Judgment 43/2003

Barrett and Barrett v
Island Development Committee
and Osprey Developments Ltd
(Third Party)
Royal Court
(Civil Action File 735)
1st July, 2003

Island Development (Guernsey) Law, 1966 – grant of preliminary declaration – application for leave to appeal or judicial review – Strategic and Corporate Plan and Rural Area Plan Phase 2 – whether the decision of the Committee was demonstrably wrong – matters taken into account by the Committee.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 1st day of July, 2003 before Catherine Mary Newman, Q. C. Lieutenant Bailiff; sitting alone:-

BARRETT AND BARRETT

Applicants

v.

THE PRESIDENT OF THE ISLAND DEVELOPMENT COMMITTEE

Respondents

and

OSPREY INVESTMENTS LIMITED

Third Party

WHEREAS on 30th June, 2003 the Lieutenant Bailiff considered an application by the applicants to appeal from or be granted judicial review of a decision of the Island Development Committee to grant, on 13th December 2002, a Preliminary declaration on an application by Osprey Investments Limited and heard thereon Advocates J.D. Loveridge, R.McMahon and J.A.S.White counsel for the Applicants, Respondent and Third Party respectively.

The Lieutenant Bailiff this day GAVE JUDGMENT in the terms attached hereon and;

1) REFUSED the said application

2) AWARDED costs on the standard recoverable basis to the Respondent

S. M. D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

BARRETT AND BARRETT

V.

THE PRESIDENT OF THE ISLAND DEVELOPMENT COMMITTEE
and
OSPREY INVESTMENTS LIMITED

Judgment of Lieutenant Bailiff Newman Q.C.

Advocate for the Applicants: J. D. Loveridge
Advocate for Respondent: R. McMahon
Advocate for Third Party: J. White

Heard on: 30th June, 2003
Judgment handed down: 1st July, 2003

By a reformed Cause tabled on 25th April 2003, the Applicants David and Kay Barrett, seek to appeal from or be granted judicial review of a decision of the Island Development Committee to grant, on 13th December 2002, a Preliminary Declaration on an application by Osprey Investments Limited. In the event the application was argued solely as a judicial review application. Osprey had applied for a preliminary declaration in relation to their proposal to demolish glasshouses and a packing shed on their land at Sandpiper Vinery, Route de Plaisance, St. Pierre du Bois and a packing shed and storage shed incorporating processing, laboratory and administrative facilities. Mr. and Mrs. Barrett claim that the Island Development Committee's decision to grant a preliminary declaration was ultra vires or alternatively an unreasonable exercise of its powers. More particularly, they say that the decision conflicts with the policy set out in paragraphs HT7, RT6, IN6, COM 6 and CE7 of the Rural Area Plan (Phase 2) and SP33 of the Strategic and Corporate Plan and thus no reasonable committee could have concluded that the proposed development was permitted. A third ground, raising a complaint of failure to follow land use policies approved by the States of Guernsey was not separately pursued.

1. The Preliminary Declaration

The Preliminary Declaration is dated 13th December 2002.

It takes the form of a letter from the Island Development Committee to Osprey informing Osprey that the Island Development Committee has decided that it would, in principle, on the submission to it of a detailed application, be likely to grant permission for the development referred to in Osprey's application for a preliminary declaration. Seven conditions are attached to the preliminary

declaration. Without going into these in detail, amongst them are provisions indicating clearly that the following matters will be considered carefully in the process of considering any application for planning permission.

1. The scale, design and impact of the proposed buildings on the character and amenities of the locality. Particular attention is drawn to the fact that the proposed site plan attached to the application for a preliminary declaration is not approved.
2. Any application is to contain full details of the processes proposed to be carried on.
3. A traffic impact assessment is required.
4. The development is to be purely ancillary to the horticultural operation to be carried on at the site and within Agricultural Use Class 60 of the Island Development (Use Classes) Ordinance.

2. The history of the application

The following facts emerge from the affidavits of Mr. Barrett and Mr. Arthur Rowles the Development Control Manager of the Island Development Committee. The Sandpiper Vinery site is classed Green Zone 3 and is therefore in an area of rural character. Although horticultural use is permitted, it appears not to have been used for horticulture for over 3 years at the time of the application for a preliminary declaration. It is not being used now.

Following a presentation at a hotel on 2nd September 2002, by letter dated 17th September 2002 (to which a simple site plan was attached) Osprey, acting by its agents Lovell Ozanne & Partners Limited, made an application for a preliminary declaration. The proposed works involved the demolition of derelict glass and the construction of a single storey 30,000 ft ² packing shed incorporating and ancillary processing laboratory and administrative facilities. Plants would be grown in the good quality glasshouses to the south of the site.

On 2nd October 2002 Mr. Barrett objected to the proposal in writing. From a document entitled "Diversification of Healthy Direct", lodged with the Island Development Committee, Mr. Barrett learned that Osprey supplied vitamins, minerals and natural supplements by mail order to retail buyers in the United Kingdom.

Mr. Barrett's initial concern was that there was no clear suggestion that Osprey was in the horticulture business at all and the sheer size of the building which it wanted to put up (some 11 times bigger than the shed it would replace) suggested that an industrial process was being contemplated, to which any horticulture at the site would be ancillary, rather than the other way round.

On 22nd November 2000 the Chief Planning Officer for the Island Development Committee, Mr. W. E. Lockwood signed a memorandum in which he recommended that the application for a preliminary declaration should be deferred for further information to be provided. His view was that there was little concrete information regarding the actual form of horticultural production proposed and it would be most unwise to allow the development of substantial ancillary facilities without "very firm" evidence of the nature and likelihood of sustainability of the proposed horticultural activity. His view was that the "very substantial" proposed ancillary facilities meant that the development would have a significant impact on the character and amenities of the locality. No conclusive case had been made to justify the extent of the accommodation proposed. Adopted policy meant that facilities should be genuinely ancillary to horticultural use.

The Island Development Committee met on 26th November 2002. By that date it had received a letter from the Guernsey Growers' Association dated 22nd November 2002 supporting the proposal and a letter dated 31st October 2002 from the Committee for Horticulture in similar vein, albeit a bit more tentative. The Douzeniers (by a majority) and a Mr. Le Poidevin also objected to the proposal. The Guernsey Growers' Association emphasised the fact that the proposal would result in substantial investment in the site.

On 26th November the Island Development Committee accepted the recommendation of the Chief Planning Officer and deferred making any decision until further information had been obtained. Mr. Rowles was designated to address with Osprey the matters which had caused concern. He had a meeting with their representatives at which he explained that the principal concern of the Island Development Committee was whether the proposed new building and the uses to which it would be put could properly be regarded as ancillary to the horticultural activity. Barry Smith the Technical Director of Healthy Direct Limited responded that Guernsey Hydroponics had been established as a vehicle which would grow plants, harvest them, store, grind and freeze-dry them for despatch. Freeze-drying and grinding on site ensured that the active ingredients from the plant were not contaminated.

To confirm what had been discussed Healthy Direct (not Osprey) wrote to the Island Development Committee on 28th November 2002. The letter was written by Mr. Graham Winn, a director. By that letter Healthy Direct confirmed that the proposal was to upgrade and renovate existing glass at Sandpiper Vinery and use it to grow medicinal herbs. The herbs would be dried, ground and the active ingredients extracted on site. The stringent requirements of the pharmaceutical companies which manufacture the tablets and herbal medicines could not be met if the processing plant were located elsewhere unless there were a significant investment made on any building purchased. Mr. Winn claimed that this would make the project commercially unviable. No figures were supplied with the letter which would enable anyone to assess this claim.

The Island Development Committee must have asked the Committee for Horticulture for its further comments because that Committee sent a letter to the Island Development Committee dated 3rd December 2002 making a number of new points.

In particular the Committee noted that the Sandpiper Vinery site was attractive for the development of crops for the pharmaceutical industry because no pesticides had been used in the glasshouses for over 3 years. There would have to be major investment in re-equipping the glasshouses, including the introduction of re-circulating hydroponic systems, sophisticated temperature and environmental controls through computers and the establishment of specialised propagation facilities.

Although the Committee expressed very strong views about the need for the storage and processing facilities to be on site, they gave only sketchy reasons and their views were not wholly consistent with those expressed by Mr. Winn in Healthy Direct's letter of 28th November.

Mr. Rowles of the Island Development Committee swore an affidavit on 21st May 2003. He deposed that whenever the Island Development Committee determines an application for a Preliminary Declaration it has regard to the factors that it would be required to take into account in determining a full application. They do this against the applicable Detailed Development Plan and the most recent Strategic and Corporate Plan. The Island Development Committee decided that the proposal was not for a new industrial development, nor was it a retail or office development. The real issue, as the Island Development Committee correctly surmised, was whether a building of this size was truly ancillary to the horticultural activity proposed to be carried on at the site. The Island Development Committee considered policies HT1 and HT3. On 13th December 2002 they issued the preliminary declaration. This application raises the question of whether what they did was demonstrably wrong.

3. Preliminary Declarations

The Island Development (Guernsey) Law, 1966 provides, by section 27, that before making an application for planning permission a person who desires to carry out a development or work for which permission is required may make an application for a preliminary declaration as to whether, in principle, the Island Development Committee, on submission to it of an application with such detailed plans or information or both as the Committee may require, would be likely to grant permission for such development or work.

The preliminary declaration does not bind the Island Development Committee and the States pay no compensation to anyone who may suffer loss in the event that permission is ultimately refused: section 28.

A preliminary declaration is not planning permission. It does not entitle the person who applies for it to do anything.

At one point, it looked as though it might be possible for the Island Development Committee to argue that no decision at all had been taken and that the grant of a preliminary declaration was not, in this case at any rate, amenable to judicial review. The case was not argued in that way in the event.

It emerged that this particular preliminary declaration did involve a decision that neither HT1 nor HT3 necessarily prohibited the particular development. If that was plainly wrong then the Island Development Committee's decision is amenable to judicial review. But it must be noted that even if neither HT1 nor HT3 could be shown now to rule out this development, it does not follow automatically that it should or will be permitted. All that has happened is that a preliminary view has been taken by the Island Development Committee of what they would be likely to do. When they come to review the application of policy in the light of the full facts which will be placed before them, they may well decide that the matter is more finely balanced than they first thought or that Osprey's claims that storage and processing cannot be carried on elsewhere amount to no more than an expression of their strong preference for commercial reasons.

In my judgment it would be entirely wrong for the Island Development Committee to start the process of considering any application for permission to develop as though there were a presumption in favour of granting it. The law does not provide for any such presumption.

4. The Strategic and Corporate Plan and the Rural Area Plan (Phase 2) and its application

As a result of amendments to the Island Development Law the details of which are immaterial for "Outline Development Plan" in the Island Development Law one must now read "Strategic and Corporate Plan", and for "Detailed Development Plan" one must now read "Rural Area Plan". In argument before me it was common ground that the relevant binding plan is the Rural Area Plan (Phase 2) of July 1997.

The overriding emphasis in the plan is the conservation and enhancement of the rural environment of which Sandpiper Vinery is a part. When the Island Development Committee come to consider any planning application which Osprey may chose to make they will not look at a small number of policy statements in isolation but at the entirety of the plan. A building such as the one Osprey desires to erect may indeed be used for horticultural purposes of an exciting new sort, Osprey may indeed be offering a large and attractive investment for the Island's economy. But the Island Development Committee are charged with ensuring that the rural environment of the area in which Sandpiper Vinery is located is conserved and enhanced. In the performance of their duty they will have to treat that as the overriding emphasis for that is what the Rural Area Plan directs them to do. It may not be possible to reconcile Osprey's demands for a large industrial style building with the requirement to preserve the rural character of the area. It may be that the ingenuity of the designers may indeed surmount that problem.

I now turn to HT1 and HT3 which Mr. Rowles says the Island Development Committee considered to be of most relevance to their deliberations.

> "In all areas permission will generally be given for works essential to the proper running of existing productive horticultural holdings. However, if such a proposal falls within an Area of Special Environmental Importance (Green Zone 1) or a Conservation Area, permission will only be granted if it can be shown that the changes will not have a significant detrimental effect on the special environmental qualities of the area."

In my judgment HT1 is inapplicable.

It can only be made applicable by ignoring the plain words of the policy or fudging their meaning. Sandpiper Vinery is not an existing productive holding. There was a suggestion in argument that because of the time lapse between sowing and producing the first crop and storing it by the time the building was used the Vinery would be an existing productive holding. I cannot accept this. There is no suggestion whatsoever that Osprey plan to start growing plants before permission is obtained to build and before the building is erected.

HT3 reads:

"In areas of Rural Character (Green Zone 3) applications to redevelop or extend existing glass or to erect new glass, together with essential ancillary works will generally be granted provided that:

(i) at the time of the application the site is occupied by glass or at any time commencing five years prior to 1st October, 1992 the site was occupied by glass;
(ii) the site constitutes a prime horticultural site;
(iii) the development does not intrude unacceptably into otherwise open areas of countryside; and
(iv) the development does not have an unacceptable impact upon important open views in otherwise developed glass areas."

In contrast, however, it is in my judgment possible for HT3 to support the proposed development. Whilst the redevelopment of glass did not feature strongly in submissions, it is clearly mentioned in both Healthy Direct's letter of 28th November 2002 and the Committee for Horticulture's letter of 3rd December 2002. It seems obvious that if plants are to be grown to the exacting standards which Mr. Winn and the Committee say the pharmaceutical industry imposes and if hydroponic cultivation is being introduced, redevelopment of the useable glasshouses will, to some degree, be essential.

Advocate Loveridge, for the Applicants, endeavoured to show me that HT3 could not apply. He faced a formidable task given that HT3 contains two subjective elements, numbers

"(iii) the development does not intrude unacceptably into otherwise open areas of countryside; and

(iv) the development does not have an unacceptable impact upon important open views in otherwise developed glass areas"

and one other element, the concept of a prime horticultural site, which must be assessed by reference to factors set out at paragraph 5.5 of the Rural Area Plan and which involve a subjective element albeit one which may be assisted by professional judgment. It is not for me to decide whether, on a full examination of the issues on a full application, Mr. and Mrs. Barrett might, perhaps with the benefit of advice from an expert such as a surveyor well versed in planning matters, succeed in persuading the Island Development Committee that HT3 should not be applied in Osprey's favour. Mr. Loveridge made a powerful case for showing that it should not. The Island Development Committee's decision will be unenviably difficult not least because of:-

1. The suggestion that locating the building on an industrial site would make the project commercially unviable.
2. The late suggestion that a two storey building might be required.
3. Upon receipt of an application under section 15 of the Island Development Law there must be a proper consideration of the project and of any objections to it and the full range of options set out in section 16 remains open. This full consideration should include a careful assessment of whether there is in fact a minor departure from the Detailed Development Plan meriting a Planning Inquiry. Although Advocate McMahon said in argument that if the application failed there would not be such an inquiry I am confident that on reflection his clients will see that the time for making such a decision has not yet come.

But it is not for me to say what the outcome should be. In my judgment HT3 is not an absolute bar to the success of Osprey's application and the Island Development Committee cannot be said to have been demonstrably wrong to issue a Preliminary Declaration.

My task does not end there, however. I must also consider whether the Island Development Committee took into account any matter which they should not have taken into account or failed to take into account any matter which they should have taken into account. I have seen no evidence of either error in the papers before me. If they failed to take into account all aspects relevant to HT3(i)–(iv) that can be fully remedied when the application for permission is made and the matters which all interested parties wish to rely upon are fully before them.

For reasons stated, the application fails.

