Judgment 6/2008 **Bird v Minister of the Environment Department – Royal Court (Civil Action File 1160) – 8 February 2008**

Island Development (Guernsey) Law, 1966 – appeal from refusal of application to erect a replacement radio mast – permission had been given in 1968 ″to re-site″ a mast on the premises, which mast was removed in 2005 – Appellant sought declaration that the 1968 permission 'to re-site' a mast remained valid – duration of a grant of development permission – held that the permission granted in 1968 was valid for twelve months only and was fully implemented within that period – therefore it was no longer valid – declaration refused

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1160

The 8th day of February, 2008 before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

Between:-

RICHARD ANTHONY BIRD

Appellant

- and -

THE MINISTER OF THE ENVIRONMENT DEPARTMENT

Respondent

WHEREAS on the 23rd day of January, 2008 THE COURT considered the application at 11.3 of the attached cause for a declaratory relief, and heard thereon Advocates N.J. Barnes and K.E. Walder, Counsel for the Appellant and Respondent respectively, and RESERVED JUDGMENT;

THE COURT this day handed down judgment in the terms attached hereto and REFUSED to make the declaration sought.

S M D ROSS
Her Majesty's Deputy Greffier.

Approved Text
8 February 2008

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

JUDGMENT RE DECLARATORY RELIEF

Between **Richard Anthony BIRD** **Applicant**

-v-

THE MINISTER OF THE ENVIRONMENT DEPARTMENT **Respondent**

Judgment handed down on: 8th February 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for the Applicants: **N J Barnes**
Advocate for the Respondent: **K Walder**

Cases, texts & statutes referred to:

1. The Island Development (Guernsey) Law, 1966.
2. R v Rochdale Metropolitan Borough Council, ex parte Tew and others [1999 3 PLR 74.
3. Butterworth's Planning Law Service, Section 1/C/15A4
4. Vaudin v Hamon [1973] AC569, at page 582A-E.
5. La Cloche v La Cloche [1870] L.R. 3P.C. 125.
6. I'm Your Man Limited v Secretary of State for the Environment [1998] 4 PLR 107.
7. Pioneer Aggregates (UK) Limited v Secretary of State for the Environment [1984] 1A.C.132.

Introduction

1. From 1968 until 2005, a radio mast stood on a site at Rue des Pointes, St Andrew's and supported the communications system of the Island's Ambulance service. In September 2005 it was taken down. Richard Anthony Bird ("the Appellant"), who had acquired the site of the mast, applied to the States Environment Department ("the Department") to replace it. The Department decided to refuse the application and the Appellant has appealed against that decision. He has also applied for a Declaration *"that the permission granted on 13th November 1968 is still in force and that no further*

permission is required to re-erect the radio mast". This is my judgment on his application for that Declaration ("the Declaration").

Background

2. By letter dated 13th November 1968, development permission was issued by the then States Housing Authority and the States Island Development Committee in favour of St John Ambulance Brigade. (I will refer to St John Ambulance Brigade and to St John Ambulance and Rescue Service as "St John".) The permission was in the following terms:

> *"By virtue of the Building (Guernsey) Law, 1956 and the Building Regulations 1957, made thereunder, and the Island Development (Guernsey) Law, 1966, permission is hereby accorded you to re-site your Aerial Tower and construct a R.C. base at Pointes Lane, St Andrew's, as indicated on Plan No. K260Pla."*

3. The letter was signed by the Secretary to States Committees. The following condition was printed at the foot of the notepaper:

> *"This permit is valid for twelve months from the date of issue. If the work authorised by this permit is not commenced within twelve months, then an application for the issue of a new permit should be made."*

There was no delay in erecting the mast and I am told (in paragraph 2 of the Appellant's cause) that it was constructed by 29th November 1968.

4. It is to be noted that permission was given to "*re-site*" the aerial. It is not now known why that was so. In an Affidavit sworn on behalf of the Department, Faith Helen Rose, the Director of Planning Policy, said that:

> *"I infer that there was a mast positioned elsewhere previously but it is possible that it could have been a replacement mast on the same site. I cannot confirm from the Department's files any further information, including whether or not this was the first application for a radio mast in respect of the site, as the documents date from 1968 and the files from that period do not appear to be comprehensive."* (Paragraph 5 of her Affidavit)

5. Advocate Barnes, on behalf of the Appellant, submitted that radio communications may have been something of an innovation in 1968 and hence it was quite likely that there was no existing aerial to be relocated. He suggested it was possible there had been a previous application, to erect a mast on a different site, which had been replaced by the application to re-site the proposed mast on this site.

6. In this judgment, I do not have to decide which explanation is correct. In fact, neither counsel has attached any significance to the word "*re-site*". Both have treated the permission as if it read to "*erect*" a radio mast.

7. Although the permission was issued to St John, St John has never owned the site of the mast. There have been several conveyances of the horticultural property of which it formed part and then, on 27th November 2003, the owners of the horticultural property conveyed the site of the radio mast to the Appellant. The premises thereby conveyed were described as two items. The first was an area of land identified by reference to a plan, attached to the conveyance, on which is marked the "*Position of Existing Aerial System*". The second item was *"all such right title and interest in the existing aerial system as the Vendors have or may have"*; wording which suggests the parties were not sure who owned the aerial system. The question of who does own the aerial system is one of several factual issues I cannot resolve but, fortunately, I do not need to do so.

8. In 2003 and 2004 the Island Development Committee (the predecessor of the Department) received four separate applications for the erection of telecommunications masts in St Andrew's.

9. On 26th April 2004, planning permission was issued to St John to erect a communications tower at St Andrew's Reservoir. The permission was conditional upon St John removing the existing mast at Rue des Pointes. That condition was imposed in reliance upon a joint letter, from St John and the then States Water Board (as owner of St Andrew's Reservoir), in which they agreed to be bound by any reasonable conditions that might be imposed in respect of the removal of the existing mast. (The letter was not dated but was stamped as having been received on 23rd April 2004.)

10. In his cause, the Appellant pleaded (at paragraph 5) that, at some time prior to March 2005, he had explained to officers of the Department that he would not give permission (to St John) for access to his land for the existing mast to be removed. The Department say that, when they issued the permission for the new communications tower at St Andrew's Reservoir, they believed that St John had the authority needed to remove the mast at Rue des Pointes. For my part, I do not have to resolve this issue in this judgment. In any event, factual issues are for the Jurats to resolve.

11. Advocate Barnes argues that the issue might be, or might have been, significant because if the condition was unenforceable then it was illegal. In support of that proposition, he produced a decision of Sullivan J in the Queen's Bench Division namely *R v Rochdale Metropolitan Borough Council, ex parte Tew and others [1999 3 PLR 74*. I do not need to consider the issue further in this judgment as counsel agree that I can accept that the old aerial was removed on 10th September 2005 and that, in this judgment, it does not matter for what reason, or by whom, it was taken down; nor does it matter whether that was done lawfully or without lawful authority.

12. The Appellant applied to the Department to erect a replacement radio mast on his site at Rue des Pointes. His application or, applications, has, or have, been refused. Advocate Walder sought to attach some significance to the fact that the Appellant believed permission was needed to replace the mast. In my view

it does not matter, for the purpose of this judgment, what he believed. What he believed can not alter the legal position as to whether planning permission is needed to replace the mast.

The Parties' Submissions

13. The Department submits that planning permission to re-erect the mast is required under at least two sub-sections of section 14 of the Island Development (Guernsey) Law 1966, as amended, ("the Development Law"). Firstly, it would amount to "development", under sub-section 14(1)(a) and the definition of "development" in section 40, because it would involve a building or engineering operation. Secondly, sub-section 14(1)(b) requires permission to place, erect or re-erect an immovable structure on any site. The proposal does not fall within any of the exceptions which, under Section 40, are deemed not to involve development.

14. Advocate Barnes relies upon a sentence in Butterworth's Planning Law Service at Section 1/C/15A4:

> *"It is therefore unclear whether a building which is erected pursuant to planning permission and then demolished may be re-erected under the original permission."*

As this issue has not been decided in either Guernsey or England, he seeks to persuade me to decide it in favour of the Appellant.

15. He submitted that the Development Law is substantially based upon English planning legislation and he contends that it is, therefore, appropriate to regard decisions of the English courts, in planning cases, as having persuasive authority in the interpretation of the Guernsey legislation. On the other hand, Advocate Walder submitted that the Guernsey legislation is distinct from the English planning regime and, consequently, we should be slow to import English principles and authorities. She drew my attention to the speech of Lord Wilberforce in *Vaudin v Hamon [1973] AC569*, following the decision of the Privy Council in *La Cloche v La Cloche [1870] L.R. 3P.C. 125*. Lord Wilberforce recognised that it is proper to look at related systems of law to elucidate the meaning of a particular legal provision but, he said, in the end Guernsey law must be interpreted in the light of its own terminology, context and history (at page 582D).

16. Advocate Barnes sought to persuade me that a planning permission has a permanent quality and remains valid notwithstanding that the work authorised by it has been completed. He relied upon *I'm Your Man Limited v Secretary of State for the Environment [1998] 4 PLR 107*, where a planning permission was deemed to be permanent. In summarising the facts, at the start of his judgment, Mr Robin Purchas QC (sitting as a Deputy Judge of the Queen's Bench Division) said:

> *"Put shortly, on February 15th 1995 an inspector, on appeal, granted planning permission for the use of the buildings* [at Weston Business Park,

> Weston-Super-Mare] *for "sales, exhibitions and leisure activities for a temporary period of seven years". No condition was imposed requiring cessation of that use at the end of seven years."*

The Deputy Judge then posed the following question:

> *"Would continuance of the use beyond seven years constitute a breach of planning control? In other words, was the permission in effect permanent or temporary?"*

17. In deciding that question, he said (at page 7 of the extract before me under the heading "*Use For a Limited Period"*):

> *"In the present case, the relevant application was for a temporary period, thus effectively volunteering a condition in accordance with what is now para 110 of the annex to Circular 11/95. The imposition of a temporary condition was plainly open to the 1995 inspector. His failure to impose such a condition might well have been open to criticism. His decision, however, became immune from challenge after six weeks by virtue of Section 284 of the 1990 Act. That does not provide grounds for implying a condition to that effect in what is a public document, conferring rights in connection with the use of land. In my judgment, accordingly, the permission as granted became effectively a permanent permission".*

18. I conclude that his decision was based upon the powers of an English planning inspector and the specific provisions of the relevant Statute: powers and provisions which are not replicated in the Development Law. The case is, therefore, of no assistance to me.

19. In further support of his submission that planning permissions have a permanent quality, Advocate Barnes relied upon *Pioneer Aggregates (UK) Limited v Secretary of State for the Environment [1984] 1A.C.132*. The case concerned a limestone quarry which had been worked from 1950 to 1966 under a planning permission granted in 1950 (and extended in 1962). Quarrying ceased in 1966, but in 1978 a new owner of the site wanted to resume quarrying. The question arose as to whether it could rely upon the 1950 planning permission. Or, had that planning permission been abandoned by the previous owner, such that a fresh planning permission was required before quarrying could resume?

20. On appeal, Lord Scarman delivered the judgment of the House of Lords in a speech with which their other Lordships agreed. He said (at p.136F) there were two questions to be considered. The first of those questions was one of legal principle, namely "*whether a planning permission for the development of land can be abandoned by act of a party entitled to its benefit".* He concluded:

> *"There is no principle in the Planning Law that a valid permission capable of being implemented according to its terms can be abandoned."* (Page 145G)

21. The key words are, in my view, *"a valid permission capable of being implemented according to its terms"*. In that case there was a possibility of reopening the quarry in order to resume operations that had been authorised under the permission granted in 1950. Advocate Walder submits that the facts of the present case are different in two significant respects: the 1968 permission was fully implemented when construction of the radio mast was completed in November, 1968; and the 1968 permission was expressed to be valid for one year only. It can not be suggested that the 1968 permission has been abandoned.

22. Advocate Walder accepted Advocate Barnes' submission that planning permission enures for the benefit of the land concerned, notwithstanding a change of ownership in the land. I, therefore, also accept that submission even though there is no express statutory provision to that effect in the Development Law; unlike Section 33(1) of the Town and Country Planning Act 1971 (referred to in *Pioneer Aggregates*) and unlike Section 18 (2) of the Land Planning and Development (Guernsey) Law, 2005, which is not yet in force ("the Law of 2005").

23. Section 16(3) of the Development Law originally specified that a planning permission is valid for a period of one year. (The period of one year was amended and replaced by a term of three years under the Island Development (Amendment)(Guernsey) Law, 1990.) The interpretation given to that Section by the Department is that development work does not have to be completed within one year (or three years) provided that it is commenced within such period. That interpretation is clear from the condition printed on the letter of 13th November 1968 quoted above.

24. Advocate Barnes points out that there is no other provision in the Development Law specifying when permitted work must be completed and there is no power for the Department to revoke a permit if work has ground to a halt or is progressing slowly. That defect, if it is a defect in the Development Law, will be corrected by Section 19 of the Law of 2005 which contains provisions for the issue of a completion notice.

25. Advocate Barnes argues that the absence of any express power under the Development Law to require a development to be completed within a specified period of time means that if St John had commenced the work by, for example, building the re-enforced concrete base for the mast within the twelve month period, there was no time limit within which they needed to complete the erection of the aerial. Such work, he says, could have been completed even now, nearly forty years later, under the terms of the original permission.

26. I do not agree. Section 16(3) of the Development Law, and the condition printed on the letter of 13th November 1968 (quoted in paragraph 3 above), specified that the permission was valid for one year only. That means the permission did not authorise the carrying out of any work after the expiry of that one year period. It does not permit the erection, or re-erection, of a radio

mast nearly 40 years later. The Department may interpret Section 16(3), and it may be the Department's practice, to allow a development which has commenced within the specified period to continue and be completed thereafter, but that, in my view, is a concession to enable incomplete works to be completed. It does not authorise fresh work to be started nearly forty years later.

27. I also reject the submission that a permit to erect, for example, a dwelling would automatically include permission to re-erect that dwelling if it was completely destroyed by fire or otherwise. Section 14 of the Development Law uses the words *"erect"* and *"re-erect"* as separate and distinct operations each requiring planning permission. It would be wrong, in my view, to interpret *"erect"* as including the term *"re-erect"*.

28. Advocate Barnes points to the hardship that could be caused to the owner of a dwelling which has burned down, if it is located in an area of high landscape value where the approved planning policies do not permit the construction or re-construction of dwellings. He says the owner's insurance policy could be largely ineffective as it would cover the rebuilding cost of the property, but not the value of the site which would be seriously devalued if the building could not be replaced. He argues that could not have been the intention of the legislation. So, he submits, the owner must be permitted to rebuild the dwelling under the permission which authorised its original construction and without requiring a fresh planning application.

29. In my view, that is not a complete answer because it does not assist the owner of a dwelling constructed in the days before the enactment of planning legislation. Many fine old buildings are located in areas of high landscape value, where new building would not be permitted, and were constructed without planning permission because they pre-date planning legislation.

30. Advocate Walder replied that the Department could grant permission under Section 18(1) of the Development Law as long as it was satisfied the work involved a departure from a Detailed Development Plan of a minor nature, not warranting specific reference to the States. If the work was considered to involve a departure from the Plan of more than a minor nature, the States could be asked to establish a Planning Inquiry to consider an alteration to the Detailed Development Plan. That may seem less than wholly satisfactory from the point of view of the person whose house has been destroyed, but it is, in my view, the correct analysis.

31. Advocate Barnes also referred to quarrying and mining operations, involving continuing works of development which may not be completed within one year, or three years, of the grant of planning permission and where it must be assumed the permission continues to be valid. I do not know whether the Department requires such permissions to be renewed. Even if they do not, I regard them as a special case as, by their very nature, quarrying and mining operations have a longer lasting, or more permanent, quality than other developments.

Conclusion

32. The permission granted to "*re-site*" the radio mast at Rue des Pointes in November 1968 was valid for twelve months only and was fully implemented in November 1968. Consequently, it is no longer valid. Planning permission must be obtained before the Appellant can re-erect the mast. As he can not rely upon the 1968 permission, further permission is required. Therefore, I will not grant the Declaration sought by the Appellant.

