Judgment 17/2010 **Swallow Apartments Ltd v Environment Department - Royal Court (Civil Action file 1451) – 4 March 2010 and 26 March 2010**

Island Development (Guernsey) Law, 1966 – appeal from refusal of permission for change of use from self-catering accommodation (Tourist Use Class 15) to permanent residential use – relevant Policies of the Rural Area Plan – decision held not to have been unreasonable and appeal dismissed by 8 votes to 1.

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil File No.1451

The 4th day of March, 2010 before John Russell Finch, Esquire, Judge of the Royal Court; present: Alan Cecil Bisson, Esquire, The Reverend Peter Gerald Lane, Michael John Tanguy, Esquire, Susan Mowbray, David Osmond Le Conte, John Ferguson and Stephen Murray Jones, Esquires, Claire Helen Le Pelley and Niall David McCathie, Esquire, Jurats.

In the action of SWALLOW APARTMENTS LIMITED against THE MINISTER OF THE ENVIRONMENT DEPARTMENT in the terms attached hereto;

THE COURT having heard Advocate P.M.A. Palmer for the Appellant and Advocate K. Hill-Tout for the Department and having carried out a Vue de Justice DISMISSED the Appeal by eight votes to 1.

AND THE COURT AWARDED costs in favour of the Department.

S M SIMMONDS
Her Majesty's Deputy Greffier

24 July 2009
Collas Day
PMAP

SWALLOW APARTMENTS LIMITED the Registered Office of which is situate at La Cloture, L'Ancresse, in the Parish of Vale ("the Appellant") (which company changed its name from Hotel Les Douvres Limited pursuant to a petition granted by the Royal Court on the 12th February, 1987) whose address for service is Manor Place in the Parish of St Peter Port, as owner of premises formerly part of "Les Terres de la Cloture de my Lord" being a parcel of land with the premises known as "Swallow Flats" comprising ten self-catering apartments (two one bedroomed, six two bedroomed and two three bedroomed) in two buildings (hereinafter called "the said premises") thereon the whole adjoining and situate at L'Ancresse in the said Parish of the Vale acquired by the Appellant by Conveyance from Swallow Properties Limited registered on 30 December 1986,

ACTIONS

THE MINISTER of the **ENVIRONMENT DEPARTMENT** ("the Respondent") whose address for service is care of St James' Chambers in the said Parish of St Peter Port **TO SEE** the Respondent show cause why the decision of the Respondent whereby the Appellant was refused permission to change the use of the portion of the said premises comprising Apartments 2, 5, 7, 8, 9 and 10 from the current use as self-catering accommodation within Tourist Use Class 15 to permanent residential use ("the Application"), which said decision was most recently communicated to the Appellant by a letter of Refusal of Consent dated the 27 February 2009, ("the Refusal of Consent") should not be set aside or varied on the grounds that the said decision is unreasonable, the material facts on which the Appellant relies being as follows:

1. On the 14th day of January, 2009 and by subsequent letter dated 30th January, 2009 Mr. Mark Hesse a Director of the Appellant applied to the Respondent for a reconsideration of its previous decision to reject the Application.

2. On the 27th February, 2009 the Respondent rejected the Appellant's said application for reconsideration which Refusal of Consent stated inter alia:

The Department decided to reject your proposal for the following reasons under the provisions of Section 17 of the Island Development (Guernsey) Laws, 1966-1990: -

(a) the Rural Area Plan as approved by the States.

In reaching it's decision the Department has taken into account all relevant policies in the above Plan. Particular attention is drawn to Policies RCE14 and RE12.

3. The Appellant submits that the Respondent's decision was unreasonable in that:

(i) The Appellant premises in accordance with the terms of the Rural Area Plan (review No. 1) ("the said Plan") are situate within an un-designated area of the Rural Area Plan and accordingly the terms of the said Plan do not preclude the Respondent from giving the permission sought within an area so designated;

(ii) **Policy RCE 14** of the said Plan provides:
Proposals to convert or re-use buildings will only be permitted where:

a) it has been clearly demonstrated to the satisfaction of the Department that the building is no longer useful, or capable of being used for its current or last known viable purpose or that more appropriate buildings are available to accommodate such use;

b) the building is of sound and substantial construction and is capable of conversion without extensive alteration, rebuilding or extension;

c) in Areas of High Landscape Quality, the building is of architectural or historic interest or makes a positive contribution to the character of the rural environment;

d) the conversion can be implemented without adversely affecting the character or appearance of the building; and,

e) the provision of curtilage, road access, driveways and parking, ancillary buildings and boundaries would not adversely affect the character of the building or its setting.

It is not accepted that the said premises can still be viably used as short-term self-catering holiday lets due to reduced demand and significant change in the requirements of the tourist industry particularly in circumstances where there are buildings in more appropriate locations available for such use. The proposed change of use would comply with all of the requirements set out in sub-paragraphs (a) to (e) above and the Respondent is therefore not precluded from granting the change of use permission sought.

(iii) **Policy RE12** of the said plan provides:

The change of use or redevelopment of visitor accommodation to other uses will only be permitted where it would not prejudice the retention of any adequate stock of visitor accommodation across the Island and where:

(a) the existing premises provide an unsatisfactory standard of accommodation and facilities and are incapable of being upgraded or otherwise adapted to a satisfactory standard or, changed to an alternative tourist accommodation use at reasonable expenses, having regard to the location, immediate surroundings and size of the establishment; or

(b) the premises are currently of an inappropriate size for a modern, viable operation and are not readily capable of being suitably adapted or re-sized.

Where a residential use is proposed, a satisfactory living environment and standard of accommodation must be provided including satisfactory levels of amenity, servicing and parking provision appropriate to the type of accommodation being created and it location.

It is not accepted that the said premises are reasonably capable of continuing to be used for the purpose of short term self-catering holiday lets. It is submitted that the said premises are in a dated condition and do not meet the standard of accommodation and facilities expected by experienced travellers and the cost of upgrading or otherwise adapting the premises, re-signing or changing to an alternative tourist accommodation use would not be reasonable or viable bearing in mind the location of the said premises, the immediate surroundings and the very restricted site.

4. There is and was no valid reason for not granting permission on the basis of the Policies and other considerations put forward by the Department.

5. In all the circumstances the Respondent's decision is unreasonable.

AND the Appellant claims costs.

Approved Judgment
26 March 2010

IN THE ROYAL COURT OF GUERNSEY

APPEAL

Between

SWALLOW APARTMENTS LIMITED

The Appellant

-v-

THE MINISTER OF THE ENVIRONMENT DEPARTMENT

The Respondent

Date of hearing: 4th March 2010

Decision handed down: 26th March 2010

Before: John Russell Finch Esq., Judge of the Royal Court and Jurats: A C Bisson, M J Tanguy, E I J S M Mowbray, The Reverend P G Lane, D O Le Conte, J Ferguson, S M Jones, C Le Pelley, and N D McCathie

Counsel for the Appellant: **Advocate P M A Palmer**
Counsel for the Respondent: **Advocate K Hill-Tout**

Materials referred to:
The Island Development (Guernsey) Law, 1966, as amended, Section 17
The Rural Area Plan, (Review No. 1)
Token Ltd v Island Planning and Env. Committee [2001] JLR at 703-4

Background

1. This appeal was heard on 4th March 2010 and included a Vue de Justice. The appeal was dismissed that same day and it was indicated that the Jurats' reasons, both in the majority and the minority would follow, which they do now. An agreed bundle plus plans, photographs and other documentation was placed before the Jurats and references are to page numbers therein. The Appellant is referred to as "A", the Respondent as "R".

2. The appeal is set out in detail in A's Cause at pages 1-4. The Court's task was to decide whether R's decision, dated 27th February, 2009 (pages 87-90), which substantially repeated their earlier decision of 21st November, 2008 (pages 65-69), should be set aside as unreasonable. The decision appealed against was a reconsideration of the previous decision. The application was to change the use of six self-catering units to permanent residential use.

3. It is helpful to consider the notes of a meeting between Mr Hesse, who is the individual behind A, and Mr Perrio from the Commerce and Employment Department on 8th January, 2009 (page 77C). This sets out concisely, a good deal of the relevant background. The site comprises an office and ten (not twelve, as erroneously stated in some documents) Units. One is occupied by Mr Hesse and another by his daughter, both on a long-term basis. Four of the remainder have local market tenants on leases. The site is depicted on the coloured plan at page 60A. It must be emphasised that the Court was only concerned with planning as

opposed to enforcement matters at the appeal hearing. In assessing the background to the appeal it is also useful to consider other items of correspondence in the bundle, starting with Mr Hesse's letter on page 53 and the response.

4. By virtue of Policy RE 12 of the Rural Area Plan (page 50A), an application of this nature requires R to seek the views of the Commerce and Employment Department. The Rural Area Plan at 5.12 sets the rationale out behind this clearly (page 49-50). The Department has set out its views at some length in response to A's first application (page 64) and was firmly opposed to it. When the present application was presented to the Department, it remained of the same mind and confirmed its original views (page 81). The views of the Department are set out in the Planning Report at page 89. The conclusion was:

> *"The Commerce and Employment Department is of the view that the site has the potential to continue making a valuable contribution to the Island's visitor industry and does not support the application by Mr M Hesse for a change of use of apartments to permanent residential and self-catering at Swallow Apartments, La Clôture, Vale".*

5. As the burden is on R to establish that it was not acting unreasonably, submissions made on behalf of R were heard first. The principal submissions of Counsel will be set out concisely, followed by the legal directions given and then the majority and minority decisions of the Jurats.

Submissions on behalf of the Respondent

6. Counsel went over the history of the application and indicated that the decision appealed against was upon a re-consideration. The Law of 1966 must be taken into account and Section 17(a) was relevant, i.e., the Rural Area Plan as approved by the States. There were ten units on the site and the proposed residential units were 2, 5, 7, 8, 9 and 10; 1, 3, 4 and 6 would remain self-catering. Commerce and Employment were consulted and wholly opposed the application for the reasons given on page 64, which were set out. A had referred to the fact that the site was on a "*Non-designated area"* (page 17). The Plan does provide for some limited forms of development in such areas, but R still has to take into account the applicable Policies before granting permission. The key Policy, Counsel suggested was RE 12, where detailed guidance is found at page 49. It was submitted that there was a two-fold test: firstly, change of use will only be permitted where there is no prejudice to an adequate stock of visitor accommodation; and, secondly, where the unit is in an unsatisfactory state, incapable of upgrading at reasonable expense, etc. It is apparent from the terms of the decision, that R took all the relevant information into account (page 92).

7. The considerations remained the same as in the earlier refusal. The requirements of Policy RE 12 have not been met and if the Jurats agreed with that proposition the appeal should be dismissed.

8. Reliance was also placed on Policy RCE 14 (conversion and re-use of buildings), which is on page 34B. Paragraph (a) was applicable. It was submitted that R was not satisfied that the building is no longer useful, so this requirement is not met. Again it was useful to consider the views of the Commerce and Employment Department. In essence the question for the consideration of the Jurats was a narrow one: Could R reasonably conclude that the Policies were not met? In view of all the circumstances it could not be argued that R had acted outside the band of reasonable responses open to it, on the information it had had.

9. The views of the Commerce and Employment Department included the point that the apartments could be made viable at reasonable expense. Whether Mr Hesse could do this is a different issue. It is important that there is a range of accommodation available in the Island for all budgets, and the figures put forward at the hearing on behalf of A actually indicated

pretty full occupancy in the high summer months. R was, in all the circumstances, fully entitled to come to the conclusions it did, firstly on RE 12 and then on RCE 14.

Submissions on behalf of the Appellant

10. The fact that this was a non-designated area did not preclude the development. The essential issues for the Court to consider are the viability of the present use and the question of whether updating and maintaining the holiday use can be achieved at reasonable expense. Mr Hesse has been in the tourist industry all his life and operating the Apartments for 30 years. In 2000 he took the decision that it was not viable to run ten self-catering units and reduced the number to six, then to five in 2007. In 2008 he went down to four. He is the best person to assess the viability of the operation. He is very happy to carry on with four units on the site. The building was fine for tourists 30 years ago. But expectations have changed and greater facilities are needed. Mr Hesse does not have the capacity in this limited site. It is worthy of note that the Commerce and Employment Department were aware that some units were not available for self-catering, but are now saying all the units should revert to that use. Six of the units have not been used by tourists for 3-10 years. The cost of carrying out the works needed would be out of proportion to the realizable profits. The site was not viable.

11. The concept of viability is very important when looking at Policy RCE 14. It is not viable to bring these units back. RE 12, when applied to the site also supports A's contentions (page 50). There are five criteria listed and it has to be said that there is no easy access to town or the southern cliffs. L'Ancresse is adjacent, but the views can hardly be deemed desirable and there are no other attractions adjacent apart from a golf course, where there are no facilities for visitors. Up-grading simply cannot be carried out economically, and there is no sound-proofing, which would be a considerable expense. There is no question that the work needed would be a *"reasonable expense"*, and the cost could not reasonably be considered. RE 12 is therefore, on its wording, to be taken as weighing in favour of the appeal.

Legal Directions to the Jurats

12. The first direction was that, as far as the law is concerned, the Jurats must accept what they are told.

13. The burden of proof in this case lay on R, that is the Minister of the Environment, and as it is the decision of the Environment Department which is the subject of the appeal. R must satisfy the Jurats that its decision was reasonable.

14. The standard of proof upon which R must satisfy the Jurats is the balance of probabilities; that is to say, weighing everything in the balance, are they more persuaded rather than less persuaded that R's decision was reasonable? Having conducted that mental exercise, it is only if the balance tilts in R's favour that the Jurats should support it and dismiss the appeal.

15. In dealing with respective functions and responsibilities: the Judge is the sole judge of law; the Jurats are the sole judges of fact. The Jurats are, therefore, the sole judges as to whether the decision of R was reasonable. To determine that question, they should bear in mind the requirements of the IDC Law, which includes the relevant parts of the Rural Area Plan; the Jurats should also bear in mind the legal directions, the submissions of the parties and all the facts and circumstances of this case. Bearing all those matters in mind, the Jurats have to then decide, whether the decision which R reached was reasonable.

16. It was emphasised to the Jurats that there is a band of decision within which they should not seek to replace R's judgment with their own. If they should think that R's view was mistaken that does not of itself entitle them to substitute their own decision. However, if they reached the conclusion that R's decision was not only mistaken but also not reasonable then they could intervene. There is a margin of appreciation or band of reasonableness to which the Jurats must have regard before concluding that a decision which the Court may think is

mistaken becomes so wrong that it is not reasonable. Bearing that further direction in mind, if the Jurats considered that R had not persuaded them on the balance of probabilities that its decision was reasonable then they must allow the appeal.

17. The Jurats might be assisted in their deliberations by a set of observations from the then Bailiff of Jersey in a case called *Token Ltd v Island Planning and Env. Committee* [2001] JLR at 703-4:

> *"…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 nevertheless 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."*

18. If the Jurats considered that they would have come to a different decision, but nevertheless that R's decision was within the band of reasonableness, then they must dismiss the appeal.

19. The Department is required, by virtue of Section 17 of the Law to take into account certain matters when deciding whether to grant or refuse a development application. This is referred to by R in their Refusal of Consent, which is to be found principally at pages 87, 89 and 90 of the bundle, namely – paragraph (a), which is applicable in this particular case.

Section 17, Paragraph (a)

20. Reference was made firstly to Paragraph (a) of Section 17. It provides that R must take into account:

> *"(a) the Strategic and Corporate Plan when approved by the States and any relevant Detailed Development Plans when so approved."*

It followed that this paragraph was definitely engaged in this case.

21. The Detailed Plan in this case is the Rural Area Plan.

22. The Written Statement lays down both general and specific guidance as to how planning applications are to be dealt with. The Jurats must follow that guidance and do so whether they approve of it or not.

23. However, interpretation of the contents of the Written Statement could be a matter for the Jurats, subject to any directions that may be given. It was certainly a matter for the Jurats to decide whether R had reasonably applied the requirements of the terms of the relevant parts of the Written Statement and to the particular circumstances of this case.

24. R in this case had relied on Policies, RCE 14 and RE 12; the Jurats were reminded of them. The Policies are stated succinctly. Having noted that R should take account of these Policies, the question was whether the conclusions drawn by R were reasonable in his case. Put another way, the Jurats had to determine if R acted reasonably in the exercise of its judgment.

25. The Jurats were told to consider the facts, the Policies and Section 17(a) of the Law. They had to assess what they saw on site, the contents of the bundle and other documentation as well as the submissions of counsel.

26. They had to consider whether R had acted reasonably when it refused the proposed development on the basis of paragraph (a), of Section 17, because if it was found that R had

acted reasonably then the Jurats must answer the question in the affirmative and dismiss the appeal.

27. The Jurats were directed that they must remember that if they held a different view from R then that is not enough for them to decide to uphold the appeal on the basis of Section 17(a), which applies in this appeal. They must go further than that and conclude that R's decision is not within the band of reasonable responses open to R.

Decision of the Majority

28. Jurats, Bisson, Tanguy, Lane, Le Conte, Ferguson, Jones, Le Pelley and McCathie were in favour of dismissing the appeal.

29. R had to consult Commerce and Employment in order to determine "*whether a visitor accommodation is not viable*" under Policy RE 12. The views of this Department remained constant, despite A's further application. The critical observations would seem to be that access is excellent, the site should be viable for a fully commercial operation and although over the years there has been a general lack of investment, there is potential for modernisation and improvement at a reasonable cost. There is nothing irrational in these observations. The majority were concerned that the use of these units has fallen away from self-catering over the years, without any intervention, but enforcement is for another day. The Jurats also reminded themselves that the modernisation/improvement aspect is an objective one, it is not a question whether this is viable under the present ownership, but whether it could be achieved reasonably under any ownership. It is most unfortunate, as was apparent from the Vue de Justice, that the site has fallen away in quality over the years and investment has not been effectively made. These points are closely linked to the wording of Policy RE 12, which is the main consideration in this case. The Policy (page 50A) makes it clear that change of use of visitor accommodation will only be permitted "*where it would not prejudice the retention of an adequate stock of visitor accommodation across the Island"* and upgrading is not possible at reasonable expense. In the circumstances, bearing in mind the clear views of the Commerce and Employment Department, R's decision was reasonably open to it. Policy RCE 14 (a) (page 34B), is also engaged. A had provided no figures to prove that the cost of upgrading the units to achieve a marketable standard would not be reasonable, and further that he presented no business plan to show that the site was not viable except for some indication of occupancy in 2008 and 2009, which tended to show pretty good visitor use in the high summer months.

30. In summary, based on clearly-expressed Policies, the decision taken by R, which took account of relevant considerations, fell wholly within the band of reasonable responses open to it and was entirely understandable.

Decision of the Minority

31. Jurat Mowbray would have allowed the appeal.

32. Close attention to the observations of Commerce and Employment is necessary. There are no attractive views and the site is cramped, with a large number of dwellings in the immediate vicinity. There is no reasonable prospect of extension, without, in effect, a large-scale reconstruction. The facilities of the site, including a small swimming-pool, were satisfactory to a previous generation, but unsuitable now. All in all, RE 12 does not preclude the application, as the premises are no longer viable, due to lack of upgrading and reduced demand. The location is hardly ideal and, apart from the wide open spaces at L'Ancresse, there are no easily reached nearby attractions or facilities. There are no restaurants in the vicinity and access to the golf-course by visitors is not permitted, it seems. The premises exude a dated "1970's" appearance and the market is no longer as undemanding as it was 30 years ago. It is not good enough nowadays, and the reality is that updating it would cost too much. There are a number of better facilities in Guernsey and it is hardly surprising that

complaints have been made regarding this one (page 98), and it is likely that the mixed use of the premises will detract from their usefulness for visitors (see page 95). The refusal is based on an unrealistic view of a difficult situation for A. The appeal should be allowed.

33. Appeal Dismissed.

