COURT OF APPEAL 199.

Judgment reserved: 26th September, 1996.
Judgment delivered: 30th October, 1996.

Before: Sir Godfray Le Quesne, Q.C., (President)
Sir David Calcutt, Q.C., and
Miss E. Gloster, Q.C.

Between:	Fairview Farm Limited	Appellant
And:	The Island Development Committee	Respondent

Appeal by the Respondent from the Judgment of the Royal Court (Samedi Division) of 9th November, 1995, (*See Jersey Unreported Judgment of that date*), whereby the Royal Court allowed the Appellant's appeal against two conditions attached to a development consent, dated 15th December, 1993, and removed the said conditions.

Advocate T. J. Le Cocq for the Appellant.
The Solicitor General for the Committee.

JUDGMENT

THE PRESIDENT:

1. Fairview Farm lies in St. Martin's, between Hougue Bie and Maufant. It is worked by a company called Fairview Farm Ltd, the respondent in this case. This is a family company, the shares of which are owned by a brother and two sisters - Mr. Thomas Binet, Miss Rose Binet and Miss Kate Binet - in equal thirds. Their father, Mr. Thomas Binet senior, formerly worked the farm, and he is still the owner of the original farm house and buildings. The land worked by the company now amounts to more than 1,000 vergees, spread over eight of the twelve parishes. Most of this land the company occupies on annual tenancies, and the identity of the land worked changes from year to year.

2. The business of the company is run by Mr. Thomas Binet (to whom I shall refer as Mr. Binet) and Miss Rose Binet. By the middle of the 1980s they wished to extend their business and modernise their methods of farming. They decided that completely new farm buildings were needed, and the best place to build them would be field 673. This field lies on the east side of the Rue du Trot and just to the south of the new housing at Maufant, from which it is separated by a narrow field and a narrow road. The company chose it to be the site of the new farm buildings because it lay in the middle of the land which the company was using.

3. On the 24th January, 1985, the company applied to the Island Development Committee (which we shall call the IDC) for permission to build new farm buildings on field 673. On the 13th March, 1986, the IDC refused this permission, on the grounds that the proposal:-

> *"would involve an extension of development in open countryside, detrimental to the amenities of the area and contrary to the provisions of the Development Plan".*

Negotiation followed, with the result that the IDC granted planning permission on the 4th September, 1986. The permission was for the building of a new farm unit, outbuildings, parlour buildings and loose cow house building. The application had also included 'future house and garage', but this was not approved.

4. Development permission followed on the 24th November, 1986. It was for the building of:-

> *"new farm unit, cattle housing with silage dump and storage tank"*

The permit was subject to a number of conditions. One provided that the permit would cease to be valid if the development was not commenced within a year, and another that the whole of the approved work was to be completed by the 24th November, 1988. Condition No. 6 (which had also appeared in the planning permit) read as follows:-

> *"That the proposed agricultural buildings shall be used for agricultural purposes only, in association with the farm unit hereby approved".*

5. By May, 1987, the dairy units of the new buildings were finished. At that point building work came to a stop, because of financial constraints. Although the IDC granted an extension for a year to the 24th November, 1989, no more work was done under the permit of 1986.

6. When the new dairy buildings were brought into use, vociferous complaints arose from people living in Maufant about pungent smells. The affair of the 'Maufant smell' attracted much public attention. There were petitions, public meetings, articles in the newspaper and discussions in the States. The IDC was criticised by some people for having allowed farm buildings in field 673 at all. For the purposes of this appear it is not necessary to go into the rights and wrongs of this affair, or to recite the allegations made against both the company and the IDC and the answers given by both. Nevertheless, it has relevance to the matter before us, because it is clear that the IDC was understandably sensitive to the feelings aroused and so very wary in handling the company's subsequent application for planning permission.

7. On the 10th April, 1990, the company's architect sent to the IDC plans showing 'an adjusted layout' for the part of the new farm project which had not by then been built. The IDC asked in reply why the size of the proposed packing shed had been increased. Mr. Binet explained, in a letter of the 6th June, 1990, that the

growing side of the business had been extended since 1985 because of the poor returns from dairy farming, and produce had to be packed in conditions meeting the requirements of the supermarkets which the farm supplied.

8. On the 15th February, 1991, the IDC purported to reject an application made by the company's agent for erection of a packing shed and staff accommodation. The company had made no formal application since the expiry of the permit of 1986, but the IDC were apparently referring to the plans submitted on the 10th April, 1990. The reason given for the rejection was that the development was 'of an inappropriate scale and design which would prejudice the visual amenity and appearance of the area'.

9. The company submitted further plans on the 11th July, 1991. On the 12th November, 1991, the IDC wrote to the company's architect that they 'would be prepared to support' the scheme shown in the plans on condition that the buildings would be restricted to agricultural use only. The company was subsequently asked to submit a master plan for the completion of the new farm buildings, and on the 1st September, 1992, Mr. Binet, on behalf of the company, wrote to the IDC setting out the whole of the company's proposals. On the 29th September, 1992, he made an application for the next stage of the development - the creation of a seed store, a stock unit, a packing shed and staff accommodation.

10. When notice of this application was published in the Evening Post, the IDC received nine letters of objection, signed altogether by fourteen residents of Maufant. The predominant subject of all these letters was smell. This may have been relevant to the proposal to create a stock unit (though the company argued that it was not), but it was not relevant to the proposal of a packing shed. Two of the nine letters did also complain of noise.

11. Argument and discussion over the 'Maufant smell' continued through the autumn of 1992. As a result, the IDC did not come to any decision about the application of the 29th September, 1992 (made formally by Mr. Binet, but really for the company). On the 3rd February, 1993, the company's solicitor wrote to the President of the Agriculture and Fisheries Committee asking for his support, and emphasising the very serious effect on the company's business of the absence of any decision. On the 3rd March, 1993, the solicitor wrote to the IDC agreeing on behalf of the company that the application relating to the stock unit be 'left over for the time being' and adding that the rest of the application was 'of immediate urgency' in so far as the applicants are concerned.

12. On the 30th March, 1993, a petition was presented to the States, asking that 'appropriate action' be taken to remedy the nuisance arising from smells. A second petition was presented, on the 11th May, 1993, asking that the proposed packing shed be not erected closer than existing buildings to dwellings. Between the presentation of these two petitions, the Agriculture and Fisheries Committee lodged a proposition (on the 27th April, 1993) that the States request the IDC to consider immediately the company's outstanding application.

13. This proposition was accompanied by a report of the Agriculture and Fisheries Committee, containing the following passage:-

> *"There is now a most urgent need for a packing shed/store as [the company] is engaged in a programme of lettuce growing. This necessitates a modern shed with packing facilities for the farm produce and that of Top Produce, the grower controlled marketing group of which [the company] is a member".*

This reference to T.O.P. was to produce important consequences.

14. These matters came before the States on the 11th May, 1993. As regards the smell, the States charged the Agriculture and Fisheries Committee to do certain works, at a cost of about £44,500, to reduce the smell from Fairview Farm. As regards the outstanding application, the States requested the IDC to consider it immediately. They also adopted a proposition (which we shall call 'the proximity proposition') asking the IDC to ensure that the proposed packing shed be not constructed closer than the existing farm buildings to existing dwellings.

15. A week later, on the 19th May, 1993, the IDC met to consider the company's application and the decisions of the States reached on the 11th May. We quote from the minutes of the early part of the meeting:-

> *"The Committee recalled that planning permission had been given in 1986 for [agricultural] buildings in connection with Mr. Binet's own farm holding, but it now transpired [s.c. from the report of the Agriculture and Fisheries Committee quoted in paragraph 13 above] that it was proposed that the marketing group Top Produce would be using the packing shed to process both Mr. Binet's and other farmers' produce".*

16. At this point it is necessary to interrupt the narrative, in order to consider the way in which the company carries on its business and the position of Top Produce Ltd (which we shall call 'TPL'). For this purpose we quote a passage from the first affidavit sworn by Mr. Binet when the case was before the Royal Court.

> *"<u>The History of the Company's packing activities</u>*
>
> *2. Originally the Company marketed its produce through a co-operative called H & H Limited. The Company's potatoes were packed by Le Maistre Bros. Limited at Peacock Farm but the company packed all of its other produce.*
>
> *During the late 1980s my sister and I became increasingly concerned that persons involved in the agricultural industry in Jersey did not have the right attitude and approach to its customers and the industry was being prejudiced. We spent much time researching the background of Jersey agricultural marketing and trying to implement improvements. At the end of 1990 the Company and others*

formed a new marketing group called Top Produce Limited ("TPL").

The Company held 12% of the shares of TPL and assumed an organisational and managerial role in TPL. TPL then occupied the Weighbridge Island site by agreement with the Agricultural and Fisheries Committee. It was always made clear that this was temporary accommodation (EXHIBIT "TB1"). Following successful production trials TPL were offered the opportunity to become commercial suppliers of iceberg lettuces to a major UK supermarket.

In addition TPL learned that the same supermarket chain was proposing to phase out the purchase of Jersey Royal Potatoes because of dissatisfaction with local suppliers. TPL were invited to supply 10% of the supermarkets requirements of those potatoes on a trial basis. This was successful and TPL's share of this business has now grown to 85%. This business is currently worth approximately £3 million. In commercial terms I believe that Jersey Agriculture could not survive without access to this market.

In February of 1994 TPL became a subsidiary of the Company which then and now owns 56% of the shares in TPL. Both the Company and TPL are directly run and managed by my sister and me. The Company currently packs its own produce and sufficient produce from other growers through TPL to meet the quality and quantity requirements of its customers.

3. It is important to understand that the business of the Company is the supply of agricultural produce in bulk. The Company's customers are exacting in their requirements and, for example, supermarket chains require suppliers such as the Company to comply with high standards relating to produce pre-cooling facilities, extensive staff facilities, shelf life trial facilities, versatile low impact grading equipment, staff training in agronomy, hygiene and first-aid. I give these examples to illustrate the fact that the Company's customers require very high standards from their suppliers which includes the purchase of produce at certain times and in substantial quantities. If we are unable to provide sufficient bulk of produce at the required times to our customers then we will lose their business and the Company will no longer be able to conduct its business. The ability to sell in bulk is absolutely essential to the Company".

This evidence was supplemented by a further affidavit of Mr. Binet which, without objection on behalf of the IDC, we allowed the company to put in during the hearing in this Court. We quote from it:-

"2. Fairview Farm Limited ("FFL") is a farming company and has no other business activities. Top Produce Limited

("TPL") is a marketing company which markets agricultural produce and enters into agreements with supermarkets and the wholesale market for the supply of that produce. Those customers require the produce to be supplied in bulk and packed in an approved pack house.

3. FFL currently owns 56% of the shares in TPL. There are approximately 6 other shareholders. Farmers can be members of TPL without being shareholders.

4. As part of its farming operation FFL packs its own produce in the Shed in Field 673 ("the shed"). No crops are ever packed in the Shed which do not in part come from FFL's land. TPL does market some crops which are not grown by FFL but these are never packed in the Shed.

5. FFL grows the following crops which have been or will be packed in the Shed in 1996. The percentage of these crops grown by FFL is as follows:-

Potatoes	*30-35%*	*Mid April to mid July*
Lettuce	*75%*	*Mid October to mid November*
Spray carnations	*100%*	*Mid August to mid November*
Spring greens	*100%*	*November to March*
Strawberries	*100%*	*Early July to September*
Daffodils	*98%*	*December to April*

It should be noted that the potato crop occupies the highest volume and value of activity. The ability to supply potatoes in bulk is a pre-requisite to orders being placed by our customers for the other crops.

6. If the conditions as drafted remain TPL will not be able to fulfil its contracts for the bulk supply of potatoes and FFL will lose its customers for this crop. As a consequence FFL would I believe lose its access to the same market in respect of all other crops as it is only the ability to provide potatoes in bulk and to the requirements of the Supermarket customers that allows FFL to supply to those customers generally.

7. FFL has no facility for packing elsewhere to the required volume and standard for FFL to retain its customers.

8. FFL does not operate a packing business and all its packing activities are undertaken to further the sale of its farm produce. It packs only for itself and for members of TPL".

To these passages we need only add that counsel told us that, when the company packs produce of other members of TPL, it does so at cost.

17. To resume the narrative of events, Mr. Binet, Miss Rose Binet and their solicitor (Mr. Bisson) attended the meeting of the IDC on the 19th May, 1993. The President of the Committee, as recorded in the minutes:-

"expressed concern that produce from other farms would be packed there, while the original planning permission was given in respect of Fairview Farm only".

Mr. Binet and Mr. Bisson described the business of the company and TPL's place in it. When the President suggested that the company would not be allowed to pack produce from other growers, Mr. Binet replied that he could, and often did, buy crops standing.

18. The IDC met again on the 27th May, 1993. We quote from the minutes:-

"The Committee reaffirmed its opinion that it would not allow Top Produce to use Fairview Farm facilities, in particular as the States had been against this eventuality, and because this had not been part of the planning application approved by the Committee in 1986".

The Committee did not reach a decision on the application, but decided to invite representatives of the Maufant Residents' Association, who had asked for an opportunity to meet the Committee, to come to the next meeting.

19. The next meeting took place on the 3rd June, 1993. Two representatives of the Residents' Association and their solicitor attended, and expressed 'the fear that Top Produce would use the packing shed by one means or another'. The President said, in the presence of this delegation, that:-

"any consent given would relate to Fairview Farm only, as indicated on the planning permit, and such a consent would have to be carefully thought out and referred to the Attorney General, to ensure that it was reasonable, and enforceable".

20. By the 17th June, 1993, the IDC was at last approaching a decision. It decided on that day that:-

"it was minded to approve development permission to effect the spirit of the planning permit issued, with safeguards to protect the residents living to the north".

The first of these 'safeguards' was:-

"the Committee reiterated the original condition that the buildings be for the use of Fairview Farm Ltd and considered that it should restrict the use of the packing shed to produce grown on Mr. Binet's land only, to remove the potential loophole that crops bought 'standing' could legitimately be packed there".

The Committee decided to seek the guidance of the Law Officers about the wording of the permit and conditions, and to make a statement of its proposed action to the States.

21. On the 21st June, 1993, the IDC wrote to Mr. Binet telling him of the 'stance' taken on the 17th June. The first 'safeguard' quoted above appeared in the letter in this form:-

> *"[The Committee] insist that the use of the packing shed will be for Fairview Farm Ltd only. This means that they see the activities taking place within the shed being restricted to produce grown on land belonging solely to Fairview Farm Ltd and not to any third party".*

The company's solicitor replied on the 16th July, 1993, that to impose such a condition would be unreasonable and improper.

22. The statement which the IDC had decided to make to the States was made by the President on the 27th July, 1993. Two points of interest arise on the statement. First, the President said:-

> *"The debates in the House had identified a number of issues on which Members were agreed -*
>
> *(i) ...*
>
> *(ii) that the States were opposed to a commercial packing operation handling produce beyond that generated by the land owned or rented by Fairview Farm Ltd ..."*

Secondly, it is fair to the IDC to note that it was clear from the statement that their task had been complicated by the adoption by the States of the proximity proposition on the 14th May, 1993 (paragraph 14 above). That proposition had been debated and adopted on the very day on which it had been presented. The States had suspended standing orders to enable this to be done. The Committee had therefore had no chance before the debate to consider the proposition and advise the States about its implications. When they did come to consider it, they found, as explained in the report, that it raised both planning and legal difficulties, so that they were not able to implement it.

23. The condition limiting the use of the packing shed, which the IDC intended to include in the planning permit, appeared in the statement in this form:-

> *"that the packing shed shall be used solely for the packing of produce from Fairview Farm Ltd. That is to say, that all produce packed on site derives solely from land owned or rented by Fairview Farm Ltd to prevent an escalation of packing activity beyond that arising directly from Fairview Farm Ltd".*

24. On the 5th August, 1993, the IDC considered and accepted draft conditions prepared in the Law Officers' Department. In this draft, the condition about the packing shed took this form:-

> *"the packing shed should only be used for the packing of agricultural produce grown or cultivated on or from the relevant land and not for the packing, processing or other commercial handling whatsoever of anything grown,*

cultivated or otherwise manufactured or produced elsewhere except that which was necessary for, or incidental to, the packing of agricultural produce grown or cultivated on or from the relevant land.

(NB. In this consent "the relevant land" meant the land to which this consent related and such other land as was at the date hereof owned or leased by the Applicant (or by a company of which he was the beneficial owner) and used by him for or in connection with agricultural production".

25. The planning permit was finally issued on the 9th August, 1993. It was for the construction of three agricultural sheds and staff accommodation, but did not extend to the proposed stock building. It included the conditions which the IDC had accepted on the 5th August. A development permit, limited to the packing shed and refrigerated area, was issued on the 15th December, 1993. The condition about the packing shed included in the planning permit appeared also in the development permit, with the substitution of '9th August, 1993' for 'the date hereof' in the second paragraph. We shall call it 'the use condition'.

26. The company appealed to the Royal Court, under the Island Planning (Jersey) Law, 1964, Article 21, against the use condition in each permit. The grounds of appeal included in both cases the contention that the inclusion of the use condition was 'capricious, inconsistent and unreasonable in all the circumstances of the case'.

27. The appeal to the Royal Court relating to the development permit was heard on the 26th and 27th July and the 5th October, 1995. The Court delivered judgment on the 9th November, 1995, allowing the appeal and deleting the use condition from the development permit.

28. By their notice of appeal to this Court, the IDC asked that the company's appeal against the conditions should be dismissed, or, if it was not, either the matter should be remitted to the IDC for reconsideration or the permit should fall.

29. The use condition shows the hand of a legal draftsman. There can be no complaint of this, for it was desirable that the company's rights should be precisely defined, and for this purpose legal style and language may be useful. It does mean, however, that the condition demands careful attention before revealing fully what it allows and what it does not.

30. In the first place, the condition will not allow the company to pack in the shed all even of the produce which it grows on its own land or land leased to it. It allows the shed to be used only for produce grown on land which was owned by the company or leased to it on the 9th August, 1993. Mr. Binet explained in his first affidavit that the land used by the company (what he called 'the company's land base') changes every year, because 'most of the company's land use comes about as a result of annual tenancies agreed verbally'. It may therefore be taken as almost certain that some of the land leased to the company in 1996 was not leased to it in 1993, and obedience to the use condition would prevent the

company from packing in the shed produce grown on that land - even if the whole area of land cultivated by the company was less than in 1993.

31. Secondly, in other circumstances, the use condition would not prevent the company from increasing substantially the amount of produce packed in the shed. Mr. Binet said in his first affidavit that approximately 30% of the 'relevant land' was used as pasture for cattle. If that land were changed from pasture to cultivation, the use conditions would allow the company to pack its produce in the shed. If, on the other hand, that land were kept as pasture and an equal area of new land were obtained and put under cultivation, the produce of that new land could not be packed in the shed.

32. Thirdly, in certain circumstances the use condition would even allow the company to pack in the shed produce grown by another grower, unconnected with TPL, on land owned by him. This would happen if that land had been leased to the company and used by the company for agricultural production on the 9th August, 1993. Such land, even when taken in hand again by its owner, would be 'relevant land' as defined by the condition, and produce grown on it could be packed in the shed.

33. Fourthly, the use condition would prevent the company from packing in the shed crops bought standing. Indeed, according to the IDC's minutes of the 17th June, 1993 (paragraph 20 above), this was part of the deliberate purpose of the IDC. As Mr. Binet explained in his first affidavit, the company supplies produce in bulk to supermarkets, which require 'the purchase of produce at certain times and in substantial quantities'. The company may expect a certain crop to yield 500 tons (we take figures purely as a example) and in that expectation may include a bulk contract. The crop may in fact yield only 450 tons. The obvious remedy is to buy enough standing produce to make up 50 tons. The company can do this, but if so the use condition will prohibit the packing of the 50 tons in the shed; yet, if the company's own crop had come up to expectation, the shed could have been used for packing all 500 tons.

34. These examples of the inconsistent and capricious working of the use condition are quite enough to show that the condition would be unreasonable in its operation. We now go on to consider some features of the procedure by which the IDC came to adopt it.

35. The planning permit and the development permit issued in 1986 were both subject to the condition that the buildings be used 'for agricultural purposes only, in association with the farm hereby approved'. It is clear that the IDC had this in mind when they came to consider the renewed application of 1992. At the meeting held on the 19th May, 1993, the President:-

> *"expressed concern that produce from other farms would be packed there, while the original planning permission was given in respect of Fairview Farm only".*

When the IDC wrote to Mr. Binet on the 21st June, 1993, to explain their intentions, they said that packing in the shed should be:-

> *"restricted to produce grown on the land belonging solely to Fairview Farm Ltd and not to any third party".*

In the statement made by the President to the States on the 27th July, 1993, this proposal was refined further in these words:-

> *"all produce packed on site derives solely from land owned or rented by Fairview Farm Ltd to prevent an escalation of packing activity beyond that arising directly from Fairview Farms Ltd".*

36. It thus appears that it was the consistent intention of the IDC that the shed should be available for the packing of produce grown on land owned or rented by the company. There is no sign that the IDC ever contemplated that the company would be prevented from packing in the shed produce grown on part of the land owned or rented by the company itself. As we have already shown by examination of the terms of the use condition, in any year after 1993 it would have precisely that effect. The decision to impose the use condition was thus unreasonable in the sense that the condition does not carry out the intention of the IDC. (In certain circumstances, the condition would actually allow the packing in the shed of produce of other growers: cf. paragraph 32 above. This also would be contrary to the intention of the IDC).

37. The President of the IDC observed, in his statement of the 27th July, 1993, that debates in the States had shown:-

> *"that the States were opposed to a commercial packing operation handling produce beyond that generated by the land owned or rented by Fairview Farm Ltd".*

There is an assumption here that inclusion of produce of other growers must necessarily make the packing a commercial undertaking inappropriate to agricultural land. We do not think that so simple a distinction can be drawn.

38. If a man grows no produce and carries on business solely by packing and marketing produce grown by others, it may be accurate to classify his business as commercial rather than agricultural. On the other hand, if a grower packs and markets his own produce, his whole business, in our judgment, is agricultural. The packing and marketing are ancillary. The company carries on business in a way between these two. It grows its own produce and packs and markets it, but, in order to market it to best advantage, may pack with it some produce of other growers, and TPL then markets the whole together under bulk contracts. Whether this whole business was a commercial or an agricultural activity was an important question for the disposal of the company's application, but the IDC did not consider it.

39. It may be that the IDC's attitude on this point was influenced by the case of La Solitude Farm Ltd -v- IDC (22nd April, 1985) Jersey Unreported. The Royal Court there held that:-

> *"where a farmer or grower buys produce from other farms for storage in, or re-sale from, his farm building, then he is no longer using those buildings for agricultural purposes in the ordinary meaning of those words, but he is indulging in the activity of buying and selling, and that is a food wholesaling use".*

The facts of that case seem to have been that La Solitude Farm Ltd was growing and selling its own produce and also buying the produce of other farmers and separately selling that. For present purposes it is not necessary to consider whether on those facts the case was rightly decided. It cannot be an authority for the decision of this case, the facts of which are materially different. The company does not buy produce of other farms and sell it separately from its own. In order to get the best market for its own produce, it packs (at cost) some produce of other farms associated with it in TPL so that that produce and its own produce may be sold together under bulk contracts.

40. The Royal Court criticised the IDC for making 'no enquiries as to the tenure or extent of the company's land nor did it carry out a survey of traffic movements'. By imposing the use condition, the IDC was limiting the use to be made of the shed by reference to the land owned or leased by the company on the 9th August, 1993. It was in our judgment unreasonable to decide to do this without any attempt to find out what the effect of the restriction was likely to be in future years. If the IDC had asked the company about this, they would have discovered that the use condition would have the irrational consequences described in paragraph 30 above. As to traffic movements, the Solicitor General submitted that the IDC was entitled to assume that what she called 'use of the shed by TPL' would generate traffic, but conceded that it would have been better if the Committee had made some enquiry. No enquiry having been made, Mr. Le Cocq was, in our judgment, right in submitting that the Committee did not know whether the effect upon traffic of omitting the use condition would be catastrophic or trivial. It was unreasonable to come to a decision in such a state of ignorance.

41. It is true that the company might have taken the initiative in giving to the IDC information upon these two matters, but it had no reason to do so until it knew the terms of the use condition. This condition was first adumbrated to it by the IDC's letter of the 21st June, 1993. It was then stated as something upon which the Committee 'insist', and the company was not asked for comments or suggestions, but only for 'any questions'. In fact the company's solicitor had already said at the meeting of the 19th May, 1993, that he *'did not feel that there would be a material difference in the amount of traffic in and out of the farm unit if Top Produce did use the packing facility'.*

42. Another of the Royal Court's criticisms of the IDC was this:-

> *"it took into account the debate in the States which was not something it was entitled to do unless it had received clear instructions (in so far as the States may instruct a*

Committee) on the question of allowing others to pack produce at the farm unit apart from the company".

As the IDC pointed out in paragraph 3.3 of the President's statement of the 27th July, 1993, the responsibility of deciding upon planning applications is placed (by Articles 5 and 6 of the Law) not upon the States but upon the Committee. Nevertheless, if the States sees fit to express a view upon some question relevant to a planning application, there is no reason why the Committee, without in any way abdicating that responsibility, should not take that view into account. However, the States can express a view only in one way - by a proposition properly adopted. At its meeting of the 27th May, 1993, the IDC

"reaffirmed its opinion that it would not allow Top Produce to use Fairview Farm facilities, in particular as the States had been against this eventuality".

No material was put either before the Royal Court or before us to show that the States had ever adopted any proposition in this sense. It therefore seems that the IDC must have been relying on remarks made by members in the course of a debate. We respectfully agree with the Royal Court that this was something which the Committee was not entitled to do.

43. (We should add that the Royal Court also criticised the IDC for paying `insufficient regard to the Agriculture and Fisheries Committee's report which recognised the interest of Top Produce Ltd in packing at the unit'. In out judgment this criticism was not justified. The reference is to the report of the 27th July, 1993. That report does contain a reference to the need for `a modern shed with packing facilities for the farm produce and that of Top Produce'. The purpose of the report, however, was not to express any view about the use of the shed, but to support a proposition that the States should request the IDC to consider the company's application immediately. Whether the IDC paid any attention to this incidental reference to TPL it is impossible to tell. If they did, this may not have been improper; but they were under no obligation to do so).

44. For the various reasons which we have stated, the decision of the IDC to impose the use condition was in our judgment unreasonable. The question then arises of what relief should be granted to the company. The Royal Court removed the condition from the development permit. The Solicitor General submitted that this was wrong; the Court should not simply have left the permit to take effect without the unreasonable condition, but should either have declared the whole permit invalid or have remitted it to the IDC to consider whether to impose any substituted condition.

45. Article 21 of the Island Planning (Jersey) Law, 1964 reads, so far as relevant for present purposes, as follows:-

"Any person aggrieved by the refusal of the Committee to grant permission under Article 6 of this Law, or by any condition attached to the grant of any such permission ... may appeal ... to the Royal Court ... on the ground that

the decision of the Committee ... was unreasonable, having regard to all the circumstances of the case".

The Law says nothing about powers exercisable by the Royal Court on such an appeal.

46. The Royal Court's view of its function under Article 21 is set out in Taylor -v- IDC (1969) JJ 1267, 1280:-

"The view which this Court takes of the way in which it must consider appeals made to it under the provisions of Article 21 of the Law is well established. The Court must satisfy itself:-

(1) that the proceedings of the Committee in relation to the application, the rejection of which gives rise to an appeal are, in general, sufficient and satisfactory;

(2) that the decision was one which the Law empowered the Committee to make; and

(3) that the decision reached by the Committee was one to which it could reasonably have come having regard to all the circumstances of the case.

It has not been suggested that the decision of the Committee was not one which the Law empowered the Committee to make.

As regards the third of the above matters about which the Court has to be satisfied, it is also well established that, firstly, the Court, in considering such matters, will not substitute its own opinion for that of the Committee, and secondly, because an extension of development is permitted in one place that does not necessarily mean that a similar extension must be permitted in another".

47. The test stated by the Royal Court in paragraph (3) above is the test established in England by the Court of Appeal in the famous case of Associated Provincial Picture Houses Ltd -v- Wednesbury Corp (1948) 1 KB 223. That was an action for a declaration that a condition attached to a licence granted under the Cinematograph Act, 1909 was *ultra vires* and unreasonable. Lord Greene, MR discusses in his judgment the powers exercisable by the Court in an action for a declaration. He summarises the principle in the words (at pp.233/4:-

"The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have

kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them".

Earlier in his judgment, Lord Greene had said this (at p.228):-

"When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of the discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal".

48. The emphasis placed by Lord Greene on the court not being a court of appeal illuminates the difference between that case and the present. When the Court in England is dealing with an action for a declaration or an application for judicial review, it does not sit on appeal from the planning authority, and is concerned only to see whether the authority has reached its decision in a lawful manner. Here the Royal Court does sit on appeal from the Planning and Environment Committee, and has to form its own view whether the Committee's decision is reasonable.

49. Here a second distinction arises. What is meant for this purpose by 'reasonable'? Lord Greene gave his answer at p.230:-

"... if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere ... I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether".

50. The Royal Court is a court of appeal under Article 21. As Lord Greene observed in the first of the passages which we have quoted, the power of an appellate body is to override the decision of the inferior body. He contrasted this with a power to see only whether the inferior body had exceeded its powers. The Royal Court, as an appellate body, must consider not merely whether the inferior body has followed correct procedure, but whether its own view is that the decision was unreasonable. It may allow whatever weight it thinks proper to the experience and knowledge of the inferior body, but it cannot escape the responsibility of forming its own view.

51. In our judgment, therefore, the statement of the Royal Court in paragraph (3) on p.1280 of Taylor -v- IDC was wrong. The duty of the Court on an appeal under Article 21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach, but to decide whether the Court considers that that decision was, in its view, unreasonable.

52. The Law does not say what powers the Royal Court may exercise if it allows an appeal under Article 21. Clearly it must have power on an appeal against a condition to order that the condition be removed from the permit. The question then arises whether, the condition having been removed, the permit should remain effective without it, or remain effective with a modified condition, or be totally set aside, or be remitted to the Committee.

53. Counsel cited before us three English cases in which the courts, having held a condition attached to a consent to be *ultra vires*, went on to consider whether the consent could be left standing shorn of the condition: Hall & Co Ltd -v- Shoreham-by-Sea UDC (1964) 1 All ER 1, Kent CC -v- Kingsway Investments (Kent) Ltd (1971) AC 72, and Allnatt London Properties Ltd -v- Middlesex CC (1964) 62 LGR 304. In the Kingsway Investments case, Lord Reid said (at p.89-90) the critical question was whether the condition was severable. He went on:-

> ***"[If] a condition, although invalid because ultra vires or unreasonable, limits the manner in which the land can be developed, then the condition would not be severable, for if it were simply struck out the result would be that the owner could do things on his land for which he never in fact obtained permission".***

That reasoning appears to us to be equally applicable to a case arising here under Article 21. Moreover, the use condition is a condition of the kind which Lord Reid describes. It 'limits' the manner in which the land can be developed', because it limits the extent to which the land can be used for packing produce. If it were simply struck out, the company could use the land for packing without any limit, which would be something for which the company 'never in fact obtained permission'.

54. The conclusion drawn in the English cases is that in such a case the whole condition must fall. Here, in our judgment, the authority of those cases is not applicable here. The reason is that the powers of an English court in an action for a declaration are narrower than the powers of the Royal Court in an appeal under Article 21. The English Court has no power to re-write the condition: see the judgment of Willmer, LJ in the case of Hall & Co at p.10C. The Royal Court, by contrast, has power to reach its own decision of what would be a reasonable condition. It follows that in an appropriate case it can re-write the condition in what it considers to be a reasonable form. The English court cannot, in an action for a declaration, remit the case to the planning authority. The Royal Court can - as it did in Taylor -v- IDC.

55. We should have been glad if we had felt able to decide that in this case we should proceed to settle a reasonable condition. We say

this because we respectfully share the view taken in the Kingsway Investments case by Lord Upjohn (at p.114) that any injustice which the decision would do to the applicant is an important consideration for the Court. We agree with Mr. Le Cocq's submission that the company has already suffered hardship from the considerable delay of the IDC in dealing with the application, which was largely due to the failure to separate issues arising in the argument about smell from the quite different issues raised by the present application. To this has been added the burden of litigation made necessary because the IDC came in the end to an unreasonable decision. It will be a further hardship if the litigation does not settle the matter and the company is left facing complete *de novo* to arrive at a reasonable condition.

56. In spite of these circumstances, we are driven to the conclusion that this is not an appropriate case for this Court itself to frame a condition. Any substituted condition will have to be reasonable in all the circumstances of the case. Part of the vice of the use condition is that the IDC imposed it without knowledge of all the relevant circumstances (see paragraphs 40 and 41 above). Information on some points has been put before us which was not before them, but we do not think we can claim to have adequate knowledge of all the circumstances relevant to the question of a new condition. It is a particularly important circumstance that the packing shed has been in full use by the company since April, 1994. We have no information on the significant questions whether this use has affected the amenities of residents of Maufant to any degree greater than people living in an area of intensive agriculture must expect, and whether any reasonable complaints about the use of the shed have been made during these 2½ years. In his affidavit sworn on the 21st July, 1995, Mr. Binet said he was not aware of any complaints about the operation of the packing shed and the traffic going to and from it.

57. The application, therefore, in our judgment, will have to go back to the Planning and Environment Committee (as it is now styled). However, any hardship to the company will be greatly reduced if we state, for the assistance of the Committee, our view of certain matters properly within our purview which will be relevant to the Committee's decision.

58. The application will be remitted to the Committee, not for re-opening of the decision to grant a development permit, but to enable the Committee to consider again whether any condition limiting the use of the packing shed is necessary, and if so what the terms of the condition should be. In coming to its decision the Committee will be guided by the following conclusions of this Court:-

(a) it is not reasonable to limit the use of the shed to the produce of particular pieces of land owned or leased by the company at a particular date;

(b) it is not reasonable to prohibit the use of the shed for packing crops bought standing in circumstances such as those described in paragraph 33 above;

(c) the use of the shed by the company in the manner described in paragraph 38 above is use for an agricultural purpose;

(d) the company has submitted to us that its business if growing depends upon its survival in new markets which it has penetrated, and this depends upon the co-operative arrangements for marketing which it has made through TPL; it will be for the Committee to consider this argument; if there is any possibility that the adoption of a particular policy, or the imposition of a particular condition, might imperil the future of an important part of local agriculture, that would carry its own implications for the preservation of the countryside and would therefore be a valid planning consideration.

59. On the issue of the reasonableness of the conditions the appeal must be dismissed. The application will be remitted to the Planning and Environment Committee to reconsider consistently with the conclusions stated in this judgment whether a condition limiting the use of the packing shed is necessary and, if so, what its terms should be.

60. At the end of the argument, the Solicitor General conceded that, if the conditions were found to be unreasonable, the IDC should pay the company's costs. We order accordingly.

Authorities

Island Planning (Jersey) Law, 1964: Article 21.

Housing (Jersey) Law, 1949: Article 12.

Herrick -v- IDC (1984) JJ 103 CofA.

Association of Provincial Picture Houses Ltd -v- Wednesbury Corporation (1948) 1 KB 223.

Blackall & Danby Ltd -v- IDC (1963) JJ 273.

La Solitude Farm Ltd -v- IDC (22nd April, 1985) Jersey Unreported.

Hall & Co Ltd -v- Shoreham-by-Sea UDC (1964) 1 All ER 1.

Taylor -v- IDC (1969) JJ 1267.

Alnatt London Properties -v- Middlesex CC (1964) QB 304; (1964) 62 LGR 304.

Kent CC -v- Kingsway Investments (1970) 1 All ER 70; (1971) AC 72.

Williams -v- Minister of Housing and Local Government (1967) 18 P & CR 514.

Ex parte Strangways, Viscount Wimborne (1983) JJ 17.