85/109

30th October 1985

Before: Sir Frank Ereaut, Bailiff
Jurat H. Perree
Jurat C.S. Dupre, M.C.

BETWEEN

Alfred Samuel John de Gruchy — Appellant

AND

The Housing Committee

Advocate J.A. Clyde-Smith for the Appellant
Advocate S. Nicolle for the Committee

This is an appeal by the Appellant against the refusal of the Housing Committee to consent to the purchase by him of Sycamore Lodge, St. Peter, from Mr. and Mrs. Dempsey for a consideration of £95,000 plus commission of £1,900.

The relevant facts, which are not in dispute, are as follows.

On 30th April, 1982, the appellant submitted an application to the Committee to buy the above property and declared on the form that the proposed occupiers of it would be Mr. and Mrs. D.L. Minikin. In an accompanying letter of the same date Messrs. Ogier & Le Cornu, acting on behalf of the Appellant, stated that the arrangements for the transaction were exactly the same as those submitted in a previous application for the proposed purchase by the Appellant of Braemar, Castle Green, Gorey, which transaction had fallen through, and the Committee was asked to consider the previous application and all the correspondence relating thereto as forming part of the present application. We therefore refer to the previous application to buy Braemar and the correspondence relating thereto.

By letters dated 19th March and 20th April, 1982, Messrs. Ogier & Le Cornu had informed the Committee that the arrangements for the proposed purchase by the Appellant of Braemar were as follows:-

(a) that the proposed occupier was to be Mr. D. Minikin who was qualified as from January, 1982, to lease (for nine years or less) dwelling accommodation in accordance with the provisions of Regulation 5(1)(b)(ii) of the Housing (General Provisions) (Jersey)

Regulations, 1970 (as amended);

(b) that the whole of the consideration for the purchase was being lent to the Appellant by Mr. Minikin on favourable terms by way of an interest free loan which would be registered as a first charge against the property and would be repayable on demand;

(c) that the property would be legally and beneficially owned by the Appellant and that he would be absolutely entitled to the proceeds of sale in the event of the property being sold. Although Mr. Minikin would obviously wish to have the property transferred to him once he had become qualified by length of residence under the provisions of the appropriate housing regulations to buy it, he understood that the Appellant was under no legal obligation to sell the property to him, and if the Appellant neglected or refused to do so he would have no redress, except of course that he could require repayment of the loan.

On 11th June, 1982, the Committee gave formal notice of refusal of consent to the proposed transaction, on the grounds:-

> "that the proposed transaction is part of a device, plan or scheme, for a transaction or arrangement that is inconsistent with the application for consent to purchase, and is inconsistent with an application to be made for consent to a lease of the property."

The matter is governed by the Housing (Jersey) Law, 1949, as amended, and by the Regulations made thereunder.

The preamble or long title of the 1949 Law states that it is a Law (inter alia) "to control sales and leases of land." That purpose of the Law is implemented by Part III entitled "Control of sales and leases of land." Article 7 prohibits any person from entering into any transaction (defined by Article 6 as sales and leases) to which Part III applies without the previous consent of the Housing Committee. Article 9 makes provision for applications for such consent.

Article 10 of the 1949 Law provided -

"Any application for consent to a transaction to which part of this law applies may be refused by the Committee or may be granted either unconditionally or subject to such conditions as the Committee thinks fit, and, in considering any application, the Committee shall have regard to the necessity of preventing further aggravation of the housing shortage and to the desirability of reserving land for the use of bona fide inhabitants of the Island and of preventing undue increases in the price of land and the use of land for speculative or uneconomic purposes, and in particular shall take into account -

(a) the purposes for which the land is being used, or for which it is intended to be used, or for which, in the opinion of the Committee, it should be used;

(b) the length of time during which the intending purchaser, transferee or lessee has resided in the Island, his general connexion with the Island, and other relevant circumstances;

(c) the terms of the transaction and the terms of any other transaction in any way related thereto."

That Article was repealed and replaced by a new Article 10 in the Housing (Extension of Powers) (Jersey) Law, 1969, as amended by the Housing (Amendment No.4) (Jersey) Law, 1974. Article 1 of the 1969 Law, as amended, provides as follows -

"ARTICLE 1

"The powers of the Housing Committee under the Housing (Jersey) Law, 1949, as amended (hereinafter referred to as "the 1949 Law") to control sales and leases of land in order to prevent further aggravation of the housing shortage are hereby extended to include a power to control such sales and leases in order to ensure that sufficient land is available for the inhabitants of the Island and accordingly for Article 10 of the 1949 Law there shall be substituted the following Article -

ARTICLE 10

GRANT OR REFUSAL OF CONSENT

" (1) The Committee shall grant consent, either unconditionally or subject to such conditions as the Committee thinks fit, to the sale, transfer or lease of any land of a class for the time being specified by the States by Regulations made under this Part of this Law and shall refuse consent to any sale or transfer or lease not so specified."

In pursuance of that new Article 10(1), the States, on 10th November, 1970, enacted the Housing (General Provisions) (Jersey) Regulations, 1970, (hereinafter called "the Regulations"). Regulation 1 provides that consent to the sales or transfers of land or registered contracts of lease "shall be granted" by the Committee in certain specified cases which are enumerated in paragraphs (a) to (n). Relevant to this appeal are paragraphs (a) and (d). The former requires consent to be given where the intending purchaser, transferee or lessee is aged 20 or over, was born in the Island and has been ordinarily resident in the Island for a period of at least ten years. The latter requires consent to be given where the intending purchaser, transferee or lessee has previously been granted a consent under the Law to purchase or lease dwelling accommodation, and has actually purchased or leased that accommodation and has been resident therein for the whole of the period from a date not later than six months after the grant of such consent.

It was not disputed that the Appellant qualified under both paragraphs (a) and (d).

As regards Mr. Minikin, Regulation 5(1)(b)(ii) (as amended) provides that the provisions of Part III of the Law shall not apply to the lease (not being a registered contract of lease) of a dwelling, where the lessee is aged 16 or over and has been resident in the Island continuously for a period of ten years immediately preceding the date of the grant of the lease, such period of residence beginning on or before 1st January, 1980, and that accordingly any such transaction is deemed to be a transaction exempted from the provisions of that Part of the Law, provided that, not later than 14 days after the transaction has been entered into, both parties submit particulars of it to the Committee.

It was not disputed that Mr. Minikin became ordinarily resident in the Island, for the purpose of the Regulations, as from January, 1972, and that he then resided continuously in Jersey for the next ten years. It followed that in January, 1982, he became entitled to lease a dwelling for not more than nine years under the provisions of the above Regulation.

Article 14 in Part III of the 1949 Law makes the following conduct an offence -

"(1) Any person who -

.....

(b) with intent to deceive makes any false or misleading statement or any material omission in any application to the Committee, or in any communication (whether in writing or otherwise) to the Committee or any person, for the purposes of this Part of this Law;

.....

(d) whether as principal or agent and whether by himself or his agent, and whether as vendor, purchaser, lessor, lessee or other party, or otherwise howsoever, is party to any device, plan or scheme for any transaction or arrangement that is or is intended to be in contravention of this Part of this Law or inconsistent with any application made or to be made, or consent given or to be given, under this Part of this Law;"

In the statutory pleadings before the hearing, the Committee stated in its Statement that it had formed the view that the proposed purchase was a sham and accordingly decided to refuse consent (on the grounds already cited).

The Appellant, in his Case, argued that the mandatory terms of the 1970 Regulations required the Committee to grant him consent (because he qualified under paragraphs (a) and (d)), even if the Committee did consider that the transaction was a sham and might have constituted an offence under Article

14 of the 1949 Law. He further argued that in any event the proposed transaction would not have constituted an offence under Article 14.

The Committee contended in reply that the true purpose of the application was not to buy a house for the Appellant, but to buy a house for Mr. and Mrs. Minikin, the ultimate transfer being deferred until such time as they should have qualified to acquire property under the Regulations, (as amended). The proposed application, if carried through, was therefore inconsistent with the Appellant's application to purchase the property and with the application which he would thereafter make to lease it to Mr. and Mrs. Minikin. It would therefore constitute a device within the meaning of Article 14(1)(d) of the 1949 Law, and would render all parties liable to prosecution under the provisions of that Article.

The Committee further submitted in reply that the absolute requirement that it should give consent to purchase to, inter alia, persons falling within the classes into which the Appellant fell must be subject to the implicit qualification that the transaction should not otherwise be illegal, because, firstly, it could not have been the intention of the legislature to require the Committee to grant consent to the commission of a criminal offence, and secondly, in granting consent the Committee would itself become party to the transaction, and it could not have been the intention of the legislature to require the Committee to perform an act which would render it liable to a criminal prosecution.

At the hearing it was emphasised to us on behalf of the Appellant that neither he nor Mr. and Mrs. Minikin wished to enter into any transaction which was illegal or contrary to the Housing Laws, and therefore full disclosure of the proposed transaction had been made. They had been advised that the proposed transaction was legal and proper.

It was agreed that there were two issues before the Court.

1. Did the admitted arrangement as disclosed by the Appellant to the Committee (and already summarised) constitute an offence under Article 14(1)(d) of the 1949 Law?

2. If it did, was the Committee entitled to disregard the mandatory terms of the Regulations and refuse consent to the application?

and we were asked to consider both issues.

We propose to deal first with the second issue.

Counsel for the Appellant conceded that if the terms of a statute were contradictory, inasmuch as one part of it made a certain act mandatory and another part provided that such an act was a criminal offence, then the Court must resolve the conflict by removing such an absurdity and holding that the act was not to be deemed mandatory. However, he argued that no such contradiction existed here.

We were referred to a number of authorities on the interpretation of statutes, where there was some ambiguity in the words used. We accept that there can be no possible ambiguity in the mandatory terms of Regulation 1. However, on page 43, Maxwell's Interpretation of Statutes, the golden rule of interpretation is described thus -

> "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

The Court was also referred to page 106 of Maxwell, where examples are given of cases in which the Courts refused to give a literal interpretation which would have given rise to consequences which the legislature could not possibly have intended.

That same subject was considered in de Smith's "Judicial Review of Administrative Action" (Fourth Edition) at page 98 -

> "In the past English courts have tended to favour a formal, linguistic and textual analysis of legislation in an attempt to discover the "true meaning" of statutory provisions. The principal shortcomings of this approach are the assumption that every word and phrase has a true, single meaning and that, despite the draftsman's detailed elaborations, the text is capable of producing an answer to every conceivable

factual situation to which the legislation may have to be applied. On the other hand, a "purposive" approach, often associated with the mischief rule enunciated in Heydon's case, aimed at giving effect to the intention of Parliament, unrealistically assumes that every statutory formula embodies an intention that can be ascribed to Parliament as a whole, or to the collective will of a majority of either House or to the draftsman. In many cases, of course, the approaches converge to produce the same result; but in so far as they diverge, courts have recently tended to move away from a purely linguistic analysis, and have been prepared to blend it with an approach to interpretation that takes account of the historical context of the legislation, and the extent to which a literal reading would do violence to the legislative intention inferred both from other provisions of the measure and from accepted notions of good government and administration."

We are in no doubt that where the same statutory provisions, on the one hand, require a statutory body to consent to a transaction, and, on the other hand, contain a provision which has the effect of making that transaction a criminal offence, then it would be absurd and contrary to the accepted notions of good government and administration to hold that that body must nevertheless comply with the requirement.

It is true, of course, that in the present case the alleged contradiction does not appear expressly in the statutory provisions in question; it depends upon the nature of the transaction for which the Committee's consent is sought. However, the same principle must in common sense apply where one provision in a law requires a statutory body to consent to a transaction, and another provision in the same law would have the effect, on proper judicial interpretation, of making those who were a party to that transaction guilty of an offence under that law. Apart from any other consideration, there is the possibility that the members of that body might in such circumstances render themselves liable to a criminal prosecution.

The answer to the second issue posed to us is therefore that if the Committee was correct in its view that it was being asked to grant consent to a device, plan or scheme which fell within the provisions of Article 14(1)(d), then it was entitled to disregard the mandatory terms of Regulation 1 and refuse consent to the application.

We turn now to the first issue.

The case for the Committee was put to us as follows.

As its preamble states, the 1949 Law was enacted (inter alia) to control sales and leases of land in order to prevent further aggravation of the housing shortage. Under Article 10 the Committee was given a discretion whether or not to grant consent to a transaction to which the Law applied. In considering applications it was required to "have regard to the necessity of preventing further aggravation of the housing shortage and to the desirability of reserving land for the use of bona fide inhabitants of the Island".

In a Report presented to the States and attached to the draft Housing (Extension of Powers) (Jersey) Law 1969, which repealed and replaced Article 10, a newly appointed Housing Committee stated that the demand for houses far outstripped the supply and that its task was to create conditions which would lead to a return to a situation where the ordinary person in the Island could afford to buy a house suitable to his needs. The provisions of the 1949 Law did not allow the Committee to improve the situation because they were designed merely to prevent a further aggravation of the housing shortage. The housing situation had since got worse and positive action was required to improve it. The Committee therefore proposed in the new legislation largely to remove the discretion which it had had hitherto and to provide for Regulations to be made which would require consent to be given to transactions falling within certain specified classes and consent to be refused if the transaction did not fall within such classes.

As we have seen, those recommendations were given statutory effect by a new Article 10 and by the enactment of the Regulations.

It followed that the Committee was required to give consent to the Appellant to buy (except, as this Court has found, where to do so would be to give consent to a transaction which constituted an offence under the Law), and equally it would have been required, if Mr. and Mrs. Minikin had themselves applied for permission to buy, to refuse consent to them to do so.

The case for the Committee was that the reality and true purpose of the arrangement between the Appellant and Mr. and Mrs. Minikin which had been disclosed to it in the correspondence, was simply a scheme to get round the statutory prohibition on the grant of consent to Mr. and Mrs. Minikin to buy. It was accepted that there was no legal obligation on the Appellant eventually to convey the house to Mr. and Mrs. Minikin (or to pay a penalty instead) and that it was only a gentleman's agreement, that he would do so when they became legally entitled to buy under the Regulations. However, the reality of the arrangement was that it was a deferred purchase. The arrangement was for Mr. and Mrs. Minikin to lend the purchase price to the Appellant to enable him to buy the house for their occupation. No interest would be paid on the money lent, but that would be balanced by the non-payment of rent. Under that arrangement Mr. and Mrs. Minikin could fix now on the house which they would eventually like to own (when they became qualified to do so) and meanwhile live in it. The Appellant was transparently buying it for them to own eventually, because if there had not been this arrangement the Appellant would not have applied to buy it, since he had no use for it except in connection with the arrangement. He was in effect lending his name to enable the Minikins to get round the statutory prohibition.

To summarise, counsel's argument was that the application by the Appellant purported to be a purchase by the Appellant, with a lease or licence to Mr. and Mrs. Minikin to follow. In reality, as openly disclosed in the correspondence, it was a deferred purchase, and was therefore an arrangement to get round the Law and thus inconsistent with the application and thus caught by Article 14.

Counsel for the Appellant conceded that there was an arrangement as already described, but that it was no more than a gentlemen's agreement.

He further agreed that if the reality was that the Appellant would be buying as an agent or trustee and not as sole beneficial owner, or if the Appellant were to give to Mr. and Mrs. Minikin some legally binding undertaking whereby at the appropriate time he would either convey the property to them or (because such would not be enforceable) pay a penalty, then such an arrangement would amount to a deferred purchase by the Minikins and as such would constitute an arrangement inconsistent with the Law and the application and therefore would be contrary to Article 14.

However, the arrangement was simply one under which each of the parties would be doing what he would be entitled by the Regulations to do, the Appellant to buy and then lease the property, Mr. and Mrs. Minikin to occupy it, and eventually, if both parties were still of the same mind, Mr. and Mrs. Minikin would formally buy the property as and when they were entitled under the Regulations so to do.

As part of his argument, Counsel for the Appellant contended that the real mischief which the Law and the Regulations were designed to remedy was the occupation of land (which for our purpose means dwelling units, whether houses or flats) rather than the ownership of it, because it was the occupation of land which needed to be controlled to prevent an undue shortage of dwellings, and if occupation was sufficiently and properly controlled the shortage would be remedied. That argument, if valid, was relevant in this case because Mr. and Mrs. Minikin were and are entitled, under the Regulations, to occupy any property in the Island, and therefore, it was said, their proposed occupation of this house could not constitute a mischief of the sort which the Law and Regulations were designed to remedy. Furthermore, Counsel drew attention to the repealed Article 10, which referred to "the desirability of reserving land for the bona fide inhabitants of the Island", and to Article 1 of the 1969 Law which, in enacting the new Article 10 contained the words "in order to ensure that sufficient land is available for the inhabitants of the Island". Counsel argued that Mr. and Mrs. Minikin, because they were entitled to lease any property, were as much "inhabitants" or "bona fide inhabitants" as the Appellant himself, and therefore their occupation of the property

could not be described as the sort of mischief which the Law was designed to prevent.

We cannot accept these arguments as valid. The States have set about tackling the problem of the housing shortage by controlling not only occupation but also ownership. In the case of persons like Mr. and Mrs. Minikin, whose residential qualification is based on the date when they first took up residence in the Island, a longer period of residence is required to buy or to enter into a contract lease than to enter into a simple lease. We conclude, therefore, that the mischief intended to be prevented by the legislature is not only the control of the occupation of land, but also the control of the ownership of it, and it seems to us that this conclusion receives support from the fact that Counsel very properly conceded that if the Appellant had been buying as an agent or trustee or had entered into some form of enforceable agreement concerning the future conveyance of the property, then such arrangement would have been caught by Article 14(1)(d).

It follows that the mischief alleged here is not the mere occupation by Mr. and Mrs. Minikin of the property, but the arrangement under which, so it is said, they would virtually become the owners of the property in all but title, the title to be conveyed at the appropriate future time when they became legally eligible to receive it.

Looking at Article 14(1)(d) to constitute an offence a person must be a party to a device, plan or scheme for any transaction or arrangement which is, or intended to be, in contravention of the Law, or inconsistent with any application made under the Law. It is the transaction or arrangement which has to be inconsistent with the application if an offence is to be constituted. Was there, in this case, a device, plan or scheme for a transaction or arrangement? The clear answer is that there was. The parties came to an agreement, albeit a gentleman's agreement. What transaction or arrangement was the subject matter of such device, plan or scheme? It was that which we have already described, and involved three steps, first, the purchase of the property by the Appellant, secondly, the lease or licence to Mr. and Mrs.

Minikin to enable them to occupy it, and thirdly, the eventual conveyance of the property by the Appellant to Mr. and Mrs. Minikin. Each step was an essential one in the whole arrangement, which was nothing less than the purchase of the property by Mr. and Mrs. Minikin, but deferred until they became eligible to take the conveyance.

We appreciate that the Appellant was not legally bound eventually to convey the property or pay a penalty and that there could, therefore, be no certainty that the property ever would pass to Mr. and Mrs. Minikin. But that was the proposed arrangement and that was the sole reason why the Appellant sought consent to buy the property and to lease to Mr. and Mrs. Minikin.

The parties very frankly and properly disclosed the whole scheme and the whole transaction and arrangement. The Committee was correct to look at the whole arrangement. It decided that the application to buy and then to lease was part of a scheme for an arrangement which, because it included the intention eventually to convey the property to Mr. and Mrs. Minikin, was inconsistent with the application before it.

We agree with the Committee that this was in effect a deferred purchase. It was not just a vague hope. The future potential purchaser was to put up the purchase price, and no interest was to be paid on the money and no rent was to be demanded for the occupation of the house. The arrangement was therefore undoubtedly inconsistent with the application.

It was put to us that because all the facts had been disclosed the arrangement could not be inconsistent with the application. We do not accept that that argument is logical. We cannot see that the disclosure of an arrangement has any bearing on whether that arrangement is or is not inconsistent with the application.

It was also put to us that even if the arrangement was inconsistent with the application, it did not become so for the purposes of constituting an offence under Article 14(1)(d), unless and until it was finally carried through, that is to say, by the eventual conveyance of the property to Mr. and Mrs. Minikin. It was argued, in this connexion, that the Committee was not being

asked now to consent to all three steps in the arrangement, but only to the first step, the application by the Appellant to buy. That of course is true, but as we have already said, the first step was but one of three steps, each of which was an essential one in the whole arrangement, and therefore the Committee was entitled to look at the whole arrangement when considering the application before it.

It was put to us that under the States' Employees Housing Assistance Scheme new-comers to the Island were able to lease houses with an undertaking that they could buy them at the end of a specific period if they were still in States employment. We have to say that the restrictions under the Housing Law do not, for obvious reasons, apply to the States. Furthermore, it is, of course, open to the Housing Committee to propose exceptions to the restrictions where it is considered to be in the interest of the public good.

Earlier in this judgment we posed the two issues before us as questions. Our answer to each is in the affirmative.

The appeal is therefore dismissed.