Judgment 44/2007 **Minister for the Environment Department v Johns – Court of Appeal (Civil Appeal 384) – 22 November 2007**

Island Development (Guernsey) Law, 1966 – Respondent had appealed successfully to the Royal Court - relevance of Respondent's personal circumstances – Department sought to appeal that decision – review of proceedings before the Royal Court – whether the decision of the Jurats was perverse or they had been misdirected - jurisdiction of the Court of Appeal to consider such an appeal (See especially judgments by Vaughan and Carey JJA)

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 384

The 22nd day of November, 2007 before David Arthur John Vaughan, CBE QC presiding, Sir de Vic Carey and Dame Heather Steel, DBE

Minister of the Environment Department
(Appellant/The Committee)

-v-

Peter David Johns
(Respondent/Mr Johns)

In the appeal by the above Appellant from the decision of the Royal Court on 23rd November 2007 allowing an appeal by the above Respondent from a decision by the then Island Development Committee (predecessor to the above Appellant) dated 5th May 2004;

THE COURT having on 3rd and 4th July, 2007, heard Crown Advocate F. Raffray for the Appellant and Advocate M.G.A. Dunster for the Respondent therein, this day ISSUED JUDGMENT in the terms attached hereto and:

1. DISMISSED the appeal; and
2. EXPRESSED the hope that counsel would be able to resolve between themselves any matters relating to costs without the need to refer the matter back to the Court, given that both parties were publicly funded.

K H TOUGH
Registrar of the Court of Appeal

Final Judgment
22.11.07

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 384

Between **THE MINISTER FOR THE ENVIRONMENT DEPARTMENT**

(Appellant)

V

PETER DAVID JOHNS

(Respondent)

Before: **David Arthur John Vaughan Esq., CBE., QC**
Dame Heather Steel DBE
Sir de Vic Carey

Crown Advocate F Raffray for the Appellant
Advocate M G A Dunster for the Respondent

Cases

South Buckinghamshire District Council v Porter [2004] 4 All E.R. 775
Westminster City Council v Great Portland Estates plc [1984] 3 All E.R. 744
Walters v The States Housing Authority (23 July 1997)
Island Development Committee v Lainé (Court of Appeal, 18th December 2003)
President of the State of Equatorial Guinea and another v Royal Bank of Scotland International, Logo Ltd and another intervening [2006] UKPC 7
Island Development Committee v Portholme Properties Limited, (20th September 2002)
Morton v Paint, (Court of Appeal, 9th February 1966)
State of Qatar v Al Thani [1999] JLR 118
Attorney General for Jersey v O'Brien, [2006] JLR 133)
Sherry v The Queen [1987 1 WLR 341
Guille v Law Officers of the Crown (1986 4 GLJ 24)
Snowden v Law Officers of the Crown [1996] 22GLJ 75)
Century Holdings Limited v HM Procureur, [1997] 23 GLJ 88
Bassington v HM Procureur, [1998] 26 GLJ 14
Vidamour v Hood 16 GLJ 68)
Foster v Chief Adjudication Officer [1991] 3 All E R 846
The Regulation and Control of Aeronautics in Canada 1932 AC 55 at page 70
Fitzpatrick v Sterling Housing Association 2001 1AC 27
Attorney General for Ontario v Attorney-General for Canada [1947] AC127
Flower v Lloyd [1877] 6 QBD 297
Taylor v Lawrence [2002] 2 All E R 353
Birmingham and District Land Co v London and North Western Rly Co (1886) 34 Ch D 261 at 277

Ex p Banco de Portugal, Re Hooper (1880) 14 Ch D 1 at 6
Hession v Jones [1914] 2 KB 421

JUDGMENT

VAUGHAN J. A.

1. This is an appeal by the Environment Department (the successor to the Island Development Committee ("the Committee")) against a decision of the Full Court whereby it allowed an appeal by the Respondent Peter David Johns ("Mr Johns") under Section 26(1) of the Island Development (Guernsey) Law 1966 ("the 1966 Law") in which the Full Court decided that the decision of the Committee conveyed in a letter dated 5th May 2004 to reject a planning application by Mr. Johns was an unreasonable exercise of its powers.

2. The property in question is Le Courtil Banque Vinery, Les Barras Lane, Vale which is owned by Mr Johns. The property is designated in planning terms as in horticultural use [Use Class 60 The Island Development (Use Classes) Ordinance 1991, Island Development (Amendment) (Guernsey) Law 1988] and is in an area of Landscape Value (Green Zone 2) in the Rural Area Plan (Phase 1) originally adopted by the States on 27th October 1994 (and since extended). That Plan comprises a written statement and map showing the zoning to which every part of the plan area is subject. In the Introduction the scheme of the Plan is explained *"It deals, firstly (Section 2), with conservation and enhancement of the rural environment, as this is the key strategic aim of the Plan, and sets out the principal objectives and policies in each of the planning zones. It then deals separately, in subsequent sections, with each of the main types of land use and development likely to occur in the Plan area, under the following headings:*

Section 3 : Housing

Section 4 : Agriculture

Section 5 : Horticulture ……"

3. The objective of Section 2 of the Plan is described as being "to maintain and, where appropriate, reinforce the rural character of the plan area by conserving and enhancing the underlying landscape character". The Policy for such an area of Landscape Value (Green Zone 2) is described in Policy CE 6 in the following terms:

> "… the overall policy is to protect the character, quality and generally open nature of the rural landscape.

> New development will only be permitted in certain specific and limited circumstances and then only in relation to agriculture, horticultural, recreation or tourism use.
>
> The erection of new housing will not be permitted."

Further under Policy HT8 it is provided that "proposals to change the use of glasshouses and ancillary horticultural buildings will not normally be permitted." The expression "will not normally be permitted" means that there is a presumption that permission will not be given for proposals of the type in question. Policy CE10 provides for the encouragement of appropriate environmental enhancement schemes and Policy H14 provides that the erection of new housing will not be permitted in an area of Landscape Value. The Written Statement amplifies the reasons for these policies.

4. The property in question is described in documents before the Court. The Vinery is described in some detail in a letter by the Deputy Chief Executive of 10 June 2002 and in the Planning Application Report dated 3 February 2004. The Vinery consists of an area of 0.85 acres accessed by a drive between residential properties. Within the Vinery there are some disused greenhouses and a packing shed which shed was the subject of Mr. Johns' application for planning permission. In September 2002 Mr. Johns had been given permission by the Committee to carry out certain works to the packing shed, which would include the installation of a kitchen and a shower room and a WC. In granting that permission the Committee made it clear that the building was not to be used for habitable accommodation. Mr. Johns carried out those works and the works were approved by Building Control. It was at that stage declared that the packing shed would be used as a workshop and computer store.

5. It would appear that in 2002 Mr. Johns, who was on Supplementary Benefit, got into financial difficulties and was not able to pay the rent for the accommodation in which he and his wife lived and was unlikely to obtain a tenancy of a States house given the length of the waiting list and others being in more need of such housing. He decided that the only viable way forward for him was to apply for a change of use of the packing shed so that he might be able to use it as living accommodation for his wife and himself. There was to be no (or only minor) alteration to the external appearance of the structure, but only to the interior by alterations which would involve the re-positioning of the kitchen and the fitting of a bathroom and the making of a living room and a bedroom there. The Application was first made in April 2002.

6. That Application was rejected by the Committee on the grounds that it contravened the policies set out in CE6 and HT8, for it was decided it would detract from the character and amenity of the area concerned and the effect it would have on the adjoining properties. Mr. Johns did

not challenge that decision or respond to the Committee's invitation to discuss the decision of rejection in more detail.

7. In 2003, notwithstanding that decision and without any permission, Mr. Johns seems to have carried out at least some of the work for which he had previously made application and which had been rejected and he and his wife moved into the packing shed as now converted as their home. On 2 February 2004, when threatened with prosecution, Mr. Johns made a retrospective application for a change of use of the packing shed to allow him to use it as residential accommodation for himself and his wife. That application was supported by a letter of the same date from his Advocate setting out the financial and housing evidence upon which Mr. Johns relied in support of his application for change of user and the arguments why neither Policy HT8 or CE6 provided a reason in themselves to justify a refusal of change of use and relying on human rights arguments. The letter also put forward reasons why the effect of the setting of the property and the effect on neighbouring properties were not reasons to reject this particular application and stating that Mr. Johns would accept any condition limiting the period of validity of the permission. That retrospective application was the subject of objection from neighbouring properties. It was subsequently made clear that the application was not for a permanent change of user.

8. On such an application the Committee, pursuant to Section 16 of the 1966 Law, could either grant the permission, refuse the permission or grant permission subject to specified conditions. In deciding whether or not to grant permission, the Committee pursuant to Section 17 of the 1966 Law was obliged to take into account a number of factors including any relevant development plan approved by the States, the effect of the development on the natural beauty of the area, in the case of land designated as agricultural (as this was) the suitability of the land for such use, the extent to which the development would detract from the character or amenity of the locality concerned and the effect of the development on, inter alia, adjoining properties. Section 18 allows for minor departures from development plans but there is no suggestion that this was a minor departure.

9. Following a detailed planning application report Mr. Johns' application was rejected on 5th May 2004. The letter of refusal relies in particular on the following:

    (1) the Rural Area Plan (Phase 1) taking into account all relevant policies, in particular Policies CE6, CE10 and HT8;

    (2) the extent to which the proposal would detract from the character and amenity of the locality concerned;

    (3) the effect of the proposal on neighbouring properties.

The reasons for refusal were set out in more detail in the following terms:

> "The building is located within an Area of Landscape Value (Green Zone 2) in Rural Area Plan (Phase 1). Policy CE6 states that within Areas of Landscape Value, the overall policy is to protect the character, quality and generally open nature of the rural landscape and that new development will only be permitted in certain specific and limited circumstances and then only in relation to agriculture, horticulture, recreation or tourism use. The erection of new housing will not be permitted. Policy HT8 states that proposals to change the use of glasshouses and ancillary horticultural buildings will not normally be permitted.
>
> In this case, the proposed development is not in relation to agriculture, horticulture, recreation or tourism use. The provision of associated external works to facilitate the use of the building as a dwelling including amenity space and servicing areas would represent an intrusion into the landscape to the detriment of its rural character and appearance, contrary to the intentions of Policies CE6 and CE10. Policy HT8 sets out a general presumption against allowing proposals to change the use of glasshouses and ancillary horticulture buildings to other uses. With regard to Policy HT8 it is considered that the circumstances put forward on behalf of the Applicant do not justify overriding the general presumption against allowing a change of use of the former packing shed to a dwelling. The Committee in determining not to exercise its discretion to allow a change of use has also taken into consideration the preclusion of the erection of new housing in Areas of Landscape Value under Policies CE6 and H14.
>
> It is also considered that the proposal would not achieve a satisfactory grouping in relation to the neighbouring dwellings situated to the north of the site and when combined with its elevated position would result in an unneighbourly form of development which would detract from the amenities that neighbouring residents might reasonably expect to enjoy.
>
> With regard to Article 8 of the European Convention on Human Rights, the Committee has had regard to the Island Development (Guernsey) Law, 1966 (as amended) and the decision of the Committee is in pursuance to the legitimate aim of conserving and enhancing the rural environment of Guernsey. It is also noted that there are procedural safeguards available in determining whether the Committee has acted within its margin of appreciation.

In the light of this decision, action will continue to be taken regarding the current unauthorised use of the packing shed as residential accommodation."

The Appeal to the Royal Court

10. Mr. Johns appealed against that Refusal of Consent to the Royal Court pursuant to Section 26(1) of the 1996 Law. Section 26 (as amended) provides as follows:

> "26(1) Any person aggrieved by any decision of the Committee under any of the provisions of this Law may within the four months past following the date of the said decision, appeal therefrom to the Royal Court sitting as a Full Court on the grounds that the decision of the Committee was ultra vires or was an unreasonable exercise of its powers.
>
> (2) Any appeal under this section shall be instituted by way of summons which shall set out the material facts upon which the appellant relies and which shall be served on the President of the Committee to show cause why the decision appealed from should not be set aside or varied.
>
> (3) On any appeal under this section the burden of satisfying the Royal Court that the decision of the Committee which is the subject of the appeal is intra vires or reasonable shall be discharged by the Committee, and the Committee shall be entitled to a final right of reply."

11. Whereas the Royal Court in some civil appeals sits as an "Ordinary Court" consisting of the Bailiff sitting with a minimum of two Jurats, (but usually with three), a "Full Court" consists of the Bailiff sitting with a minimum of seven Jurats. In the instant appeal the Royal Court, sitting as it had to do as a Full Court, consisted of the Deputy Bailiff and nine Jurats.

12. The grounds of appeal advanced on behalf of Mr. Johns were that the decision was unreasonable and should be set aside or declared void because:

    (1) The Committee failed to give sufficient weight to Mr. Johns' pressing needs for and the right to a home,

    (2) The Committee took into account an irrelevant consideration by taking into account Policy H14 (the preclusion of the erection of new buildings in the Green Zone).

13. In relation to Mr. Johns' appeal there were certain preliminary legal issues which had to be decided, and it was accepted by all that these

were matters which had to be decided by the Deputy Bailiff acting alone and they were heard as preliminary issues. These were:

(1) Whether personal circumstances such as Mr. Johns' need for a home were considerations which could have been taken into account by the Committee when making its decision,

(2) Whether the European Convention of Human Rights ("the Convention") was a matter which should have been taken into account by the Committee when making this discretionary decision,

(3) If the Committee should have taken into account the Convention when making its decision on the merits, it failed to do so and thereby made a decision which was wrong and ultra vires.

At the hearing it was conceded that the argument in (3) could not be sustained.

14. In his judgment of 20 March 2006 the Deputy Bailiff dealt with these preliminary issues. With regard to "personal circumstances", the Deputy Bailiff, relying in particular upon the judgments of the House of Lords in ***South Buckinghamshire District Council v. Porter*** [2004] 4 All E.R. 775, approving ***Westminster City Council v. Great Portland Estates plc*** [1984] 3 All E.R. 744, held that personal circumstances are capable of being a material consideration in planning cases and this applied as much to Guernsey as it did to England and Wales. He held, adopting the wording of Lord Scarman in ***Great Portland Estates plc*** at page [750] "it would be inhuman pedantry to direct the [Committee] that it must always ignore the human factor and must never take into account exceptional or special personal circumstances". Following the guidance given by the Court of Appeal in ***Walters v. The States Housing Authority*** (23 July 1997), the Deputy Bailiff, as he did not consider the decision to be ultra vires (to include ***Wednesdbury*** unreasonable) and therefore not to be a question of law for him to decide, found it would be a matter for the Jurats to decide whether as a question of fact the decision was unreasonable and he said that he would be directing them accordingly that it would only be in exceptional or special cases that personal considerations could be considered as a relevant factor as an exception to the general rule that they are not to be taken into account.

15. On the Human Rights issue he found that, as the Human Rights (Bailliwick of Guernsey) Law 2000 had not been brought into effect at the date of the ruling, the position was the same as in the United Kingdom prior to the coming into force of the Human Rights Act 1998 and accordingly the Royal Court could not set aside a discretionary decision of the Committee on the grounds of it being in breach of rights contained in the Convention. He also rejected the alternative argument that ratification of the Convention gave rise to a legitimate expectation

that the Committee would take into account an applicant's rights under the Convention when considering a planning application.

16. In the light of those preliminary rulings (which were not challenged), the Appeal was listed for hearing before the Full Court for the Jurats to decide whether as a question of fact the Committee's refusal of Mr. Johns' application was an unreasonable exercise of its powers. That that was the correct procedure in the instant case was not disputed.

17. The matter accordingly came before the Full Court on 10th October 2006. In the course of that hearing the Jurats (and the Deputy Bailiff) had the benefit of a Vue de Justice and therefore they were able to consider the factual issues raised in the context of this particular property and its situation and obviously, as experienced Jurats with considerable experience of the matters such as this which fell to be dealt with by the Full Court, in particular housing matters, they were well aware of the considerations peculiar to Guernsey and its physical characteristics relevant to the policy objectives of the Committee as well as the economic, social and housing conditions on the island and, an appreciation of the predicament of those in this island forced to claim Supplementary Benefit. They were also able to inspect the packing shed itself, and the works that had been carried out there and the effects that the grant of a planning permission, even if conditional, would have upon the property itself and upon the neighbourhood.

18. In the course of the proceedings the Full Court heard extensive arguments and received documentary evidence relating to the planning objectives relevant to the Rural Area Plan, the factual matters relating to the planning application for the Vinery and its planning history and the financial and social circumstances upon which Mr. Johns relied and which had been set out in the letter from Mr. Johns' advocate referred to above. In essence Mr. Johns and his partner have throughout their relationship lived in privately rented accommodation, the rent being paid by the Social Security Department and its predecessor Authority since 1995 in accordance with the Supplementary Benefit Regulations, but that in August 2002 the rent had been raised to a level above that which could be covered by the Social Security Department. As a consequence he fell into arrears of rent and accordingly he needed to find affordable alternative accommodation which in his financial situation as a supplementary beneficiary he had been unable to do. That this was the factual situation was not disputed.

19. The Deputy Bailiff gave directions to the Jurats relating to the facts and the legal considerations relevant to the issues of fact on which they had to decide and on the role of the Jurats and the matters they had to consider. In particular he directed the Jurats making it very clear that it was not for them to decide the case on the merits and not to substitute their views for that of the Committee but that they had to decide as a matter of fact upon the reasonableness of the decision. All this was in accordance with the indication given by the Court of Appeal in ***Island***

Development Committee v. Lainé (Court of Appeal, 18th December 2003), adopting guidance previously given by this Court in ***Walters***. He made it clear to the Jurats that they must be satisfied not only that the Committee's decision was mistaken but also that the decision was outside the bound of reasonable decisions, whether right or mistaken, which the law allows the Committee to reach. Throughout his directions he based himself very clearly upon the guidance given by the Court of Appeal in ***Lainé*** and ***Walters.*** Moreover in ***Lainé*** the Royal Court was reminded that it can subject the decisions of the Committee to a somewhat more intensive form of scrutiny than would conventionally be applicable for judicial review so as, if appropriate, to conclude the decision of the Committee is unreasonable, but that the Committee must be allowed a due margin of discretion or margin of appreciation, even though it may consider the decision is mistaken.

20. The Jurats were left to answer various questions which were clearly based on the need to ascertain the reasoning by which the Jurats came to that decision. We were informed that these questions had been agreed as appropriate. The questions and their answers are set out below:

"Question 1: Did the Department reach a conclusion reasonably open to it that the circumstances put forward in the letter dated 2 February 2004, other than the personal circumstances of the Appellant and his wife, did not rebut the general presumption in HT8 (taking into account that the erection of new housing was precluded under policies [CE6 and HI4]

Answer 1: Yes – unanimous

Question 2: (a) On the information he presented to the Department did the Appellant make out an exceptional or special case that the personal circumstances of the Appellant and his wife can be taken into account as a relevant factor which might assist in rebutting the presumption in [Policy] HT8.

Answer 2(a): Yes – 6; No – 3

Question 2: (b) If yes to 2(a), did the Department reach a conclusion reasonably open to it that the Appellant's personal circumstances taken together with other relevant factors put forward in the letter dated 2 February 2004 did not rebut the general presumption in [Policy] HT8.

Answer 2(b): Yes – 1; No – 5; (3 Jurats did not answer this question in the light of their negative answer to Q2(a)).

Question 3: Did the Department reach a conclusion reasonably open to it that the Appellant's proposal would not achieve a satisfactory grouping in relation to the neighbouring dwellings situated to the north of the site which taken together with its elevated position would result in an unneighbourly form of development which would detract from the amenities that neighbouring residents might reasonably expect to enjoy [Sec 17(e) and (f)] [of the 1966 law]

Answer 3: Yes – 2 No – 7.

Question 4: Did the Department, in any event, reach a conclusion reasonably open to it that the Appellant had not rebutted the presumption in [Policy] HT8.

Answer 4: Yes – 4; No – 5."

21. It follows from those answers that a majority of the Jurats found that in relation to the personal circumstances advanced on behalf of Mr. Johns, that whereas they found that without "special circumstances" the decision of the Committee was one which was reasonably open to them:

(1) Mr. Johns had made out an exceptional or special case that his personal circumstances could be taken into account as a relevant factor which might assist in rebutting the presumption in the relevant planning policies.

(2) That the Committee did not reach a conclusion reasonably open to it when it found that the said personal circumstances did not rebut the general presumption in the planning policies relating to neighbourhood considerations,

(3) That the Committee did not reach a conclusion reasonably open to it that Mr. Johns had not rebutted the presumption in the planning policies.

22. In the light of those answers by the Jurats, there remained a matter of law upon which the Deputy Bailiff had to rule, and following argument he delivered his judgment on that issue in a judgment dated 23rd November 2006. In that ruling (which is not challenged) he ruled that the Committee had the power to grant Mr. Johns' application for change of user on a conditional basis and accordingly (in the light of the decision of the Jurats) he ruled that the refusal of permission should be set aside and the matters referred back to the Committee for them to grant a change of use on such condition as was lawful and reasonable, in particular in relation to the length of time for which the change of use should be granted.

The Appeal to the Court of Appeal

23. The Environment Department sought to challenge the decision of the Full Court to allow the Appeal by Mr. Johns on the basis that:

    (1) The decision of the Jurats was perverse in that there was no or no sufficient evidence upon which the Jurats could have concluded that a decision of the Committee was factually unreasonable,

    (2) The decision of the Jurats under Question 4 was manifestly inconsistent with the decision in Question 1,

    (3) The Deputy Bailiff misdirected the Jurats, as to the tests to be applied by the Jurats to enable them to find that there were exceptional circumstances,

    (4) Further or alternatively the Deputy Bailiff erred in law in failing to direct the Jurats that there was insufficient evidence to enable the Jurats to find that there were exceptional personal circumstances such as to rebut the presumption in Policy HT8 of the plan.

24. In his Statement of Case, Crown Advocate Raffray appearing for the Department, explained Grounds (1) and (2) as being that the Jurats interfered with the margin of appreciation afforded to the Committee in reaching its decision on Mr. Johns' application and Grounds (3) and (4) being that the Deputy Bailiff misdirected the Jurats, on the fact of this particular case, on their restricted right to interfere with the Committee's margin of appreciation because of the limited evidence put before the Committee on the application of the issue of special circumstances. He explained that all the Grounds related to the evidence adduced by Mr. Johns and put before the Committee to support the case on exceptional personal circumstances. In essence as Advocate Dunster submitted on behalf of Mr. Johns (and not disputed by Crown Advocate Raffray) their contention can be divided into two, namely the absence of directions on the limited evidence placed before the Committee and into the perversity contention which also relies on the of lack of evidence.

25. In this appeal it will be noted that there is no issue before this Court that the Rulings by the Deputy Bailiff of 20th March 2006 on issues of law was wrong and in particular no dispute that the Committee could in very exceptional circumstances be obliged to have regard to personal circumstances of an applicant nor was there any dispute concerning the ruling of 23rd November 2006 on the Committee's powers to attach a suitable condition on the grant of permission. Nor does the Respondent challenge the Deputy Bailiff's ruling on human rights.

(i) Jurisdiction of the Court of Appeal

26. Before considering the matters raised in the Notice of Appeal it is necessary for this Court to satisfy itself that it has jurisdiction to hear this appeal against the decision of the Full Court. This issue of jurisdiction was originally raised by this Court in advance of the hearing and it invited the parties to deal with this matter in argument. Any court must consider of its own initiative whether it has jurisdiction to hear a matter and this is not affected by the comments of the Privy Council in ***President of the State of Equatorial Guinea and another v Royal Bank of Scotland International, Logo Ltd and another intervening*** [2006] UKPC 7. On this issue the Appellant contended that this court had jurisdiction relying in particular on the decision of the Court of Appeal in ***Island Development Committee v. Portholme Properties Limited***, (20th September 2002), but on the other hand the Respondent contended for the contrary position and contended that this Court had no jurisdiction to consider the appeal and that any appeal must be direct to the Judicial Committee of the Privy Council.

27. In ***Island Development Committee v. Portholme Properties Limited*** (20th September 2002), the Court of Appeal (Gloster, Sumption and Bellof JJ.A) had to consider the same question of jurisdiction arising out of an appeal to the Court of Appeal against the decision of the Full Court under Section 26 of the 1966 law in an appeal against the decision of the Island Development Committee. In that case the Court of Appeal ruled that there was a right of appeal to the Court of Appeal and not simply direct to the Privy Council. The Court of Appeal in that case rejected exactly the same arguments as are raised by the Respondent herein. That judgment was followed in ***Lainé*** and it has never, so far as I am aware, been previously questioned.

28. It is common ground that the Court of Appeal is not bound by its previous judgments (***Morton v. Paint***, Court of Appeal, 9th February 1966), but I, for my part, have no doubt that previous judgments, particularly when followed by subsequent cases before the Court of Appeal, should be followed unless the subsequent Court of Appeal is convinced, on a detailed examination of the law and the arguments raised, that the previous judgment was wrong in principle and not simply because the Court of Appeal in a subsequent case would have reached a different decision. This issue of precedence was dealt with extensively by the Jersey Royal Court in ***State of Qatar v. Al Thani*** [1999] JLR 118, which I consider accurately sets out the position in this jurisdiction as much as it does for Jersey. It has not been suggested that the Court of Appeal in ***Portholme*** failed to take into consideration matters which it should have taken into account, nor that the issue was not fully argued or the matter was not fully considered. It was obviously a very careful judgment upon which all members of that very experienced Court agreed and which has subsequently been followed without demur. For my part, not only am I persuaded that the decision of the Court of Appeal in ***Portholme*** was not wrong, but I am wholly convinced that the Decision of the Court of Appeal in ***Portholme*** was

correct. It also seems to me to be a wholly sensible decision and wholly consistent with current attitudes to judicial approach. I see no basis for excluding an appeal from such a decision of the Full Court from the Court of Appeal or that any such appeal could only be to the Judicial Committee of the Privy Council for exactly the same reasons as were accepted by the Court of Appeal in ***Portholme.*** I have considered carefully the draft Judgment of Carey JA on this issue, but as he agrees with this judgment and does not dissent from it, it is not necessary for me to deal with the interesting issues of jurisdiction raised in his judgment.

(ii) Approach by the Court of Appeal

29. It was decided by the Court of Appeal in ***Lainé*** (supra), and it is not disputed, that the Court of Appeal can only interfere with the decision of the Full Court if the Bailiff has mis-directed the Jurats or, if it is satisfied that the directions were unexceptionable, it is satisfied that there was no evidence before the Jurats upon which they could reasonably have relied for the finding of facts, which they did, or for any other reason the findings of fact were perverse. ***Lainé*** also restates and refines the guidance which this Court has given as to matters which should be dealt with in directions to the Jurats and (per Southwell JA) in particular recommends developing the practice of the drafting of agreed questions to the Jurats designed to elucidate their reasoning. (which was followed by the Royal Court in the present case).

(a) The Directions to the Jurats

30. It has been contended on behalf of the Appellant that the directions given by the Deputy Bailiff to the Jurats on the issue of special considerations were defective. It is contended that the Deputy Bailiff misdirected the Jurats as to the test to be applied to enable them to find that there were exceptional circumstances. It is contended that he ought to have directed the Jurats that there was a threshold of evidence which required the Jurats to reach for them proceed to conclude that there was sufficient evidential circumstances to entitle them to find that the Committee had acted unreasonably. In his direction the Deputy Bailiff, keeping closely to the guidance as contained in ***Lainé,*** dealt in considerable detail as to the approach of the Jurats, the planning policies and the reasons for those policies and the reasons for the Refusal of Consent and the exceptional nature of the decision which the Jurats had to take and their role in such a matter. He dealt in some detail with the evidence upon which Mr. Johns relied in support of his contentions and he stressed that the Jurats "… must consider whether in this appeal the personal circumstances that were put forward by [Mr. Johns] were so exceptional or special that they come within special cases that circumstances are to be given direct effect" and "what you have to consider is whether this is a case where the circumstances are so special or exceptional that they are to be given direct effect … I leave it

to your good judgment to decide whether this is one of those cases." All these directions quite correctly instructed the Jurats of the wholly exceptional nature of a finding that the special circumstances would be sufficient to justify a finding that the personal circumstances of Mr. Johns were sufficient to make the Committee's decision to follow the ordinary requirements of the planning regime into a decision which was unreasonable.

31. The evidence relating to the special circumstances upon which Mr. Johns relied was extensively dealt with, in particular the matters set out in his advocates letter and his earlier letters. The Deputy Bailiff correctly pointed out that it was for Mr. Johns to set up the facts upon which he relied and not for the Committee to make enquiries, but obviously the Committee was well aware, like the Jurats, of the social conditions on the Island including housing. He pointed out that Mr. Johns had changed his position concerning the conditions with regard to which permission could be given in that he originally said he only needed the accommodation temporarily until he could obtain affordable accommodation to that contending they wished to live there for the rest of their lives. He also pointed out that there were some matters which could be relevant which had not been dealt with in the evidence.

32. I have no doubt that the directions of the Deputy Bailiff both on fact and law were a concise and accurate and wholly appropriate statement both of the facts and the law. In my opinion there was no question of there being no evidence to put to the Jurats in support of the contention of special circumstances, and indeed it was never contended that there was no evidence. Moreover, as pointed out by Advocate Dunster, it was not a question of the Request for Permission being refused on the grounds of no evidence, or no sufficient evidence, but because on the facts the Committee did not consider that the evidence adduced amounted to special circumstances to justify departing from general principles. It was that decision of the Committee which was being considered by the Jurats.

(b) <u>The decisions of the Jurats: Evidence and Perversity</u>

33. As this is a decision on fact by the Jurats sitting as a Full Court, it is necessary to bear in mind that it is not for this Court to usurp the functions of the Jurats (see for example paragraphs 23-26 of the judgment of the Judicial Committee of the Privy Council in ***Attorney General for Jersey v. O'Brien***, [2006] JLR 133). It matters not that this was a decision of the Jurats by a majority or a bare majority. The fact that a significant number of the Jurats did not agree that the decision was unreasonable cannot be relied upon to support a contention that because some of the Jurats disagreed with the majority the decision of the Committee cannot have been outside the range of reasonable decisions which the law allowed the Committee to reach. The decision of the majority of the Jurats constituted the decision of the Jurats. It follows that it is not for this Court to decide whether or not it

would have made the same findings of fact as made by the majority of the Jurats. This Court has to respect that decision. Apart from considering the correctness of the directions of the Bailiff, this Court can only interfere with the decision of the Jurats if it considers that there was no evidence relating to personal circumstances such as could have been left to the Jurats or that the findings of fact were perverse. As stated above, I consider that there was significant evidence (albeit incomplete) which could have been left to the Jurats upon which they could have relied and I do not see how their findings could possibly be said to be perverse. Nor do I see how it could be considered that the Jurats answer to Question 4 was inconsistent with their answers to Question 1. Question 1 dealt with the issue without personal circumstances yet Question 4 dealt with the reasonableness of the decision in the light of the findings as to personal circumstances in Question 2 and as to the neighbourhood in Question 3.

(c) Conclusion

34. Accordingly, as I do not consider that it is either possible to criticize the directions of the Deputy Bailiff or to find that there was no evidence upon which the Jurats could rely or that the findings were perverse I would dismiss this appeal. On costs I agree with Carey J.A. at paragraph 83 of his Judgment.

Postscript

35. By letter dated 24 September 2007, well after the conclusion of oral argument, but before this judgment was delivered, Advocate Dunster, quite correctly, wrote to the Court, with a copy to Crown Advocate Raffray, to inform us that Mr. Johns' situation had very recently changed, in that he had just managed to start a small business, but whether this would be successful was far from clear. This meant that Mr. Johns was no longer on Supplementary Benefit. I do not consider that this makes any difference to the result of the Department's appeal against the decision of the Full Court, but obviously the changed circumstances may be matters which the Department will have to take into account when they reconsider this matter in the light of the Full Court's ruling of 23 November 2006.

STEEL J.A.

36. I have read and considered the draft judgment of Carey, J.A. concerning the jurisdiction of the Court of Appeal in this matter. I agree with Vaughan, J.A. that the decision in ***Island Development Committee v. Portholme Properties Ltd*** 20th September 2002 was correct, and endorse his reasons as set out in paragraphs 26, 27 and 28 of his judgment.

37. I agree with the conclusion of Vaughan J.A. in relation to the subject of the present appeal which I would dismiss, and have nothing to add, save to agree with Carey J A on costs as contained in paragraph 83 of his Judgment.

CAREY J.A.

38. In ***IDC v Portholme Properties Ltd***, 20th September 2002, this Court, composed of three senior and experienced Judges, (Gloster and Sumption and Beloff JJ A) rejected the then Respondent's submissions challenging the jurisdiction of this Court to entertain Civil Appeals from decisions of the Royal Court sitting as a Full Court.

39. That decision was not challenged at the time. The judge in the Royal Court had been sitting alone and adjudicating on a point of law upon which, in the view of the members of this Court then sitting, he had clearly misdirected himself. If this point could not be corrected in the Court of Appeal, the States who were the Appellant, would have had to take the matter to the Privy Council, with a consequent delay and extra cost. Further if the members of the Judicial Committee were of the same view as the Court of Appeal, as then comprised, which as the judge whose decision was the subject of that appeal, I feel I can venture to suggest they would have, the Appeal would have been allowed and presumably the unsuccessful Respondent would have had to meet heavier costs.

40. The correctness of the decision on merits cannot influence my approach as to whether it was rightly decided on jurisdiction, but that may be a factor in deciding whether or not it should be followed. The decision was followed by a differently constituted Court of Appeal in ***IDC v Laine***, although there is no indication whatever that jurisdiction was in issue on that occasion.

41. In January Mr Raffray sought leave to extend the time for appealing in the case now before the Court. I endorsed the draft Order for extension of time, which was not resisted by Mr Dunster, with words signifying that I did not, in agreeing to an extension of time, concede that this Court had jurisdiction. When the papers came in, no point was taken on jurisdiction by Mr Dunster. After the members of this Court had conferred, it was decided to invite argument on jurisdiction, and in particular to consider whether ***Portholme*** had been correctly decided.

42. Mr Raffray has, since the hearing before us reminded us of the recent authority of ***Equatorial Guinea*** where the Privy Council criticised this Court (composed on that occasion of two of the Judges who happen to be sitting on this case) for raising an issue, which had not been raised by the parties. I note and accept what their Lordships were saying, but it would, in my view, be wholly inappropriate for a Judge who has serious

doubts as to whether, despite a previous decision of this Court, the Court is entitled to exercise jurisdiction in a matter, to keep silent when the argument has not be raised on behalf of the Respondent. Such a reticence is particularly inappropriate in my view when it is a States Department that is the Appellant. A concern about whether the States has given a power to a court can so easily be resolved by the States putting the matter beyond doubt by clarifying the law.

43. The Court of Appeal is a creature of statute established well within living memory. After the Second World War, the Island's constitution came under scrutiny and it was rightly recognised that there was need for a separate Appellate Jurisdiction to be developed, distinct from the Royal Courts of Guernsey and Jersey. It had been hoped to establish one Court for both Islands, but as so often has happened, this proposal, sensible as it may have seemed to those in Whitehall, ran into real difficulties locally and the upshot was that separate Courts of Appeal had to be established within each Bailiwick, albeit that the ordinary Judges were generally appointed to serve in both jurisdictions. The Court of Appeal (Guernsey) Law 1961 was enacted in this jurisdiction, empowering the Court of Appeal to deal with civil matters and criminal matters. The Law was passed in 1961, but it was another three years before Judges were appointed and the Court was formally convened for the first time.

44. The Law of 1961 clearly distinguished between the role of this Court's criminal and civil divisions, a distinction that does not appear to have been so marked in the case of the Royal Court although I accept that in its sitting as a *"Cour des Jugements et Records"* the jurisdiction exercised was exclusively civil.

45. Prior to the Law of 1961, there was no appeal from decisions of the Royal Court sitting as a Full Court in criminal matters other than to Her Majesty in Council. Since the institution of a separate Magistrate's Court in 1925, the Ordinary Court's criminal jurisdiction had been substantially curtailed and indeed remained only for cases originating in Alderney and Sark. Appeals in criminal matters from the Magistrate's Court and from the Ordinary Court lay to the Full Court in accordance with the provisions of the Police Court Appeals Law 1939 (re-enacted in the Magistrate's Court (Criminal Appeals) (Guernsey) Law 1988 ("The Law of 1988")). In passing I note that until 1939 there had been no right of appeal against decisions of the Royal Court sitting *en petit criminel* or *a l'ordinaire* or post 1925 decisions of the magistrate in criminal as opposed to civil matters. It may be thought that in the nineteenth century it was unusual or unfair to let the Ordinary Court enjoy an unappealable discretion in cases involving a maximum penalty of one month's imprisonment or a fine of £5, but that was not the view of the Royal Commissioners appointed to enquire into the criminal law who reported in 1848, who, almost entirely condemnatory about the way the Island was governed, justifiably drew attention to the lack of an appellate jurisdiction in criminal matters generally

46. The important point to note about the criminal jurisdiction of this Court was that initially it was restricted to dealing with Appeals against conviction and sentence in respect of matters dealt with on indictment of the Royal Court. There was, until the enactment of the Law of 1988, no right to refer on to the Court of Appeal, decisions in criminal matters made by the Full Court sitting as an Appellate Court from the Magistrate's Court or the Ordinary Court. That perceived lacuna, highlighted by the Appeal of ***Sherry v The Queen*** [1987 1 WLR 341 was filled by Section 7 of the Law of 1988. The lack of jurisdiction of the Court of Appeal to deal with appeals from the Royal Court in connection with matters originating in the Magistrate's Court matters prior to 1988 had been earlier recognised in this Court's decision in ***Guille v Law Officers of the Crown*** (1986 4 GLJ 24).

47. Section 7 of the Law of 1988 provided that leave to appeal was required in every case and subsection (2) limited the power of appeal to cases involving questions of law alone or pursuant to a certificate granted by the Bailiff that sufficient grounds of appeal exist in the case. [Bailiff in this context would in my judgment mean the presiding judge in the Royal Court]. Even then, the Court of Appeal did not become seized of every criminal matter dealt with on Appeal by the Royal Court (see for example ***Snowden v Law Officers of the Crown*** [1996] 22GLJ 75).

48. In the first case challenging a notice served by HM Procureur under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law 1991- ***Century Holdings Limited v HM Procureur***, [1997] 23 GLJ 88, this Court declined jurisdiction on the basis that in the Criminal Division there was no power to entertain an appeal from the Royal Court in a case where that Court had held that there was no power for it to question the validity of a notice issued by HM Procureur. As we shall see in the later case of ***Bassington v HM Procureur***, [1998] 26 GLJ 14 the Court of Appeal faced again with the apparent inability of aggrieved persons to challenge in the Criminal Division directions made by HM Procureur incarnated itself as the Civil Division and affirmed the availability of judicial review in the Courts of this Bailiwick.

49. This leads me on to a review of the Civil Appellate Jurisdiction and as Beloff J A did in delivering the judgment of the Court in ***Portholme***, I will start with sections 13 and 14 of the Law of 1961.

> *"13. (1) On such day as shall be appointed in that behalf by Ordinance of the States there shall be vested in the Court of Appeal the appellate jurisdiction in civil matters which immediately before that day was vested in the Royal Court, sitting as a* ***"Cour des Jugements et Records"****.*
>
> *(2) Any civil matter pending in the Royal Court, sitting as a* ***"Cour des Jugements et Records"****, immediately before the day appointed under subsection (1) of this*

section shall on such day be transferred to the Court of Appeal and, subject to such directions as the Court of Appeal may think fit to give in relation thereto, proceedings thereon shall be continued as if the matter had originated in and the previous proceedings had been taken in the Court of Appeal.

*14. For all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction which vested in the Royal Court sitting as a **Cour des Jugements et Records"** and shall have power, if it appears to the Court of Appeal that a new trial ought to be had, to order, if it thinks fit, that the verdict and judgment be set aside and that a new trial be had."*

50. It is accepted that the Island Development (Guernsey) Law 1966 as amended is silent as to whether there is a further right of appeal to this Court. That Law was of course enacted after the Law of 1961. Section 26 of the 1966 Law is in identical form to Section 15 of its predecessor the Preservation of Natural Beauty and Agricultural Land Law (Guernsey) 1959.

51. I will now endeavour to identify the difficulties that I have with the Court's Judgment in ***Portholme***. After quoting the sections of the 1961 Law to which I have referred, the Court goes on to look at Halsbury's Laws Fourth Edition Volume 6, para 847. It is worth referring to its full title "Halsbury's Laws of England". In passing, I note that information concerning the Bailiwick is contained in a chapter dealing with the whole of the Commonwealth, written by an eminent Professor of Laws at the University of Oxford. I stand to be corrected, but I am not aware of any input by persons qualified on the laws of this Island in to the sections of this erudite work where Guernsey is referred to at paragraph 847 which is stated to be declaratory of the law in force on 3rd December1990. The paragraph is clearly incomplete. That is however all by the way.

52. The Court of Appeal in England has rather a different pedigree to that of our Court of Appeal in that it was, as I understand it, created at the time of the 1875 reforms and is a constituent part of the Supreme Court of Judicature, but separate and apart from the High Court. However as I will identify later from an early stage it acknowledged that it could only exercise the jurisdiction conferred on it by Parliament. The Guernsey Court of Appeal, as I have said, was created under the Law of 1961. My view is that likewise it can only exercise the jurisdiction conferred on it by the States in that Law.

53. When the Law of 1961 was enacted, Section 6(2)(a) of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law 1950 ("The Law of

1950") had not been brought into force. This Section which provides for issues of law to be the responsibility of the Bailiff alone was only brought in to force in 1964, shortly before the establishment of this Court. I accept that the *Cour des Jugements et Records* could not have sat on Appeal from decisions of the Full Court, by virtue of the fact that its constitution was the same as the Full Court. However, I do not accept and can find no authority (other than ***Portholme***) for the proposition that this Court, simply because it is composed of different Judges and because the law to provide for the separate roles of the Bailiff and Jurats has been brought in to force, can take upon itself powers and responsibilities which would not have been vested in the Court whose jurisdiction it subsumes.

54. If in 1960 it had been the wish of the States to provide a general power for this Court to entertain Appeals in all matters involving decisions of the Royal Court sitting as a Full Court, it could have said so. The States would have been aware that Section 6(2)(a) of the Law of 1950 had been enacted ten years previously and that there would have been benefit in providing just the kind of Appellate Jurisdiction that this Court claimed to be able to exercise so effectively in ***Portholme***, but that does not mean to say that at that stage the States would have been supportive of a general right of appeal from decisions of the Bailiff and seven plus Jurats, particularly as their separate roles had not, at that stage, been distinguished.

55. The Royal Court, sitting as a Full Court, does have a Civil Jurisdiction in a number of matters. The longest established is probably the licensing of public houses and establishments purveying alcohol. Recent reforms have provided for the initial applications to be brought before the Ordinary Court rather than the Full Court as theretofore with the power for the Ordinary Court to refer up to the Full Court, those applications which concern matters of principle or are sensitive for other reasons. Likewise from 1914 Public Halls whether or not licensed to sell liquor had to be separately licensed by the Full Court. Following in this vein the Court was during the nineteenth and twentieth centuries entrusted with the oversight and control by the requirement of a grant of permission from the Court for a number of potentially dangerous or noxious activities in the days before the development of departments of the States engaged in more systematically regulating the lives of the subject. Examples of such activity on the part of the Court are to be found in the nineteenth century legislation requiring approval amongst other things for the installation of bread ovens and the operation of steam boilers. Other legislation gives the Court power to license dangerous activities such as storing explosives and quarrying. These licensing functions are essentially matters of discretion and therefore despite the separation of roles defined in section 6(2)(a) of the Law of 1950, one sees the practice today of the Bailiff and Jurats retiring to consider applications of this kind and, if there is to be a refusal, the Court through the Bailiff will detail the reasons, which would not always have been the position in the past.

56. As the life of the Island became more complex during the twentieth century, the States as the Legislature and government acting through its various committees had to begin to control with greater rigidity what the subject might do with his property and how he should conduct his affairs. A common theme is to be found in many of the enactments restricting the freedom of the subject to engage in what has formerly been lawful activity as he pleased, namely that an individual aggrieved by this kind of administrative decision of a department of the States could appeal to the Bailiff and Jurats of the Royal Court on the grounds that the decision was ultra vires or unreasonable. The entrepreneurial and freedom seeking people of Guernsey were resistant to these kinds of restrictions being placed on them in the apparent greater good and the only way that some of these provisions could be got through the legislature was to write into the relevant law the right for the aggrieved individual to take his case to the Royal Court if he felt that the restriction placed on him was unreasonable.

57. This appellate Jurisdiction has been established in a somewhat haphazard manner to the extent that there has been little consistency on the part of the States in deciding whether such administrative Appeals should be to the Ordinary Court or to the Full Court. Indeed, this wavering still seems not to have ended. Under the new Planning Law, appeals on points of law from the Tribunal (which is to replace the Court as first tier repository for all appeals against planning decisions) are to be to the Ordinary Court and quite recently the States have enacted legislation transferring from the Full Court to the Ordinary Court the hearing of appeals in Housing Control cases, one of the most sensitive and contentious areas of governmental control in this Island. Interestingly, there are still provisions in such Laws that persons may appeal to the Court of Appeal from decisions of the Ordinary Court, but these provisions may be otiose to the extent that the *Cour des Jugements et Records* would undoubtedly have exercised jurisdiction in appeals from the Ordinary Court, save in those cases where the Statutes specifically provided that the decision of the Ordinary Court was to be final. Express provision would however have to be made where the right of appeal was being in any way curtailed or conditioned. I can well understand the Court in ***Portholme*** feeling that the examples contained in other legislation did not assist with the approach to be taken in the face of the omission of an express right of appeal in the Law of 1966

58. In my Judgment there is no authority to support the contention that this Court has been expressly entrusted with an appellate role in matters such as these. The legislature has had the opportunity for in excess of forty years to add to the responsibilities of the Court of Appeal by making provision for this Court to have an Appellate role in all Causes arising in the Royal Court sitting as a Full Court. This could have been done, but it has not been considered appropriate by those responsible for promoting legislation reform. That is why I find it particularly surprising that these and other appeals to this Court in respect of Island Development matters have been instigated by the Law Officers on behalf of a States Department.

59. I have noted that part of the judgment of Beloff J A where he concludes that the *Cour des Jugements et Records* had a general civil appellate jurisdiction. As I have suggested, I do not consider that prior to the 1961 Law, the Royal Court regarded itself as having a jurisdiction closely defined as being civil or criminal. What the Royal Court sitting as a Full Court did prior to 1961 apart from exercising its original criminal and civil jurisdictions and its jurisdiction to hear appeals against public bodies, such jurisdiction being derived exclusively from statute, was to sit as the *Cour des Jugements et Records,* to determine civil appeals against decisions of the Ordinary Court, comprised of the Bailiff or Lieutenant-Bailiff and two or more Jurats. The *Cour des Jugements et Records* would have dealt with appeals from the Ordinary Court whether sitting *en plaids de meubles*, *plaids d'heritage* or *en amirauté.* (I have not felt it necessary to review the special way in which *causes en adjonction* were dealt with as they had been abolished in1948). I regret that I cannot accept the conclusion that simply because the personnel of the Court of Appeal were different to those of the *Cour des Jugements et Records*, the appellate jurisdiction of this Court could be expanded in the way suggested.

60. The Court in ***Portholme*** went on to record comfort and support for this conclusion from ***Bassington***. ***Bassington***, in my judgment, was correctly decided, notwithstanding that this Court with the same membership had decided in ***Century Holdings*** the previous year that it did not have jurisdiction to entertain an appeal from the Royal Court in identical circumstances. What ***Bassington*** decided, and decided correctly, was that the remedy of Judicial Review should be available in the courts of this Bailiwick. Collins J A and his brothers thus engaged in a valuable piece of judicial law making as indeed this Court did in the unrelated decision in ***Morton v Paint*** which related to the law of occupiers' liability.

61. I agree with the quotation from Collins J A's judgment. On first reading, this passage would seem to be suggesting that the jurisdiction of the Court of Appeal was in some way being extended from that exercised by the *Cour des Jugements et Records*, but that with respect is not what is being said in the words *"the law must be free to develop both in the Royal Court and in this Court, in order to take account of changing circumstances and perceptions*. *It was not intended to be a museum piece"*. It is the substantive law of Guernsey that has to move on – on that occasion by adding to the armoury of the Ordinary Court a general power to review judicially decisions of an administrative nature. Despite a slightly misleading reference back to 1964 I do not read into what the Court was saying any suggestion of an extension of the jurisdiction of the Court of Appeal itself. The willingness of the Royal Court and this Court to develop the law, adhering at all times to the approved parameters for ensuring that the powers of the legislature are not usurped (see for example ***Vidamour v Hood*** *16 GLJ 68)*, is particularly important in a small jurisdiction with until very recently, limited resources for drafting legislation.

62. At the top of page 6 of the ***Portholme*** judgment, the Court begins to enunciate another principle which perhaps is the crucial point of this judgment, upon which its correctness stands or falls. It says referring back to ***Bassington***:-

> *"In short, this Court was saying that Section 13 of the 1961 Law was a so-called "always speaking" provision which had to be construed against contemporary conditions".*

63. The judgment in ***Bassington*** although soundly reasoned in its central conclusion that judicial review was available in Guernsey has a number of obiter statements that I would respectfully suggest may have to be revisited if litigants seek to rely on them in the future. HM Procureur consented to an order in which the Court claimed jurisdiction to review his decision and set aside his directions (see Act of Court 6th January 1999. As a consequence there was not the opportunity of further exploring the points made in the judgment over and above the basic principle that administrative decisions of this kind were capable of review in Guernsey Courts. I do not however see anything in the ***Bassington*** judgment as supporting the contention that Section 13 of the 1961 Law was an "*always speaking*" provision.

64. One of the difficulties that I find with ***Bassington*** is the suggestion that there is some independent jurisdiction of the Court of Appeal to engage in judicial review in matters that are not justiciable before the Ordinary Court. Whilst one can well understand how, having made the groundbreaking decision that those affected by the Procureur's Order in ***Bassington*** could challenge it, the Court may have been attracted after having given leave to appeal to continue to deal with the substantive matter itself albeit as it transpired by consent (See Act of Court dated 6th January 1999), particularly in view of the caution of the judge below in ***Century Holdings v HM Procureur*** a caution which with hindsight would now appear to have been misplaced.

65. However, strictly speaking, I consider that in ***Bassington*** the Court of Appeal should have sent the matter back for review in the Ordinary Court, presided over, if they felt it appropriate to so order, by a different Judge I cannot find any grounds to suggest that the Court of Appeal in Guernsey has a "curious quasi-original jurisdiction" of the kind identified by Donaldson M.R in ***Foster v Chief Adjudication Officer*** *[1991] 3 All E R 846* at page 856 of the Report and endorsed in ***Practice Direction*** *1982 1 WLR 1375* . However further discussion herein of what is a side issue is not appropriate, particularly as matters have moved on in England following promulgation of the CPR in 1999.

66. The issue returns a little later in the ***Portholme*** judgment when reference is made to ***Foster*** as pointing to an alternative route for this Court to adopt in order to attain jurisdiction. Beloff JA makes it clear that he does not rely on this, so it is not necessary for me to comment further on the difficulties I see in this suggestion.

67. One is therefore led back to look further at the jurisprudence on the principle that legislation is intended to develop in meaning with altering circumstances, save in comparatively rare cases were axiom intended to be fixed in the time of their passing. The issue of how to approach the question of whether Statutes are *"always speaking"*, is summarised in paragraph 12.18 of Halsbury's Laws of England, Fourth Edition Reissue, Volume 44(1), which I set out:

> ***"Acts whose language may be treated as updated and Acts whose language is fixed in time.*** *One distinction between Acts is concerned with whether or not without specific amendment the language of an Act can be treated as updated in response to conditions which have changed since it was passed. In the usual case the Act is intended to develop in meaning with altering circumstances; but in comparatively rare cases an Act is intended to be fixed in the time of its passing, to be of unchanging effect and to be applied in the same way whatever changes might occur after its passing, having as it were a once for all operation. Such an Act must be construed as if one were interpreting it the day after it was passed. Examples of an Act whose language is fixed in time are an Act setting up a constitution, an Act implementing an international convention, an indemnity Act, and an Act which, like many private Acts, has the nature of a contract."*

68. The case referred to in the footnote against the word *"constitution"* is in ***Re The Regulation and Control of Aeronautics in Canada*** *1932 AC 55 at page 70*. This is a case centred on a dispute between the Dominion Government and the various Provincial Governments of Canada as to which of those bodies had the right to regulate aeronautical activity in Canada. This was one of a considerable number of jurisdictional differences between the Federal Government and the Provinces which the Privy Council was called on to examine in the inter war years. Lord Sankey LC said this at page 70:-

> *"Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment."*
>
> ……..
>
> *"Inasmuch as the Act embodies a compromise under which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was*

> *subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies."*

69. When the Court of Appeal was established, it was established with the consent of the legislature in Guernsey as a result of comment from a Privy Council enquiry. Some may have had reservations (erroneously held in my view) that a fundamental constitutional right established by Edward III in 1331 when the Eyre was discontinued to the effect that the people of this Bailiwick were entitled to be judged in their own courts, manned by local judges was in some way being diluted in that for the first time since 1331 a Court (other than the Privy Council) manned in the main by judges who are not resident in Guernsey was being given jurisdiction to review decisions of the local court. The very fact that it took fifteen years to implement the recommendations of the Privy Council indicates to me that there was a certain reticence to make this necessary reform and it is for that reason that I feel it necessary to respect carefully the terms of the original Law establishing the Court of Appeal and caution the Court of Appeal however well motivated against assuming jurisdiction that was not clearly entrusted to it at the time the Court was established. Despite the lack of resources to which I have referred it would not have been an insurmountable task for the legislature of this small jurisdiction to widen the powers of the Court of Appeal if considered appropriate as was done in the case of the Magistrate's Courts Appeals in the Law of 1988 and in a number of laws where rights of appeal to the Royal Court against administrative decisions feature.

70. The Court in ***Portholme*** drew support from two further decisions, one of the House of Lords and the other the Privy Council. The first contains a helpful quote from Lord Nicholls of Birkenhead in the case of ***Fitzpatrick v Sterling Housing Association*** *2001 1AC 27*. This was a 3/2 decision taking forward the meaning of partners of deceased protected tenants entitled to succeed to the tenancy to include those in long term homosexual relationships.

71. The next quote is from a case again involving Canada, ***Attorney General for Ontario v Attorney-General for Canada*** *[1947] AC127*. This was centred on the issue of the Dominion Parliament with devolved power from Westminster having the right to legislate to cut the umbilical cord and abolish the right of appeal to the Privy Council. I agree that in this regard the British North America Act had to be regarded in the words of Lord Jowett LC as:-

> *"An organic statute to which the flexible interpretation must be given that changing circumstances require."*

72. There is nothing very revolutionary about this idea. Many other jurisdictions which were former colonies have removed the right of appeal to the Privy Council. Indeed, there have been suggestions in certain quarters that now this court is so well established consideration be given to abolishing or curtailing the right of appeal to the Privy Council in this jurisdiction and indeed it appears that, subject to the sanction of Her Majesty in Council, it would be within the powers of the States to promote a Projet de Loi to that effect.

73. Where I part company with the Court in ***Portholme*** on this particular point is that I do not see that this Canadian decision can be used as authority to locate a right of appeal as well as to remove it. The Court then goes on to justify the decision by pointing to the sense of what the Court was deciding and, as I said earlier in this judgment, in the particular circumstances of ***Portholme*** it was clearly understandable that the Court should feel it was proper for it to take this power.

74. The next remarks are, it is accepted erroneous, in that in Jersey, Planning Appeals are dealt with in the Inferior number of the Royal Court and so are clearly appealable to the Court of Appeal of that Bailiwick.

75. Although Halsbury does not mention specifically, as an exception to the *"always speaking"* rule, statutes that create a new jurisdiction, support for such a proposition can be found from Maxwell 's Interpretation of Statutes Ninth Edition at page 299 in the chapter enumerating which enactments were to be subject to the principle of strict construction:-

> *"New Jurisdictions*
> *The same principle of construction is applied to enactments which create new jurisdiction, or delegate subordinate legislative or other powers".*

76. The leading authority with regard to the application of this principle to the Court of Appeal is ***Flower v Lloyd [1877]*** *6 QBD 297*. This case involved an application to reopen, before the Court of Appeal, a case which had already been dismissed, on the grounds that since the matter was disposed of, new facts had come to light indicating that the aggrieved party had been the victim of fraud in that the opinion on the validity of a patent given by an expert had been erroneous as a result of the expert deliberately not having been given the full facts by the opponent. At page 300 Jessel M R, after taking comfort from the fact that the Appellant had a remedy to go back to the High Court and seek to set aside the Judgment on the grounds of fraud, said this:-

> *"There is, therefore, no necessity for straining, if I may say so, the meaning of the words which confer power upon this Court, and we must look simply at the provisions of the Acts of Parliament as they stand. Now, when we look at the 4th and 19th sections of the* ***Judicature Act*** *of 1873, it is plain that this Court*

> *is simply a Court of Appeal and nothing more. It has very large powers conferred upon it with reference to disposing of appeals, but beyond that it has no jurisdiction. The 4th section says this:* ***"The said Supreme Court shall consist of two permanent divisions, one of which, under the name of 'Her Majesty's High Court of Justice,' shall have and exercise original jurisdiction, … and the other of which, under the name of 'Her Majesty's Court of Appeal,' shall have and exercise appellate jurisdiction with such original jurisdiction, as hereinafter mentioned, as may be incident to the determination of any appeal."*** *Therefore, if this Court has once determined an appeal, it has no further jurisdiction."*

77. James L J went on to amplify his views perhaps even more clearly and simply at page 301:-

> *"I am of the same opinion. It is very important, as I have said more than once, that this Court should set the example to other bodies of obeying the law, and that we here sitting as a Court of appellate jurisdiction should not attempt to enlarge that jurisdiction beyond what Parliament has chosen to give. It is beyond all question that we are made a Court of Appeal, and a Court of Appeal only, with incidental original jurisdiction for the purpose of exercising that appellate jurisdiction. That is our sole power. It seems to me to have been intentionally provided by the Act that we should not be part of the High Court. We are part of the Supreme Court. The High Court is one thing, and the court of Appeal is another, and we have no power to make any order of or for the High Court except by way of substituting a proper order for an order which we think has been improperly made by the High Court. Therefore I think we have no original jurisdiction in this matter which can enable us to entertain the motion."*

78. This judgment has been the subject of relatively recent analysis and comment in a decision of the English Court of Appeal in ***Taylor v Lawrence*** [2002] 2 All E R 353. There a five judge court decided that it did have a residual jurisdiction to reopen an Appeal which it has already determined in order to avoid *"a real injustice in exceptional circumstances"*. This particular case centred on a complaint which had already been considered of real bias on the part of a trial judge where new facts had emerged since the Appeal had been dismissed. In the event, the Court was not satisfied that grounds for setting aside the decision of the original Court had been established, but the point of the decision was that there was this power although to be exercised very sparingly.

79. The commentary on ***Flower v Lloyd*** is to be found in the judgment of Woolf LCJ commencing at paragraph 21 on page 362:-

"[21] Mr Corner then referred us to statements of principle which he submitted authoritatively determine that this court has no jurisdiction to reopen an appeal once it has been finally decided, and that the only course available to persons in the appellants' position is to seek to appeal to the House of Lords out of time.

[22] The earliest and perhaps the most important case upon which Mr Corner relied for this submission is the case of ***Flower v Lloyd*** *(1877) 6 Ch D 297.* ***Flower v Lloyd*** *was decided early in the life of this court but it did exert a considerable influence on what was said in judgments in later cases. The court was presided over by the then Master of the Rolls, Sir George Jessel. The issue before the court was whether the claimant in that action was entitled by motion to apply for leave for rehearing of an appeal because of the 'subsequent discovery of facts which shew or tend to shew that the order of the Court of Appeal was obtained by a fraud practised on the Court below'.*

[23] Jessel MR stated (at 299):

> *'If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy.'*

[24] Jessel MR then went on to point out that where a fraud has been practised on a court it is possible to bring a fresh action to impeach the original decree and obtain justice by so doing if the fraud is established to have occurred. Jessel MR added that as there was this alternative remedy there was 'no necessity for straining' the meaning of the legislation which established the Court of Appeal. He then concluded that if the Court of Appeal' has once determined an appeal, it has no further jurisdiction'. He added that the original jurisdiction of the Court of Appeal is 'limited to that which is necessary for the determination of any appeal, and the amendment, execution, and enforcement of any order made on such an appeal'. James LJ took the same view. The third member of the court, Baggallay LJ concurred, though he acknowledged that initially he had 'felt great hesitation in negativing the proposition that there was jurisdiction in this Court to rehear an appeal' where a judgment had been pronounced or obtained by fraud.

[25] In contrast, there are dicta which suggest that, in exceptional circumstances, the Court of Appeal might have jurisdiction to reopen an appeal; see, for instance, the observations of Cotton LJ in ***Birmingham and District Land Co v London and North Western Rly Co*** *(1886) 34 Ch D 261 at*

> *277 and in **Ex p Banco de Portugal, Re Hooper** (1880) 14 Ch D 1 at 6. We are about to refer to some more recent observations to similar effect, but we believe that Mr Corner is correct to submit that there is no decision which is in direct conflict with **Flower v Lloyd** and **Hession v Jones** [1914] 2 KB 421."*

80. In my judgment the fact that the English Court of Appeal in 2002 made this very limited concession does not negative the statements to be found in the two passages I have quoted from ***Flower v Lloyd***. The inconvenience of an Appellant in this case, having to travel to London to pursue its remedy before the Judicial Committee of the Privy Council does not in my judgment justify a departure from the clear principles laid down in ***Flower v Lloyd*** and if anything in my judgment the ***Flower v Lloyd*** principles are strengthened by the careful judgment of the Court of Appeal in ***Taylor v Lawrence***.

81. I do not therefore consider that the Law of 1961 and its provisions are to be treated as so-called *"always speaking"*. I regret therefore that for this and the other reasons I have endeavoured to explain, I am not able to accept that ***Portholme*** was rightly decided. I accept that that is not an end of the matter as there is clear authority in England and other jurisdictions that a Court of Appeal does not lightly part from previous decisions it has made when differently constituted and particularly unless it can be argued that there are very strong grounds for doing so. Mr Raffray in his written submissions of 16th July has dealt with the issues fairly and succinctly and I would hesitate at not following his argument on this point. I could expand this judgment by reviewing the learning which has been developed in the English Court of Appeal and which would seem sensible to follow in this Court, but I do not consider this to be necessary or desirable, as having read in draft the judgment of Vaughan J A I agree that for the reasons he has stated this Appeal should be dismissed and it is therefore not necessary for me to decide whether or not this Court should be following the decision in ***Portholme*** notwithstanding the fact that I personally disagree with it. I also agree with what Vaughan, J A says in paragraph 35 concerning Mr Dunster's late letter. For my part, I cannot see that this change in Mr John's circumstances is likely to bring an early resolution of his and his partner's housing problems - the housing situation in this Island remains difficult.

82. This was an unusual and difficult case and I am not surprised that the Jurats did not achieve a common mind amongst themselves. As an admittedly tentative suggestion at one stage emanated from the Crown Advocate that the decision might be more suitable for review in such circumstances, I would like to emphasise what Vaughan JA has said in this regard. Jurats are elected by the States of Election for their personal qualities, their ability to maintain an independence of judgment in this small island and, to use an obsolescent word often seen on old memorial tablets, their disinterestedness. Whilst the arguments they hear and the opinions of their colleagues tendered after they have retired will assist in

reaching an informed decision, at the end of their day it is the responsibility of Jurats to proffer their individual opinions without any pressure from their peers or anyone else.

83. It is not appropriate to make any order for costs without hearing argument but as both parties are funded by the States of Guernsey, albeit from different budgets, I for my part would trust that counsel can sort any matters relating to costs between themselves and that it will not be necessary to refer this issue back to the Court, which will inevitably lead to further expenditure of public money.

