

**Judgement 51/2006      Johns v Minister of the Environment Department –  
Royal Court (Civil Action File 866) – 23 November  
2006**

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**Island Development (Guernsey) Law, 1966 – ruling on point of law - the Island Development Committee would have had the power to grant change of use of packing shed to a dwelling conditional upon it being occupied only by the Appellant and his partners for their lifetimes or a shorter period – Jurats had held that the Department had failed to take into account the Appellant’s special circumstances – appeal allowed - matter remitted to the Department to grant the Change of Use on such conditions as are lawful and reasonable – (see also Judgment 15/2006)**

**IN THE ROYAL COURT OF  
GUERNSEY**

**APPEAL UNDER SECTION 26 OF THE  
ISLAND DEVELOPMENT (GUERNSEY)  
LAW 1966**

**Peter David JOHNS**

**-v-**

**Appellant**

Between

**THE MINISTER OF THE  
ENVIRONMENT DEPARTMENT**

**Respondent**

**Judgment handed down on 23 November 2006**

**Before: Richard John COLLAS Esq., Deputy-Bailiff**

**Advocate for the Appellants: M G A Dunster**

**Advocate for the Respondent: F Raffray**

## Cases, texts & statutes referred to:

The Island Development (Guernsey) Law 1966, S16  
Town and Country Planning Act 1990, S70 and S72  
Newbury District Council v Secretary of State for the Environment [1981] A.C.  
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## Introduction

1. This is the second written judgment handed down in connection with this Appeal. The first, dated 20 March 2006, dealt with preliminary legal issues prior to the hearing before Jurats. This judgment deals with a legal point which arose during the course of the hearing and which it was agreed would be considered after the Jurats had given their factual decision. The question is whether the Island Development Committee (as it then was) would have had the power, had it been so minded, to grant Change of Use of a packing shed to a residential dwelling, conditional upon it being occupied only by the Appellant and his partner for their lifetimes or for a shorter period.

## Factual Background

2. The Appellant owns La Courtil Banque Vinery at Les Barras Lane, Vale. The premises consist of greenhouses (which are now in a poor state of repair and are not being used productively) and a packing shed which Mr Johns occupies as a dwelling for himself and his partner without planning permission. The property is set back from the public road, behind other dwellings and is accessed along a driveway which belongs with the property. Under the Rural Area Plan (Phase 1), which was approved by the States on 27 October 1994, the premises are zoned as an Area of Landscape Value (Green Zone 2) within an Enhancement Target Area. The Use Class is horticultural.
3. The planning history shows that a number of planning applications have been made in relation to this site many of which are not directly relevant to this judgment. Then, on 7 September 2000, the Committee gave permission under the Building Regulations 1992 to install a shower room and WC, provided the building was not used for habitable accommodation. On 1 July 2002, the Committee refused permission for the conversion of the packing shed into permanent residential accommodation. Some time thereafter, Mr Johns and his partner had to move out of premises where they had been living and they started living in the packing shed without planning consent. On 2 February 2004, Advocate White wrote to the Committee, seeking to regularise the position in either of two ways. She sought either a permanent change of use or a conditional, temporary change. Her letter begins:-

*“I am instructed by Mr P D Johns to apply to the Committee for reconsideration of its decision to reject the above proposal, made on 1<sup>st</sup> July 2002, alternatively to make a new, retrospective application for a change of use of the packing shed to residential accommodation.*

*The proposed use would be for only Mr & Mrs Johns to occupy the property, and they would accept any condition imposed upon the permission restricting occupation to them alone, and any condition reasonably limiting the period of validity of the permission”.*

4. Both parts of the application were rejected by the Committee by letter dated 5 May 2004 because of Section 17(a), (e) and (f) of The Island Development (Guernsey) Law 1966 as amended (“the 1966 Law”). In relation to subparagraph (a), the Committee relied upon the presumption against changes of use of former horticultural buildings in Policy HT8, as well as the preclusion of the erection of new housing in Areas of Landscape Value under Policies CE6 and H14 of RAP1.
5. The Appellant appealed that decision relying principally upon his personal circumstances. For reasons given in my earlier judgment, I held that in exceptional or special cases, personal circumstances of the applicant can be considered a relevant factor as an exception to the general rule that they are not to be taken into account by the Committee (now the Environment Department) when exercising its powers under the 1966 Law.
6. After some regrettable, but unavoidable, delays the matter came before the Jurats for hearing on 9 October 2006. Appearing for Mr Johns in place of Advocate White, Advocate Dunster did not pursue the appeal against the refusal of a permanent Change of Use. He pursued only the appeal against the decision to refuse permission for a temporary or conditional Change of Use and focused upon the Appellant’s personal circumstances.
7. During the hearing the court was advised that there had been at least two other instances where the Committee had taken account of exceptional personal circumstances of an applicant when granting permission for a development which would otherwise have been refused. I understand that neither of these involved a Change of Use. During further argument, I have been informed there has only been one occasion when the Committee granted a conditional Change of Use and that was in relation to the Happy Landings Hotel where, following an appeal to the Royal Court, permission was given to change hotel accommodation to staff accommodation for a three year period which was later extended. The court records show that decision was taken on 10 April 1991. Advocate Raffray, appearing for the Committee, was not aware of any case where a temporary Change of Use had been granted for a period of an uncertain number of years such as the lifetime of an individual.
8. I directed the Jurats that they were to assume that the Committee had the power to attach conditions that would limit the occupation of the packing shed to occupation by Mr Johns and his partner and that they could have attached such conditions to a permission for Change of Use if they had been minded to do so. I said I would hear argument at a later date as to whether that assumption is correct in law.
9. That was so the Jurats could give their decision on the facts while the case was fresh in their mind and to allow the Advocates further time to submit

arguments on the point of law. Following that direction and the other directions that I gave to the Jurats, the questions they were required to answer, and their responses, are as follows:-

**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 [CE 6 and H14]).*

**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.*

10. During the further submissions made by counsel following the decision of the Jurats, a question has arisen as to what the Jurats have actually decided. In particular, have they, as Advocate Dunster alleges, decided that Mr Johns and his partner may be permitted to remain in the packing shed during their lifetimes? Advocate Dunster presented his client's case to the Jurats on the clear basis that the Appellant was seeking permission to occupy the packing shed during the lifetime of him and his partner. This was different from how the case had originally been presented. In a letter to the Committee dated 12 April 2002, Mr Johns had said:

*“Your assumption of permanent residential is wrong, it is in fact only a temporary measure until I can find proper suitable accommodation at a rent agreeable with social security”.*

11. That letter was before the Committee when they made their decision on 1 July 2002, which Advocate White was seeking to have reconsidered in her letter of 2 February 2004. The letter did not state in clear terms that Mr Johns was seeking a consent for lifetime, although the second paragraph of the letter invited the Committee to *“attach any condition reasonably limiting the period of validity of the permission”* which could, as Advocate Dunster argued, be interpreted as including a period for the lifetimes of Mr Johns and his partner when read in context with the remainder of the letter.

12. In my view, the role of the court was to review the decision taken by the Committee and communicated under cover of its letter dated 5 May 2004, and to decide whether that decision could be set aside on the grounds of unreasonableness. It was not for the Jurats to decide what conditions should be attached to any permission and hence for what period of time Mr Johns and his partner should be permitted to occupy the packing shed. Having listened to the recording of the hearing, I believe the Appeal proceeded on the basis that if it was allowed, the matter would be remitted to the Environment Department to decide what period of time would be reasonable. If the Department sought to impose conditions that the Appellant considers unreasonable, he will be able to pursue a further Appeal. That was described by Advocate Dunster as being procedurally complex but, in my view, was the only way the matter could proceed as it was not for the Jurats to place themselves in the position of the Department by deciding what conditions are to be imposed, nor was there sufficient evidence before the Jurats to enable them to decide what period of time would be reasonable. The conclusion I have therefore reached (and I respectfully recognise that this issue may properly be decided elsewhere) is that the Jurats have not decided that Mr Johns and his partner may remain in the property for their lifetimes. The Jurats have resolved that, subject to the outstanding point of law, the Committee had failed to take account of the Appellant's special circumstances and consequently the Jurats would allow the Appeal and set aside the decision of the Committee. The application will now have to be remitted to the Department for a fresh decision to be taken in the light of the findings of the court and any directions given by the court. A consequence of the decision must be that if, and for so long as, there is no change in the relevant

circumstances, Mr Johns and his partner are to be allowed to continue to live in the packing shed.

### **The Power To Grant A Conditional Planning Permission**

13. By virtue of Section 16 of the 1966 Law, the Committee may grant permission subject to:

*“(c)(ii) conditions relating to the use of any buildings or other land;*

*(iii) such other conditions as the Committee may think it necessary or expedient to impose”.*

14. I am told that in England there is power for a local planning authority to grant planning permission subject to conditions pursuant to Section 70(1)(a) and 72(1) of the Town and Country Planning Act 1990. The former section is expressed in general terms and counsel agree it is not inconsistent with the relevant provisions of Section 16 of the 1966 Law.

15. It is therefore helpful to look at English case law in interpreting our Section 16. I was referred to *Newbury District Council v Secretary of State for the Environment [1981] A.C. 578* and in particular to the speech of Lord Scarman at page 618 where he addressed the validity of a condition sought to be imposed in that case and said that although it was strictly unnecessary to express a view on its validity, nevertheless he would do so as the House had heard full argument on the point. His conclusions are therefore strictly obiter, but nevertheless can be treated by me as highly persuasive. He concluded there are three tests as to the validity of a condition:

*“1 The condition must fairly and reasonably relate to the provisions of the development plan and planning considerations affecting the land.*

*2 It must fairly and reasonably relate to the permitted development.*

*3 It must be such as a reasonable planning authority, duly appreciating its statutory duties, could have properly imposed”.*

16. Both counsel agreed these are the tests to be applied in Guernsey. Advocate Dunster relied upon circular 11/95 issued by the Department of the Environment in England giving advice to local planning authorities about the use of planning conditions. It expresses the test differently but in a manner which appears to be an amplification and explanation of Lord Scarman’s tests, rather than a contradiction of them. The guidance notes state the conditions should be necessary, relevant to planning, relevant to the development to be permitted, enforceable, precise and reasonable in all other respects.

17. Regarding the first of Lord Scarman's tests, a permission to change the use of a packing shed to a dwelling house is outside the provisions of the Detailed Development Plan (as decided by the Committee and confirmed by the Jurats in their answer to the first question). Similarly, the permission cannot relate to the pure planning considerations affecting the land. However, the Jurats have decided that the Committee should exceptionally have taken account of the special personal circumstances of the Appellant. I therefore modify the first of Lord Scarman's tests to say that any condition attached to the permission must relate to his special personal circumstances.

18. The special personal circumstances pleaded by Advocate White in her letter of 2 February 2004 were:

- “ (a) Mr Johns and his partner are on Supplementary Benefit.*
- (b) They are not likely to get a tenancy of a States house given the waiting list and others being more in need of such housing.*
- (c) The rent where they were living had been increased above the Supplementary Benefit limit.*
- (d) No changes to the exterior of the building would be needed.*
- (e) The fact that Mr and Mrs Johns cannot find other affordable accommodation in the Island”.*

19. The Committee was not told, and so the court was not aware of, the reasons why Mr Johns and his partner are on Supplementary Benefit, whether their circumstances may change to a sufficient extent that they would not need to claim, or become eligible for, Benefit and if so when that may be expected to happen. Nor was there any indication as to whether they might, at a future date, become eligible for a States house tenancy or other social housing which, as the court is aware, is now more widely available than several years ago. Advocate Dunster advised me, on behalf of his clients, that if there was to be a substantial improvement in their circumstances, they would not seek to continue to live in the packing shed. I understood him to say that they would not oppose a condition that the permission to use the packing shed as a dwelling will cease if there is a material improvement. (I should add that I am not attempting to draft the conditions and I leave it to the Department, preferably in discussion with Advocate Dunster, to draft what will be required.) It seems to me it must follow that there should be a condition requiring Mr Johns and his partner to notify the Department if there is a material change in their circumstances.

20. The Department may decide that it wishes to be in a position to monitor, in some way, whether circumstances have changed. This is a difficult area because, as Advocate Raffray argued, the Department is responsible for planning policy, not social policy. They will have to consider whether it is sufficient to rely upon Mr Johns and his partner to advise the Department of any change in circumstances and/or to vacate the packing shed if and when they are in a position to do so. Alternatively, the Department may decide to include some provision for reviewing the case periodically, no doubt putting the onus on Mr Johns and his partner to contact the Department and provide them with such information as they may reasonably require. If the

Department decides some form of review is needed, it must also decide, hopefully in conjunction with Advocate Dunster, what is reasonable.

21. This brings me to the issue which occupied much of the argument, namely whether it could be lawful to grant a permission for the lifetimes of Mr Johns and his partner, or whether any permission could be for no more than a specified number of years. The first point to note is that the language of Section 16 of the 1966 Law does not assist directly except that it is drafted in wide terms. On the other hand, Section 72 (1)(b) of the English Act of 1990 refers to “*a specified period*” which Advocate Raffray interprets as meaning a specified number of years. The model condition, in paragraph 35 of Appendix A of the English Department of the Environment’s guidance note, is:

*“The use hereby permitted shall be carried on only by [name of person] and shall be for a limited period being the period (of .....years from the date of this letter, or the period) during which the premises are occupied by [name of person] whichever is the shorter”.*

22. Advocate Raffray argues that it is recognised in England that necessary ancillary conditions (such as a condition to reinstate the premises to its previous state) would not be enforceable after the lifetime of the occupier against those who would then be entitled to the property. That might be especially so in Guernsey where the executor or administrator of the personal estate may be unconnected with the realty heirs. However, I do not find that to be a convincing argument in this case, for a number of reasons.
23. First, for whatever period the consent might be given, there can be no certainty that the Appellant will continue to be the owner of the property as he might sell to a third party and he is likely to argue it would be unreasonable to seek to impose a condition preventing him from selling or otherwise disposing of any interest in the property.
24. Second, Advocate White has stated in her letter of 2 February 2004 that no changes will be needed to the exterior of the building. The Department could therefore reasonably impose a condition prohibiting any changes to the exterior and prohibiting any development to be undertaken in the adjacent amenity area without permission. Any application for permission would be carefully considered in the light of both Advocate White’s statement and the condition prohibiting any changes. If such a permission was granted it could be made subject to reasonable conditions. The Department could take, if it has not already done so, photographs to record the state of the property for future reference.
25. Third, this issue was raised by Advocate Raffray who drew the attention of the Jurats to changes to the fenestration, (which he said have already been carried out) and to the need to incorporate some of the adjacent land within the amenity area. In the light of the Jurats’ decisions I infer that they did not regard the issue as significant.

26. There must be certainty as to the duration of the permission, but that can be achieved by reference to their lifetimes as easily as by reference to the number of years.
27. The Department may consider it has insufficient information at present to enable it to decide what would be a reasonable period of time. As the matter will be remitted to the Department for a decision, it is able to seek such further information as it may require. That might include information from the Appellant as well as from other States departments such as Housing and Social Security if needed. The court is well aware that the Environment Department regularly consults other States departments on planning matters and I do not see why this matter should be any different. In the circumstances, it is unlikely to be considered unreasonable to ask the Appellant to give his permission to the other departments to assist in answering questions regarding his circumstances if that is necessary to give proper consideration to the application.
28. The two other tests laid down by Lord Scarman do not require further comment.
29. In conclusion, I find that the Committee (now the Department) had the power to grant the Change of Use requested on a conditional basis. The decision of the Committee dated 5 May 2004 is set aside. The matter goes back to the Department to grant the Change of Use on such conditions as are lawful and reasonable. The Department must also decide the duration of the change of use which may or may not be for the lifetimes of the Appellant and his partner and, if for a shorter period, may have to contain a provision for it to be reviewed in the light of their circumstances from time to time.