Judgment 58/2003

Old Government House Hotel Limited v Island Development Committee and Mighty Mouse Limited
Royal Court
(Civil Action File 791)
9th December, 2003

Island Development (Guernsey) Laws, 1966 to 1990 – building in course of construction – application for judicial review – grant by IDC of variation to previous planning permissions – remedy of judicial review is available in Guernsey – procedural framework for judicial review has yet to be established – present proceedings conducted on basis that the applicant must first obtain leave to pursue the remedy of judicial review – matter for judicial discretion – whether the IDC had acted unlawfully – other factors to be taken into account – application refused

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 9th day of December, 2003 before Andrew Christopher King Day, Esquire C.B.E Lieutenant Bailiff; sitting alone:

Between

OLD GOVERNMENT HOUSE HOTEL LIMITED

Applicant

and

THE PRESIDENT OF THE ISLAND DEVELOPMENT COMMITTEE

Respondent

and

MIGHTY MOUSE LIMITED

Intervenor

On the application of OLD GOVERNMENT HOUSE HOTEL LIMITED ("the Applicant") against THE PRESIDENT OF THE ISLAND DEVELOPMENT COMMITTEE ("the Respondent") in the terms attached hereto;

WHEREAS on the 2nd, 3rd and 4th December, 2003 the Court, having heard Advocates R. I. C. E. Harris, F. Raffray and M. G. A. Dunster, Counsel for the Applicant, Respondent and Intervenor respectively, RESERVED JUDGMENT;

THE COURT this day handed down Judgment in the terms attached hereto and DISMISSED the application, and RESERVED the issue of costs.

M. A. TOSTEVIN
Her Majesty's Deputy Greffier

Approved Judgment
17th December, 2003

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

BETWEEN **OLD GOVERNMENT HOUSE HOTEL LIMITED** **Applicant**

and

THE PRESIDENT OF THE ISLAND DEVELOPMENT COMMITTEE **Respondent**

and

MIGHTY MOUSE LIMITED **Intervenor**

JUDICIAL REVIEW; LEAVE TO PROCEED

Judgement of Day LB on the Applicant's application for judicial review of the Respondent's decision to grant planning permission dated 13th May, 2003, to the Intervenor to construct offices at its premises at Hirzel Street/Hospital Lane, St. Peter Port, specifically relating to building works on the 4th floor level; whether the Applicant should be given leave to proceed.

Advocate R.I.C.E. Harris appeared for the Applicant.
Advocate F. Raffray appeared for the Respondent.
Advocate M.G.A. Dunster appeared for the Intervenor.

Hearing dates: 2nd, 3rd, 4th December, 2003
Judgment handed down: 9th December, 2003

A. <u>The Factual Matrix</u>

1. Until November, 2002, the Applicant was the owner of premises predominantly comprising and known as the Old Government House Hotel, and lying to the north of Ann's Place, to the west of Hirzel Street and to the south of Hospital Lane. On the 19th November, 2002, the Applicant sold, by way of conveyance, the eastern part of its premises to the Intervenor. For convenience I refer to the premises (i.e. in effect the Hotel) retained by the Applicant as the "OGH premises", and those which have become vested in the Intervenor as the "MML premises".

2. In May, 1998, the Applicant had made what can be described as an outline application for the demolition of part of its premises, for extension to the Hotel, and for the construction of offices, the latter of which would basically fall within the MML premises. On the 7th July, 1999 (valid to the June, 2001), the Respondent granted a Preliminary Declaration (under s.27 of the Island Development (Guernsey) Law, 1966 – "the Law") for such works in principle, and, as would be the norm, the questions as to the precise details, not least referring to scale, height, massing,

etc., were deferred. On 26th April, 2000, the Respondent granted a Permission in Principle (under section 16 the Law – generally hereafter "PiP"(s)) – for alterations/extensions to the Hotel and the construction of buildings, for use as, *inter alia*, offices. That PiP was to be valid to April, 2003. On the 25th October, 2001 (valid to the 24th October, 2002) a further PiP was granted, being effectively on a dual application, for the Hotel works on the OGH Premises and offices on the MML premises – the impact of the "office pavilions" (on the dominant eastern elevation, in my view) being of particular concern to the Committee. (Previously, the outline applications had indicated some of the buildings/rooms on the MML premises were to be used as part of the Hotel). An additional warning was given at this time, namely that of the approaching likely ratification of a revised Urban Area Plan (the general planning regime incorporating the area in which this site fell); hence the life of this PiP being limited to one year.

3. On the 12th November, 2001, the Applicant entered into an Agreement to Lease ("Agreement to lease") with Generali World Wide Insurance Company Limited ("Generali") by which, in the briefest outline, the Applicant agreed to construct office premises on the MML premises which Generali undertook to let at the rent and upon terms the details of which I need not relate. Save to say that the plans attached to this Agreement indicated that whilst there were to be new offices on the fourth floor level of the northern half (Hospital Lane) of the MML premises, there were to be effectively open roof terraces at that level on the southern half, importantly immediately to the east of the existing Hotel restaurant and an existing hotel bedroom, which by virtue of the PiP of the 21st October, 2001, was to be converted into an extended restaurant, both having views to the east. These plans (i.e. attached to the Agreement to lease) were indeed the same as the plans that had been approved on the 25th October, 2001.

4. On the 17th January, 2002, the Applicant and the Intervenor, after apparently about two months negotiations, entered into an Agreement relating to the sale and purchase of the MML premises for £2.3 m. This Agreement ("the Agreement to sell") was subject to the Agreement to lease with Generali. Again I do not need to relate the terms of this Agreement, which were in what might be described as standard form for such transactions, save to note that at the time of the envisaged future conveyance the land would pass with the benefit of planning permission and that the requisite consents relating thereto had been granted, including the right to complete the office development independently of works on the OGH premises. Most importantly the draft terms of the conveyance formed part of this Agreement, and specifically contained the covenant on the part of the purchaser, in favour of the vendor, that it would not construct any building on the MML premises above a maximum height which, roughly speaking, was that of the top of both the proposed extended restaurant and of the existing one. Hence no restrictive covenant restraining building immediately in front of those restaurant windows was to be included in the conveyance, but a specific restriction above that height was to be so included. Moreover, a licence was to be granted by MML in favour of the Applicant in respect of the proposed roof

terrace to the immediate east of the existing restaurant, which was described on the plan as being the "hotel restaurant terrace". The area similarly adjacent to the extended restaurant was described as the "office terrace", both of which, in argument and herein, are used as shorthand terms to describe the areas in question. They are important. That licence was to the effect that the Hotel terrace could be utilised by the OGH Hotel and its guests for a period of 99 years; thus, effectively, creating a restrictive covenant for that period of time on any built structures on that area.

5. During the first half of 2002, planning matters proceeded apace, to a greater or lesser extent. Various points should be noted, I believe. The Intervenor was now making the running in this regard, using the same architects (Lovell Ozanne and Partners) as had been employed by the Applicant, though as the Intervenor was not yet the owner of the premises it had to obtain the specific authorisation of the owner, the Applicant, to enable the Respondent to consider MML's applications. One matter upon which there could be considerable argument, in due course, is the exact extent of the authorisation given by the Applicant in favour of MML with regard to planning applications. A further matter of note is that the PiP of the 25th October, 2001, was reissued as early as July, 2002, valid till July, 2003. This appears to have been very much at the instigation of the officers of the Respondent, as they were concerned, not necessarily correctly, that if the extant PiP was not reissued (if desired) before the revised UAP came into force on the 31st July, 2002, then any application thereafter to renew it might have to be turned down because of the terms of that new Plan.

6. In addition, during the course of 2002 – though there appears to be factual dispute as to whether Mr. McVey (the sole director of the Applicant) was specifically aware of this – the Applicant's architects had submitted a revised scheme (scheme C) which included building works on the fourth floor to the south of those previously granted in principle, that is to say specifically on the office terrace. Be that as it may, that scheme was not progressed to any great extent and certainly no approval was given for it.

7. Thus in November, 2002, the extant planning permission was the PiP of the previous July, which was to expire in July, 2003. The Conveyance was duly completed on the 19th November, being in substance identical to that which had been agreed as part of the Agreement to sell in January of that year, though the terms of the proposed Licence in respect of the hotel restaurant terrace were to be varied in the sense that the Intervenor was to be allowed to increase slightly the height of that terrace of which the Applicant, and its licensees, were to have the use (see the side Agreement of the 20th November, 2002. The anticipated restrictive covenants were formally established, as were the western boundaries of the conveyed premises; both of which were under the control of the Applicant as the vendor, save to the extent, realistically, that they were part and parcel of a commercial agreement to which both sides had to agree.

8. It is also apparent from the correspondence which has been produced that, during 2002, a dispute had broken out between Generali and the Intervenor regarding alleged breaches of the Agreement to lease of November, 2001. The Intervenor was, of course, not a party to that Agreement, and would not assume the benefit and burden of it until the completion of the conveyance of the MML premises, whenever that might be. The Applicant was aware of this dispute.

9. In early 2003 the Intervenor proceeded in its own name (as was to be expected), and through new architects, to make a further planning application, in fact for another PiP, which has been contrastingly described (in the correspondence and documents which have come to light since the filing of this application), by officers of the Respondent either as being a variation of the July, 2002, PiP, or a new self-standing application. The Respondent considered that that application did not merit notice being given in the Press. Also, the PiP which resulted from that application was to expire in July, 2003, at the same time as the July, 2002, PiP. Thus the two PiP's were described as running "in tandem", the later in the name of MML and the earlier in the name of the Applicant, which of course still very much had an interest in the OGH premises plans. This may have been a pragmatic approach by the Respondent, which is not necessarily to be criticised for that reason alone – urgency was very much the order of the day. The Intervenor forthwith apparently put in its detailed application for final permission, notice of which was given in the Press on the 23rd April, 2003.

10. Mr. McVey asserts that he did not see that notice and did not become aware of it until August/September later this year. Certainly he made no inquiries about the application and made no representations. For completeness I should add that the notice in the Press was as follows – *"Mighty Mouse Limited – erect office accommodation at Government House Hotel, Ann's Place."*. Mr. McVey further asserts that even if he had seen this notice it would not have triggered any action on his part as it referred to office accommodation at Old Government House in Ann's Place (the premises being retained by the Applicant). In passing I should say that that assertion is not particularly credible, because it is quite clear to me from the correspondence in 2002 that the name Mighty Mouse did not please Mr. McVey; in any event by naming the Intervenor as applicant it was quite clear that the application related to the proposed office accommodation (anticipated by all) on the MML premises.

11. The plans for which detailed and final approval was now being sought included building works on the fourth floor on the office terrace (the southern extent of which was very close to that envisaged in Scheme C in 2002), in contrast to the July, 2002, PiP. Apart from, I believe, certain rooms, the new crucial feature was that the office terrace was to house the summit of the central lift shaft which was to serve the whole of the MML office premises, thereby necessitating a change of plans on all the lower floors, at least to some extent; and, I believe,

perhaps providing for extra office accommodation. Detailed planning permission was granted on the 13th May, in the name of the Intervenor.

12. Subsequent to fully detailed permission being granted, work started on the MML premises by about the end of May. At the end of August Mr. McVey noticed that steel girders were now being erected on the fourth floor of the MML premises in the area of the office terrace – clearly building works were going to be carried out in respect of that area. He started to make inquiries. On the 3rd September, 2003, he had a long meeting, he says, with a Mr Piggott of MML, from whom he ascertained that the latter intended on the office terrace for rooms and offices (and of course the lift) to be constructed. It must be said therefore, as Mr. Raffray submitted that, certainly by this date, the Applicant had sufficient intimation of what was going to be built on the office terrace. Mr. McVey proceeded to try and establish exactly what permissions had been granted – and I have sympathy for his complaint about the time which it took for him, or his agents, to be provided with that precise knowledge, which was not acquired until the 10th October when Advocate Harris was able to inspect the full plans at the Respondent's premises. At this time, also, there was correspondence between the Applicant and the Intervenor, in which, *inter alia*, Mr. McVey put MML on notice as to the risk they were taking in continuing works until the matter was resolved.

B. <u>The proceedings</u>

13. On the 31st October, 2003, the Applicant filed its application for judicial review. That was done by way of filing a Cause, with an affidavit from Mr. McVey, of which the Respondent had been given notice by the usual summons. Hence the proceedings were instituted *inter partes*. The Intervenor had also been alerted to the filing of the Cause, Mr. Dunster being accordingly present on its behalf. His client was on that day granted permission to intervene. For the best of reasons, different judges dealt with the earlier stages of these proceedings. All that is important is that, resulting therefrom, much information has been produced, by all three parties, by way of affidavit and argument. In particular, there is another affidavit from Mr. McVey, one from Mr. Rowles (IDC) and one from Mr. N. Jones, a chartered surveyor, of MML, with attached documentation.

14. Far more significant than this change in judicial personnel is the fact that in Guernsey the Royal Court has not yet, either in its legislative capacity by making rules of court or otherwise in its judicial capacity, established guidance to practitioners in their approach to seeking judicial review. The premise for that necessity for guidance is that the remedy of judicial review exists at all in Guernsey. So as to remove any doubt as to that, I can positively express the view, which I know is shared by my judicial colleagues, that the remedy is unquestionably available in this jurisdiction. The fundamental question is in what circumstances the remedy is available,

and what procedures should be followed in seeking to achieve it. It will, I trust, be a matter for urgent attention to start putting that particular house in order, at least in general terms.

15. In the circumstances of this case we have had to proceed as we find ourselves. Accordingly, the proceedings which I have conducted have been on the basis of what, I believe, must be the essential first hurdle that any applicant for judicial review has to overcome, namely the obtaining of leave to pursue the remedy. That is a necessary filtering process to avoid this Court being inundated by unworthy applications. However, this case, as indicated, has in the event been conducted on the basis of a full oral *inter partes* hearing, with far more information being provided, at least by the Respondent, than would perhaps be the normal course on a simpler *ex parte* paper or oral application in England and Wales. Nevertheless, the basic issue which I have to determine is still whether the Applicant should be allowed to proceed to a full hearing seeking judicial review. It was not contested by Counsel, and in my view must be the case, that it is a question for my discretion, which of course must be exercised judicially.

16. That this matter was to proceed in this way may have come as a surprise to the parties, as I only so informed them a few hours before the Court convened for what had been anticipated would be a directions hearing. In the very few cases seeking practical review in this jurisdiction, a "leave" stage has not taken place. In one sense that may have been particularly hard on Mr. Harris; on the other hand, regardless of whether this was an application for judicial review or any other nature, it is always to be expected of a party who files an application, seeking the exercise of the Court's discretion, to be ready to proceed with it forthwith. In the event I am grateful to Counsel for the professional way in which they have enabled the Court to address this preliminary issue at such short notice. It was, however, always indicated by both the Applicant and the Intervenor from the very beginning that urgency in dealing with the matter was of the essence. I have proceeded accordingly.

C. <u>The Applicant's case and Counsels' submissions, in summary</u>

17. The Applicant's Cause is attached as an appendix which includes an additional paragraph 6 for which I gave leave to be inserted during the course of hearing argument. The Applicant complains that the Respondent has acted unlawfully in granting the permissions for the development of offices as is presently taking place, the PiP of March, 2003, and more particularly the detailed planning permission of May this year, both being fundamentally flawed. The legal issues which this application raises are, at the least, arguable, merit serious consideration, and thus judicial determination at a full hearing.

18. The permissions which were granted by the Respondent earlier this year were unlawful in a variety of ways.

19. Firstly, as had been indicated in correspondence from the Respondent, the applications in respect of which those permissions were granted were treated as being a variation of the existing July, 2002, PiP granted to the Applicant. To be more precise, the PiP of March, 2003, was a variation of the earlier extant July, 2002 PiP, and the detailed permission of May this year came on the back of that later PiP. The unlawfulness of that treatment of that application was that MML could not seek to vary a permission which had been granted to somebody else, namely the Applicant. That was so because the wording of section 16(2) of the Law, which, in its full context, provides as follows:-

"16(1) Upon receipt of an application under the provisions of the last preceding section, the Committee may either –

(a) grant the permission applied for;
(b) refuse such permission; or
(c) grant such permission subject to –

(i) conditions relating to the dimensions, design, structure or external appearance of any building, or the materials to be used in its construction;
(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.

(2) The Committee may, from time to time, revoke or vary any condition attached to any permission granted in pursuance of the provisions of the last proceeding sub-section upon application being made to it in writing in that behalf <u>by the person to whom such permission was granted</u>." (my emphasis).

(3) (Relates to time limits of permissions).

20. The PiP of July, 2002, was subject to seven specific conditions (some of which are standard form when permissions in principle are granted) but included the statement:-

"In particular, further consideration shall be given to the following:-

- The detailed design of the exterior of the hotel element, to ensure that an appropriate vertical emphasis to elevation as achieved;

- The detailed design and integration of the office pavilions;

…

21. I would add that this permission, as also the one of October, 2001, was entitled:-

> *"Proposal: extend and alter hotel premises and construct <u>independent office</u> accommodation* (*re-issue*) (my emphasis)".

22. Though this was one PiP, it related to the two separate premises. It was granted to the Applicant and partly related to premises which it continued to own after the 19th November, 2002. The only person whose application could be considered for varying such permission, and to whom a varied permission could be granted, must be the Applicant. That had not been the case. (Notwithstanding, I would add, that during the course of 2002 the Committee had been receiving applications from MML (in effect, though technically from the Applicant, that is scheme C), in relation to the premises it was to acquire, with the authority – though contested says Mr. Harris – of the Applicant). In the words of paragraph 2 of the Cause, the granting of this variation permission was *"In breach of the Applicant's legitimate expectation that the Previous Permissions granted to it would remain unaltered until such time as it made an application to vary the same.".*

23. The variation argument underlay both paragraphs 1 and 2 of the Cause. Additionally, the PiP of March, 2003, was so significantly different from the PiP of July, 2002, (and its predecessor) that it could not, rationally, have been treated as a variation (paragraph 5 of the Cause).

24 Alternatively (paragraph 6 of the Cause), the application from MML early this year, from which the March PiP emanated, was treated by the Respondent, as again revealed in the documents, as self-standing and not related in any way to the July, 2002, PiP; similarly the May detailed permission which followed from it. If they were in fact free-standing applications, and not a variation of the earlier permission, then the Committee was precluded from considering them, let alone granting permission, under the terms of the new UAP which had come into force on the 31st July, 2002. The particular relevant provisions of that Plan were policy EMP 1 which stated:-

> *"Proposals for new office floor space will only be permitted where:-*
>
> *(a) it is in accordance with the approved Outline Planning Brief for a Mixed Use Redevelopment Area (MURA);*
>
> *OR*
>
> *(b) it is located on an existing office site in the Central Areas and, where appropriate, provides for a mix of uses;*
>
> *OR*

(c) *it is in accordance with policy EMP 2.* (Irrelevant)".

25. The site of the MML premises is not within a MURA (undoubtedly correct); nor is it an existing office site in the central areas (whether it was an existing office site might be the subject of argument as the enabling (i.e. foundation) works were underway or completed before the UAP came into force). Again this was a seriously arguable case which, Mr. Harris submitted, should be properly considered and determined at a full hearing.

26. The third objection to the PiP of March, 2003 (though not advanced in the Cause), was that it was described to be in tandem with the July, 2002, PiP, in the sense that it was to have the same expiry date in July of 2003 – so that they would run together. That, again, in the submission of Mr. Harris was an unlawful concept, and an unlawful situation, meriting full review.

27. The fourth complaint, in paragraphs 3 and 4 of the Cause, taken together, is that there was effectively something inherently inconsistent and irrational about granting the 2003 permission for structures on the fourth floor of the MML premises, and more precisely on the office terrace, in the light of the extant July, 2002, PiP granted to the Applicant in respect of the extended restaurant; the two could not and did not stand together. The irrationality of the Respondent was further demonstrated by its ignoring the Applicant's amenity.

28. The Applicant's case can, I think, be fairly summarised in this way. The Respondent has acted unlawfully. Improper conduct on the part of a public body, not least in regard to a matter so important as planning, should not be allowed to proceed unchecked. If the Committee had acted unlawfully, then its unlawful decisions should be quashed. At the least the Applicant had a seriously arguable case for detailed examination at a full hearing.

29. Mr. Raffray did not accept that there had been anything unlawful in the permissions granted in early 2003 by the Respondent. However, the main thrust of his arguments was that there were such major hurdles in the path of the Applicant proceeding to a full hearing as to require that the application be brought to a halt forthwith. They were:- the conduct of the Applicant (material non disclosure relating to the restrictive covenants), delay and consequent detriment to the Intervenor, impact on good administration (which necessarily involves the nature of the relief being sought by the Applicant), and what alternative remedies the Applicant might have. These matters far outweighed, in the balancing exercise I had to conduct, any arguments as to unlawfulness.

30 Mr. Dunster helpfully restricted his submissions to the question of detriment to the Intervenor; as he put it, the application was now "far too late".

D. Conclusions

31 I turn to consider the matters which I identify as being the most important in this case, or otherwise require comment.

32. Does the Applicant have sufficient *locus* or sufficient interest to be entitled to bring these proceedings? Although Mr. Raffray's persuasive arguments modified my initial clear cut view that the Applicant had such an interest (arguments to which I will return because they are also relevant in other contexts), I conclude that the Applicant does have that sufficiency of interest in the decisions of the Respondent relating to the neighbouring office development. Equally, the Intervenor was granted leave to intervene, and clearly rightly so as it has a direct interest in the matter as being the land owner and developer, with a commercial commitment to enter into a lease with a major local insurance company (a situation known fully to the Applicant before November, 2002).

33. I have no doubt that administrative bodies should, and should be seen to, act lawfully. It is the duty of courts to intervene and correct unlawful acts, as a matter of principle, when it is right to do so, which will depend upon the particular circumstances.

34. The first step which this Court should take, on receipt of an application for judicial review, apart from considering the question of the *locus* of the applicant (and other interested parties), is to determine whether it is right to allow an applicant to proceed to a full hearing for judicial review so as to remedy its complaints. This Court's jurisdiction to proceed in such a summary way is based not only on Rule 55, but also on its historic power to treat *causes* as *privilégiées* and its inherent jurisdiction to do justice, which requires *inter alia* that the Court's time is not wasted on unworthy matters. Thus this Court should adopt the permission (formerly leave) stage present in equivalent proceedings in England and Wales.

35. Mr. McVey's first affidavit in support of the application for judicial review was seriously inadequate. In the absence of any Rules or judicial directions in that regard, I do not make any criticism of that failing; save for one matter, which Mr. Harris graciously accepted should, with hindsight, have been specifically referred to, that is the covenants which were, or as pertinently were not, included in the Conveyance of November, 2002, between the Applicant and the Intervenor. On any analysis of this case, those covenants, or lack of them, must be central to the Court's determination of the issues. This is a matter to which I return.

36. I must take a view at this stage as to the strength of the Applicant's arguments in relation to the unlawfulness of the Respondent's decisions of March and particularly May, 2003; accepting that, for now, it can be no more than a feel, in the absence of full and considered argument

which is rightly the province of any full hearing should the matter proceed. I am not immediately impressed by any obvious force in any of the Applicant's arguments.

37. The Applicant's "variation" argument, is probably too simple a reading of section 16(2), and does not place it in the wider context of sections 14, 15 and 16(1); the statutory structure for planning permission being based on ownership (which naturally would include lessees, agents and licensees). It could be an odd situation if a former owner could unilaterally seek to change a condition to any permission granted to it, during the lifetime of the permission, in respect of land belonging to another, without the involvement of the current owner. That is the other side of the proposition which the Applicant advances, namely that a purchaser of land which has the benefit of a planning permission granted to the previous owner must continue to rely upon the latter to change any conditions to that permission.

38. The alternative argument of the Applicant as to the unlawfulness of the 2003 permissions, namely that if they were free-standing applications they had as a matter of law to be rejected under the provisions of the revised UAP, is equally unconvincing. Consider this scenario. MML makes a free-standing application in March, 2003, in respect of the same development to which an extant PiP relates. The Respondent rejects the application on the grounds that it would be *ultra vires* to consider it. It seems to me that, in the light of the planning history, the fact that the application was made in the lifetime of an existing PiP, and the legitimate expectations of the Applicant, the Respondent would be hard pressed in law to justify such a refusal. For similar reasons, the complaint in respect of the tandem PiP's is unattractive. The complaints about the irrationality of the Respondent, in ignoring the impact on the Applicant's concurrent permission, and its amenity generally, might well be robustly challenged at a full hearing. The immediate point for the purpose of these proceedings is that they are matters for which the Applicant sought no protection in its dealings with MML, a subject to which I revert.

39. Nevertheless, for present purposes, I proceed on the basis that the Applicant's case is sufficiently arguable that, all other things being equal, it should proceed to determination at a full hearing. I turn, therefore, to the matters which may militate against such a course being appropriate. As Michael Beloff Q.C. has stated (*inter alia* Jersey Law Review February 2003, Vol. 7 issue 1 p 29, para 43):-

> *"The main common feature of public law remedies is that they are discretionary in nature: they can be refused on grounds of delay; lack of utility; interference with good administration or with the rights of third parties; improper conduct by the applicant; or the existence of an available alternative remedy.".*

40. I turn immediately to the contractual arrangements between the Applicant and the Intervenor as provided *inter alia* in the Conveyance between them of the 19th November, 2002. In particular, what covenants were, and were not, made between the parties, to run with the land, in respect of the building works which were without doubt going to take place on the MML premises? Permission for, and the fact of, new offices was of direct interest to both parties to the Conveyance; to the Applicant to maximise the value of the asset being sold, and to the Intervenor to maximise the investment.

41. I reiterate that the area to which this application essentially relates is that described as the office terrace, being the fourth floor immediately adjacent to and the east of that part of the hotel premises which currently comprise a bedroom but which was to be converted (I put it no higher) into an extension of the existing restaurant, which itself lies immediately to the south. The parties specifically applied their minds to the height of any future building on the MML premises. The maximum height was not to exceed, roughly, the ceiling of the extended restaurant. In effect, that meant that the Applicant was not, by restrictive covenant, seeking to protect its views from any east facing windows in that part of the hotel. The Intervenor was not restrained from building as far as the western boundary of its new premises immediately adjacent to the extended restaurant, and to its full height. Moreover, it was specifically agreed that the Applicant would be allowed to make use, for the benefit of its guests, of the roof area immediately to the east of the existing restaurant, thus effectively restricting building works there. These matters all form part of a major commercial transaction between the parties which had been the subject of genuine "arms length" negotiation prior to the completion of the Agreement to sell of January, 2002.

42. It is clear to me that the Applicant can have no legitimate complaint that offices were going to be, and indeed are being, built on the site which it has sold; nor can it have any legitimate complaint, as a matter of land law, if buildings are constructed immediately to the east of, and blocking the view from, the windows in the part of the hotel described as the extended restaurant. Whilst those conclusions did not persuade me that the Applicant had no sufficient interest in making this application, they are highly relevant as to whether the Applicant should be allowed to proceed with its application.

43. Mr. Harris argued that when a property owner sold part of his premises, as in this case, it could seek to protect itself in two separate ways. The first was to impose appropriate restrictive covenants for the benefit of the land being retained. Alternatively, he should be able to rely upon the planning authority discharging its functions lawfully, and not unlawfully to the detriment of the seller's interests. He honestly accepted, had to accept, that the latter was the only possible protection upon which this Applicant could rely. I concur with Mr. Raffray's submission that the question of the restrictive covenants is at the core of this case; accordingly,

notwithstanding the absence of any procedural provisions in this regard, it was incumbent upon the Applicant, as a basic legal principle as the party approaching the Court to exercise its discretion in that party's favour, to disclose such a material circumstance.

44. As Mr. Raffray submitted, if the Applicant had a legitimate complaint against the Intervenor, as a matter of land law, in respect of building works being carried out by the latter on the office terrace, that would be a matter for taking proceedings to enforce a restrictive covenant, if one existed. That avenue was not open; there was no legitimate complaint against MML. Whether the Applicant had any legitimate complaint against any of its professional advisors, for whatever reason, is a matter upon which not even conjecture could assist me. Those advisors, if the circumstances existed, could be a legitimate target for judicial proceedings. But not the Respondent.

45. I turn to the question of delay. I do not think it assists me much in this case to try and assess what might be periods of culpable delay on the part of the Applicant. Nevertheless, I am not impressed by the complaint that the Applicant's alleged ignorance of MML's proposed building works arose from its sole director's absence when the notice of the detailed planning application in April this year appeared in the Press. He gave no explanation as to what procedures the company might have in place to alert itself, and therefore Mr. McVey, to planning applications which might, apparently, be so important to it. It was an absolute certainty that MML would be making application of some kind for full planning permission to develop its new site as offices. That was the whole point of the transaction. From the end of May the Applicant knew, admitted Mr. Harris, that building works were progressing. In addition, it is clear to me that by early September Mr. McVey was sufficiently aware that building works had been permitted for the office terrace. On the other hand, I have sympathy for Mr. McVey's complaint that he was frustrated in finding out sooner rather than later exactly what permissions had been granted to MML, so as to prevent him from making any appropriate application to the Court before he did.

46. There has, as a matter of fact, been delay in bringing these proceedings. Whether that was culpable delay on the part of the Applicant is largely immaterial. Far more important is that the greater the delay, the greater may be the inevitable detriment to a third party who has placed legitimate reliance upon the apparent validity of the impugned act.

47. Which leads, therefore, to consideration of the question as to what the impact may be on the Intervenor if the Applicant is allowed to proceed to a full hearing for judicial review, and more importantly if that application were to be ultimately successful.

48. Mr. N. Jones of the Intervenor deposed as to the state of the building works as at the end of November, 2003, and the financial loss which the Intervenor would incur should it now or in the

future have to redesign its building so as to eliminate all structures on the office terrace. The building is now in an advanced state of construction. Completion is scheduled for March, 2004. Contractually it is to be available for occupation by Generali by the end of June, 2004. Mr. Jones estimates (and I put this no higher than a rough estimate) that the direct financial loss arising from having to make structural alterations to the building – loss of income and profit to the building contractors, redesign costs, costs of removal of parts of the structure and reconstruction costs – could exceed £1,000,000. In addition, restructuring the building would inevitably lead to less office space being available to let which would reduce the Intervenor's investment. Moreover, in failing to provide the offices for Generali which it is contractually obliged to do, it could not only lose that tenant but also be liable in damages. Without probing further those potential losses, I think I am entitled to infer that the financial detriment to the Intervenor would be very considerable.

49. I turn to the question of utility and the potential impact on administration, or other consequences, if the Respondent's decisions of March and May, 2003, were quashed for unlawfulness. As already indicated, I agree in principle that unlawful administrative acts should not be allowed to go unchecked, which is the nub of the Applicant's argument. Has the Respondent acted unlawfully? What may happen thereafter should not be of direct concern to the Court.

50. Nevertheless, the Court must live in the real world, which is why I sought to explore with Mr. Harris what might happen should his client ultimately be successful in its application. It must not be forgotten that the logic of the Applicant's argument is that all the new offices are unlawful, not just the structures on the fourth floor office area which is really what it complains about. If the Court decided that the permissions of early 2003 (by whichever route advanced by the Applicant) were unlawful, then a new application, supposing one was made, could only be considered if the UAP was changed, which itself would require a public inquiry – to legitimate a building that would or perhaps might have already been completed. If a public inquiry had to be set in train, questions might well be reasonably and pertinently asked by tax payers as to why their money was being used on a largely or wholly academic exercise to correct a planning irregularity, when the essence was a dispute between two private parties one of whom had failed adequately to protect its interests when it sold part of its property to the other.

51. A further scenario – in the event of no application being made after a determination of unlawfulness – is that of the Respondent seeking to persuade the Law Officers to institute criminal proceedings against the Intervenor for having constructed a building unlawfully (a pre-requisite to seeking demolition of the building). Merely to pose the question, I believe, identifies its absurdity. Unsurprisingly, the Applicant's basic position was limited to the

desirability of an alleged act of maladministration being rectified, with no more, worthy as that stance is in theory.

52. For all the reasons which I have identified, there are, in my view, overwhelming factors which militate against granting the Applicant leave to proceed with this application, even on the basis that there is an arguable case with regard to the unlawfulness of the Respondent's actions in granting the permissions in March and May 2003. These factors, not least the injustice of the potential prejudice to the Intervenor, far outweigh what could only be strictly theoretical justice afforded to the Applicant by the eventual granting of the remedy it seeks. In the circumstances of this case, the Respondent is not a justified target for complaint by the Applicant. Whether the latter has legitimate cause for complaint against others, or merely self-anger, I know not.

53. Leave to proceed is refused and the application is dismissed.

