicate how the court resolved the apparent conflict of opinion, nor does it set out explicitly what it made of the point about the bank profile. The impression one is left with from the references in the judgment to the site visit made by

the court is that this influenced its decision making. 12. In *Trump Holdings Limited-v-Planning and Environment Committee*

[2004] JLR 232 at pages 249-250 I expressed disquiet about site visits not directed solely to enabling the Court to understand the

issues.

In the same case, at page 237, Southwell JA said that courts should abstain from forming their own subjective views by means of a site visit as this would involve the court in taking into account factual or opinion evidence which had not been before the decision maker on an application to develop land. 13. The judgment in the instant case does not record in any detail what the Jurats made of what they saw in the course of the site visit, nor does it indicate that they were given any warning of the legal pitfalls inherent in such a visit. But whatever the position the judgment seems to us to suffer from the major shortcoming of failing explicitly to address the issue of the new bank profile in addition to that of the restoration of the vegetation. 14. It will be noted from the portions of the judgment that we have quoted that the Royal Court mentioned two other factors in support of its conclusion as to the unreasonableness of the Minister's decision. One was the earlier grant of permission for the construction of the pitched roof and the other was the hazard faced by Mr and Mrs Dorey and their two small children in crossing Le Mont les Vaux to get to their car which has to be parked in a lay-by on the far side of the road from their home. 15. As to the first of these, there is no legal basis on which any entitlement or expectation as to access could be implied from the grant of permission to extend the accommodation available in Crow's Nest. That the premises have no vehicular access from the public road was a factor to be taken into account by the Minister but clearly this must have happened as it featured in Mr Norman's submission on behalf of the Doreys. But it cannot be said that the Minister's refusal to be swayed by this factor was unreasonable. 16. As to the hazard of the family having to cross the road, we observe that the written comments furnished to the Applications Officer by Mr Bob Baudains, Manager, Traffic and Street Works in the Transport and Technical Services Department, indicate that he did not consider crossing the road at the material point to be particularly hazardous. No other evidence contradicting this view was put before the Minister. In so far as this point is relevant it is difficult to see how the Minister's decision could fairly be described as unreasonable in the light of it. 17. We mentioned at the beginning of this judgment that the Royal Court directed the Minister to grant the permission sought subject to three conditions and that we would make reference to one of them. This requires " the meeting of the highway standards " . Miss Sharpe on behalf of the Minister argued that the effect of this condition would be to require the Minister to grant permission for development other than that applied for. 18. The highway standards are referred to in Mr Baudains' comments and this is what he said about them:- "The proposed access is to be cut into a bank which is over 15m high and exceeds 45 degrees in places. For a distance of 5m back from the edge of the carriageway, the gradient of the access ramp must be no more than 1:20 gradient. Internal ramps can be steeper, up to a maximum of 1:10. The proposed 70m long ramp is closer to 1:5 which is considered impassable. It is estimated the driveway would need to be at least 150m long to meet acceptable standards. As no information on

levels or construction have been provided, it is difficult to comment on these points precisely. It is possible to create a vehicular access to this property that meets full highway standards; however it will require an enormous amount of excavation work to quarry a zig-zag driveway into the bank." 19. It would seem from this that what the standards require is a very different access from that for which permission was sought. It would be something like twice as long and would follow a significantly different route. Moreover the scale of the excavations required would appear to be much greater than that contemplated in the application. 20. In *Bernard Wheatcroft Ltd-v-Secretary of State for the Environment*

[1982] 43 P & CR 237 *Forbes J* said that, when considering whether the effect of conditional planning permission allowing development is in substance not that which was applied for, the main criterion "is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation." (page 241). This chimes with the approach of *Bailhache, Bailiff*, delivering the judgment of the Royal Court in *McCarthy-v-Planning and Environment Minister*

[2007] JLR 167, who described the coming into force of the Law as marking "a watershed of which the courts should take cognisance." He went on to point out that it imposes on the Minister a wide duty of consultation with interested bodies and persons and to stress the importance of due process leading to a considered decision on the part of the Minister (page 183). 21. We endorse these statements. The effect of them is that the decision of the Royal Court cannot stand. The due process required by law to be followed before permission could be granted for what is clearly different development from that applied for has not been followed and it was not open to the Royal Court or this Court to dispense with it. 22. We would add that the Royal Court's decision can also be analysed in another way in the light of the proposed condition as to the meeting of the highway standards. In considering the impact of the development did the court have in mind the access as applied for or one meeting the highway standards? If the former, the consideration was otiose as that is not the access that the Royal Court's decision would have permitted. On the other hand, however, there is absolutely nothing in the judgement to indicate that the Royal Court considered the impact in planning terms of an access meeting the standards - indeed it could hardly have done so as, as Mr Baudains pointed out, no information on levels or construction had been provided. In these circumstances, irrespective of the impact of the planning legislation, we could not have endorsed the Royal Court's decision. 23. It follows that we must allow this appeal. But we cannot leave it without expressing our sympathy for Mr and Mrs Dorey for whom it is at least highly inconvenient, if not hazardous, to have to leave their car in a lay-by on the far side of Le Mont les Vaux and cross the busy road with their small children and whatever else they have to carry before climbing a series of steps to their home. Their predicament is compounded by the fact that not only have they had the cost of the planning application but they have also been put to the expense of being represented at two court hearings. 24. Mr and Mrs Dorey may or may not decide to make a revised application under the Law taking account of the

impact of the highway standards. Nothing that we have said in this judgment should be interpreted as this Court expressing any view as to what the outcome of any such application should be. But for future reference it does occur to us to suggest that where, on an appeal under Art 113(2) of the Law, the Royal Court is minded to allow the appeal subject to a condition, a prudent procedure would be for it to invite the submissions of the parties on the proposed condition before including it in the Act of Court. Authorities Planning and Building (Jersey) Law 2002. Token Ltd-v-Planning and Environment Committee

[2001] JLR 698 , 703. Planning and Environment Committee-v-Le Maistre

[2002] JLR 389 , 398, 399 and 405. Trump Holdings Limited-v-Planning and Environment Committee

[2004] JLR 232 at pages 249-250. McCarthy-v-Planning and Environment Minister

[2007] JLR 167 . Bernard Wheatcroft Ltd-v-Secretary of State for the Environment [1982] 43 P & CR 237. Page Last Updated: 29 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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