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SHORTER ARTICLES AND NOTES

THE TEST FOR APPEALS AGAINST DECISIONS OF ADMINISTRATIVE BODIES: UNREASONABLE OR JUST PLAIN WRONG?

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1 The jurisdiction of the Royal Court to hear statutory appeals from decisions of administrative bodies has already been the subject of comment in this Review.[1] However, the previous discussion, which was prompted by the decision of the Royal Court in the case of *Bernard v The Constable of St Clement*[2] concerned the exercise by the Royal Court of an entirely "unfettered" appeal jurisdiction such as that conferred by article 4(8) of the Firearms (Jersey) Law 1956 and article 12 of the Housing (Jersey) Law 1949.

2 The scope of this article, however, is to consider the approach which the courts in both Jersey and Guernsey have taken to the exercise of a statutory appeal jurisdiction which, rather than being unfettered, is limited to a single ground of appeal, namely that the decision which is sought to be challenged is "unreasonable having regard to all the circumstances of the case."[3]

Developments in the law

3 In Jersey, the Royal Court's approach to the exercise of its statutory appeal jurisdiction to quash administrative decisions on the grounds of "unreasonableness" has been considered in a long line of authorities, beginning with *Taylor v Island Development Committee*[4] in the late 1960s and culminating, at least until recently, in the decision of Jersey Court of Appeal in *Island Development Committee v Fairview Farm Limited*.[5] The latter gave rise to a significant shift in the approach which had previously been taken by the Royal Court. However, two more recent decisions in Jersey, *Token Limited v Planning and Environment Committee*[6] and *Anchor Trust Company Limited v Jersey Financial Services Commission*[7] have developed and restated the test as laid down by the Court of Appeal, and the implications of these decisions are more far reaching than might at first have appeared.

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[1] Robinson, *Administrative Appeals: a hearing de novo*? (1997) 1 Jersey Law Review 233; see also Le Sueur, *Appeals and judicial review after the Human Rights (Jersey) Law 2000* (2002) 6 Jersey Law Review 142.
[2] Unreported, 14 May 1997; 1997 JLR N-11
[3] In Jersey, such a right of appeal is conferred by, *inter alia*, Article 109 of the Planning and Building (Jersey) Law 2002 (formerly Article 21 of the Island Planning (Jersey) Law 1964) and the Financial Services (Jersey) Law 1998. In Guernsey, section 56 of the Housing (Control of Occupation) (Guernsey) Law 1994 provides for a right of appeal against decisions which are *ultra vires* or "an unreasonable exercise of the Authority's powers."
[4] 1969 JJ 1267
[5] 1996 JLR 306 CA
[6] 2001 JLR 698
[7] 2005 JLR 428

4 In *Interface Management Limited v Jersey Financial Services Commission*[8] the Royal Court noted that, prior to the Court of Appeal's decision in *Fairview Farm*, the test which had historically been applied in all administrative appeals was a three-fold one. The court had had to satisfy itself -

(1) that the proceedings of the [decision maker] were in general sufficient and satisfactory;

(2) that the decision was one which the law empowered the [decision maker] to make; and

(3) that the decision reached by the [decision maker] was one to which it could

5 However, in *Fairview Farm*, a case which concerned a right of appeal conferred by article 21 of the Island Planning (Jersey) Law 1964[9] (the "Planning Law") the Court of Appeal held that part (3) of the above test had been formulated incorrectly. The Court of Appeal went on to hold as follows -

> "The Royal Court, as an appellate body, must consider not merely whether the inferior body has followed the correct procedure, but also whether its own view is that the decision was unreasonable. It may allow whatever weight it thinks proper to the experience and knowledge of the inferior body, but it cannot escape the responsibility of forming its own view…..**The duty of the Court on an appeal under article 21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach, but to decide whether the Court considers that that decision was, in its view, unreasonable.***"* [emphasis added.]

6 The distinction which the Court of Appeal was seeking to draw can perhaps best be understood in the context of a comparison of a court's judicial review function and its statutory appeal function.

7 A judicial review function is a supervisory function, the purpose of which is to ensure that the exercise of administrative functions by public bodies is carried out within the framework of the law. A court exercising a judicial review function will therefore consider whether a decision may be challenged on grounds of illegality, procedural impropriety and irrationality, but will not undertake any assessment of the underlying merits of the original decision.

8 By contrast, a right of appeal to a court is a creature of statute. There is no inherent right of appeal. Where such a right has been conferred, the range of persons entitled to appeal, the permissible grounds of appeal and the jurisdiction of the appellate body are entirely matters of definition and interpretation of the relevant statute.

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[8] [2003] JRC 172
[9] Now article 109 of the Planning and Building (Jersey) Law 2002

9 In some contexts (and depending of course upon the wording of the statute) the appeal may be way of re-hearing, the appellate court being entitled to substitute its own opinion on the facts and merits of the case for that of the body making the original decision. In Jersey, this is the interpretation which the Royal Court has placed on article 4(8) of the Firearms (Jersey) Law 1956 following the decision in *Bernard*.[10] The Court held in that case that, when considering an appeal against the decision of the Constable relating to a firearms licence, it should "work out the matter *de novo.*"

10 Prior to the decision in *Fairview Farm*, the Royal Court had historically exercised its function to set aside administrative decisions on the grounds of "unreasonableness" as if it were exercising a judicial review function. Indeed, the three limbs of the test described by the Court in *Interface* broadly correspond to the grounds of judicial review. The first limb of the test corresponds with the "procedural impropriety" ground; the second limb corresponds with the "illegality" ground; and the third limb corresponds with the "irrationality" or "*Wednesbury* unreasonableness" ground.

11 In *Fairview Farm*, the Court of Appeal held that the third part of the *Taylor* test had been incorrectly formulated. This was because, in the opinion of the court, the *Taylor* formulation ignored the distinction between the court's appellate function and its supervisory (*i.e.* judicial review) function. As already noted, the Court of Appeal then went on to hold that "the duty of the Court on an appeal under article 21 is not merely to consider whether any reasonable body could have reached the decision which the Committee did reach (*i.e.* the judicial review function) but to decide whether the Court considers that that decision was, in its view, unreasonable.*"*(*i.e.* the appellate function).

12 In re-formulating the third part of the *Taylor* test as it did, the Court of Appeal had in mind the following passage from the judgment of Lord Greene MR in the case of *Associated Provincial Picture Houses Limited v Wednesbury Corp***:** "If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it then the courts can interfere…I think Mr Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the Court considers it to be a decision that no reasonable body could have come to. **It is not what the court considers unreasonable, a different thing altogether."**[11] [emphasis added].

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[10] Although a detailed discussion of the *Bernard* decision falls outside the scope of this Article, it is worth noting three points in passing: (i) although the Royal Court in *Bernard* held that it was bound by the decision of the Court of Appeal in *Fairview Farm*, this was clearly wrong. The decision in *Fairview Farm* concerned the interpretation of article 21 of the Island Planning (Jersey) Law 1964, the wording of which is quite different to that of article 4(8) of the Firearms (Jersey) Law 1956; (ii) the Court of Appeal in *Fairview* did not, in any event, say that article 21 should be interpreted as requiring the Court to "work out the matter *de novo*": on the contrary, the Court simply said that it was for the appellate court to decide whether the decision was "unreasonable"; (iii) notwithstanding these criticisms, the decision reached was clearly the correct one. Article 4 (8) of the Firearms Law confers an "unfettered" right of appeal to the Royal Court. In these circumstances, the Royal Court's interpretation of the statute as requiring it to substitute its own opinion of the merits of the case for that of the original decision maker was clearly right.

[11] [1948] 1 KB 223 at 230; [1947] 2 All ER 680

13 The Court of Appeal in *Fairview Farm* seems to have relied upon this *dictun* as authority for holding that the effect of article 21 of the Planning Law was, to use the words of Lord Greene in a later passage in the same judgment, "to set up the court as an arbiter of the correctness of one view [*i.e.* as to the reasonableness of the decision in question] over another*."*

14 However, in the passage cited above, Lord Greene did not have in mind the exercise of a statutory appeal jurisdiction to quash decisions on the grounds of "unreasonableness". Rather, he was concerned with the common law supervisory jurisdiction. He cannot therefore be taken to have been laying down any general proposition as to the meaning of the word "unreasonable" in the statutory appeal context. Furthermore, if the passage is read in the light of Lord Greene's judgment as a whole, it is clear that, in drawing a distinction between "*Wednesbury* unreasonableness" on one hand and "what the court considers unreasonable" on the other, Lord Greene was simply seeking to emphasise that where an executive discretion has been entrusted by the legislature to an administrative body, it is only in very limited circumstances that the exercise of that discretion should be challenged by the courts. Thus, where a statute confers a statutory right of appeal against an administrative decision, unless such a statute is construed narrowly, the court arguably risks trespassing too much on the jurisdiction of the administrative decision maker.

15 *Fairview Farm* was followed in Jersey some five years later by a decision of the Royal Court in *Token Ltd v Planning & Environment Committee*.[12] In that case, the Royal Court, whilst citing *Fairview Farm* with approval, elaborated on the meaning of the word "unreasonable" as follows -

> **"**The Solicitor General submitted that the decision in Fairview Farm did not entitle the court to find that the Committee's decision was reasonable but quash it because the court had reached an equally reasonable but different decision. We agree."[13]

16 By using the word "reasonable" to describe an hypothetical Committee decision in this context, the Royal Court must surely have meant a decision "to which a reasonable body could have come," rather than a decision "which the court, itself, considers reasonable". Otherwise, the court's statement would simply amount to a meaningless assurance that it would not replace one decision it thought reasonable with another decision it also thought reasonable. If this is so, the Royal Court appeared to have been signalling a return to the position pre-*Fairview Farm*, namely that the court would not interfere with an administrative decision on the grounds of unreasonableness unless satisfied that the decision in question was one to which no reasonable body could have come.

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[12] 2001 JLR 698

[13] 2001 JLR 698 at 703; see also paragraph 69(i) of the judgment of Southwell JA in *Trump Holdings Limited v The Planning and Environment Committee* 2004 JLR 232 at 254.

17 However, having in one breath apparently accepted the Solicitor General's submission that the court had no jurisdiction to quash a decision if it was one to which a reasonable body could have come (regardless of what the court thought about the actual merits of the decision) the court then, rather confusingly (and without appearing to note the contradiction) went on to assert that its function was to consider the merits of the decision under review. The court stated that it must "…form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a qualitative difference between finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the court thinks to be mistaken becomes so wrong that it is, in the view of the court, unreasonable".[14]

18 The *dictum* of the Royal Court in *Token* was endorsed by the Court of Appeal in *Planning and Environment Committee v Le Maistre***.**[15] However, in the next case which was to come before the Jersey courts, *Trump Holdings Limited v The Planning and Environment Committee,*[16] Southwell JA appears to have interpreted the Bailiff's words in *Token* as constituting a material departure from the test laid down in *Fairview Farm***.** At paragraph 69 of the judgment, Southwell JA added the following postscript to the Court of Appeal's decision -

> "I agree entirely with the judgment of Smith JA and add only the following points which I wish to emphasise:
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> (i) In my judgment the statement of the test under article 21 of the Island Planning (Jersey) Law 1964, as amended, contained in the Bailiff's judgment in *Token*, at page 703, paragraph 9 is the correct statement of the test. **It materially differs from the statement in this Court in *Fairview Farm* at page 317. The difference is not a mere semantic one. The statement of the test in *Token* is the one which in my judgment should be followed by the Royal Court in cases arising under article 21 of the Planning Law, and the statement in *Fairview Farm* should no longer be followed.**" [emphasis added.][17]

19 Although Southwell JA did not elucidate on what he perceived the differences in the two tests to be, it seems logical to assume that he must have interpreted the Bailiff's words as meaning that, notwithstanding the decision in *Fairview Farm*, henceforth the Royal Court would only exercise its fettered statutory appeal jurisdiction to quash decisions if satisfied that they were decisions to which no reasonable body could have come.

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[14] 2001 JLR 698 at 703
[15] 2002 JLR 389. The decision has also most recently been approved by the Royal Court in *Premier Tour Limited v Minister for Planning and Environment* [2007] JRC 102.
[16] 2004 JLR 232.
[17] At page 254

20 After the decision of the Court of Appeal in *Trump***,** it was only a few months before the Royal Court was called upon once more to deliberate upon the proper test to be applied on a statutory appeal. On this occasion, the issue arose in the context of an appeal under article 11 (3) of the Financial Services (Jersey) Law 1998 in *Anchor Trust Company Limited v Jersey Financial Services Commission*.[18] The relevant parts of article 11(3) are identical to those of article 109 of the Planning Law.

21 Counsel for the JFSC argued that the Court of Appeal in *Fairview Farm* had fallen into error in finding that there was difference between unreasonableness and *Wednesbury* unreasonableness. He contended that where a statute only allowed the court to intervene on appeal on the ground that the decision was unreasonable, there was no qualitative difference between the exercise of the appellate function and the exercise of a judicial review function. The test to be applied in deciding whether to allow the appeal or quash a decision subject to judicial review should therefore be the same.

22 The Royal Court rejected this submission. It held that it was bound by the decision of the Court of Appeal in *Fairview Farm.*[19] The court also cited with approval a decision of the Guernsey Court of Appeal in *Walters v States Housing Authority*[20] and noted that the Court of Appeal in that case had also drawn a clear distinction between a decision which was *Wednesbury* unreasonable, and a decision which was merely unreasonable.[21]

23 The Deputy Bailiff went on to hold as follows -

"In our judgment, these authorities confirm that there are at least three possible degrees of "wrongness" which the court may find in respect of a decision under appeal. In ascending order of "wrongness", they are as follows:

(a) The decision was wrong in the sense that it is not the decision which the Jurats would themselves have reached.

(b) The decision was wrong to such an extent that the Jurats would categorise it as unreasonable.

(c) The decision was wrong to such an extent that it goes beyond merely being unreasonable and becomes a decision to which no reasonable decision-maker could have come, *i.e.* "*Wednesbury* unreasonable" or "irrational".

On an appeal under the 1998 Law (and any similarly worded Law) the Jurats should dismiss the appeal if their conclusion falls within (a) of the preceding paragraph, but

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[18] 2005 JLR 428

[19] Interestingly, the Royal Court made no reference to the finding of Southwell JA in *Trump* that *Fairview Farm* should no longer be followed, even though this effectively amounted to an overruling of the earlier decision.

[20] (1997) 24 Guernsey Law Journal 39

[21] It is noteworthy however, that although the Guernsey Court of Appeal in *Walters* emphasised that "unreasonable" "means something other than that [the Jurats] would have come to a different decision", The Court offered no guidance as to what "unreasonable" did mean, choosing instead to leave this matter entirely in the hands of the Jurats.

should allow the appeal if it falls within (b). Contrary to [the submissions of Counsel for the JFSC] the decision does not have to be categorised as falling within (c) before an appeal can be successful".[22]

24 In describing these degrees of "wrongness", the Royal Court in *Anchor* was merely elaborating upon the previous statement of the Bailiff in *Token* that there must be a "margin of appreciation"[23] before a decision which the court considers to be mistaken is so wrong as to be considered unreasonable.

25 It is important to note, however, that notwithstanding (i) the Royal Court's apparent assurance in *Token* that it would not quash "a decision to which a reasonable body could have come" merely to replace it with another, equally reasonable, decision and (ii) the comments of Southwell JA in ***Trump,*** the Royal Court in *Anchor* implicitly rejected this approach. The Court held that the test to be applied in the context of a statutory right of appeal on grounds of "unreasonableness" was lower than the test to be applied in determining "*Wednesbury* unreasonableness". As the test for the latter is that the decision must be one "to which no reasonable decision-maker could have come", it follows that the court in *Anchor* must have been asserting a jurisdiction to quash a decision on the grounds of unreasonableness even though it was a decision to which a reasonable body could have come.

Criticism of the courts' approach post Fairview Farm

26 It is submitted that the approach which the courts have taken since *Fairview Farm* to the exercise of their statutory appeal jurisdiction to quash decisions on the grounds of "unreasonableness" gives rise to some real difficulties.

27 First, the natural interpretation of the word "unreasonable" in the context of a decision which is subject to an appeal is "a decision to which no reasonable body could have come". To construe "unreasonable" as meaning "really wrong" is a far less natural interpretation of the statute, and yet this is the interpretation the courts in both Jersey and Guernsey have preferred.

28 Secondly, it is not at all clear how the courts will go about deciding whether a decision is so wrong that it can properly be classified as "unreasonable" (in the sense of really wrong) as distinct from simply mistaken. Whilst a hierarchy of "wrongness" may be fine in theory, in practice a court hearing an appeal against an administrative decision will either agree with the decision or disagree with it. It is hard to conceive of any middle ground between disagreeing with a decision, and really disagreeing with it. Furthermore, none of the decisions which have purported to identify a distinction between "*Wednesbury* unreasonableness" and "what the court considers unreasonable" have offered any

[22] 2005 JLR 428 at 443, paras 13-14
[23] Professor Le Sueur thinks that the appropriate phrase is "margin of discretion". See Le Sueur, *Appeals and Judicial review after the Human Rights (Jersey) Law 2000* (2002) 6 Jersey Law Review 142 at 160, fn. 53.

guidance as to where the line should be drawn in such circumstances.[24] In reality, therefore, there is unlikely to be any real difference in approach between the courts' exercise of an unfettered appeal jurisdiction, and the exercise of an appeal jurisdiction to quash a decision on the grounds of "unreasonableness" alone. In both cases, the court hearing the appeal will conduct a merits review of the decision and will strike it down if it believes the decision to be wrong.

29 Thirdly, the approach which the courts have adopted trespasses too much on the exercise of executive discretion. As the courts in both Jersey and Guernsey have asserted a jurisdiction to review the merits of administrative decisions on the basis of *dicta* of Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corp.*, it is worthwhile looking again at what Lord Greene said in that case.

30 Having first emphasised the distinction between *"Wednesbury* unreasonableness" and "what the court considers unreasonable", Lord Greene went on to say this -

> "If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted [to cinemas][25] on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."[26]

31 This passage clearly emphasises that, in Lord Greene's view, matters of "high public policy" should be decided by the administrative bodies to whom Parliament has entrusted this responsibility, and that provided such bodies act "within the four corners of their jurisdiction" the courts should not interfere with the exercise of their discretion. It seems unlikely that his Lordship would have anticipated that his words might be cited by the courts in Jersey and Guernsey as justifying greater judicial interference in the administrative decision making process.

Conclusion

32 The test laid down by the Court of Appeal in *Fairview Farm* (as developed and restated in *Token* and *Anchor*) has arguably tipped the balance of power between administrative bodies and the courts too far in favour of the courts. The interpretation

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[24] In *Anchor***,** the Deputy Bailiff noted that the Court of Appeal had not elaborated on the difference, but went on to say (at paragraph 9 of the judgment) that it was clear that the Court considered that there was a difference, "otherwise there was no point in substituting one test for the other." With respect, this hardly elucidates the point.

[25] The plaintiff company in the *Wednesbury* case was seeking to challenge a condition imposed by a local authority pursuant to the provisions of the Sunday Entertainments Act 1932 which prohibited children under the age of fifteen from being admitted to Sunday cinema performances.

[26] [1948] 1 KB 223 at 234

which the courts have sought to place on the word “unreasonable” is strained and unnatural, and appears to have been rejected by the Jersey Court of Appeal in any event. Also, the lack of clear guidance as to how the courts should go about exercising their discretion to quash decisions will inevitably add an unwelcome layer of uncertainty and inconsistency to the appeal process.

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