

JERSEY / JUDGMENT

Sunier v Planing and Environment

[2003] JRC 188 (23 October 2003)

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judgment

the bailiff: 1. This is an appeal by Michael Sunier and Marianne Sunier (to whom we shall refer individually as "Mr Sunier" and "Mrs Sunier" and collectively as "the appellants") against a decision of the Planning and Environment Committee, now known as the Environment and Public Services Committee (to which we shall refer as "the Committee") to issue a notice requiring the reduction in height of a wall erected contrary to the terms of a development permission. 2. The parties to this appeal submitted a very helpful agreed statement of facts. We have made minor amendments in the interests of internal consistency with terms used in this judgment but, subject thereto, the statement is in the following terms - "(1) The appellants are the owners of a property known as Cape House. Cape House is a substantial late nineteenth century house located on the north side of La Rue du Pontlietaut in the Parish of St Clement. The property is a proposed Site of Special Interest on the Register of Buildings and Sites of Architectural, Archaeological and Historical Importance in Jersey. (2) To the north and north east of the property is a row of new houses by the name of Beach Gardens which have recently been constructed on the site of the old Eastern Railway line. The appellants voiced their concerns during the application for development permission for these properties about the extent to which they would overlook Cape House once completed. The Committee took these representations into account prior to imposing conditions on the four properties most geographically proximate to Cape House restricting upstairs windows on the southern side overlooking Cape House and its garden. (3) On 17th December 2001 the Committee received an application from the appellants, dated 5th December 2001 seeking permission to raise the height of the wall on the northern boundary of Cape House ('the wall') to a maximum height above ground level of 5.25 metres. At that time the wall was predominantly 2.64 metres in height with part being 3.64 metres, this additional metre being constructed in brick, and a small part of the latter section being 4.39 metres in height. (4) Miss Radford, an official from the Planning Department, undertook a site visit on 22nd January 2002. (5) One of several telephone calls to the Planning Department took place on 6th February 2002 between Mrs Sunier and Miss Radford. The purpose of the call was to ascertain the Committee's attitude to the appellants' application to increase the height of the wall in order that the appellants might order building work to start at the earliest opportunity. What was said during the telephone conversation is unclear. Miss Radford's file note states she

suggested to Mrs Sunier that an extension no higher than 3.64m in reclaimed brick would be acceptable. Mrs Sunier states that as a result of the telephone conversation she believed she was entitled to build an extension to the height of the highest existing point of the wall, part in reclaimed Jersey granite. Miss Radford consulted by a memorandum dated 6th February with the Historical Buildings Section of the Department by virtue of Cape House being a proposed Site of Special Interest. (6) Shortly after the telephone call of 6th February 2002 the appellants began constructing the extension to the wall - in brick where the existing materials used were brick, and granite where the existing materials were granite - to a height of 4.5m. (7) Planning consultant Rachel Godel replied on behalf of the Historical Buildings Section to Miss Radford's memorandum of 6th February 2002 on the 26th of the month, stating that an extension of the wall to 3.64m in reclaimed brick would be acceptable. (8) On 12th March 2002 the Committee granted the appellants permission to increase the height of the wall, but attached to the permission conditions restricting the height of the extension to the wall to no higher than 3.64 metres and restricting the construction materials to reclaimed brick, so as to match the existing brick section of the wall. (9) Miss Radford informed the appellants by letters dated 2nd April and 24th July 2002 that the height of the wall on their property breached the conditions of the development permission issued by the Committee on 12th March. Miss Radford stated that remedial work to enable the alterations to comply with condition 1 - to reduce the height of the wall to 3.64m - would be required, but did not stipulate any action in respect of condition 2 - that the extension should be in reclaimed brick, rather than brick and granite. The appellants contacted the Department by telephone but failed to resolve the matter to their satisfaction. Miss Radford undertook a further site visit on 9th August 2002 after which a file note concerning the height of the wall was produced. (10) Miss Radford produced an Officer Committee Report dated 4th September 2002 for the Planning and Environment Applications Sub-Committee, which met on 16th September 2002 and decided to order enforcement action against the appellants. (11) On 24th September 2002 the Committee served a notice on the appellants pursuant to Article 8(1) Island Planning (Jersey) Law 1964 requiring them to reduce the height of the wall from the present 4.5 metres to a maximum of 3.64 metres by 24th October 2002. (12) The appellants' lawyers, Daniel Young, wrote to Mr Young, Chief Executive Officer of the Department, in a letter dated 21st October 2002 explaining that the appellants had requested advice pertaining to a potential retrospective planning application. Deputy Philip Ozouf [as he then was] met with the Director of Planning on the same day, where it was agreed that he could address the Committee at its next meeting to request that it reconsider the condition relating to the height of the wall. (13) On 14th November 2002 the Committee considered written and oral representations by Deputy Ozouf on behalf of the appellants to reconsider the imposition of the restriction in the height of the wall, and to consider a site visit on the part of the Committee. On viewing colour photographs of the wall, the Committee decided that a site visit would not be necessary. (14) The Committee decided on 14th November 2002 to maintain the restriction relating to the height of the wall present as a condition in the original development permit of 12th March 2002. The Committee ordered the withdrawal of the enforcement notice dated 24th September 2002, and agreed its replacement with a new enforcement notice conveyed to the appellants and their lawyer by letters dated 15th November, allowing 60 days to carry out the required remedial work

or to appeal against the notice under Article 21 of the Island Planning (Jersey) Law 1964. (15) The appellants made written submissions to the Committee which they termed "Response to the Royal Court" in the week ending 17th January [2003]. The appellants believed this was an effective method for giving notice of their appeal. The Committee did not take up any point relating to the prescription period of sixty days. (16) A Notice of Appeal was served upon the Committee on 12th February 2003 incorporating the text of the appellants' submissions to the Committee of the week ending 17th January. As this Notice did not comply with Rule 12 of the Royal Court Rules as amended by R&O 62/2002 a subsequent revised Notice was served on 14th March 2003. (17) The appellants wrote to Mr Young on 31st March 2003 requesting that the newly constituted Environment and Public Services Committee reconsider the decision of the previous Committee. This request was submitted to the Committee at a subsequent meeting on 2nd May, at which it was decided that the Committee would not make a site visit, and that it would maintain the decision previously made." 3. It is clear from the above recital of facts, and it is not denied by the appellants, that they acted prematurely and unlawfully in constructing the wall to a height greater than that permitted on 12th March 2002. They acted under a mistaken apprehension of what had been permitted, but they acted unlawfully nonetheless. While that factor is clearly a matter to be taken into account, our task is to consider the reasonableness of the Committee's decision to require the reduction in height of the wall to 3.64 metres from its current 4.5 metres. 4. There was no dispute as to the legal test to be applied by the Court. It is conveniently set out in the judgment of this Court in *Token v Planning and Environment Committee* (2001) JLR 698 at 703 - "The test to be applied by this court in determining appeals under the Island Planning (Jersey) Law 1964 was settled by the Court of Appeal in *Island Dev. Cttee. v. Fairview Farm Ltd* . (2). *Le Quesne, J. A.* stated

(1996) JLR at 317: "The Royal Court, as an appellate body, must consider not merely whether the inferior body has followed the correct procedure, but also whether its own view is that the decision was unreasonable. It may allow whatever weight it thinks proper to the experience and knowledge of the inferior body, but it cannot escape the responsibility of forming its own view ... The duty of the court on an appeal under art.21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach, but to decide whether the court considers that the decision was, in its view, unreasonable." The Solicitor General submitted that the decision in *Fairview Farm* did not entitle the court to find that the Committee's decision was reasonable but quash it because the court had reached an equally reasonable but different decision. We agree. The court might think that a Committee's 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 qualitative 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." 5. That approach was endorsed by the

Court of Appeal in Planning and Environment Committee v Le Maistre

- (2002) JLR 388 at paragraph 25 . We would modify it only in one minor respect, following a suggestion by Professor Andrew Le Sueur in an article entitled ' Appeals and Judicial Review after the Human Rights (Jersey) Law 2000 ' (2002) 6 JL Review 142 that the phrase "margin of appreciation" was apt to be confused with the different concept of international law. We would therefore substitute the phrase "margin of discretion".
6. The Committee's decision to issue the enforcement notice under Article 8 was recorded in its minutes in the following terms - The Committee noted that the wall had been constructed at a height considerably in excess of the 3.6 metres allowed by a condition of the development permission. The wall was considered to prejudice the neighbouring properties causing loss of light. The appellants had to date failed to comply with an enforcement notice requiring them to correct the situation. They wished to make a retrospective planning application to allow the current height to remain, on the grounds that their privacy had been compromised by the new housing development adjoining their property. These properties overlooked the rear bedroom of Cape House. Deputy Ozouf suggested that the Committee should visit the site to assess the impact of the present wall. The appellants further maintained that the height of the current wall matched the height of a very small section of the wall in its previous condition. The Committee viewed recent photographs of the wall and its effect on the houses to the rear of Cape House. It felt that the impact of the present wall was quite clear from this evidence. Furthermore, it was advised that these houses had been built in such a way that their windows did not face directly on to Cape House. It was also advised that the section of wall referred to by the appellants matching the present height of the wall was probably an old chimney breast and should not be taken as a reason for maintaining the present height. In addition, the extension to the wall had originally been constructed unsympathetically without any rendering on the side of these houses, although the position had since been rectified. Following the departure of Deputy Ozouf, the Committee agreed to maintain the original condition relating to the height of the rear wall at Cape House.
7. The Director of Planning elaborated on the decision in an email to Deputy Ozouf by stating - The Committee decided today to maintain its position on the appropriate height for the wall. It considers that the height of the wall has an overbearing impact on the homes recently built on the old railway track (Beach Gardens). The Committee has a duty to look after the reasonable interests of adjoining residents as well as the reasonable interests of the Suniers. It maintains that a wall of 3.64 metres in height will protect the reasonable expectations of all parties.
8. It seems therefore that four factors influenced the Committee in arriving at its decision. First, they considered that the height of the wall created an "an overbearing impact" upon the newly constructed houses opposite the appellants' property. Secondly, they concluded that a reduction in height to 3.64 metres would not adversely affect the privacy of the appellants. Thirdly, they considered that the height of the wall prejudiced the new houses by causing a loss of light. Fourthly, although this was not referred to in the Committee's minute, nor in the email

from the Director of Planning, a further reason given for the condition limiting the height of the wall to 3.64 metres was "to safeguard the visual amenities of the area", although this is of course related to the first factor set out above. 9. Before arriving at its decision, the Committee did not undertake a site visit. As the Solicitor General correctly submitted, it is not an essential pre-requisite in every case to visit the site to which an application relates. As the Court stated in *Guillard v IDC*

(1969) JJ 1225 at 1228 - "We do not consider that the members of the Committee must in person visit every site for which application for consent to develop is made. It is, however, essential that the Committee should have before it, and be in a position to appreciate, all the information relevant and necessary to enable it to come to a proper decision on the application. In some cases, this may require a personal visit to the site. In other cases, the application and accompanying plans, together with the report of one of its qualified officers, will suffice." 10. In this case the Committee was invited to visit the site, not only by the appellants, but also by Deputy Ozouf, their political representative. They chose not to accept this invitation but to rely upon the reports of their officials and photographs of the wall and surrounding area. While we understand the pressure under which the Committee is working, we think that it is a pity that the Committee did not visit the site in this instance. The members of the Court did go on site and gained a completely different impression from that afforded by the photographs. 11. One photograph in particular, entitled 'Shadows cast by high wall of Cape House at 1.45 pm Thursday 14.11.2002' is seriously misleading in the impression that it conveys. It does indeed show a shadow falling half way up the wall of one of the new houses and above the windows on the ground floor. The appellants contended that this shadow was cast not by the wall but by the roof of Cape House. This contention appears to be supported by four protruding shadows above the horizontal line which the appellants stated were the four chimneys of the property. More importantly, by a happy chance, the members of the court were able to see the sun emerge from the clouds at its visit at 2 pm on Friday 10th October 2003. It was quite clear to us that when the sun descended in the sky it would fall behind the roof of Cape House which would indeed cast its shadow upon the new properties. The height of the wall causes no prejudice at all in terms of loss of light. Furthermore the same photograph does convey an impression of threatening mass in terms of the new properties. That impression is in our judgment entirely wrong. The wall is indeed fairly high but not disproportionately so. In our view it certainly does not create an "overbearing impact" upon the new houses. 12. The court was invited by the appellants, with the Solicitor General and Director of Planning, to go inside Cape House to view the wall from that perspective too. It was clear to us that a reduction in height of nearly a metre would enable those in the master bedroom and the second bedroom in particular to see into the first floor bedroom of the house opposite. Conversely a person in that first floor bedroom would be able to look into those bedrooms of Cape House. There would therefore be a serious loss of privacy, not only to the appellants, but also to the owners of the new house opposite. This conclusion is difficult, if not impossible, to draw from the photographs. As

one can see on the ground, however, the new house is set at a slight angle to Cape House so that the bedroom window on its gable end is the window that would cause the loss of privacy. The Committee had taken the appellants' representations into account by restricting upstairs windows on the south side, but did not apparently appreciate that it was a window on the western gable end that caused the prejudicial invasion of privacy. 13. Finally we consider the visual amenities of the area. We concede that this is a matter of subjective appraisal. However, we observed that Cape House is a very substantial property constructed during the 19th century. It is thought to be a 'Cod' house. The new houses in Beach Gardens, while not on the same scale, are three storey buildings of some substance. The road that divides the properties is reasonably wide and capable of allowing two cars to pass each other in opposite directions. The scale of the wall at 4.50 metres is not out of proportion to its surroundings. We gained no impression of overbearing mass. 14. We return to the test which we must apply. In our judgment the Committee's decision was not merely mistaken, but is so wrong that it cannot be allowed to stand. We think that if the Committee had attended on site it would not have arrived at the conclusion that a notice requiring the reduction in height was the right way to proceed. None of the reasons given by the Committee holds water. In so saying we do not criticize the Committee's officials. A decision had been reached in good faith and on advice that 3.64 metres was the appropriate height. The appellants acted prematurely and unlawfully in building the wall up to 4.50 metres and one can well understand the reaction of officials that there should be compliance with the conditions attached to the development permission. The function of the Committee was however to review the matter in the light of all relevant circumstances. It was one of those cases where a site visit was in fact essential to enable it to come to a proper decision. 15. In our judgment the Committee's decision was unreasonable. We therefore allow the appeal and quash the notice issued on 15th November 2002 requiring the appellants to reduce the height of the wall to a maximum height of 3.64 metres. We also direct the Committee to withdraw the first condition attached to the development permission dated 12th March 2002 and to substitute a condition limiting the height to 4.5 metres. *Authorities Token -v- Planning & Environment Committee*

[2001] JLR 698 . *Planning & Environment Committee -v- Le Maistre* [2002] JLR 388. *Le Sueur: Appeals and Judicial Review after the Human Rights (Jersey) Law, 2000*

(2002) *Jersey Law Review* 142. *Guillard -v- IDC*

(1969) JJ 1225 . *IDC -v- Fairview Farm*

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Prepared on 23 October 2026 · Esheria