22 pages.

4th October, 1990.

In the Royal Court of Jersey
(Samedi Division).

142.

Before: Bailiff
Jurat D. E. Le Boutillier
Jurat J. Orchard

| | | |
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| BETWEEN | John Michael Mesch<br>Patricia Ann Mesch (née Rivett) | APPELLANTS |
| AND | The Housing Committee | RESPONDENT |

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Advocate P. de C. Mourant for the Appellants
Advocate S. Nicolle for the Respondent

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## THE PROPERTY

Anneville Lodge ("the property") is in the Parish of St. Martin and is owned by the appellants. It consists of the main house, a cottage (the subject of this appeal) and a flat over a garage. All these units are joined together and abut onto a public road. The main access to the house and cottage is over a driveway to the west of the three units. Access to the flat is by a door giving on to the public road. Approaching along the drive from the west one comes, firstly, to the garage and flat, secondly the cottage, and thirdly the main house. Before one comes to the cottage and the main house one passes through two pillars and a wrought iron gate which leads from the drive into a courtyard which in turn is bordered on the north by the cottage and the main house, including the kitchen, on the south partly by an underground swimming pool and a section of the garden, and on all the other sides by the main house and swimming pool. One bedroom window of the flat over the garage overlooks the courtyard from the west and there is a door below that window which leads into a boiler and laundry room which is shared in common between the main house and the cottage. There is also a small enclosed area at first floor level between the cottage and the main house which is accessible from both the cottage and the main house.

The cottage itself is quite small. It consists of a sitting room 12' x 10'1", a kitchen, a bedroom on the ground floor, which in fact is part of an open area and includes the staircase leading to the first floor, one bathroom on the ground floor and one bedroom 12' x 9'8" on the first floor. The area which

There is a passage which leads from the ground floor of the cottage to the public road. It passes a door which leads into the kitchen of the main house. At the end of the passage is another door which gives on to the public road and serves as a tradesmen's entrance for the main house as well as for direct access to the main road from the cottage.

Attached to the main house is a large garden (which does not form part of this appeal save that it is used by the appellants and their family) and a substantial part of which can be seen from the windows of the cottage, particularly the first floor window. It is fair to say that the same applies to all the windows of the flat above the garage. The whole of the courtyard and the enclosed swimming pool may be seen from inside the cottage, whether from the ground or first floor. The extent to which these areas can be seen depends on the angle from which one is looking and whether one is looking from the first floor or the ground floor.

We were able to observe these features, as we have described them in the preceding paragraphs, during a site visit which we made at the request of the parties.

## THE BACKGROUND

On the 30th October, 1987 the Housing Committee ("The Committee") gave consent to the purchase of ("the property") to a Mr. and Mrs. Sunley. That consent contained, inter alia, the following condition:-

> "4. that the remaining existing 2 units comprising the flat above the garage and the staff cottage shall not, without the consent of the Committee, be let unfurnished to, or be occupied by any persons other than those approved by the Committee as being persons of a category specified in Regulation 1 (1)(a), (b), (c), (d), (e), (f), (g) or (h) of the Housing (General Provisions)(Jersey) Regulations, 1970, as amended, and who will occupy the accommodation as their sole or principal place of residence;"

It will be seen that the cottage is described in that condition as "a staff cottage". The Estate Agents had described it as "an integral staff wing". For some reason that is unrelated to this appeal the sale to Mr. and Mrs. Sunley did not materialize. An application by the appellants to buy the property was submitted to the Committee on the 2nd December, 1987. The next day the solicitor acting for the appellants, Mr. C. Coutanche, wrote to the Committee asking that the restriction imposed on the letting and occupancy of the cottage by condition 4 should be lifted. His letter is as follows:-

> "I refer to an application currently before your Department for consent to the purchase of Anneville Lodge by my clients, Lt. Col. and Mrs. Mesch .
>
> I have seen an earlier consent issued to the sale of this property dated 30th October, number 91751.
>
> Paragraph No.4. of that consent states that the remaining existing two units comprising the flat above the garage and the staff cottage shall not without the Committee's consent be let ..... or occupied by persons other than those falling within categories (a) to (h).
>
> My purpose in writing is to request that the staff cottage be released from such condition. An inspection of the property reveals that the main house can be entered from within the cottage. Furthermore, the unit overlooks at both ground floor and first floor level, the patio area forming part of the main house. The patio in question is an essential part of the enjoyment of the property as it is on the western side of the house and accordingly enjoys any available afternoon sunshine. It is the part of the curtilage of the house which one would usually expect the occupiers to make regular use of. If strangers to the family occupy the cottage there would in my submission be a substantial intrusion upon the privacy of the occupiers of the main house. You will recall, that the staff cottage is within that area of curtilage of the main house which is contained inside the garden wall.
>
> Finally, the staff cottage is very small indeed. Should the measurements not be available to you, I list below the dimensions of the rooms comprising the staff cottage as prepared by the Vendors' estate agents.
>
> | | |
> |---|---|
> | Sitting Room | 12' x 10'1" |
> | Kitchen | |
> | Bedroom 1 | 9'1" x 9'1" |
> | En Suite Bathroom | |
> | Bedroom 2 (1st floor) | 12' x 9'8" |
>
> Colonel and Mrs. Mesch have aged family in the United Kingdom and would hope to install an aged relative in the staff cottage for her security and care. One would fully appreciate that if my clients let the staff cottage for reward they should do so to local residents but I hope the Committee will be minded to bear my comments in mind when issuing consent to my clients."

On the 8th January, 1988 the Committee visited the property and, having done so, decided to maintain the restrictions. The minute of its visit and decision is as follows:-

> "7. The Committee visited Anneville Lodge, St. Martin, in connexion with a request by Mourant du Feu & Jeune, on behalf of their clients, a Lt.Col. and Mrs. Mesch, concerning their application to purchase Anneville Lodge, St. Martin and, in particular, the request that the staff cottage be released from the condition that it would not without the Committee's consent be let, or occupied by persons other than those falling within categories 1(1)(a)-(h) of the Housing (General Provisions)(Jersey)Regulations, 1970, as amended. Colonel and Mrs. Mesch had aged family living in the United Kingdom and would hope to install an aged relative in the staff cottage for her security and care.
>
> The Committee, having also considered a letter, dated 3rd December, 1987, from Mourant du Feu & Jeune, decided that the unit was one upon which clear(sic)(a-h) occupancy conditions should be imposed.
>
> The Housing Officer was authorised to take the appropriate action."

In its statement of the reasons for its decision the Committee expands the minute and explains it as follows:-

> "In considering the letter, the Committee had regard to:-
>
> (i) the purposes of the Housing (Jersey) Law, 1949, as set out in the long title thereto, the relevant part of which is in the following terms:-
>
> > "A LAW...(sic) to control sales and leases of land in order to prevent further aggravation of the housing shortage...".
>
> (ii) the extension of its powers by Article 1 of the Housing (Extension of Powers) (Jersey)(Law), 1969, to include a power to control sales and leases of land in order to ensure that sufficient land is available for the inhabitants of the Island.
>
> (iii) its power under paragraph (3) of Article 19 of the Law, as substituted by the Law of 1969, to attach to the grant of any consent conditions relating inter alia to the persons by whom the land may be occupied.
>
> The Committee concluded that the cottage is a unit of dwelling accommodation capable of occupation by local persons and that the imposition of condition 4 in respect of the cottage would further the purpose of ensuring sufficient land is available for the inhabitants of the Island, inasmuch as it would require that unit to be occupied by such inhabitants and not by persons who are not inhabitants of the Island. Accordingly, the Committee decided to maintain the occupancy condition in respect of the cottage."

The Committee replied to the appellants' solicitor's letter of the 3rd December, 1987 on the 11th January, 1988 and repeated part of the minute.

On the 10th February, 1988 the appellants served notice of appeal upon the Committee. The grounds of the appeal were:-

"(1) the only viable means of access to the cottage is through a secluded and otherwise private part of the garden of the main house;

(2) the cottage overlooks the patio area of the main house at both ground floor and first floor levels causing a substantial intrusion upon the privacy of the occupiers of the main house;

(3) that your decision was therefore unreasonable have regard to all the circumstances of the case: and

(4) that you failed to have any or any sufficient regard to factors submitted to you including the details and layout of the property."

## THE LAW

Where a statute confers upon an administrative body, such as the Housing Committee in this case, or the Island Development Committee, a discretionary power, there is usually, but not inevitably included in the statute, a right of appeal, sometimes to a higher administrative body, such as a Minister in the case of English statutes, sometimes to the Royal Court, as in Jersey. The usual phrase is "... may appeal to ...". The question that has been much canvassed both in England and in this jurisdiction is whether the inclusion of such words in a statute give an appellate body unfettered discretion to substitute its own opinion for that of the administrative body appealed from. If the matter were restricted, as some of the cases show, both in English Courts and here, to the measure of reasonableness of the decision, it should be observed that it is possible for there to be two different opinions upon the measure of reasonableness, each equally tenable. Why then should the view of a Court, for example, prevail over that of an elected body endeavouring not to deal with complex legal problems but to balance the conflicting needs of a private individual with those of the community? To that it may be replied that if the statute, properly interpreted, confers upon a Court or other appellate body, the duty to hear an appeal de novo it must do so. Do the appeal provisions in the Housing (Jersey) Law 1949 do so? If so, should any contrary decisions of the Royal Court be overruled? In some jurisdictions maladministration which can, but not always necessarily, include appeals from administrative decisions, is dealt with by an ombudsman. In Jersey, parallel to the statutes and the rights of appeal conferred on appellants is a right to refer the matter to the Judicial Greffier to ask him to set up a review board.

There are extensive powers given to the review board but it cannot substitute its decision for that of the Committee apealed from. Since the administrative review board consists of States' Members it may be said that a reference to it should properly take the form of a re-hearing, and certainly such decisions that have been available to the Court indicate that the review boards have interpreted their powers very widely indeed. This does seem to suggest, but no more, that by setting up review boards the States were indicating that appeals to the Royal Court should not, by contrast, be by way of a re-hearing.

However, before attempting to answer these interesting questions there is one further matter to be considered. The Housing (Jersey) Law appeal provisions are differently worded from the corresponding provisions in the Island Planning (Jersey) Law 1964. In the latter Law the words refer to the decision being "unreasonable having regard to all the circumstances of the case". It may be that there is a distinction between the two appeal provisions which should be reflected in the interpretation of the powers conferred on the Court by the respective articles in each Law. Nevertheless, for reasons which will become apparent, we do not think we need dwell on this aspect of the case. Furthermore, since this is an appeal confined to the interpretation of the appeal provisions in the Housing (Jersey) Law only, decisions of the Royal Court on appeals from the Island Development Committee, or the Gambling Control Committee (the other bodies appealed from and in respect of which there are a number of cases), are less cogent and we should confine ourselves mainly to appeals under the Housing (Jersey) Law. Even if we were to hold that appeals under that Law should be by way of a re-hearing, the more restrictive wording in the Island Planning (Jersey) Law and the Gambling (Jersey) Law would make it difficult to extend to the appeal provisions of those Laws the wider interpretation which has been urged in respect of the Housing (Jersey) Law. We say this because the leading Jersey case on this subject namely the Housing Committee v. Phantesie Investments Limited 1985-86 JLR included a reference by the Court of Appeal to only two cases that were not appeals from Housing Committee decisions. In that case, as will be seen from the extract cited below, the Court held that there was a serious question to be considered, that is to say the extent of the Royal Court powers on an appeal from a decision of the Housing Committee. The relevant passage from that judgment in relation to the meaning of the words "may appeal" is to be found at pages 117 - 118 where the Court said this:-

"It would be otiose for us to go into the very important point raised by Mr. Bailhache as to the scope of an appeal under art. 12(1) of the Housing (Jersey) Law, 1949. In substance the argument is, as I have earlier stated, that the words "may appeal to the Court against the decision of the Committee" coupled with "the power to give such directions in the matter as it considers proper and the Committee shall comply with any such direction," together with the fact that evidence can be called, all point, say Mr. Bailhache, to a re-hearing situation de novo and put the Royal Court in precisely the same position as the Housing Committee. It could therefore take its own view on the merits of this case and would not be restricted to the sort of tests which are applied on an application for judicial review, such as the Wednesbury test, on which I have said it found itself satisified. As against that argument there is a long series of decisions by the Inferior Number and one by the Superior Number holding that under the Housing (Jersey) Law, art. 12, and indeed, under some similar legislation with similar provisions, the right of appeal is not of the unrestricted character indicated by Mr. Bailhache's arguments.

The authorities for the narrower view are as follows: Coated Steel of Europe Ltd. (5), Hamon (14), Simon (18), Associated Builders & Contractors Ltd. (2), Cottignies (6), Pinel (16), Hackett (13), Bundy (4), and then coming in between the last two cases, the decision of the Superior Number, Habin (12), where, in a very interesting and careful judgment, the learned Bailiff concluded, having looked at several examples of statutes with the words "may appeal," that they all contemplate a much more restricted type of appeal than the one for which Mr. Bailhache has contended before us.

What I think emerges from the cases that we have seen is that in all those decisions which have been given by the Jersey courts, no reference has been made to a line of English authorities where the words "may appeal" have been held many times - I will not say invariably, because unless one has carried out a most exhausting research exercise that would be a dangerous statement - but in all the cases we have seen coming from England rather than in the Privy Council on appeal from Canada, "may appeal" has been held to give an unrestricted right of appeal and to point to a de novo hearing. I think the earliest of the cases we were shown was Fulham Borough Council v. Santilli (9), and there are other cases in the same line: Godfrey v. Bournemouth Corp. (10), Greenly v. Lawrence (11) and the judgments of Edmund Davies and Phillimore, L.J.J. in Sagnata Invs. Ltd. v. Norwich Corp. (17) where there was a citation back to Archbold, Quarter Sessions Practice, 6th ed., (1908) showing the law as already clearly established to that effect.

On the other side, we were referred in reply, by Mr. Whelan, to a couple of cases in the Privy Council on appeal from Canada where an opposite approach appears to have been adopted but as seems to happen continually in this field, none of the cases from England that I have just mentioned had been cited and we have not got the advantage of knowing what was the language of the Canadian statute which was being construed in those cases. The two cases are Minister of Natl. Rev. v. Wrights' Canadian Ropes Ltd. (15) and D.R. Fraser & Co. Ltd. v. Minister of Natl. Rev. (8).

> All that we need to say today and all that we propose to say is that there is a serious question to be considered, and when that question comes to be considered the Privy Council cases will have to be before the court, the text of the Canadian statute will have to be there and it will then be a question for the courts of this Island to consider whether the English cases are of significance and importance or whether a more restricted meaning on the word "appeal" should be attached to it in accordance with the views so far taken here. But beyond saying that that is a serious question which cannot be resolved and does not need to be resolved today, we say no more about the matter."

The instant appeal was set down for an earlier hearing but I invited counsel in Chambers to address the Court on the question of the scope of the appeal from the decision of the Housing Committee and a further date had to be obtained. Accordingly, we agreed to sit in vacation and we are grateful to Counsel both for appearing and for their full and helpful submissions.

Two further matters may be mentioned here. The President of the Court of Appeal in the Phantesie judgment referred to a number of English and Canadian cases. The decisions of the English Courts, and where appropriate, the Courts of the Commonwealth, are, as we have said many times, of persuasive effect only, but where those decisions relate to statutes and orders which are identical or very similar to those within our own jurisdiction, the weight to be attached to those outside cases is immeasurably increased, particularly where they happen to be judgments of the highest Court as far as this jurisdiction is concerned, that is to say the Judicial Committee of the Privy Council. Secondly, in appeals to the Court of Appeal from the Royal Court the correct approach as the Court of Appeal said in Cutner v. Green & Others Trustees of Mark Bolan Charitable Trust 1980 I CA 202 at page 276 is (that the Appeal Court should)

> "...not interfere with the discretion exercised by the Royal Court except on grounds of law, unless it appears that on other grounds injustice will result from the manner in which it has been exercised."

Mr. Mourant for the appellants submitted, firstly, that the line of Jersey cases which restricted a right of appeal, in effect, to judicial review was wrong and that this Court on an appeal from a decision of the Housing Committee had, by reason of the express words in the Law unfettered original jurisdiction. Secondly, if the Court was unable to accept that submission then the Committee, in the instant case, had failed even the more restrictive test, as modified by later cases in the Court, for example, the Phantesie case, in that it did not apply its mind -

(a) to the nature of the occupancy it found when it visited the property in January 1988

(b) to the extent to which the cottage was an integral part of the main house and

(c) because of its failure under heads (a) and (b) it ignored the question of privacy altogether.

Further the Committee erred in law by deciding that if a property was capable of being occupied, as it appeared to consider the cottage was when it visited it, it should be occupied by a qualified person, and the Committee's duty under the law was an absolute one. As to Mr. Mourant's first submission, this appears to be the first case in which the English Authorities have been cited in full by counsel and we are grateful to them for their help. It was perhaps unfortunate that in Coated Steel of Europe Ltd. v. Housing Committee (1962) JJ 179 where the very point we are now having to decide was under consideration counsel conceded it. Although it is fair to say that the case which was heard in 1962 was one of the earliest in the series. Whether the narrower or wider view is to be preferred, and whether the words permitting an appeal are qualified or not (as in the Island Planning Law) the Royal Court has been prepared to strike down decisions of administrative bodies, such as the IDC, where the appellant has been encouraged to take certain steps by that body, see for example Le Maistre v. IDC (1980) JJ p.1.

Unfortunately little help is to be found in the text books. The late Professor De Smith's Judicial Review of Administrative Actions, Second Edition, at pages 267 to 269 distinguishes between a review, stricto sensu, and an appeal and his comment that "the inter-relationship between forms of proceedings and the scope of review is subtle and complex" expresses the difficulties that lie before a Court in interpreting the appeal provisions in particular statutes. Professor De Smith cites a number of cases, where the right of appeal is to be construed as empowering the Court to substitute its own decision if it is satisfied that the decision is wrong. Unfortunately the New Zealand case of Hammond v. Hutt Valley and Bays Metropolitan Milk Board (1958) NZLR 720 which, according to the footnote in Professor De Smith's book on page 268 provides "a particularly good illustration of the difference between full appellate review and supervisory review" was not available to us.

However. support for what may be called the wider appellate view is to be found in the judgment of Lord Goddard C.J. in Hughes v. Architects' Registration Council of the United Kingdom 1957 2 Queen's Bench.Section 9 of the Architects' Registration Act 1931 provides for an appeal from a decision of the Council in these terms:-

> "Any person aggrieved by the removal of his name from the register, or by a determination of the Council that he be disqualified for registration during any period, may within three months from the date on which notice of the removal or the determination was served on him appeal to the High Court or Court of Session against the removal or determination and on any such appeal the Court may give such directions in the matter as they think proper and the order of the Court shall be final."

Article 12 of the Housing (Jersey) Law 1949 governing appeals is as follows:-

> "(1) Any person aggrieved by the refusal of the Committee to grant consent to any transaction to which this Part of this Law applies or by any conditions attached to any such consent or by the revocation of any such consent may appeal to the Court against the decision of the Committee within one month after the date on which notice of such decision was sent to him.
>
> (2) On any such appeal, the Court may either dismiss the appeal or may give to the Committee such directions in the matter as it considers proper, and the Committee shall comply with any such direction.
>
> (3) Any appeal under this Article may be heard and determined either in term or in vacation.
>
> (4) The costs of any appeal under this Article shall be paid in such manner and by such parties as the Court may direct."

The similarity between the terms of these two appellate provisions is striking. In the Hughes case Lord Goddard C.J. said this about the Court's powers at page 558:-

"It has been held by this court that a section in these terms confers a right of appeal as wide as one from a judge to the Court of Appeal: see Allender v. Royal College of Veterinary Surgeons. While an appellate court will always attach great importance to the finding of a lower court, especially on findings of fact, if, in their opinion, the decision below is wrong they must give effect to their opinion and reverse it. It is contended that this court cannot on the authorities reverse the finding that the conduct of the appellant was disgraceful as an architect, though not in the popular sense of that word, because what is or is not proper professional conduct is entirely a matter for the council. On this point reliance is placed on Allinson v. General Council of Medical Education and Registration, and on Rex v. General Council of Medical Education and Registration. The essential and vital difference between those cases and the present in my opinion, is that no appeal is given from a decision of the General Medical Council and an appeal is given from a decision of the Architects' Registration Council. This is not a matter of certiorari, it is an appeal. It is not a case in which the court has to see only if the council had jurisdiction to make the order they did, and whether they had evidence on which they could act; in this case, as in the case of appeals from the decision of several other professional domestic tribunals, all of which are set out in R.S.C., Ord. 59, r. 38, this court must decide whether the decision of the tribunal was right and can be upheld. "

Nowhere is there any suggestion in that passage that the Court should substitute its own opinion for that of the administrative body if it is satisfied that, even if it would have decided the case differently, the decision can be supported; the distinction between what is wrong palpably and what is unreasonable and therefore wrong is a fine one. There appears, looking at the Jersey cases, to have been a shading over the years and a retreat from the extreme and narrower view on the one hand and a complete re-hearing of an appeal on the other to the position which we think has now been reached, namely, that the Court will interfere even though there were matters upon which the Committee could base its decision if it is satisfied that that decision was unreasonable in the sense mentioned by the Court of Appeal in the Phantesie case, that is to say, that the condition imposed was so unreasonable "that it was not one that could have been imposed by any Committee acting reasonably and properly directing itself".

The words in Lord Goddard C.J.'s judgment about the importance to be attached to the findings of the lower court were an extension of his remarks in Stepney Borough Council v. Joffe (1949) 1 All E.R. 256 where at page 257 he said at letters (f) to (g) "that does not mean to say that a court of appeal ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter and ought not lightly to reverse their opinion". The Stepney case followed the earlier decision of Fulham Borough Council v. Santilli( 1933) 2 KB 357. The appellate provisions in the relevant statutes provided for an appeal by saying that "any person aggrieved ... may appeal to a petty sessional court ... The Court may "confirm, reverse or vary the decision ...". In Sagnata Investments v. Norwich Corporation (1971) 2 All E.R. at page 1441 the Court of Appeal reviewed the authorities and applied Lord Goddard C.J.'s dictum in the Stepney case. The decision of the Court (Lord Denning M.R. dissenting) is set out/~~on~~ in the head note at page 1442 -

> "Held - (i) it did not follow from the fact that the granting of a permit under the 1963 Act was an administrative decision which was expressed to be 'at the discretion of the local authority' that quarter sessions were bound by the decision of the local authority and its stated reasons unless it could be demonstrated that they were wrong; the appeal to quarter sessions was by way of a complete rehearing and accordingly the recorder was entitled to reconsider all the evidence, to receive fresh evidence, and on that basis to come to his own conclusion; if it were otherwise the provision for an appeal to quarter sessions would be illusory since the recorder, being confined to the bare knowledge that the local authority had refused the application and their written grounds for refusal, would be powerless to make an effective examination of those reasons and furthermore would be unable properly to state a case for the Divisional Court if called on to do so (see p 1454 j, p 1456 a and h to p 1457 b and p 1459 g and j, post); dictum of Lush J in R v Pilgrim (1870) LR 6 QB at 95, Greenly v Lawrence [1949] 1 All ER 241 and dictum of Lord Goddard CJ in Stepney Borough Council v Joffe [1949] 1 All ER at 258 applied;
>
> (ii) although the appeal was by way of a rehearing, quarter sessions must pay proper regard to the decision of the local authority and the recorder could not exercise his discretion uninfluenced by the local authority's opinion (see p 1457 c to f and p 1460 a, post); dicta of Lord Goddard CJ in Stepney Borough Council v Joffe [1949] 1 All ER at 258 and of Lord Parker CJ in R v Essex Quarter Sessions, ex parte Thomas [1966] 1 All ER at 355 approved; dictum of Lord Parker CJ in Godfrey v Bournemouth Corpn [1968] 3 All ER at 319 disapproved;"

Lord Denning M.R. was satisifed that, contrary to what Mr. Mourant has urged occurred in the instant case, the local authority listened to everything that the appellant had to say and yet decided against him. He also reviewed the law on what he called "the general policy decision". At page 1447 between letters (h) to (g) he says this :-

"I take it to be perfectly clear now that an administrative body, including a licensing body, which may have to consider numerous applications of a similar kind, is entitled to lay down a general policy which it proposes to follow in coming to its individual decisions, provided always that it is a reasonable policy which it is fair and just to apply. Once laid down, the administrative body is entitled to apply the policy in the individual cases which come before it. The only qualification is that the administrative body must not apply it so rigidly as to reject an applicant without hearing what he has to say. It must 'not shut its ears to an application' The applicant is entitled to put forward reasons urging that the policy should be changed, or saying that in any case it should not be applied to him. But, so long as the administrative body is ready to hear him and consider what he has to say, it is entitled to apply its general policy to him as to others."

It appears to us that the Committee applies its general policy to most properties believing it to be under a public duty to do so, and imposes an occupancy condition wherever any property is capable of being occupied. The question, therefore, is did the Committee hear the appellant and all that he had to say? But it goes further than this. Unless the Committee applied its mind to all the relevant matters it could not be said that it was able to balance its general policy with the needs of the appellants.

For the Committee Miss Nicolle submitted that there were three possible approaches.

(1) That of the restrictive, supported by a long line of Jersey cases

(2) That of the original jurisdiction (de novo) and

(3) The very restrictive approach confining itself to procedural defects:

She did not urge this last possibility upon the Court. There could be, she said, a modified middle course which would be a combination of the original jurisdiction approach but giving due weight to the Committee's decision. The de novo approach was supported by the decision in Godfrey v. Bournemouth Corporation (1968) 3 All E.R. 315 but that decision had been criticised in the Sagnata case. She suggested that the Court might accept the restrictive approach subject to the decision of the Committee being in accord with justice and common sense. See Cottignies and Another v. Housing Committee (1969) 257 EX 472. There could be no appeal unless conferred by statute (per Edmund Davies L.J. in the Sagnata at page 1454). Therefore, the English cases that depended on English statutes giving rights of appeal to petty sessions and quarter sessions were not authorities in this jurisdiction unless the same or similar principles of appeal had been established in the Royal Court.

Before 1949 an appeal from the Police Court was on matters of law only. Even now it was not at large A.G. v. Brown (Unreported cases 16th January, 1989). In any case there was little difference between the enabling words "may appeal" and the inclusion of the test of reasonableness "having regard to all the circumstances of the case". Although Coated Steel of Europe was challenged in Cottignies in 1969 the Court maintained the historic test. If a decision could be reversed if it was contrary to common sense and justice (the Cottignies test) an appeal was not illusory. Moreover the Court could not ignore entirely the Committee's decision. See the further remarks of Edmund Davies L.J. on page 1457 of Sagnata.

It seems to us that if we accept Miss Nicolle's submissions that an appeal to the Court from a decision of the Housing Committee should be what she has called the modified restrictive view, that might preclude the Court in appropriate cases from hearing fresh evidence. We do not think it should. The appellants and the Committee might wish to produce such evidence and the appellate powers do not exclude the Court from receiving it. It should be noted that the Committee, in fact, heard no evidence unless one accepts Mr. Coutanche's letter of the 3rd December, 1987, nor did anyone appear before it on oath or was cross-examined. If we are wrong on this point then we would prefer to adopt the original jurisdiction approach to safe-guard the Court's powers to hear fresh evidence, but it further follows that, if we were to rule that an appeal was by way of a re-hearing, then evidence would have to be heard unless the parties were agreed that all the relevant evidence had been adduced before or by the Committee.

We now turn to the two Canadian cases referred to by the Court of Appeal in the Phantesie case. The first is a Privy Council case and it is that of Minister of National Revenue v. Wrights Canadian Ropes (1947) AC 109. It concerned an appeal under the Income War Tax Act 1927 from the disallowance by the Minister of National Revenue of sums paid by a company (to an English company by way of commission) on the grounds that they were in excess of what was reasonable for its business. After dealing with the meaning of the word "discretion" Lord Greene M.R. has this to say at page 122:-

> "The reference to "discretion" in this context does not, in the opinion of their Lordships, mean more than that the Minister is the judge of what is reasonable or normal. If the matter had stood there, and there had been no right of appeal against the decision of the Minister, the position would have been different from what it is. But in contrast to cases arising under sub-ss. 3 and 4 of s. 6, where the decision of the Minister is to be "final and "conclusive", a right of appeal to the Exchequer Court is given, and the appeal is to be regarded as an action in that court. This right of appeal must, in their Lordships' opinion, have been intended

by the legislature to be an effective right. This involves the consequence that the court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless, the limits within which the court is entitled to interfere are, in their Lordships' opinion, strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in Sharp v. Wakefield (I), he must act "according to the rules of reason and justice, not "according to private opinion .... according to law, and "not humour. It is to be, not arbitrary, vague and fanciful, "but legal and regular." "

The second case is that of Fraser v. Minister of National Revenue (1949) AC 24 a House of Lords case. In that case the Minister of National Revenue had disallowed a claim for deduction to determine the income of the appellant company derived from cutting timber. On page 36 of the judgment which was delivered by Lord MacMillan his Lordship said this - "the criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases and it is well settled that if the discretion has been exercised bona fide uninfluenced by irrelevant considerations and not arbitrarily or illegally no Court is entitled to interfere even if the Court had the discretion been theirs might have exercised it otherwise". It is fair to say that the issue before the House of Lords was not its appellate powers but the extent of the discretionary power of the Minister.

To these two cases should be added two Australian cases. The first is that of Ex parte Australian Sporting Club Ltd. re Dash and Anor ALR Volume 47. The judgment is short and may be cited in full. It is that of Jordan C.J. -

"This is the return of a rule nisi for a common law mandamus to require a magistrate to proceed with the hearing of an appeal under s. 4B (3) of the Motor Traffic Act, 1909-1937, against a refusal of the Commissioner of Police to approve of a race between motor vehicles on public streets. Section 4B (3) provides that there shall be an appeal to a court of petty sessions holden before a stipendiary or police magistrate against such a refusal. The learned magistrate held that he had no jurisdiction to entertain the appeal except upon the footing that he was entitled to look at nothing except the material placed before the Commissioner and the Commissioner's decision on that material, because the section did not provide that the appeal was to be a rehearing.

The word "appeal" may be used in two connections. It may refer to an appeal from one judicial tribunal to another; such an appeal may be an appeal stricto sensu or an appeal by way of rehearing, in which latter case the jurisdiction exercised by the appellate tribunal is in part original; or the word may refer to an appeal from an executive authority to some other executive authority or to a Court. If such an

appeal is to a Court, the jurisdiction which it exercises is not appellate but original: Federal Commissioner of Taxation v. Munro (1); McCaughey v. Commissioner of Stamp Duties. (2).

In the present case the appeal is from a decision of an executive authority to a Court which pro hac vice is authorised to exercise a jurisdiction which is both executive and original. This being so. the magistrate was not restricted to examining the material which the Commissioner had before him. but was entitled and required to consider such relevant material as the parties desired to produce. The learned magistrate was evidently led to take the course which he did upon a consideration of the case of Victorian Stevedoring and General Contracting Co. Pty Ltd. v. Dignan (1), and a supposition that the principles stated there were of general application. If his Worship's attention had been drawn to the fact that in the present case the appeal is not from a Court but from an executive authority, a type of case to which quite different considerations are applicable. I have no doubt that he would have come to a different conclusion. In the result, I think that the course which he has taken amounts in law to a constructive failure to exercise jurisdiction.

For these reasons, I think that the rule nisi should be made absolute, but as the Police raised no objection to the facts being gone into fully before the magistrate, I think that there should be no order as to costs."

The second Australian case is that of Minister for Aboriginal Affairs v. Peko Wallsend Limited (1987) LRC (Const). It is an Australian High Court case and whilst not absolutely in point because in the main it was limited to a consideration of the exercise of judicial review the Court discussed the principles governing appeals from a lower Court. Certainly this case repeats the well known principle that an appellate court should exercise its jurisdiction to reverse a discretionary judgment made by a lower court only where there is an identifiable error or manifest injustice. (pp 842 and 862/863). The Court also considered the role of a court in reviewing the exercise of an administrative discretion and followed the Wednesbury Corporation case. A passage in the judgment of Mason J. at page 837 is interesting. It is as follows:-

"The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned (Wednesbury Corporation, at p.228).

It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power (Sean Investments Pty Ltd v MacKellar, at p.375; R v Anderson, ex parte Ipec-Air Pty Ltd (1965) 113 CLR 117, at p.205; Elliot v Southwark London Borough Council [1976] 1 WLR 499, at p.507; [1976] 2 All ER 781 at p.788; Pickwell v Camden London

set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene, M.R., in Wednesdury Corporation, at pp.230, if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in sections 5(2)(g) and 6(2)(g) of the ADJr Act in these terms. The test has been embraced in both Australia and England (Parramatta City Council v Pestell (1972) 128 CLR 305, at p.327; Bread Manufacturers of NSW v Evans (1981) 56 ALJR 89, at p.96; Re Moore, ex parte Co-operative Bulk Handling Ltd (1982) 41 ALR 221, at pp.221-222; Hall & Co Ltd v Shoreham-By-Sea Urban District Council [1964] 1 WLR 240, at pp.248, 255; R v Hillingdon London Borough Council, ex parte Royco Homes Ltd [1974] QB 720, at pp.731-732; Newbury District Council v Secretary of State for the Environment [1981] AC 578, at pp.599-600, 608]. However, in its application, there has been considerable diversity in the readiness with which courts have found the test to be satisfied (compare, for example, Wednesbury Corporation, at p.230, and Parramatta City Council, at p.328, with the conclusions reached in South Oxfordshire District Council v Secretary of State for the Environment [1981] 1 WLR 1092, at p.1099; Shoreham-By-Sea Urban District Council and Minister of Housing and Local Government v Hartnell [1965] AC 1134, at p.1173). But guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion. In the context of the latter, it has been held that an appellate court may review a discretionary judgment that has failed to give proper weight to a particular matter, but it will be slow to do so because a mere preference for a different result will not suffice (Lovell v Lovell (1959) 81 CLR 513, at p.519; Gronow v Gronow (1979) 144 CLR 513, at pp. 519-520, 534, 537-538; Mallet v Mallet (1984) 58 ALJR 248, at pp. 252, 255. So, too, in the context of administrative law, a court should proceed with caution when reviewing an administrative decision on the ground that it does not give proper weight to relevant factors, lest it exceed its supervisory role by reviewing the decision on its merits."

That case, however, is not an authority as to the extent of an appellate court's powers in reviewing an adminsitrative decision where the right of appeal is as widely laid down and in unqualified language as it is in Article 12 of the Housing (Jersey) Law 1949. On page 863 of the same case Dawson J. says this:-

"Where an exercise of discretion has taken place in an appellate court no different rule applies upon appeal to this Court: see King v Ivanhoe Gold Corporation Ltd (1908) 8 CLR 617, at pp.621, 625; Kroehn v Kroehn (1912) 15 CLR 137, at pp.143, 146; Leeder v Ellis (1952) 86 CLR 64, at pp.70-71. As a matter of law, the appellate jurisdiction of this Court would extend to the reversal of a discretionary judgment: Judiciary Act 1903 (Cth) section 37, of Kent Coal Concessions Ltd v Duguid [1910] AC 452, at p.453. But it is in accordance with well-recognised practice that it will only exercise its jurisdiction for such a purpose where there has been some identified error or manifest injustice in the exercise of the discretion. The real reason for the practice is that there can be no justification for the mere substitution of

one discretion for another and that reason applies equally whether the exercise of the discretion is by a judge at first instance or an appellate court (see Storie v Storie (1945) 80 CLR 597, at p.600: Lovell v Lovell (1950) 81 CLR 513, at p.519)."

As we have said above we would not like the Royal Court to be deprived of the right to hear fresh evidence on an appeal from a decision of an administrative body where the right of appeal, as in the instant case, appears to be unfettered by the words conferring a right of appeal. Accordingly, we find, as a matter of law, that the Royal Court has the power to reverse a discretionary decision of an administrative body where the appellate provisions are as wide as those in the Housing (Jersey) Law 1949 which would allow it to hear fresh evidence or decide on any disputed fact. That power, however, is not unfettered but must be exercised, as Dawson J. said in the Peko Wallsend case .."where there can be some identified error or manifest injustice in the exercise of its (the administering body) discretion". Our decision might have meant that but for the subsequent dilution of the restrictive approach of the Royal Court in earlier cases by subsequent decisions we might have felt obliged to rule that earlier decisions were wrong. We would have been reluctant to do this particularly in the light of the careful analysis of the cases in Habin v. Gambling Authority (1971) JJ 1637 to which the Court of Appeal in Phantesie referred. If a decision is such that no Committee properly directed could reasonably have made it and is contrary to justice and common sense, it must follow that that decision is wrong and should be struck down.

## THE COMMITTEE'S DECISION

We now have to decide whether in applying the Law as we conceive it to be we should overturn the Committee's decision and for this we must look at Mr. Mourant's submissions on the facts. First, the Committee's visit to the property in January 1988. At that time the cottage was occupied by a Portuguese family. We have already noted the description of the cottage in the estate agent's notice of sale and condition (4) of the Housing Committee's consent. Lt-Col. Mesch said that when he was shown the property for the first time the Portuguese family were in the flat. Mr. Connew, the Housing Law and Loans Officer of the Committee, said that he did not know the terms of the family's occupancy. We may infer, therefore, that neither did the Committee and believed, wrongly as it turned out, that the cottage was let separately from the main house. It had, in fact, been a staff cottage for the occupants of the main house before Mr. and Mrs. Sunley applied to purchase the property. It follows that the Committee did not apply its mind to the extent

The Committee dismisses the question of privacy in its "case" in paragraphs 8, 9 and 10. These are as follows:-

> "8. The case of Housing Committee v. Phantesie Investments Limited does not establish the principle that in any case where there is a loss of privacy to the main unit, the Committee's statutory power to impose a condition relating to the persons by whom the secondary unit may be occupied shall cease to be exercisable. What the Phantesie Investments case said was that as the Committee had chosen to justify the imposition of the condition on a ground, namely that the loss of privacy was minimal, which it later conceded would not support the condition, therefore the Committee's decision could not be upheld.
>
> 9. The Committee will say that it does not agree that its powers are circumscribed in the way suggested. In a heavily developed Island such as Jersey, many properties overlook, or enjoy rights of way across, neighbouring properties, e.g. blocks of flats, semi-detached, terraced or adjoining houses, farm houses with dower houses attached, etc. Many gardens are overlooked from the windows of neighbouring properties, and the upper windows of many houses look into the windows of the adjoining properties.
>
> 10. If it were the law that any person who owned two units of accommodation, and occupied one of them, was entitled to insist that there should be no occupancy attached to the other, it would follow, for example, that the owner of a property which was overlooked by the property next door could buy the property next door, and could insist that the Committee should remove, or not impose, as the case might be, any occupancy condition. He would then be entitled to fill the house next door with unqualified relations, or staff, or guests, as the fancy took him."

These paragraphs might have been relevant had the question of privacy been considered at all by the Committee. It seems to us that the paragraphs are really ex post facto explanations. If the Committee did consider the question of privacy the paragraphs might be thought logical but not otherwise. It seems to us that the question of privacy was not in fact considered by the Committee at all, and even if it was, then the effect of the condition on the main house and on the question of reasonable privacy (we accept that there cannot be an absolute right) was not mentioned in the minutes nor in its "case".

Miss Nicolle submitted that the Committee based its decision on the intention of the appellant disclosed in Mr. Coutanche's letter to the Committee of the 3rd December, 1987 to use the cottage to house elderly relations. That meant that the control of the occupants of the cottage would remain with the appellants as the occupiers of the main house. We find that in maintaining its decision the Committee, because of its failure to find out (1) the terms of the

occupancy by the Portuguese family (2) the extent to which the cottage was an integral part of the main house and (3) to examine the degree of loss of privacy upon the occupants of the main house was not in a position to give a reasonable decision and one that accords fully with justice and common sense.

Accordingly, applying the words of the Privy Council in the Wrights Canadian Ropes case we find that the appellants have shown that there are grounds for interfering with the Committee's decision. We allow the appeal and in the exercise of Article 12 (2) of the Housing (Jersey) Law 1949 direct the Committee to amend condition (4) of its consent of the 3rd May, 1988 by deleting the words "and the staff cottage" from that condition. We would like to add that had we been hearing the appeal de novo our decision would have been the same.

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