

ROYAL COURT
(Samedi Division)

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26th September, 1997

Before: Advocate B.I. Le Marquand, Greffier Substitute

In the Matter of the Representation of Idocare Properties Limited

Between:	Idocare Properties Limited	Representor
And:	The Planning and Environment Committee of the States of Jersey	Respondent

Application by the Representor that the Respondent discover documentation relating to various matters raised in the pleadings.

Advocate M.M.G. Voisin for the Representor.
Advocate P. Matthews for the Respondent.

JUDGMENT

GREFFIER SUBSTITUTE: This Representation is an application for judicial review of the decision of the Respondent to refuse to grant planning permission to the Representor in relation to a development of offices and eight flats on a site in Green Street.

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The Representation was commenced in May, 1996, and amended in November, 1996. In the amended Representation, the Representor pleaded that the Respondent had given its consent for the construction of office developments on numerous sites within St. Helier and elsewhere which are outside "the defined office area" and thirty-six alleged such sites were mentioned. One of the grounds for the refusal of planning permission was that the relevant site in Green Street was outside the "defined office area".

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In its amended Answer, the Respondent answered this allegation by providing an explanation in relation to the thirty-six sites. In the amended Answer the Respondent pleaded that, in relation to applications where planning permission was granted prior to November, 1987, when the new Island Plan was approved, and in relation to applications which were made prior to the Island Plan being approved, the Respondent had applied the criteria under the old Island Plan.

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The Representor, by a Summons dated 28th April, 1997, applied for Further and Better Particulars of various paragraphs of the amended Answer. The first twenty-three of the twenty-seven requests contained therein related to acquiring additional information in relation to the thirty-six sites. Where the relevant planning permission was given with

the criteria set out in the new Island Plan being applied, the Respondent consented to the giving of that information. However, where the Respondent says that the relevant planning permission was granted applying the criteria under the old Island Plan, the Respondent refused to provide the particulars requested and in my Judgment dated 5th June, 1997, I set out my decision in relation thereto.

In relation to this application, the Respondent consented to paragraph 1(a) of the Summons and what was in issue were paragraphs 1(b) and (c) of the Summons dated 6th August, 1997, which read as follows:-

"1. The Respondent should not be ordered to prepare and file a List, verified by Affidavit, of all documentation in its possession, custody or power relating to:-

(b) the planning applications for all office developments outside the office development area which are referred to in paragraph 13(i) of the Representation and paragraph 9 of the Reply and any other such planning applications known to the Respondent, including, but not limited to, application forms, correspondence between applicants and the Respondent, planning and/or development permits and details of the car parking provision required and/or approved in each case.

(c) The deliberations of the Respondent in respect of each of the planning and/or development applications referred to in sub-paragraph (b) above, including, but not limited to, Minutes of Committee meetings, Acts of the Respondent, internal memoranda, reports prepared and/or advice given by the Respondent's officers, and others, to the Respondent."

At the hearing Advocate Voisin conceded that of the thirty-six sites, discovery under 1(b) and (c) should not be ordered in relation to numbers 1, 4, 5, 7, 11, 16, 19, 20 and 26 because the Respondent had pleaded that the relevant permission had been granted applying the criteria under the old Island Plan. Upon examining the pleadings, it became clear to me that sites numbers 10, 12, 18, 22, 23, 28, 30, 33 and 34 fell into the same categories and the Representor's applications under 1(b) and (c) are, therefore, refused in relation to those properties.

There also exists a category of properties in relation to which I refused to order the Further and Better Particulars requested. In the cases of sites numbers 17, 29 and 31 that was because there was some additional factor involved which meant that that particular property had only slight relevance to the Representation. Where I refused the Further and Better Particulars, I am also refusing the request for discovery under 1(b) and (c).

This leaves for me to consider sites numbers, 2, 3, 6, 8, 9, 13, 14, 15, 21, 24, 25, 27, 32, 35 and 36 together with any other planning applications known to the Respondent which do not relate to the thirty-six sites.

Royal Court Rules 1992, as amended, 6/16(1) and (2) read as follows:-

5 "6/16.-(1) The Court may order any party to any proceedings to furnish any other party with a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and to verify such list by affidavit.

10 (2) An order under paragraph (1) of this Rule may be limited to such documents or classes of documents only, or to such only of the matters in question in the proceedings, as may be specified in the order."

15 Advocate Voisin brought my attention to various passages in the case of Mayo Associates S.A. and others v. Finance & Economics Committee (1996) JLR 45. In that Judgment commencing on line 36 on page 11 is the following section from Supperstone & Goudie, Judicial Review:-

20 "Discovery may be ordered if there is some reason for thinking that affidavits do not disclose the full picture (see *Re H* (1990) *Guardian*, 17 May). It may be pertinent in this connection to bear in mind Parker L.J.'s exhortation in *R. v. Lancashire County Council, ex p. Huddleston* [1986] 2 All E.R. 941 that local authorities when challenged, 'should set out fully what they did and why, so far as is necessary fully and fairly to meet the challenge' (see p.947e...). He made it clear that the power to order discovery or interrogatories could be used to make good any deficiencies (see p.947d).

25 That section is written in the light of the English procedure relating to Judicial Review where the public body involved will produce an affidavit setting out the relevant facts. In the Jersey system, the Committee's version of facts is set out in the Answer to the Representation and, in this case, in the Further and Better Particulars which they have filed. Advocate Voisin submitted that there were deficiencies in the information given by the Committee and that the requested orders for discovery should be made in order to make good these deficiencies.

30 Advocate Voisin also drew my attention to sections on pages 20 and 22 of the Judgment in Fairview Farm Limited v. IDC (9th November, 1995) Jersey Unreported which indicated that the Court had requested the provision of additional information by the Committee in order that it could see whether the Committee had maintained consistency in relation to similar previous decisions.

35 Section 24/3/1 commencing on page 427 of volume 1 of the 1997 R.S.C. (with case references omitted) reads as follows:-

40 "Discovery in proceedings for judicial review - 0.24, r.3 (unlike 0.24, rr.1 and 2) is wide enough in scope to apply to proceedings for judicial review. Therefore, although discovery is not automatic in judicial review proceedings, the Court may order discovery where such an order is

necessary for disposing of the matter fairly within the meaning of 0.24, r.8.

5 Because of the nature of an application for judicial review, discovery in judicial review proceedings is inevitably different from discovery in an action begun by writ; although the Court has power under 0.24, r.3 to order discovery in judicial review proceedings, it will be appropriate in fewer cases and is likely to be more circumscribed. A minister who had to make a decision as part of an appellate process would necessarily consult with officials in his department and obtain their expertise and advice and unless that consultative exercise involved a new point with which the parties had had no opportunity of dealing, the minister was under no duty to disclose material resulting from such consultative process.

10 Since in applications for judicial review the burden of proof lies on the applicant to raise his case, the Court will refuse to order discovery against the respondent in order to make good defects in the evidence adduced by the applicant.

15 As a general principle in judicial review discovery will be ordered where it is required in order that the justice of the case may be advanced and where it is, within the meaning of 0.24, r.8, necessary for disposing fairly of the matter; the Court should not order discovery, however, where there is no material before it to show that the reasoning of the respondent's decision-making process is defective or unreasonable or open to challenge, and where the purpose of the application is to study the respondent's documents to see if some flaw in the decision-making process can be established."

20 In Lewis: "Judicial Remedies in Public Law": Chapter 9: Introduction: p.255 there is a section on the test for ordering discovery which commences as follows:-

25 "Test for ordering discovery
The governing principle in ordinary writ actions is that the court should not make an order for discovery "... unless the Court is of the opinion that the order is necessary for disposing fairly of the cause or matter or for saving costs. The same test applies, in principle, in judicial review proceedings, so that discovery should be ordered whenever and to the extent that it is necessary in order to dispose fairly of a particular case or for saving costs. The courts have, however, pointed out that, as the nature of judicial review proceedings is different from ordinary litigation, discovery in practice is likely to be ordered in far fewer cases and will be more circumscribed in its extent than would be the case in ordinary private litigation. The court in judicial review proceedings is not usually concerned with making findings of fact. The court is largely performing a supervisory role. Facts will often be agreed or appear in documentary form and it will be the legal consequences

from that point the situation here is the same as in relation to Bourne House.

- 5 14. Le Gallais Chambers and Minden House, Bath Street

The situation here is the same as in relation to Bourne House and this application is refused.

- 10 15. 2 to 8 Oxford Road

There is a dispute here between the parties as to whether there was a previous office use in relation to this property and in line with my decision on 13 I am ordering discovery limited to that issue. Apart from that the situation here is the same as in relation to Bourne House.

- 15 21. Maison de la Pape

The position here is the same as in relation to Bourne House.

- 20 24. Malzard House, Union Street

25 There is a disagreement here between the parties as to which property is meant by the Representor by Malzard House. It appears to me that the parties ought to liaise together on this in order to check which property is being referred to. There ought then to be consequential amendments to pleadings and, in particular, if a different property were meant by the Representor to that in relation to which an Answer has been given by the Respondent then different information will need to be provided. Until those steps have been taken, I am simply not in a position to determine whether or not there will be an issue between the parties which will lead to an order for discovery being necessary in order to dispose fairly of this Representation.

- 30 35 25. Site adjacent to Mechanics Institute, Burrard Street

40 Some particulars under request 14(iii) of the Request for Further and Better Particulars have not yet been provided by the Committee which should proceed so to do. Once this has occurred then the situation will be the same as in relation to Bourne House.

27. The position here is the same as in relation to Bourne House.

- 45 32. Hotel de L'Europe

50 At first there appears to be a discrepancy as to the number of flats constructed on this site because the Answer to the Representation says seven and the Reply says four. However, the Answer to Request 20 of the Further and Better Particulars now confirms four and so any dispute has disappeared on this point. Accordingly, the situation is the same as in relation to Bourne House.

- 55 35. Pickford's store

The situation here is the same as in relation to Bourne House.

36. Beachside Business Centre

5 On the face of the Answer and the Reply there is a dispute as to
whether or not these premises are unsuitable for conversion into
dwelling accommodation. However, paragraph 23 of the Further and
Better Particulars refers to a restrictive covenant against use for
residential purposes. It is not clear at this point in time as to
10 whether or not there is an issue between the parties as to the
existence of such a restrictive covenant. There is also a dispute
as to whether the building is of architectural importance. The
Respondent says that it was and the Representor denies this. I
cannot see that discovery will be of any assistance in relation to
that issue and, accordingly, the situation here is the same as in
15 relation to Bourne House.

I come now to the application of the Representor under paragraph
1(a) and (b) in relation to any other planning applications similar to
those for the thirty-six sites. Until such time as an allegation is
20 made by the Representor of another specific property in this category
and pleadings have been exchanged in relation thereto, it is impossible
to say that any issue has arisen between the parties in relation to
which an order for discovery will be appropriate. Accordingly, this
application is also refused.

25 Finally, I will need to be addressed both in relation to the costs
of and incidental to the Representor's Summons dated 6th August, 1997,
and in relation to the time period for the provision of the discovery
which has been agreed or ordered.

Authorities

Mayo Associates SA & Ors -v- Finance & Economics Committee (1996) JLR 45.

Supperstone & Goudie: "Judicial Review" (1992 Ed'n): pp.368-9.

Lewis: "Judicial Remedies in Public Law": Chapter 9: Introduction p.255.

Royal Court Rules 1992, as amended: 6/16(1) and (2).

Mayo Associates -v- Finance & Economics Committee (1995) JLR 333.

Fairview Farm Ltd -v- Island Development Committee (9th November, 1995) Jersey Unreported.

RSC (1997 Ed'n) O.24/3/1.

R. -v- Secretary of State for the Environment ex parte London Borough of Islington (1992) COD 67.