**Judgment 3/2010** **Bougourd and Bougourd v Environment Department – Royal Court (Civil action file 1237) – 13 January 2010**

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**Island Development (Guernsey) Law, 1966 – appeal from refusal of retrospective application to carry out development - permission had been granted to enlarge a dwelling - development carried out beyond that permitted – burden on the Department to establish that its decision was reasonable – adequacy of the reasons given by the Department for its decision – reliance on paragraphs (a), (c) and (e) of s.17 of the Law – Jurats dismissed the appeal by a majority of 5 to 3**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

Civil 1237

The 13th day of January, 2010 before John Russell Finch, Esquire, Judge of the Royal Court; present: Stephen Edward Francis Le Poidevin and Michael John Tanguy, Esquires, Susan Mowbray, Reverend Peter Gerald Lane, Barbara Jean Bartie, Stephen Murray Jones and Peter Sean Trueman Girard, Esquires, and Constance Adele Elizabeth Helyar-Wilkinson, Jurats.

In the action of ANDREW BOUGOURD and HEGE BOUGOURD ("the Appellants") against THE MINISTER OF THE ENVIRONMENT DEPARTMENT ("the Department") in the terms attached hereto;

THE COURT, having heard Advocate P.T.R. Ferbrache for the Appellants and Advocate P. Nicol-Gent for the Department and having carried out a Vue de Justice DISMISSED the appeal by five votes to three and AWARDED costs in favour of the Department.

S M SIMMONDS
Her Majesty's Deputy Greffier

 

Ozannes
RAP
12.05.08

**ANDREW BOUGOURD AND HEGE BOUGOURD** ("the Appellants") whose address for service is at 1 Le Marchant Street in the parish of Saint Peter Port

ACTION

**THE MINISTER OF THE ENVIRONMENT DEPARTMENT** ("the Department") TO SHOW CAUSE why the decision of the Department (which decision was communicated to R A Perrot, Advocate, acting for the Appellants by letter dated 5th March 2008) not to allow the Appellant retrospective consent in respect of the development ("the Retrospective Application") at Le Haut, Les Niaux, Saint Andrew as shown on drawings 3441.03.8, 9 , 10 and 11 prepared by Mr Brian Martel (to the extent that such work was not authorised by drawings 3441.03.01 (Revision D), 02 (Revision B), 03 (Revision C) and 04 (Revision C) prepared by Mr Martel ("the Original Scheme")) should not be set aside or varied, such decision having been an unreasonable exercise of the powers of the Department, the facts upon which the Appellants rely being as follows:-

1. **Policy RGEN5**

***"In considering proposals for development the Department will take into account the need to respect and retain the general character and amenity of the rural environment."***

Department's Contentions

The Department asserts (in the relevant Planning Application Report dated the 5th December 2007 ("the Report") which formed the basis for the Department's rejection of the Retrospective Application), that the proposal would result in a significant increase in the scale massing and visual impact of the dwelling, making it more prominent and increasing the impact of the built form within its rural setting and in public views to the detriment of the rural character and landscape quality of the locality. By virtue of the enlarged front gable, in particular, with the proposed increased glazing at upper level, the building as proposed would be much more prominent in public views than the original dwelling was or than the previously approved development would have been.

The report also records a representation from a nearby resident within the valley area which asserted, inter alia, that the modern glazed triangular picture window did not comply with Policy RGEN 5, that the northern glazed gable had "a visual impact" and an "impact at night" and that the "large glazed gable will be contrary to Policy RGEN6".

Appellants' Contentions

In the context of a development as a whole at the site the Retrospective Application is not significantly different from the Original Scheme. In particular, and having regard to the need to respect and retain the general character and amenity of the Rural Environment, the Environment Department in giving consent for the Original Scheme must have satisfied itself as to the fact that it respected and retained the general character and amenity of the Rural Environment. The Retrospective Application is not so different from the Original Scheme as to tip the balance so as to make it reasonable to refuse consent on the basis of the alleged lack of respect of and the retention of the general character and amenity of the rural environment.

(The Appellants have difficulty in responding to each of the policies which have been cited as the basis for rejecting the Retrospective Application by reason that no proper attempt has been made by the Department to reconcile specific objections contained within the report with the policies cited at the beginning of the report.)

As to the representation from a nearby resident, the glazing of which complaint is made is little more than that shown in the original scheme (drawing 3 (Revision C)).

2. **Policy RGEN6**

***"In considering proposals for development, the Department will take into account the quality of design and the materials to be used and the relationship of the development to its surroundings."***

Department's Contentions

In addition to what the Environment Department said which has been referred to in relation to Policy RGEN5, the Department says this:-

> "These latest drawings now show the dwelling in a similar design to the previously approved dwelling, but the width of the dwelling is shown extended to the east by approximately 1 metre and the ridge is shown to be approximately 400mm higher. [It is noted that the roof was previously being built approximately 1m higher than approved, but works have been carried out to lower it somewhat.] The increased width and height has also been shown for the front gable, resulting in a larger gable and a larger area of glazing at the upper level.
>
> Other significant changes include the revision of the proposed rear dormer windows from catslide design to pitched roof design, and the sun lounge to the rear is now shown approximately 1m wider and approximately 0.5m deeper.

 

> What is now proposed goes beyond what was previously approved, in terms of the increase in the scale and massing of the development, and its visual impact within the landscape setting. The previously approved proposal involved raising the ridge height of the original dwelling by approximately one metre.
>
> This proposal increases that, but raising the ridge height by approximately 1.4 metres, which an overall significant increase in the scale and impact of the dwelling which would be higher, bulkier and more prominent and intrusive in public views."

Appellants' Contentions

The authorised development (i.e. that permitted by the Original Scheme approval) concerned the enlargement of a single-block wall bungalow built in the early 1960s, of a design of no architectural merit. The ridge of the new roof was to be constructed at a height of 20 ft 10 ins feet above the datum of the drawings. The effect of the authorised development was to allow the construction of a bungalow with a raised roof, thereby accommodating 2 bedrooms and bathrooms and a study, a living room at ground floor level to the west, a sun lounge at ground floor level to the south and a lobby at ground floor level to the north. After receiving the original consent from the Department, the Appellants received consent for the construction of a garage as shown on drawing 3441.03.06.

The unauthorised work carried out on site related to (a) constructing the roof on an east/west axis ("the main roof") at a level higher than that shown in the drawings, (b) extending the eastern wall of the dwelling by 3 feet 3 inches and (c) constructing a roof on a north/south axis ("the study roof") 1' 4" higher than shown in the approved drawings**.** Although it has been contended by the Department that the two lines of blocks at the top of the southern elevation were not lawful, it is shown in drawing 3441.03.04, Revision C (Section C-C) that that wall was to be built up. The Appellants have now altered the angle of the roof so that the rafters extend from that built-up wall to a ridge height which accords to the height shown in the drawings relating to the Original Scheme. The ridge height of the main roof shown in drawing 10 of the Retrospective Application is at a height of 20' 10'' above datum – i.e. at the height shown in the Original Scheme.

The "larger area of glazing" of which the Report complains is trivial in amount and the change in the dormer windows from a catslide design to a pitched roof design is a change of (a) no architectural significance and (b) consonant with window design in the rural area and thus not out of context with the site's surroundings.

 

The Appellants repeat their assertion that as compared with the Original Scheme the proposals contained in the Retrospective Application are not of a sufficient difference from the design shown in the Original Scheme as to make it reasonable for the Department to refuse consent for the Retrospective Application on the basis of the quality of design and the materials used and the relationship of the development to its surroundings, such design and use of materials and relationship of the development of its surroundings having been sufficiently to the satisfaction of the Department to allow it to give consent in respect of the Original Scheme.

3. **Policy RCE1**

***"There will be a presumption against the unacceptable loss of open and undeveloped land, Development will only be permitted where:***

***a) it is an acceptable form of development for which a rural location can be justified or where the development can be located satisfactorily in the Rural Centre; and***

***b) the scale, location and design of the development would not detract from the openness of the country side or result in the unacceptable irreversible loss of agricultural land, or have an adverse effect on the viability of an agricultural holding."***

Departments' Contentions

The Department sets out no separate analysis in relation to limb (a) of the Policy. As to limb (b), the Department has merely said in several parts of the Report that the building as proposed is "much more prominent in public views than the original dwelling was, or than the previously approved development would have been".

Appellants' Contentions

Again, the Appellants repeat all that they have said in connection with what they have said in respect of Policies RGEN5 and RGEN6 in respect of the absence of any significant difference between the Original Scheme and the Retrospective Application. It is wrong, and therefore unreasonable, for the Report to say that the building as proposed would be more prominent in public views than the previously approached development would have been.

4. **Policy RCE3**

***"In Areas of High Landscape Quality, development will only be permitted where:***

***a) the development would not have a significant adverse effect on the visual quality or landscape character of the area; and,***

***b) in the case of proposals to rebuild, extend or alter existing structures the development would respect the size, form, bulk and siting of the original structure.***

 

***Permission will not be granted for the replacement of buildings or other structures that are derelict or structurally unsound and, in cases involving dwellings, currently not habitable."***

Department's Contentions

The Report (on its first page) says that "the current proposal would also not respect the size, form and bulk of the original structure". Save as aforesaid, it isn't clear from the Report what analysis there is, if any there be, specifically in respect of Policy RCE3. As noted elsewhere in this Cause, the Department complains that (so it alleges) the proposal would result in a signficant increase in the scale, massing and visual impact of the dwelling, making it more prominent and increasing the impact of the built form within its rural setting and in public views to the detriment of the rural character and landscape quality of the locality.

Appellants' Contentions

If the Report, when referring to the "original structure" is referring to the bungalow built on site in the early 1960's, it is correct in saying that the proposal does not respect its size, form and bulk. That, however, is irrelevant. The question to be asked is whether the proposal respects the size, form and bulk of the Original Scheme. It does.

Again, the Appellants repeat all that they have said in connection with what they have said in respect of Policies RGEN5, RGEN6 and RCE1 in respect of the absence of any significant difference between the Original Scheme and the Retrospective Application.

5. **Policy RCE12**

***"Proposals for development will only be permitted where they:***

***a) achieve a good standard of design;***

***b) respect the scale and massing of other buildings in the vicinity;***

***c) avoid the introduction of obtrusive or discordant elements; and,***

***d) retain and respect features that contribute to local distinctiveness and the quality of the built heritage."***

Department's Contentions

There was no specific analysis of the objection relating to this policy.

Appellants' Contentions

Again, the Appellants repeat all that they have said in connection with Policies RGEN5, RGEN6, RCE1 and RCE12 in respect of the absence of any significant difference between the Original Scheme and the Retrospective Application.

 

6. **Policy RH1**

***"Proposals for residential development (excluding the subdivisions of existing dwellings) will only be permitted where:***

***a) they involve the conversion of existing buildings or the replacement of existing dwellings on a one for one basis; and,***

***b) the site is suitable having regard to the existing characteristics of the site and its relationship with the surrounding area;***

***c) the development is acceptable in terms of siting, design, scale, massing, amenity and provision of a satisfactory living environment; and***

***d) in the case of replacement dwellings, they also satisfy the provisions of Policy RCE13 and where appropriate RCE11.***

***Exceptionally, replacement of other buildings may be acceptable subject to the requirements of (d), provided that their conversion under Policy RCE 14 had first been granted detailed planning permission and Building Regulations approval and the floorspace and volume of the approved conversion scheme are not exceeded. Replacement of a scheme for residential sub-division which has been granted detailed planning permission and Building Regulations approval under Policy RH3 may also be acceptable subject to (d) provided that the floorspace and volume of the approved sub-division scheme are not exceeded, nor the approved number of dwelling units exceeded."***

Department's Contentions

The Department says (on page 2 of the Report) that the application is to demolish a dwelling and build a new dwelling. It then goes on to say (on the last page of the Report): "This proposal would result in a significant increase in the scale, massing and visual impact of the dwelling, making it more prominent and increasing the impact of the built form within its rural setting and in public views to the detriment of the rural character and landscape quality of the locality. By virtue of the enlarged front gable, in particular, with the proposed increased glazing at upper level, the building as proposed is much more prominent in public views than the original dwelling was, or than the previously approved development would have been. The current proposal would also not respect the size, form and bulk of the original structure."

Appellants' Contentions

This application does not concern a new dwelling. The position is that the Appellants received full detailed development consent, in respect of which they went ahead and commenced the construction of a dwelling. During the course of the work, consent was forthcoming from the Department for the walls in the southern and northern elevations to be demolished and replaced with cavity walls. The Appellants departed from the development

as authorised in respect of the main roof, the eastern gable and the study roof. The main roof has now been re-constructed – i.e. lowered – to the height originally authorised. The only other contention which remains in issue in respect of the main roof is that the Department alleges that the wall-plate is set at too high a level. Even if it were not correct that the wall-plate was to be at the level which exists (which is the assertion of the Appellants), the only matter to which the objection could relate in respect of the roof would be that the wall-plate is 1 ft 6 ins above the level which the Department says it ought to be set at, thereby resulting in the roof angle of 39 degrees, rather than 42 degrees.

As respects the eastern gable, the argument boils down to an objection by the Department that the house has been built an additional 3 ft 3 ins too far to the east which the Retrospective Application sought to legitimise.

After the Appellants started to build the house pursuant to the consent given for the original scheme, they went beyond the existing permission permitted for the floor plate and built it a further 3 feet 3 inches to the east. It is accepted that such work was carried out without consent. It is accepted that the ridge of the study roof has been constructed at a height of 1' 4" above the level approved in the Original Scheme.

Consent was given by the planner dealing with the case – Julian Pentland – via a building inspector (Andrew McKay) for the southern and northern elevations of the original property to be demolished. By then the dwelling house was in the course of construction, albeit unlawfully so far as the extension to the east was concerned. The demolition of the walls in the southern and northern elevations was therefore simply a demolition of walls of a dwelling which existed in a partly constructed condition. At no stage was the whole of the original dwelling demolished, leaving an open site. Even if (which is not accepted) Policy RH1 were engaged, all of the limbs of the policy would be complied with in respect of the retrospective application, in that:-

(a) there would be the replacement of an existing building on a one-for-one basis;

(b) the site is suitable having regard to the existing characteristics of the site and its relationship with the surrounding area;

(c) the development is acceptable in terms of siting, design, scale, massing, amenity and provision of a satisfactory living environment; and

(d) the house also satisfies the provisions of Policies RCE13 and RCE11.

 

7. The Proposal would not be incongruous with the surroundings because of its design and exterior appearance.

8. The Proposal would not detract from the character and amenity of the locality concerned, and in particular would be so similar to that set out in the Original Scheme as to make no material difference.

And the Appellants claim costs.

R A PERROT
Advocate

Approved Text
8 February 2010

**IN THE ROYAL COURT OF GUERNSEY**

**APPEAL**

**Between**

**ANDREW BOUGOURD and HEDGE BOUGOURD**

**The Appellants**

**-v-**

**THE MINISTER OF THE ENVIRONMENT DEPARTMENT**

**The Respondent**

**Date of hearing: 12th & 13th January 2010**

**Decision handed down: 8th February 2010**

**Before: John Russell Finch Esq., Judge of the Royal Court and Jurats: S E F Le Poidevin, M J Tanguy, P G Lane, E I J S M Mowbray, B J Bartie, S M Jones, P S T Girard and C Helyar-Wilkinson**

**Counsel for the Appellants:** **Advocate P T R Ferbrache**
**Counsel for the Respondent:** **Advocate W P T Nicol-Gent**

**Materials referred to:**

The Island Development (Guernsey) Law, 1966, as amended, Section 17
The Housing (control of Occupation) Guernsey Laws, 1982-90, Section 4(b)
The Rural Area Plan, Review No. 1, 2 December 2005
*Ward* -v- *Housing Authority* [1989] 8 GLJ 50
*Perkins* -v- *Housing Authority* [1995] 20 GLJ 66

## Background

1. This appeal was heard on 12th and 13th January, 2010, and included a Vue de Justice. The appeal was dismissed on the 13th January, 2010 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 and other documentation was placed before the Jurats and references are to page numbers therein. The Appellants are referred to as "A", the Respondent as "R".

2. The appeal is set out in detail in A's Cause at divider 2 of the bundle, and is summarized at page 3. The Court has to decide whether R's decision, dated 5th March 2008 (pages 165 – 171), should be set aside as unreasonable. This decision related to a refusal by R to allow retrospective consent in respect of a development at Le Haut, Les Niaux in the Parish of St Andrews. The site is depicted on pages 1 and 2.

3. The contentions in support of the appeal are set out in the Cause and in great detail in Advocate R A Perrot's letter to R dated 3 December 2007 at pages 142 – 153. Before considering the submissions in the appeal, it is helpful to look at the history of planning

applications in respect of the development. These are found at dividers 5 – 12 of the bundle. At pages 174 – 176 are photographs of the original small bungalow which occupied the site.

4. The planning applications put forward on behalf of A and R's responses to them can be summarized in the following way:

| | | | |
|---|---|---|---|
| Divider 5 | - | Extend and alter existing dwelling | refused |
| Divider 6 | - | Extend and alter existing dwelling | |
| Divider 7 | - | Demolish, replace and re-position | |
| Divider 8 | - | Permission in Principle | |
| Divider 9 | - | Full Permission | |
| Divider 10 | - | Vary works previously approved | |
| Divider 11 | - | Demolish and reconstruct building | refused |
| Divider 12 | - | Retrospective application | |

5. In connection with the retrospective application, which is the subject of these proceedings, both Counsel drew attention to the last paragraph of Advocate R A Perrot's letter of 3 December 2007 already mentioned. This reads (see page 143):

> *"Before I deal with the various policies and other objections raised by you, let me say quite openly that it is accepted that the original ridge as constructed, was set at too great a height and that the eastern gable has been built too far out to the east. There is no excuse for that. Mr Bougourd, as a builder, accepts that he realized what he was doing and what he was doing was wrong. He can be criticized for that: indeed, if, consequent upon a rejection by the Department of the applications contained with the letter he fails on appeal in the Royal Court, he could well be prosecuted. All of that said, the fact that Mr Bougourd may have transgressed does not effect (sic) the argument in any way whatsoever as regards matters concerning* ***planning****. This application must be considered by the Department solely upon the basis of the development control legislation and the Rural Area Plan. It must not be used by you as an opportunity for punishing something which was done unlawfully. However, irritating the unlawful development may be to you or your colleagues."*

Counsel stressed that this appeal was dealing with a planning issue, not an enforcement issue.

6. In considering the submissions made on behalf of the parties and the decision of the Jurats, it was helpful to refer to the large white bundle of documents, particularly the computer-generated 3-D plans and overlays, which are a valuable guide to the dimensions of the various properties and the applications. The Vue de Justice not only took in the site, but the vicinity, including the view from the dwellings of various objectors, which are depicted at page 125 on a plan.

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

**Submissions on behalf of the Respondent**

8. The question for the Jurats to decide was reasonableness. R was required to have regard to the Rural Area Plan (RAP) at Tab 14. The other points arose from section 17 of the Law: sections 17(c) incongruity and 17(d) detraction from character and amenity. It was submitted that the key to the case is the house is built as against the original. The RAP was examined in some detail. REGN refers to general principles; RCE to conservation and enhancement policies. The issue is the effect of the development on an area of high landscape quality. Policies RGEN 5 (page 14 of the RAP), RCE 1(b) (pages 23-4), RCE 3(b) (pages 24-5), and

RH1 (b) and (c) (pages 39-40) were referred to. The effect of these Policies was summarized as:

i) there is a need to respect and retain the general amenity of the rural environment.
ii) there is a need to consider the suitability of the site;
iii) the scale, location and design must not detract from the openness of the countryside; and
iv) where there are proposals to rebuild, extend or alter, they must respect the size, form, bulk, scale, mass and siting of the original structure.

9. On the aspect of design, reference was made to RAP Policies RGEN 6 (page 15) on the quality of design and the relationship of a development to its surroundings and RCE12 (b), the requirement to respect the scale and massing of other buildings in the vicinity (which related back to RCE 3(b). Hence there were two matters to consider in the light of the RAP: character and amenity and design. The planning history was described (see pages 162 – 168). Counsel pointed out that the width of the new dwelling has been extended by about 3 foot 3 inches and the apex of the gable roof had gone up, the ridge is around 400 mm higher, so there is also a larger front gable with more glazing on the upper level. What has been done should be compared with the original rejected applications, so that the ridge height is exactly the same as in those, whose rejection was not appealed. Finally, in considering the documentation, reference was made to the comparisons depicted in the large white bundle.

10. The decision, which is the subject of the appeal, showed R acting reasonably and getting it right. The key to the Planning Officer's report is to be found in the application of conservation and enhancement policies, as shown at page 23 of the RAP. Accordingly, the reason given at page 167 is correct and in accordance with both section 17 and the RAP:

> *The proposal would result in a significant increase in the scale, massing and visual impact of the dwelling, making it more prominent and increasing the impact of the built form within its rural setting and in public views to the detriment of the rural character and landscape quality of the locality. The current proposal would also not respect the size, form and bulk of the original structure."*

**Submissions on behalf of the Appellant**

11. Counsel strongly relied upon the points made in Advocate Perrot's significant letter of 3 December 2007 (pages 142-150). It was conceded that the male Appellant did wrong when he went outside the plan, but this is, as Counsel both accept, a planning appeal, not a matter of enforcement. There is a presumption in favour of permission unless it conflicts with the RAP. Could it be said there is any material difference between the plans approved and those before the Court? The letter of rejection should give full reasons for the decision. There is only reference to Policies and a lack of reasons. R is stuck with the reasons given, and there is only reference to RH1, which is not relevant and RCE3. RH1 is not relevant, substantially for the reasons given in Advocate Perrot's letter (supra) at page 148, "*at no time was the original house completely demolished"*.

12. The Court of appeal cases of *Ward* v *Housing Authority (1989)* and *Perkins* v *Housing Authority (1995)* were cited. Both laid down that the Housing Authority had to make a proper statement of its reasons for refusing to grant a licence – see section 4(b) of the Housing (Control of Occupation) (Guernsey) Laws 1982 – 90 (now updated). There are only the two Policies specifically referred to in the Refusal (page 170), not those set out at page 167.

13. In examining the Policies, none apply on the facts of this case. Indeed, they militated in favour of the development. There had been a house on the site for over 50 years and what took place was on developed land, there was not going to be any loss of open and undeveloped land and to say otherwise did not reflect the realities of the site. It was also

submitted that the house as constructed is not discernibly or materially different from that originally permitted, "*the extra bits meet the test"*. Attention was also drawn to the good design of the dwelling and the lack of any discordant elements. Page 92 (the Planning Officer's report on the accepted plan) was mentioned and it should be noted (from page 170) that "*these latest drawings now show the dwelling in a similar design to the previously approved dwelling ....."*. In view of the facts as applied to the Policies, it was not reasonable to refuse the permission sought.

**Directions to the Jurats**

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

15. 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.

16. The standard of proof upon which the 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.

17. 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.

18. It was emphasised to the Jurats that there is a band of decisions 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.

19. However, 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.

20. 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. These are the matters cited by R in their Refusal of Consent, which are to be found principally at pages 165 and 166 of the bundle, namely – paragraphs (a), (c) and (e).

21. The question of the adequacy of the reasons given by R in the refusal complained of was ventilated by Counsel for A. The Jurats were directed that the two cases referred to were housing appeals, where the considerations were somewhat different, especially in the light of the terms of the legislation. The Jurats were further directed that they were not dealing with a taxing statute, but should look at the contents of the letter and Planning Officer's report as a whole, and they might conclude, particularly in the context of all the circumstances of the case, that A was provided with sufficient information. It was reasonable to look at the history

of the case and the correspondence in the bundle, as well as the contents of pages 167-171. In particular, it was open for the Jurats to consider the sentence on page 170:

> *"Other Policies of the Plan require that proposals for development must respect and retain the general character and amenity of the rural environment, and that the scale, location and design of any development must not detract from the openness of the countryside."*

22. In the light of the contents of the Planning Officer`s report, this may have been, if the Jurats saw fit, sufficient and adequate to show how R had approached the matter.

**Section 17, Paragraph (a)**

23. 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.

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

25. 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.

26. 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.

27. R in this case had relied on two general policies namely Policies RGEN5 and RGEN6 and other Policies, RCE1, RCE3, RCE12 and RH1. 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.

**Section 17, Paragraphs (c) and (e)**

28. The material provisions for the purposes of this case of these sections read as follows:

> *(c) the proposal would be incongruous with its surroundings because of its design, and exterior appearance.*
> *(e) the extent to which the development or other work would detract from the character and the amenity of the locality concerned".*

29. The Jurats might have thought, but it was wholly and entirely a matter for them, that R cannot in this case be criticised for taking them into account as relevant factors. But the crucial question for the Jurats was whether R had reasonably applied paragraphs (c) and (e) to the facts of this case.

30. The Jurats were told to consider the facts, the Policies and sections 17(a), (c) and (e) 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.

31. The Jurats had to come to a view about the character of the locality and what the site looks like in order to consider the arguments about incongruity and detraction.

32. They had to consider whether R had acted reasonably when it refused the proposed development on each of paragraphs (a), (c) and (e) of Section 17, because if it was found that R had acted reasonably when relaying on any one of those grounds then the Jurats must answer the question in the affirmative and dismiss the appeal.

33. 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 any of the paragraphs. 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 Jurats**

34. The Jurats took the view that the grounds and reasons for the decision, the subject of the appeal, were adequately set out. Taking account of the previous applications, the planning history and correspondence, the basis of the refusal was sufficiently clear to A and they were able fairly to meet it.

35. Jurats Le Poidevin, Tanguy, Mowbray, Bartie and Jones were in favour of dismissing the appeal.

36. The majority Jurats accepted that this was a planning appeal, so that enforcement was a matter for another day. The crucial question was the reasonableness of the refusal, which R had to demonstrate. In considering that, it was not possible to look at the last application purely in isolation and it was useful to bear in mind the planning history, which showed R had been working in dialogue with Mr Bougourd and his architectural adviser in a constructive fashion. The majority rejected any contention that the planning officers may have been motivated by irritation at the admitted and substantial breaches of permission. The large set of white plans was especially helpful in the determination of the appeal, particularly the 3-D images. The "*footprint areas"* of the dwellings are: the original bungalow 100%, the approved scheme 166% (which was as far as R would go), and the non-approved as built scheme 182%. In planning terms it was necessary to compare what was built with the original, though it is worthy of note that the ridge-height in the dwelling as built is the same as in the rejected applications for larger buildings, which were not the subject of appeal.

37. The Vue de Justice was also instructive. The dwelling occupied a position in an area of considerable natural attractiveness and in a commanding setting, an area which R correctly considered to be of high landscape quality. It is apposite to consider the Planning Officer's report on the permitted development, at page 91, to which the attention of the Jurats had been drawn. There it is stated that:

> *"The scale of alterations has been reduced quite significantly and the proposal now has much more respect for the size, form, bulk and siting of the original structure.*
>
> *Whilst it would still result in an increase in the overall scale and massing and could still be seen in views from across the valley, it would no longer have a significant detrimental input on the visual quality and landscape character of the area, or the general character and amenity of the rural environment."*

38. Taking the original structure into account, it was the opinion of the majority that what was built failed to achieve the acceptable effect of the revised and approved development. The building overall is not appropriate for the location, for the reasons set out in the decision which is the subject of this appeal. It was noticeable how the dwelling stood out from its high position and that the overall scale and effect was, in the judgment of the majority, obtrusive and detrimental to the area. It followed that R's decision was based on a reasonable and

correct application of the relevant planning principles and was wholly understandable in all the circumstances. It is emphasized that this decision is based purely on planning considerations.

39. Jurats Lane, Girard and Helyar-Wilkinson were in favour of allowing the appeal.

40. The minority considered that there was a real risk of approaching this case albeit with good intentions, from the point of view of wishing to punish someone guilty of unlawful development. It cannot be too strongly emphasized that this was purely a planning matter and that the relevant considerations are those connected with such a matter only. Enforcement is a matter for another tribunal.

41. When looking at the present development, it was helpful to consider the nature and extent of the illicit works done. These can be seen from the plans in the white folder, especially pages 12, 13 and 14. It was also necessary to keep a sense of proportion. Each of the minority Jurats would, had this case involved an appeal against a refusal to grant permission for this development with no other background or baggage, and nothing yet built, have allowed the appeal. The dimensions scale and effect are acceptable in all the circumstances, also taking into account that there has been a dwelling on the site for over 50 years. On considering the appearance, dimensions and bulk of the building, the minority was in agreement with the submission made on behalf of A that it contravenes none of the Policies referred to in the letter of refusal. Indeed, on a fair and common-sense view, these militate in favour of the development. The minority found itself in agreement with the intentions on the last page of Advocate R A Perrot's letter (page 150) that the dwelling is not "*considerably larger"* than the house which was approved and is no more prominent and obtrusive than that for which consent was given. Although the point could have been made rather less harshly, it was also correct as the letter concluded *"It is complete nonsense to say that anybody's privacy has been compromised. It hasn't".* Accordingly, on the facts, especially taking into account what was apparent on the site and in the vicinity, the minority found that R had not discharged the onus of demonstrating their decision was reasonable in all the circumstances.

42. Appeal dismissed by a majority of 5-3.

 