

UPDATE

Judicial review: the importance of being prompt

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The Guernsey Court of Appeal case in *Helen Litchfield v the Director of Environmental Health and Pollution Prevention* provides guidance on the procedure to be adopted in judicial review cases in Guernsey.

Introduction

The decision in *Bassington v HM Procureur 1998 26 GLJ* heralded the first formal recognition by the Guernsey Court of Appeal that it had an inherent jurisdiction to control excess or abuse of power by executive bodies. In *Bassington* Guernsey was described as a jurisdiction bearing the 'mark of a civilised polity' where private citizens could challenge administrative decisions affecting their private rights. Further judicial guidance in relation to judicial review in Guernsey came this September from the Court of Appeal in the case of *Helen Litchfield v the Director of Environmental Health and Pollution Regulation*, Judgment 37/2014.

The judgment in *Litchfield* contains guidance on the procedure to be adopted in judicial review cases and particular note should be taken of the Bailiff's comments regarding delay in bringing an application. The Bailiff provides a salutary warning that an applicant who fails to bring an application for leave promptly, and in any event within three months, in any prospective judicial review matter runs the risk of being refused on that ground. It is important to look at the facts of the *Litchfield* case to see how the Court of Appeal judged what Ms Litchfield did or did not do when making their assessment of whether she acted promptly.

The Litchfield case

The Court of Appeal dismissed an appeal by Ms Litchfield (the **Appellant**) against a decision of the Royal Court refusing her leave to seek judicial review of a decision of the Director of Environmental Health and Pollution Regulation (the **Respondent**) to issue a Waste Disposal Licence (the **Licence**). The Licence, obtained pursuant to an application under the Environmental Pollution (Guernsey) Law 2004 (the **2004 Law**), permitted an owner of a vinery (**Langlois**), to operate a waste wood incinerator and a wood store near the Appellant's home.

On 30 September 2011 the States passed a resolution acknowledging that, if Langlois were granted the Licence, the standards (regarding the combustion of waste) set out in Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (the **Directive**) could be adopted as a minimum standard. On 7 December 2012 the Respondent issued the Licence. After obtaining an initial unsatisfactory report from an expert, the Appellant obtained a second report (the **Fichtner Report**), which she forwarded to the Respondent on 15 August 2013. The Fichtner Report concluded that the Licence did not comply with the Directive. The Respondent's response, on 24 September 2013, was that it would be inappropriate for her to purport to add to or vary the reasons for her 7 December 2012 decision.

On 28 October 2013, the Appellant asked the Respondent to reconsider her decision. The Respondent responded in a letter dated 11 November 2013. The Respondent's response was that (i) the Licence was

issued in accordance with the 2004 Law; (ii) the Fichtner Report was based on erroneous information; (iii) the Directive had not been and was not required to be implemented in Guernsey under EU Law; (iv) her decision had to take into account all relevant considerations under Guernsey Law including proportionality; (v) the relevant Directive standards on emission limit values were included in the Licence; (vi) she would only exercise her powers to vary the conditions of a licence where this was necessary to comply with requirements of Guernsey Law and in particular the 2004 Law; (vii) she would only exercise her powers where necessary to ensure that the relevant operation was using the best available technique for preventing the introduction of pollutants into the environment or for reducing to a minimum the introduction of pollutants and any environmental pollution thereby caused; (viii) there was no reason to vary the conditions of the Licence and nothing had changed since its issue.

The Appellant sought leave to apply for judicial review of the 7 December 2012 and 11 November 2013 decisions.

The judgment of the Royal Court

The judge found the Appellant had locus to make an application for leave and allowed her to amend her cause to reflect the exchange of correspondence of 28 October and 11 November 2013. He rejected the argument that the application be struck out on the ground of delay but accepted that the application for leave be refused as it would achieve no practical purpose. Both parties appealed.

The Appeal

The Appellant contended that the judge had erred in holding that the 11 November 2013 decision constituted an appropriate reconsideration of the Respondent's decision and that he should have granted leave to review it. She also argued that the judge should have made an order in respect of the decision of 7 December 2012. The Respondent argued that the Judge was wrong to reject the delay argument as regards the 7 December decision and that he failed to consider whether to allow or refuse leave to review the 11 November 2013 decision.

The Judicial Review procedure

The Bailiff noted that there are currently no rules of court detailing the procedure in judicial review cases. However, Practice Direction No 3 of 2004, issued following the decision in *Old Government House Hotel Limited v IDC and Mighty Mouse Limited* (Judgment 58/2003) provides guidance in this area. In Litchfield, the Bailiff said that the final sentence of paragraph 7 of the Practice Direction implies that the presiding judge may dismiss the application without hearing from the respondent(s). In that regard it mirrors CPR r.54.4, the purpose of which is 'to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration'. In the Bailiff's view, applications for permission should, in most cases, proceed swiftly to be considered inter partes.

The Bailiff stated that at the outset, in addition to *locus standi*, there should be consideration of whether it is right to allow an applicant to proceed to a full hearing. He said that the Guernsey court should adopt the permission stage present in equivalent proceedings in England and Wales. The Bailiff also referred to the overriding objective, the need to ensure the parties are on an equal footing and the need to save expense as well as the court's time and resources. Ensuring that a case is dealt with justly will require the presiding judge to consider all relevant factors. A preliminary hearing at the leave stage might be unjust to a party in terms of adding only to the costs and expense for the applicant and delay in reaching a final conclusion, without achieving any reduction in court time or other appreciable benefit.

Locus standi

In the Bailiff's view, section 31(3) of the Senior Courts Act 1981 and the relevant case law decided thereunder provide an appropriate test to be adopted in Guernsey, namely that leave will not be granted unless the court considers that the applicant has a sufficient interest in the matter to which the application relates. The Bailiff went on to refer to paragraph 54.1.11 of the 2012 White Book in saying that it is generally undesirable for courts to consider standing in detail as a preliminary issue since the question of sufficient interest must be taken together with the legal and factual context of the claim. If permission is granted, standing can be reconsidered at the substantive hearing. He stated, *obiter*, that on the facts of the instant case, it was difficult to conceive of grounds on which the Respondent could successfully argue that

the Appellant lacked standing. She lived 30 metres from the incinerator and may have been directly affected by any pollutants it released into the atmosphere.

Delay

The Appellant commenced proceedings 11 months after the Licence. There is no statutory period in which an application for judicial review must be brought in Guernsey. The Practice Direction says that proceedings must be issued 'promptly' and in the Bailiff's view, a period of three months may be considered as an appropriate guide. Although he said that in some cases three months may be too long. The court will have to examine the reasons for delay and the burden will be on the applicant to show good reasons.

In England, the combined effect of the 1981 Act and the CPR is that the criteria to be considered may include: promptness; undue delay; whether there are good reasons for any delay; hardship, prejudice or detriment to any third party; and the requirements of good administration. It was correct to look to English case law for guidance but remain mindful that those cases must be read in the context of the English statute and rules.

The Bailiff found that there was no evidence before the judge below on which he could reasonably have concluded that the Appellant's delay was reasonable. By the time the 7 December 2012 application was received, the Appellant and Respondent had been corresponding for several months and had met on site. She had also formed an early view that the Licence did not comply with the Directive and could have issued an application much earlier.

An explanation was required and insufficient evidence had been adduced as to why it took the Appellant four months to obtain an initial unsatisfactory expert report and a further four months to obtain a second report. On receipt of the Fichtner Report, eight months after the decision, the Appellant was in a position to issue proceedings. She then delayed a further three months while waiting to see if the Respondent would vary her original decision.

Had the Respondent reconsidered her decision?

The Respondent had argued that the decisions of 24 September or 11 November 2013 amounted to a reconsideration of the grant of the Licence and hence the Appellant had obtained the only relief that she could be awarded if her application were to succeed at a substantive hearing. The decision of 24 September was overtaken by the 11 November decision and hence did not fall to be considered by the Court of Appeal. However, the Bailiff commented that the judge below may have overlooked the fact that had the remedy sought been granted, the Respondent would be ordered to reconsider her decision by looking at the matter afresh. If the Respondent had simply looked at whether anything had changed, she may not have assessed her original decision.

Comment

The Litchfield case demonstrates that in the absence of any rules of court laying down limitations or specifying any criteria to be considered, the Guernsey courts should be guided by the well-established English judicial review principles. In Litchfield the Bailiff said it was inappropriate to lay down general criteria since the range of circumstances in which judicial review might be sought are so infinitely varied and the Guernsey case law to date had been so limited.

The position in Guernsey can be contrasted with other islands like Cayman and Hong Kong which have court rules based on the old English rules (RSC Order 53). The lack of court rules in relation to judicial review in Guernsey means that the court has flexibility in its approach to this area; although the opportunity cost of flexibility is certainty.

Delay can frustrate the administrative process, hence the need for an applicant to issue proceedings promptly. Litchfield demonstrates that the court will be unsympathetic to applicants who delay bringing review proceedings until after they first reasonably could have been brought. Of equal importance is the effect of the Bailiff's comments that the difference between the Respondent reconsidering the application for the Licence afresh and looking to see whether anything has changed since its issue is significant. The message here is that an administrative body which simply looks at whether anything has changed since the grant of a decision cannot properly be said to have reconsidered its decision. This case also shows that providing expert evidence containing an interpretation of a Law (or, as here a Directive) that is contrary to

that of a decision maker neither amounts to fresh evidence nor entitles an applicant to a review of the decision.

Update

The Litchfield case was followed in:

- *Groucutt v The Minister of the Environment Department of the States of Guernsey* (Royal Court, Guernsey Judgment 30/2015) (paragraphs 19, 20 and 35); and
- *Messrs (1), (2) and (3). Companies (4) (5) and (6) and Company (7) for 3 more Companies v Judge John Russell Finch and The States of Guernsey* (Royal Court, Guernsey Judgment 57/2015) (paragraph 41)"

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