85/37

In the Royal Court of Jersey

Before: Sir Frank Ereaut, Bailiff.
Jurat M.G. Lucas.
Jurat Mrs. B. Myles.

BETWEEN

La Solitude Farm Limited — Appellant

AND

The Island Development Committee — Respondent

Advocate C.B.T. Thacker for the Appellant.
Advocate Miss S. Nicolle for the Respondent.

On the 11th April, 1983, the Island Development Committee (hereinafter called "the Committee") issued the following notice addressed to La Solitude Farm Limited (hereinafter called "the Appellant") -

"In exercise of the powers conferred on the Island Development Committee by Article 8(1) of the Island Planning (Jersey) Law, 1964, the Committee hereby gives you notice to cease the use of any part of the ground floor of an agricultural building situated at La Solitude Farm in the Parish of St. Martin -

(a) as a refrigerated store for foodstuffs not produced at La Solitude Farm, or

(b) as a store for foodstuffs other than the fresh fruits of the soil of Jersey -

before the 11th May, 1983."

The appellant, being aggrieved by that notice, has appealed against it under Article 21(1) of the Island Planning Law (hereinafter called "the Law")

"on the ground that ... the service of the notice ... was unreasonable having regard to all the circumstances of the case."

That wording is in accordance with the terms of Article 21(1) and is the only ground of appeal for which the Law provides.

The notice was served by the Committee under Article 8(1) of the Law, the relevant part of the Article being as follows -

"If any person develops, or causes or permits to be developed, any land without the grant of permission required in that behalf under this

Law ... the Committee may serve a notice on him requiring such steps as may be specified in the notice to be taken within such period as may be so specified ... for restoring the land to its condition before the development took place ... and in particular any such notice may, for the purpose aforesaid, require ... the discontinuance of any use of land."

Article 5(2) of the Law provides that "development" means (inter alia)

"(c) the making of any material change in the use of any building or other land."

It was agreed on behalf of the Committee during the hearing that paragraph (a) of the Notice was both erroneous and superfluous. Erroneous because the refrigeration of foodstuffs legally stored on premises does not thereby render such storage illegal, in other words, refrigeration is not a change of use for the purposes of the Law. Superfluous because paragraph (b) is in wider terms than (a). The Court is therefore concerned only with paragraph (b) of the Notice.

The issue of the Notice followed a visit on the 20th March to the agricultural building mentioned in the Notice (hereinafter called "the building") by an Inspector of the Committee. He found that the refrigerated store on the ground floor was 90% full of non-Jersey produce, and that the store contained non-Jersey produce and food other than produce of the soil (such as meat and butter).

The case for the Appellant is as follows.

The Law came into force on 1st April, 1965. Before that date, La Solitude Farm had an established dual use for agriculture and for food wholesaling, that is to say, wholesaling food other than the produce of the soil of the Farm. Those activities at the Farm involved the use of a Dutch barn. The Dutch barn was burnt down in 1976, and a new larger building, being "the building" which is the subject of this appeal, was constructed to replace it. At the time the Dutch barn was burnt, the established dual uses at the Farm attached to the whole unit, and continued to do so after the replacement of the Dutch barn by the building. Accordingly, the building had an established use for wholesaling of all food, and the Committee's Notice which sought to restrict the type of foodstuffs which could be stored in the building was unreasonable and should be withdrawn.

The case for the Committee is that the Farm did not have an established use for food wholesaling before the Law came into force. After the Dutch barn had burnt down, the Appellant applied for permission to construct "an agricultural building" on the approximate site of the burnt-out barn, and was granted permission to erect "an agricultural building", being the building to which the Notice relates. Accordingly, the building did not inherit a food wholesaling use and was not granted such a use when consent for its construction was given. The only use to which it could legally be put was for agricultural purposes. Its use for general food wholesaling therefore constituted an unauthorised material change of use, that is to say, unauthorised development.

At the hearing counsel for the Committee said that a material change of use could be of two kinds: first, a change in the kind of use, and secondly, a change of degree or intensification. The Committee based its case on the argument that there had been a change in kind, and not on intensification, although if this appeal were to succeed it might consider a fresh Notice based on alleged intensification.

We deal first with the question whether, as claimed, the Appellant had an established dual use for agricultural purposes and for food wholesaling before the coming into force of the Law on 1st April, 1965.

We heard evidence on this question from Mr. D.E. Wright, the Managing Director and beneficial owner of the Appellant. He told us that in 1959 the Appellant purchased La Solitude Farm, which then consisted of an old farm-house (later burnt down), outbuildings (since converted into four flats), a Dutch barn (later burnt down and replaced by "the building") and some V40 of land. The land was somewhat derelict and it took Mr. Wright two years or so to get it back into cultivation.

In 1960 the farm began to grow a small crop of potatoes, and a larger volume in 1961. In that year the Appellant also began manufacturing tomato trays on the farm (from wood brought in). In 1962 it began buying potato crops

from other Jersey growers, which it graded and bagged on the farm and then sold to greengrocers and chip shops in Jersey. A quantity were exported to England. Mr. Wright said that this was the start of his wholesaling business and the buying of other farmers' potatoes continued. The Appellant also sometimes bought fields of broccoli at auction, and it packed the broccoli on the farm and exported it.

Mr. Wright added that from 1967 the Appellant was recognised as potato wholesalers in an Island context. Before then, the wholesale business was in a much smaller way and not known as such throughout the Island. However, the Farm could not have survived financially without the additional business of buying and selling the potatoes of other growers.

He estimated that between 1962 and 1964 the business of the Appellant consisted of three areas which were roughly equal in cash terms. First, the growing of potatoes and tomatoes on the farm; secondly, the buying and selling, as already described, of potatoes and broccoli not grown on the farm but bought from other Jersey growers; and thirdly, tree felling.

Mr. Wright's desk diary for 1962-1964 was produced to us. It showed only four transactions relating to the buying of fields of potatoes and broccoli, and their sale and export; however, Mr. Wright said that there were many more such transactions during that period, up to one hundred, but they would not have been recorded because they were for smaller quantities and were in cash, as was then the customary practice.

He agreed that his memory of transactions which had occurred many years ago was hazy without documentary confirmation, which was why he had brought along as a witness Mr. H.G. Turner, who had been the Appellant's farm foreman since 1959, and had worked on the farm before then. Mr. Turner agreed that the land was derelict in 1959 but once cleaned up they grew potatoes and tomatoes on it. To help the farm financially they bought fields of potatoes and broccoli, graded, packed and weighed them and then sold them. He said that this was done from the earliest years. In the early years the buying was on a smaller scale, but it later increased considerably.

The veracity of this evidence in relation to the date of the commencement of the Law was challenged by the Committee. On 3rd April, 1981, the Appellant was charged with an offence under Article 8(1) of the Law in regard to the building. The allegation was that between 23rd April and 27th May 1980, the appellant materially changed the use of part of the ground floor of the building by using the same as a refrigerated store for foodstuffs not produced at the Farm. It pleaded not guilty and the case was sent to proof. On 29th June, 1981, evidence was heard and the Appellant was convicted. The conviction is not material to this appeal, but certain of the sworn evidence of Mr. Wright is relevant.

He was asked the date when he first started "wholesaling potatoes in any way": He replied: "I think it was June, 1967, we started in a fairly small way selling our own produce as we were rather fed up with getting the price that merchants etc. were offering". He then agreed that his invoice book went back to July, 1967, and the original book was produced. Later he was asked where the potatoes which he was selling were grown. He replied: "It is difficult to remember now, but for the first 2 or 3 years we were selling our own and possibly some neighbour's, and then obviously came the years when there weren't enough locally and we imported them from Scotland and parts of England". He agreed when his questioner asked: "So then we're talking about importing and wholesaling of potatoes back in 1970/71, that sort of time."

When giving evidence before us, Mr. Wright was, not surprisingly, cross-examined about these answers and was asked to reconcile them with his statements to us that he began wholesaling of potatoes and broccoli before 1965. He explained that at the time of the trial in 1981, he had not realised nor been advised that 1965 was the critical year and had therefore not searched his records fully. Since then he had checked and found that his invoice books went back to only 1967. Such Cash Books as existed before then had been disposed of, but most transactions in the early years were for cash without anything in writing. He repeated that before 1965 the buying of potatoes from other growers and storing and then selling them from the Farm constituted about

one third of the Appellant's business. The Appellant could not have survived without that dimension to the business.

Counsel for the Committee asked us to find that there was no convincing evidence that any buying of potatoes and broccoli from other growers had taken place before 1965, or alternatively, that if it had it was on such a small scale as to be "de minimis", and therefore to be ignored. We were referred to "Planning Law and Practice from the Decisions", 6-103, which cites a few cases where a use which has been carried on briefly has been regarded as "de minimis" and not therefore amounting to a material change of use. As that paragraph states, the facts are not very clear from the decisions.

The burden of satisfying us as to any facts on a balance of probabilities lies on the Committee. We find on the evidence that there was before 1965 a level of buying by the Appellant of potatoes and broccoli belonging to other Jersey growers, and that such produce was stored at and sold from the Farm, and that that level of activity was sufficiently substantial as not to be regarded as "de minimis".

Counsel for the Committee then argued that if we were to come to the above conclusion on the evidence, we should nevertheless conclude that the buying of locally grown fruits of the soil was an activity which came within the meaning of a use for "agricultural purposes" and did not establish a change of use to "wholesaling purposes". Counsel cited the reasons given by the Royal Court when convicting the Appellant in the prosecution in 1981 already referred to. The Deputy Bailiff then interpreted "agricultrual purposes" as meaning

> "connected with the use of the soil on the farm or even possibly ... by a liberal extension of produce in the Island, but no further".

Counsel asked us to find that an established or permitted use for "agricultural purposes" meant a use connected with the use of the soil of the farm and also with the produce of the Island, in other words, that a building which was being used to store produce of the Island bought in from other growers for later re-sale was being used for "agricultural purposes" and not for wholesaling.

It was not necessary for that Court, for the purpose of giving its reasons for convicting, to consider with any precision whether the definition of "agricultural pruposes" should be extended beyond the use of the soil of the Farm of which the building in question formed a part, and we therefore regard the words of the Deputy Bailiff as "obiter", as indeed is clear from his use of the words "or even possibly". That case is not, therefore, strong authority for counsel's argument.

Mr. R.B. Skinner, of the Island Planning Office, gave evidence as to the views and practice of the Island Development Committee concerning this issue. The Committee regarded the use by a grower of his own outbuildings for the storage and sale of his own produce as coming within the authorised use of a building for "agricultural purposes".

He added that the Committee was aware that buying and selling of produce betweens farms took place. Where a grower bought another's produce and stored it in his outbuildings to re-sell, such use of an out-building which had an authorised use for agricultural purposes only was strictly outside such authorised use. However, the Committee exercised a discretion not to intervene where such buying was on a small scale and could be reasonably regarded as ancillary to the primary use of the building as a farm or part thereof. Where, however, the buying and selling was on a large scale, so that the wholesaling ceased to be ancillary and became the main purpose, then the Committee did intervene.

It clearly emerges from that evidence that the Committee does draw a distinction, as regards the authorised use of an agricultural building, between the storage and sale of produce from the farm of which that building forms a part and produce bought in from elsewhere.

That same distinction was made in the case of Williams -v- Minister of Housing and Local Government (1967) 18 P & C.R., 514, where a person who had a nursery garden and sold his own produce from a building in the garden began selling imported produce (amounting to about ten per cent of the business). The Court held (inter alia) at p. 515 -

"That the primary use of the premises before the activities complained of was a use for agriculture, which included as an incident of that use the provision of facilities for selling the produce of the land, and that although the quantitative change which had taken place in regard to the activities which took place on the land was small, there was a significant difference between a use which involved selling the produce of the land itself and a use which involved importing goods from elsewhere for sale, and since, in the Minister's view, that change could not be dismissed as "de minimis", he was entitled to find that there had been a material change of use which constituted development for which planning permission was required."

We agree that an established or authorised use for agricultural purposes must reasonably include the storage and sale of the produce of the farm of which the building forms a part. However, we also consider that the principle set out in the Williams case above equally applies to the distinction between the use of a farm building for the storage and sale of produce grown on the farm and the use of that building for the storage and sale of produce imported on to the farm for such purpose, and that therefore, unless it is "de minimis", such latter use does constitute a material change of use, which has been well described as meaning "a change which is significant to planning considerations - a change which matters from the point of view of planning requirements." In our view, where a farmer or grower buys produce from other farms for storage in, and re-sale from, his farm buildings, 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, unless of course the activity can be dismissed as "de minimis".

We have considered whether it is possible to hold that an established or authorised use for wholesaling potatoes, tomatoes and broccoli, for example, can be restricted to "fruits of the soil". Mr. Skinner told us that for planning purposes there were no sub-divisions of food wholesaling and that an established

or authorised use as above entitled the beneficiary of that use to deal in all types of food, including meat and butter. Counsel for the Committee asked us to disregard that opinion as not describing the correct legal position, but the position as put by Mr. Skinner seems to us quite logical.

We are of course only dealing with an allegation that there has been a material change in the kind of use, and we are not concerned with a change by intensification. We therefore have to ask ourselves whether the storage and wholesaling of meat, butter and, say, eggs, (none of which comes within the meaning of "fruits of the soil") on the Farm constitutes a material change in the kind of use from the storage and wholesale of "fruits of the soil" only. It might be possible to make such distinction on the ground that imported fruits of the soil were similar in kind to the produce grown on the farm itself, whereas the other foodstuffs, namely, meat, butter and eggs, were not. However, that distinction would become very blurred in the case of milk or eggs if the farm kept cows and hens. We think that the proper test lies in the distinction between agricultural purposes and buying and selling (or wholesale) purposes, and that the nature of the foodstuff concerned is immaterial.

It is convenient at this stage to consider also whether there is a material change in the kind of use between the wholesaling of food imported on to the Farm from other parts of Jersey and the wholesaling of food imported from outside Jersey. It is necessary to consider this because the Notice restricts the use of the building to "the fresh fruits of the soil of Jersey". It may be economically desirable to encourage the sale and consumption of locally produced foodstuffs, but we cannot see that this economic aspect is a proper planning consideration. Imported food from outside Jersey will necessarily often be frozen, such as meat or butter, but we have already said that refrigeration is not a relevant factor in this case. We have little doubt that what concerned the Committee in this case was to seek to stop, and indeed to reverse, what it considered to have been an unauthorised intensification of the wholesale

use of the building. However, we are not concerned with a change by intensification, but only with a change in the kind of use. From the planning point of view we can see no difference between locally produced food and food imported from outside Jersey.

As regards the first question, therefore, we have concluded that the Appellant had an established use for the wholesaling of all food at the Farm before the commencement of the Law.

We next consider the second question, that is to say, whether, as contended by the Appellant, the building shared the established use rights of the rest of the Farm, including, of course, the Dutch barn which it replaced, so that the Committee acted, in effect, "ultra vires" in seeking to restrict the scope of its authorised use by the Notice, or whether, as contended by the Committee, the building should be treated as a new planning unit, starting with a nil use, so that its authorised use was therefore limited to that for which the Committee's permission was given, which in this case, it is alleged, was "agricultural purposes" only.

We begin by setting out the law on this matter. A number of cases were cited to us, by both parties, but we find that all the relevant English cases were clearly summarised in the judgment of Lord Denning in Jennings Motors Ltd. -v- Secretary of State for the Environment, 1982 1 Q.B. 541, the relevant extract from which begins at p. 549 -

> "We have been referred to all the cases. They disclosed two theories. The one is the theory of the "new planning unit". The other is the theory of the "new chapter in planning history". I will consider each theory separately.
>
> "The new planning unit".
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> "According to this theory, when a man applies for permission to erect a new building, either where none existed before, or to replace an old building, he creates a "new planning unit". He can use it for any purpose specified in the permission, or, if no purpose is specified, for the purpose for which it was designed to be used (see section 33 (2) of the Town and

Country Planning Act 1971), subject to any conditions contained in the permission. If he erects a new building without any permission at all, he starts with a nil use, and must get permission for any use. Once he erects that new building, he cannot fall back on previous existing use rights. This theory was stated by Widgery L.J. in Petticoat Lane Rentals Ltd. -v- Secretary of State for the Environment (1971) 1 W.L.R. 1112. In that case the new building covered the whole site. Widgery L.J. said, at p. 1117:

"...in my judgment one gets an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use ..."

In the later case of Aston -v- Secretary of State for the Environment, April 9, 1973, Lord Widgery C.J. applied it to a case where the new building covered only part of the site - just about half the site. He said:

"... where you have a new building erected, that part of the land which was absorbed in the new building and covered by the new building is merged in it, you start with a new planning unit which has no permitted planning uses except those derived from the planning permission, if any, and from section 33(2) of the Town and Country Planning Act 1971, which allows such a building in many instances to be used for the purpose for which it was designed."

That theory was accepted by Lord Fraser of Tullybelton in Newbury District Council -v- Secretary of State for the Environment (1981) A.C. 578,606, in the House of Lords, when he said:

"The only circumstances in which existing use rights are lost by accepting and implementing a later planning permission are, in my opinion, when a new planning unit comes into existence ..."

This theory has been extended by some observations in the House of Lords to a case where a man applies to change the use of a building so as to make it available for occupation for several families. If he acts on the permission and makes the change - by putting in internal partitions

and doors - then he creates a "new planning unit". He must abide by any conditions inserted in the permission. He cannot fall back on previous existing use rights: see the Newbury District Council case (1981) A.C. 578, per Lord Fraser of Tullybelton at p. 607, and at p. 618B, per Lord Scarman.

"A new chapter in planning history"

According to this theory, when a man applies for permission to erect or alter a building - or to make a change in the use of land - in such circumstances as to effect a radical alteration in the nature or use of the site - then it may be interpreted as the opening of a "new chapter in the planning history". If he then acts on the permission - and erects or alters the building or changes the use of the land - he must abide by the conditions on which the permission was given. He cannot afterwards revert to any previous existing use rights. This theory was stated clearly by Lord Parker C.J. in Prossor -v- Minister of Housing and Local Government (1968) 67 L.G.R. 109. In that case a garage proprietor applied for planning permission to erect a new building on part of the site to replace an existing repair shop. He was granted permission on the condition that no retail sales were to take place in the new building. The garage proprietor afterwards claimed that he had existing use rights for selling motor cars. Lord Parker C.J. said, at p.113:

"... Assuming ... that there was at all material times prior to April 1964 an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used..."

This theory was restated by Lord Lane in the Newbury District Council case (1981) A.C. 578, 626:

> "The holder of planning permission will not be allowed to rely on any existing use rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site

to an end and to start a new one."

The difference in the two theories.

In many cases the two theories give the same result. Thus in the Newbury District Council case (1981) A.C. 578, there was no new building at all. The two hangars remained the same throughout. So there was no "new planning unit". Equally the use of those hangars remained substantially the same throughout for storage purposes. So there was no "new chapter of planning history." Lord Lane said, at p. 626:

> "The change of use from repository to wholesale warehouse could not by any stretch of the immagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended."

But in some cases the two theories give different results. Thus, where an old building is pulled down and a new one put in its place, there is no "new planning unit". But the change of use may be so radical that the new use to which the building is put may open a "new chapter in planning history." That is what happened to Prossor's case, 67 L.G.R. 109. The new use was for a repair shop and stores. The existing use (on which the occupier relied) was for the display of secondhand cars for sale. The repair shop was so radical a change that it opened a "new chapter in planning history."

In the Aston case, April 9, 1973, and in our present case the two theories give different results. In each case there was a new building on part of the site, and thus a "new planning unit." But in neither case did the new use open a "new chapter in the planning history." I think that the Aston case was wrongly decided, so also the decision of the Divisional Court in this case which followed it.

Result.

In the light of experience, I think we should discard the theory of the "new planning unit." In future it should no longer be thought that a new building creates a "new planning unit" which starts with a "nil use." Certainly not when it is just the replacement of an old building.

The better theory is the opening of a "new chapter in the planning history." This may take place when there is a radical change in the nature of the buildings on the site or the uses to which they are put - so radical that it can be looked upon as a fresh start altogether in the character of the site. If there is such a change and the occupier applies for permission and gets it subject to conditions - and acts upon that permission - he cannot afterwards revert to any previous existing use rights."

As regards the relevant facts of this case, on 21st June, 1977, an application was made to the Committee on behalf of the Appellant for permission to construct an "agricultural building" (being the building to which this appeal relates) to replace the burnt out barn. Against the query on the form: "Proposed use of buildings or land", the answer given was: "Potato packing, washing and grading." On 28th July, 1977, the Committee gave consent for the erection of an "agricultural building."

Giving evidence, Mr. Skinner stated that the application was not accompanied by any supporting documents and that the Committee assumed that the purpose as stated in the application form correctly described the permanent use to which the building was to be put. No subsequent application for permission to change the use of the building was submitted to the Committee. Mr. Skinner also told us that the Committee was not aware (if it be the case) that the Farm had any established use rights other than for agricultural purposes.

Mr. Wright told us that after 1965 the wholesale side of the Farm had continued to expand every year and the Appellant supplied supermarkets and take-aways. Some two-thirds of its labour was involved in handling wholesale potatoes. It began wholesaling fruit and vegetables in 1975 or 1976.

Mr. Wright also stated that the Appellant expanded into the frozen food business in August 1979. He conceded that at the time of seeking permission to construct the building the Appellant had not yet formed the intention to go into that business. It was only sometime after receiving the Committee's permission to construct the "agricultural building" that the Appellant found that there was profitable expansion in the frozen food business.

Counsel for the Appellant asked us to find, on the basis of the Jennings case, that the theory of a "new planning unit" should be rejected, and that on the facts there had not been such a change of use of the building, as compared with that which it replaced and the Farm as a whole, which was so radical as to constitute "a new chapter in planning history". Furthermore, the Committee had, as Mr. Skinner had impliedly conceded, failed to ask itself the right questions and obtain the relevant information.

Counsel for the Committee asked us to find that there had been "a new planning unit, with a nil use", that the terms of the permit to build had merely followed the terms of the application to build, which was for "agricultural purposes" only, that buying in local produce of the soil came within "agricultural purposes" but importing food into the Island did not, and therefore the Notice was valid.

Counsel for the Committee placed much reliance on the terms of the application to construct the building and of the permit. We agree that on the face of it the authorised use was for agricultural purposes. However, by a letter to Mr. Skinner, dated 18th November, 1976, concerning a replacement building for the Dutch barn, Mr. Wright said (and we quote an extract) -

> "You must appreciate that our farming activities are gradually expanding, and that the fire in January has given us a prime site for additional storage area without encroaching on agricultural land or land of scenic value.
>
> The main purpose of the proposed shed is for the wholesale side of our potato business; namely, storing, pre-packing and preparation, and allows us for any possible expansion that can be foreseen.
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> This would release valuable space in our main storage shed (erected nine years ago) for the general farming activities, and which is no longer enough for both purposes."

That letter was handed to us during the hearing of the appeal for another purpose, and we were not told whether it was before the Committee when, some seven months later, it considered and granted consent for the construction of the building. If it was, then the Committee knew that the building was

intended to be used for a potato wholesaling business. On the other hand, if it was not aware of the letter, then we think that it should have been.

In the Jennings case the occupiers of the site, which had a mixed authorised use for the repair, servicing and maintenance of vehicles, applied for permission to pull down a garage workshop there and put up a new building. It was refused, but in spite of the refusal of permission they put up the new building. It continued to be used for the same purpose as the previous one. Having reviewed the case law and expressed a view as to the proper course to adopt (already quoted above), Lord Denning concluded as follows -

> "Before us Mr. Simon Brown pleaded for guidance. He told us that those in the Ministry were much perplexed as to the right principle to adopt. He submitted that the right theory was the "new chapter in the planning history." I agree with him. Applied to this case, I think there was no change in the planning history at all. There is one whole site of half an acre with existing use rights. All that has been done is to erect a new building in place of an old one, on a little portion of the site. The occupiers are entitled to the use of those rights inside the new building. I would allow the appeal, accordingly."

Applying the Jennings case to the present case we conclude as follows. The right theory to adopt is the "new chapter in the planning history". Applied to this case, we do not think that there was any change in the planning history at all. The whole farm had an established use to wholesale food, as we have already found. The proposed use of the building, that is to say, to wholesale food was no different in kind to the already established use. It is true that, unlike the Jennings case, permission for the new building was sought and a description of the proposed use was given. The application did not mention a wholesale use, but the previous letter from Mr. Wright did. In any event, on the analogy of the Jennings case, if the Appellant had erected the building without permission the Court would have found that it was nevertheless entitled to continue to use the new shed for the same food wholesale purposes as the rest of the Farm. The application by the Appellant for permission was clearly not an attempt to construct a building with a proposed materially different kind of use because Mr. Wright had openly informed Mr. Skinner earlier of its proposed wholesaling purpose.

Furthermore, whilst we agree that it appears from Lord Denning's judgment that the adoption of a planning permission for a use which is materially different from an existing use deprives the holder of that permission from setting up the existing rights, such a doctrine cannot apply in this case, not only for the reasons already given above, but also because the Committee by its Notice subsequently gave implied permission to the Appellant to use the building for the wholesaling of "fresh fruits of the soil", and we have already held that for planning purposes such a use cannot be distinguished from a use to wholesale all food.

We have already said that we think that we understand the nature of the concern which led the Committee to issue the Notice, namely, the wholesaling of foodstuffs imported from outside Jersey. We have decided that such use does not constitute a material change in the kind of use which previously existed in respect of the Farm and which, for the reasons already given, also exists as regards the building.

It therefore follows that paragraph (b) of the Notice, as well as paragraph (a), is unreasonable. This appeal is therefore allowed, and accordingly, under the terms of Article 2(2) of the Law, the Notice shall not apply.

Finally, we repeat that we have not been asked to decide whether the present use of the building represents a material change of use on the ground of intensification; it was not argued before us and therefore we have not considered it.