

Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 (the “RoU Law”) for a decision by the Royal Court on the following questions of law:-

- (i) Does the UAT have the power to extend the period of 14 days within which an appeal shall be instituted under Section 15(4) of the RoU Law;
- (ii) If not is the Appeal which has been brought outside the said 14 day period a nullity for that reason and/or otherwise incapable of proceeding to determination by the UAT;

And Whereas the Deputy Bailiff heard thereon Advocates C.J. Hay, A.M. Ozanne, R.G. Shepherd and S.H. Davies, Counsel for the Applicant, Respondent, First Intervener and UAT respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and RULED that:

1. The UAT does not have the power to extend the 14 Day Period within which an appeal shall be instituted under section 15(4) of the RoU Law;
2. The Appeal which has been brought outside the 14 Day Period is a nullity for that reason and/or otherwise incapable of proceeding to determination by the UAT;

and the Deputy Bailiff directed that he would hear any application from the parties in relation to costs and on any other issues arising out of the said decision.

S M D ROSS
Her Majesty’s Deputy Greffier.

**Approved Text
24 May 2007**

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

In the matter of a reference to the Royal Court by the Utility Appeals Tribunal for a decision on issues of law pursuant to Section 17 of the Regulation of Utilities (Bailiwick of Guernsey) Law 2001 in connection with the following Appeal (the “Appeal”) to the Utility Appeal Tribunal under Section 15 of the said Law:

Between:	CABLE AND WIRELESS GUERNSEY LIMITED	Applicant
	-and-	
	(1) DIRECTOR GENERAL OF THE OFFICE OF UTILITY REGULATION	Respondent
	(2) GUERNSEY AIRTEL LIMITED	
	(3) WAVE TELECOM LIMITED	Interveners

Judgment handed down: 24 May 2007

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for the Applicant:	C J Hay
Advocate for the Respondent:	A M Ozanne
Advocate for the First Intervener:	R G Shepherd
Advocate for the Utilities Appeal Tribunal:	S H Davies

Cases, texts and statutes referred to:-

1. Regulation of Utilities (Bailiwick of Guernsey) Law 2001.
2. The Regulation of Utilities (Utility Appeals Tribunal) Ordinance, 2001.
3. Utility Appeals (Rules of Procedure) Order, 2002.
4. Regulation of Utilities (Bailiwick of Guernsey) (Amendment) Ordinance, 2007.
5. R v Home Secretary Ex Parte Jeyanthan [2000] 1WLR 354.
6. R v Soneji [2005] UKHL49
7. London and Clydeside Estates Limited v Aberdeen District Council [1980] 1WLR182

Factual Background

1. In February 2006 the Director General of the Office of Utility Regulation (“OUR”) issued a final tender document inviting telecommunication companies to apply for the award of one 3G licence within the Bailiwick of Guernsey. Tenders for the licence were submitted by Cable and Wireless Guernsey Limited (“CWGL”), the Applicant in this matter, and by Guernsey Airtel Limited (“GAL”), the First Intervener. The second Intervener, Wave Telecom Limited (“Wave”) already held a 3G licence.
2. In June 2006 the OUR advised that it had ranked the applicants in order of preference and preferred GAL’s application to that of CWGL. CWGL and GAL were informed of this preliminary decision (“the June decision”).
3. On 28 June, CWGL’s Advocates wrote to the Secretary to the Utility Appeals Tribunal (“UAT”) indicating it was considering an appeal against the June decision. On 29 June, the UAT advised CWGL’s Advocates that the June decision was not appealable as it was not a formal decision with regard to the award of a licence.
4. On 14 September 2006, the OUR issued a decision refusing to grant the 3G licence to CWGL (the “Decision”) and granting the licence to GAL. This was a definitive decision and, as such, appealable.
5. CWGL has sought to appeal the Decision to the UAT under section 15 of the Regulation of Utilities (Bailiwick of Guernsey) Law 2001 (“the RoU Law”).
6. By letter dated 14 September 2006 Collas Day, Advocates acting for CWGL wrote to the UAT requesting (*inter alia*) an extension of 28 days to the 14 day period referred to in section 15(4) (“the 14 Day Period”).
7. By letter dated 19 September 2006, the UAT informed Collas Day that “*the Tribunal is prepared to allow an extension to the period set out in the Regulation of Utilities (Guernsey) Law 2001 Sec 15, 4(a) from 14 days to 28 days*”. A copy of this letter was sent to AO Hall, Advocates acting for the OUR, who in a letter dated 14 September 2006 had informed the UAT that the OUR was of the strong view that the UAT had no discretion to extend the 14 day period, but would not raise any objection to any appeal being instituted within 28 days. AO Hall’s letter was not copied to the other parties and CWGL has said it first saw the letter on 13 February 2007.
8. By letter dated 29 September 2006, CWGL’s Advocates sought a further extension of 21 days from 12 October 2006 to 2 November 2006. By letter dated 29 September 2006, the UAT replied that it was prepared to extend the deadline but only until 10.00 am on 16 October 2006.
9. In a letter dated 10 October 2006, the OUR’s Advocates stated that the extension until 16 October 2006 was *ultra vires* the UAT and that if any

summons was served outside the 28 day period previously acceded to, the OUR would plead the appeal was statute-barred. The letter was addressed to the UAT and copied to CWGL's Advocates.

10. CWGL issued a summons on 12 October 2006, in reliance upon the UAT's letter of 19 September 2006. (12 October 2006 was 28 days after receipt of the Decision). Some further documents required to be served with the summons, namely the Skeleton Argument, authorities and witness statement were supplied by CWGL before 10.00 am on 16 October 2006.
11. On 16 October 2006, GAL issued a request to intervene in the Appeal. Wave has also intervened.
12. The UAT has made a reference ("the Reference") under section 17 of the RoU Law for decision by the Royal Court on the following questions of law:-
 - (i) Does the UAT have the power to extend the period of 14 days within which an appeal shall be instituted under section 15(4) of the RoU Law.
 - (ii) If not, is the Appeal which has been brought outside the said 14 day period a nullity for that reason and/or otherwise incapable of proceeding to determination by the UAT.
13. Advocate Davies, acting on behalf of the UAT, submitted the Reference with relevant supporting documents and correspondence and the UAT has adopted a position of neutrality. I received a Skeleton Argument and supplemental Skeleton Argument from Advocate Hay on behalf of CWGL, arguing "yes" in respect of the first question and, "no" in respect of the second question. Advocate Ozanne filed submissions on behalf of the OUR and further submissions in response to CWGL's Skeleton Argument. Advocate Shepherd filed submissions on behalf of GAL. GAL and the OUR argue "no" to the first question and "yes" to the second question. I heard oral argument from Counsel on 3 May 2007.

The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 ("The RoU Law")

14. The legislative structure consists of an Order in Council, an Ordinance and procedural rules for the operation of the appeals tribunal which are in a Statutory Instrument made by the former States Board of Industry. The Board of Industry has been replaced by the Commerce and Employment Department and wherever possible I refer to it as "the Department".
15. As its name indicates, the RoU Law was established by the States in 2001 to provide a regime for regulating the provision of utility services which are defined in section 22 (1) of the RoU Law to include postal services, telecommunications services, electricity services and such other services as the States may by Ordinance direct. Part I of the RoU Law establishes the Office of the Director General who is not a committee, servant or agent

of the States and hence is independent of the States and holds office for a term of five years. Part II defines the general duties of the States and the Director General. The Director General's functions and powers are defined in Part III and include the power to grant and renew licences. Part IV details certain financial provisions including the establishment of a Public Utilities Regulation Fund which is intended to cover the salary and other costs of the Director General and his staff. Appeals are dealt with in Part V, to which I refer below, whilst Part VI creates Offences and Part VII contains a number of miscellaneous matters including an interpretation section and general provisions as to subordinate legislation.

16. Part V begins with section 14 of the RoU Law which establishes the Utility Appeals Panel ("UAP") and the Utility Appeals Tribunal ("UAT"). Section 14(1) provides that the States on the recommendation of the Department, after consulting with Committees in Alderney and Sark, shall draw up and maintain a panel to be called the Utilities Appeal Panel ("UAP"). The number of people appointed to the UAP are to be such as is necessary for the purpose of hearing and determining appeals (section 14(2)). The members are to have relevant knowledge and experience and are to be independent of any licensee (section 14(3)). No member of the States of Deliberation, the States of Alderney, Chief Pleas of Sark, or the States of Election may be a member of the UAP.
17. Section 14(5) provides as follows:-

"A tribunal to be called the Utility Appeals Tribunal shall be appointed from the membership of the Utility Appeals Panel to exercise the functions conferred by section 15, by any Sector Law and by any other enactment."
18. Section 14(6) provides:-

"The States may by Ordinance make such provision as they think fit in relation to the appointment, constitution, proceedings and powers of the Utility Appeals Tribunal including, without limitation, provision as to:-

 - (a) *procedure (including the method of pleading, the practice to be followed, the means by which particular facts may be proved and the method by which evidence may be given);*
and
 - (b) *costs, fees, expenses and allowances (including the expenses and allowances of members of the Tribunal)."*
19. Section 14(7) deals with confidentiality and section 14(8) creates a criminal offence and specifies the penalty for any breach of subsection 7.
20. Section 14(9) provides:-

“The States may by Ordinance amend the provisions of this section”.

21. In my view it is clear that the UAP is separate from the UAT albeit the members of the UAT are drawn from the UAP. In the documents I have had to review in this case it seems to me that at times the UAP is referred to as a Tribunal i.e. the UAT and that at times the UAT is mentioned when what is intended is the UAP. It is important to remember their different roles and that, for example, the Chairman of the UAP was not in this case the Chairman of the Tribunal (UAT).

22. Section 15 is as follows:-

“15.(1) A person aggrieved by a decision of the Director General made in the exercise of his functions and powers, being a decision of a description set out in subsection (2), may (subject to the provisions of any Sector Law) appeal against the decision to the Utility Appeals Tribunal on any of the grounds set out in subsection (3).

(2) The decisions of the Director General against which an appeal shall lie under this section are, subject to the provisions of any Sector Law, decisions of the following descriptions –

- (a) to refuse to grant a licence;*
- (b) to impose a licence condition;*
- (c) that a licensee has a dominant position in a relevant market;*
- (d) to amend or modify a licence;*
- (e) to revoke a licence; or*
- (f) to impose a direction, requirement or other sanction under this Law or any Sector Law.*

(3) The grounds of an appeal under this section shall be -

- (a) that an error of law has been made;*
- (b) that a material error as to the facts has been made;*
- (c) that there was a material procedural error; or*
- (d) that there was some other material irregularity, including unreasonableness or lack of proportionality.*

- (4) *An appeal under this section shall be instituted -*
- (a) *within a period of 14 days immediately following the date of the Director General's decision;*
 - (b) *by summons served on the Director General stating the grounds and material facts on which the appellant relies.*
- (5) *On an appeal under this section, the Utility Appeals Tribunal may -*
- (a) *dismiss the appeal; or*
 - (b) *quash the decision of the Director General;*
- and, where the Tribunal quashes the decision of the Director General, it may remit the matter to him with a direction to reconsider it and reach a decision in accordance with the findings of the Tribunal.*
- (6) *The effect of a decision to which an appeal under this section relates shall not, except where the Utility Appeals Tribunal orders otherwise, be suspended in consequence of the bringing of the appeal.*
- (7) *The Director General may, where an appeal under this section is not determined by the Utility Appeals Tribunal within a period of three months immediately following the date of the summons by which the appeal was instituted, apply to the Utility Appeals Tribunal, by summons served on the appellant, for an order that the appeal be dismissed for want of prosecution; and upon hearing such an application the Tribunal may -*
- (a) *dismiss the appeal or dismiss the application (in either case upon such terms and conditions as the Tribunal may direct); or*
 - (b) *make such other order as the Tribunal considers just.*
- (8) *The States may by Ordinance amend the provisions of this section.*

23. Section 16 provides a right of appeal from the UAT to the Royal Court and a further appeal with leave of the Court of Appeal to that Court. Section 16(2) provides:-

“No decision of the Utility Appeals Tribunal shall be invalidated solely by reason of a procedural irregularity unless the irregularity was such as to prevent any party to the appeal from presenting his case fairly before the Tribunal.”

24. Section 17 enables the UAT to refer a point of law to the Royal Court.

The Regulation of Utilities (Utility Appeals Tribunal) Ordinance, 2001 (“2001 Ordinance”)

25. The 2001 Ordinance was enacted by the States in exercise of the powers conferred by sections 14(6) and 23(1) of the RoU Law. Section 2 of the 2001 Ordinance requires the States to designate one member of the UAP as Chairman and another as Deputy Chairman. Section 3 provides :-

“Where an appeal against a decision of the Director General is instituted by summons in accordance with the provisions of section 15 of the Law –

- (a) the Director General shall, as soon as reasonably practicable after service of the summons, send a copy thereof to the [Department]; and*
- (b) the [Department] shall, as soon as reasonably practicable after receipt, forward a copy of the summons to the person designated under section 2 as Chairman of the Panel (or, if he is unavailable, to the person so designated as deputy Chairman) asking him to appoint the Tribunal to hear and determine the appeal.”*

26. Section 4 states that a UAT shall consist of three people drawn from the UAP by the Chairman, or if he is unavailable, the Deputy Chairman and that a UAT may include the Chairman or Deputy Chairman.

27. Section 5 deals with voting.

28. Section 6 is concerned with rules as to procedure of the UAT. Section 6(1)(b)(i) provides:-

“6(1) The [Department] may by order prescribe rules of procedure making such provision as the [Department] thinks fit in relation to -

- (b) the proceedings and powers of the Tribunal including, without limitation, provision as to -*
 - (i) procedure (including the method of pleading, the practice to be followed, the means by which*

particular facts may be proved and the method by which evidence may be given); and.....

6(5) *The Tribunal shall, subject to the provisions of section 5, and subject also to the provisions of any rules of procedure made by the Board under this section, determine its own procedure.”*

29. Section 7 declares that hearings of the UAT are to be in public, but with power to exclude the public or a person. Section 8 creates offences in relation to hearings at a tribunal. Section 9 deals with allowances and expenses of UAT members. Section 10 requires the Department to appoint a Secretary to the Tribunal.
30. Pursuant to section 6 of the 2001 Ordinance and “*all other powers enabling it*” the Board of Industry made the Utility Appeals (Rules of Procedure) Order, 2002 (“Rules of Procedure”). I will refer to some of its provisions later in this judgment.

First Question of the Reference

CWGL’s Submission: The tribunal has power to extend time for service of the summons.

31. CWGL’s argument on the first question of the Reference is put on two bases. First that Article 11(3) of the Rules of Procedure authorises the UAT to extend and/or supplement the 14 Day Period and second, that section 6(5) of the 2001 Ordinance confers a general power on the UAT to determine its own procedure.
32. Article 11(3) of the Rules of Procedure reads:-

“(3) The Tribunal may, subject to any specific provisions of this Order specify time limits for steps to be taken in the proceedings and may extend any time limit”.
33. Advocate Shepherd on behalf GAL (in an argument also adopted by Advocate Ozanne on behalf of the OUR) argued that as a piece of subordinate legislation the Rules of Procedure could not amend the 14 Day Period that is established in the RoU Law.
34. In my judgment the 2001 Ordinance does not amend the 14 Day Period because it was made in exercise of the powers conferred on the States by sections 14(6) and 23(1) of the RoU law, not section 15(8) of the RoU Law.
35. I am reassured that is correct because when the States enacted the Regulation of Utilities (Bailiwick of Guernsey) (Amendment) Ordinance, 2007 in order to amend the 14 Day Period (to 28 days), they did so in exercise of the powers conferred on the States inter alia by section 15(8) of

the RoU Law. (The Ordinance came into force on 28 March 2007, too late to assist CWGL in the present appeal).

36. Section 4 of the 2007 Ordinance may also be relevant. It refers to section 15(4)(a) of the RoU Law. If the States were of the view that the 14 Day Period had already been amended, then under normal drafting practice the 2007 Ordinance would refer to “*section 15(4)(a) as amended*”. The absence of the words “*as amended*” is not conclusive proof that the 14 Day Period had not been amended, but it is, in my view, a very strong indication that the States had not knowingly amended the 14 Day Period prior to the enactment of the 2007 Ordinance.

37. Advocate Hay, on behalf of CWGL, also argues that Article 11(3) of the Rules of Procedure supplements the 14 Day Period by giving the UAT a power to extend that time limit in an individual case. He argues the enabling power to do so is found in section 23(1)(c)(iii) of the RoU Law:-

“authorising the Board of Industry to make rules in relation to any matter in relation to which an Ordinance can be made under section 14(6)”.

The matters to which section 14(6) relate include the UAT’s procedure.

38. In my opinion, a provision that confers a power on the UAT to extend the time limit in an individual case is more than a supplement to the rules of procedure of the UAT. That is clear for two reasons. First, if the UAT had the power to extend the time limit for instituting an appeal after the 14 Day Period had elapsed, it would be increasing its jurisdiction and granting a right of appeal to a party who had lost that right.

39. Second, the UAT can not have the power to extend the 14 Day Period before it has elapsed because in my view the procedure laid down for appointing a UAT means that it can not function prior to the issue of a summons. Section 3 of the 2001 Ordinance requires the OUR to forward a summons to the Department who forward it as soon as practicable to the Chairman of the UAP asking him to appoint a tribunal to hear and determine the appeal.

40. Advocate Hay argues that is not the only way of establishing a tribunal and that the Chairman of the UAP has the power under section 4 of the 2001 Ordinance to appoint the members of the tribunal without having received a request from the Department to do so. I do not agree with his construction. Section 4 cannot be interpreted independently of section 3. One section follows the other and, in my view, the procedure for the appointment of the tribunal is sequential. First, the OUR must receive a summons instituting an appeal. Then, the summons is forwarded to the Department who in turn forward it to the Chairman of the UAP with a request to appoint a tribunal. Finally, the Chairman appoints a tribunal.

41. The Ordinance does not clearly state what should happen if the OUR is served with a summons purporting to institute an appeal after the expiry of the 14 Day Period. Counsel put forward the view that the Director General would not be required to forward an invalid summons to the Department. Alternatively, if he did so, the Department would not forward it to the Chairman of the UAP. Or, the Chairman of the UAP could refuse to act upon the Department's request.
42. Any one of those possibilities may be correct. I consider it is likely that the States intended that the Department would have a responsibility for reviewing the validity of an appeal summons. Otherwise there would be no reason for requiring the summons to be forwarded to the Department before it is sent to the Chairman of the UAP.
43. It is highly unfortunate that the proper procedures were not followed in this case. If the Department had received a copy of the summons and given consideration to the validity of the summons, the Department should have declared the summons to be invalid. No tribunal would have been appointed and the costs and expense the various parties have incurred would have been avoided.
44. The wrong procedure was followed from the very outset. It began when Collas Day wrote on 28 June 2006 to the Secretary to the Utility Appeals Tribunal (sic) in relation to the June decision. At this stage, no tribunal had been appointed because no appeal had yet been instituted. Indeed, as became clear, no appealable decision had yet been made by the Director General. Although addressed to the Secretary of the UAT, Collas Day's letter was in effect to the Utility Appeals **Panel**, but the UAP had no jurisdiction at that stage. The Secretary replied on 29 June on notepaper entitled "*Utility Appeals Tribunal Bailiwick of Guernsey*" which listed the name of the Chairman, Deputy Chairman and nineteen members. The notepaper should have been of the Utility Appeals Panel because the names listed were those of the Chairman, Deputy Chairman and members of the UAP. To add to the confusion, the letter referred to "*My Chairman*" and "*the Tribunal*" when in each case it was intended to be the Chairman of the UAP. Also, when the Advocates for the OUR wrote on 14 September 2006 to Professor Michael Waterson they addressed him as Chairman of the Utility Appeal Tribunal. Professor Waterson was Chairman of the UAP. The presiding chairman of the tribunal appointed in due course to hear the appeal was Professor Cave, the Deputy Chairman of the UAP.
45. On 19 September, the Secretary replied to Collas Day's letter of 14 September stating it had been "*considered by the Tribunal*". Although the sequence of events is unclear, it is possible that by this stage the UAP had purportedly appointed a tribunal. I was shown an exchange of e-mails in which the Deputy Chairman of the UAP informed the Secretary on 7 September that the Chairman of the UAP had asked him to convene a panel "*to act in this matter if required*"(emphasis added). The Secretary

replied on 13 September: “*Good to hear from you. I will ring your mobile on Thursday morning*”.

46. Next, on 20 September, the Secretary informed Advocates Hay and Ozanne the name of the presiding Chairman and two other members appointed to sit on the tribunal. So, the tribunal appears to have been appointed some time between 13 and 20 September 2006.
47. It may have been more correct to say that the persons willing, able and available to serve on a Tribunal had been identified. As I have already said, I do not consider that a tribunal could be formally appointed before a summons was issued. Even if a tribunal had been established it had no powers and could not discharge any duties until the summons was issued.
48. Advocate Hay argues that a tribunal can be validly established prior to the issue of a summons in order to deal with preliminary procedural issues including granting a stay of a decision pending an appeal. I do not agree that is correct as it would require specific powers which are not found in the legislation.
49. The summons was served on the OUR on 12 October but the Director General did not forward it to the Department. Instead, to the best of his recollection, he informed them by telephone of its receipt and he then delivered it to Stephen Oliphant secretary to the Panel. I am told that no written request was sent from the Department to the Chairman of the UAP requesting the appointment of a tribunal as envisaged under section 3(b) of the 2001 Ordinance.
50. CWGL’s second submission on the first question in the Reference is that section 6(5) of the 2001 Ordinance empowers the UAT to determine its own procedure. I can not accept the submission. The UAT has no power to extend the 14 Day Period before the issue of the summons because the procedure laid down for appointing a tribunal requires the summons to be issued (by serving it on the OUR). The UAT can not decide to extend the 14 Day Period before it has been validly appointed.
51. I therefore conclude that the answer to the first question in the Reference is “*no*”. The UAT does not have the power to extend the period of fourteen days within which an appeal should be instituted under section 15(4) of the RoU law.

Second Question of the Reference

52. On the second question in the Reference, CWGL make three submissions:-
 - “(a) *The procedural irregularity does not invalidate the proceedings.*

- (b) *The legislature should not be taken to have intended invalidity as the consequence of late service of a summons in circumstances such as those of the present case.*
- (c) *CWGL has a right to a fair hearing.”*

CWGL’s First Submission

- 53. CWGL rely upon section 16(2) of the RoU law which I have cited above. It argues that the UAT’s purported extension of time for service of the summons, whilst not founded on any valid legal power, amounts to a “*procedural irregularity*” within the meaning of section 16(2) and that no unfairness has resulted to any of the parties.
- 54. The effect of non compliance with time limits for instituting an appeal in immigration cases was considered by the English Court of Appeal in *R v Home Secretary Ex Parte Jeyanthan [2000] 1WLR 354*. Judge L J May considered at page 367 E-H whether such a failure was an “*irregularity*” within the meaning of Rule 38 of the Immigration Appeals (Procedure) Rules 1984. After referring to a number of previous decisions, he held that the principle that failure to apply for leave to appeal within a period of fourteen days was not an irregularity within the meaning of Rule 38 is a principle binding on the Court of Appeal. Although Rule 38 of the 1984 Rules is not identical to the wording of section 16(2) of the RoU law, I am satisfied that a similar principle applies.
- 55. Advocate Hay argued that the UAT’s purported **decision** to permit an extension of time was a procedural irregularity. The UAT mistakenly believed that it had the power to confer jurisdiction upon itself by granting an extension of time. That mistaken view is not, in my judgment, a “*procedural irregularity*” within the meaning of section 16(2). It is a mistake which goes to jurisdiction, not procedure.
- 56. In my view, CWGL’s first submission on the second question in the Reference is misconceived. A party aggrieved by a decision of the OUR may only appeal and a UAT can only be appointed to hear the appeal if the summons is instituted within the time period laid down in the RoU Law i.e. the 14 Day Period. The UAT is a creature of statute, its jurisdiction is defined by statute and if a summons is issued late, the UAP or UAT cannot purport to confer jurisdiction upon itself even with the acquiescence of the OUR. My view is that the UAT had no power to confer jurisdiction upon itself, even if all necessary parties, including GAL, consented.
- 57. If I am wrong and the UAT had such power, its failure to obtain the consent of GAL was in any event fatal. GAL was not informed of CWGL’s request for an extension of time and was not consulted by the UAP or UAT and so did not consent to the extension of time, even though part of the relief sought in the appeal was to quash the award of a licence to GAL.

CWGL's Second Submission

58. In support of the submission that the legislature should not be taken to have intended invalidity as the consequence of late service of a summons in circumstances such as in the present case, CWGL rely upon the proposition that:-

“a minor and insubstantial deviation from a [statutory time limit] will not make the resulting proceedings invalid” (R v Soneji [2005] UKHL49, Para 65 per Lord Carswell)

59. CWGL also rely on the judgment of Lord Woolf M R in *Jeyanthan* at page 359 H:-

“procedural requirements are designed to further the interests of justice and any consequence which would achieve a contrary result should be treated with considerable reservation”.

60. Advocate Hay argues that this approach to the consideration of the consequences of non compliance with statutory time limits derives from the judgment of Lord Hailsham L C in *London and Clydeside Estates Limited v Aberdeen District Council [1980] 1WLR182, 189 to 190:-*

“When Parliament lays down its statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non compliance on the rights of the subject viewed in the light of the concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives, but a spectrum of possibilities in which one compartment or restriction fades gradually into another.”

61. However, those observations need to be viewed in their proper context. In *London and Clydeside Estates Limited*, Lord Hailsham was concerned with *“the effect of non compliance by a statutory authority with the statutory requirements affecting the discharge of one of its functions”* (emphasis is added) (page 189C and the head note at page 183E). Lord Hailsham and the line of subsequent cases in which his judgment has been developed are therefore distinguishable from the present case where it is not a statutory authority that has failed to discharge its statutory duty in the prescribed time period.

62. In *Soneji*, the House of Lords was concerned with the statutory duty of the Crown Court, or a Magistrate's Court, to commence confiscation proceedings. Normally, any confiscation order is to be made at the same time as sentencing the Defendant if the Prosecution so requests or the court so decides. The court may postpone the confiscation proceedings for up to six months beyond the date of conviction, or in exceptional circumstances,

may postpone the proceedings even further. In *Soneji* the making of a confiscation order had been postponed by more than six months without the court having satisfied itself that exceptional circumstances existed. So the House of Lords had to consider the consequences of the failure by the court to discharge its statutory duty within the time scale laid down by Parliament (see for example the speech of Lord Rodger of Earlsferry at para 31).

63. Similarly, the case of *Jeyanthan* concerned the non-observance of a procedural rule by the Secretary of State for the Home Department. It related to an appeal from a decision of a special adjudicator in an application for asylum where the Secretary of State failed to use the form prescribed by the relevant rules.
64. In *Jeyanthan* Lord Woolf reviewed the comments of Lord Hailsham L C in *London and Clydeside Estates Limited* and concluded at page 362C that the question of whether the requirement is directory or mandatory is only at most a first step and after defining three questions which are likely to arise he concluded at page 362F:-

“If the result of non compliance goes to jurisdiction, it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver”.

65. In the present case, we are not concerned with a procedural irregularity or failure committed by a statutory authority in the discharge of its duties. What we have is a failure by CWGL to issue its summons within the 14 Day Period and an ultra vires decision by the UAT to grant an extension of time.
66. However, if I am wrong and this is a procedural irregularity by a statutory authority, I have to decide whether the States intended it to be fatal. I am satisfied that in not providing the power to enable the UAT to extend the 14 Day Period, the States intended that period to be strictly observed. I note that when enacting the 2007 Ordinance to extend the 14 Day Period to 28 days, the States did not take the opportunity to confer a power to extend the time period. I also note that, as Advocate Shepherd argued, the primary reason for extending the 14 Day Period was not because of difficulty in complying with it, but to allow a time period during which hopefully negotiations could take place between the OUR and persons aggrieved by its decision in the hope that would reduce the number of appeals (page 942, Article XIV of Billet d’Etat No X of 2006).

Third Submission

67. CWGL has a right to a fair hearing. CWGL relied upon Article 6(1) of the European Convention on Human Rights cited in Schedule 1 to the Human Rights (Bailiwick of Guernsey) Law 2000 and on section 3(1) of that law requiring that primary and subordinate legislation must, as far as it is

possible to do so, be read and given effect in a way which is compatible with Convention Rights. CWGL argued that if the Appeal were found to be time-barred it would be denied a fair hearing. There are two bases put forward. First, it would be arbitrary and disproportionate to interpret the limitation period in section 15(4) of the RoU Law in such a way as to result in the invalidity of the appeal. Second, it would be contrary to the principle of equality of arms to deprive the UAT of the power to extend the 14 Day Period in circumstances where the OUR has 42 days to respond. That would be to deny CWGL a reasonable opportunity to present its case.

68. I am not persuaded there is any merit in this final submission of CWGL. It was well aware of the 14 Day Period, as is evident from its Advocates' letter to the Secretary to the UAT/UAP dated 28 June 2006. That letter referred to the requirements for the contents of the appeal summons laid down by section 2 of the Rules of Procedure and described then as "*extremely onerous*". The letter drew attention to the fact that the 14 Day Period is set out in the RoU Law whilst the Rules of Procedure are subordinate legislation. The letter shows CWGL was fully aware of the issue. Unfortunately it chose the wrong course of action.
69. I have difficulty in accepting that the requirements of section 2 of the Rules of Procedure are extremely onerous. Section 2(3)(c) requires a skeleton argument in support of the Appeal where practicable. I accept the preparation of a skeleton argument might have been onerous, even though CWGL had preliminary notice of the OUR's intended decision in June, but CWGL could have complied with the requirements of section 2 without serving a skeleton argument with the summons if it was not practicable to do so. The only other provisions that might have been onerous were subsections (3)(a) and (d) which require a brief statement of the facts and evidence to be adduced and a list of the witnesses intended to be called at any hearing. I place emphasis on the word "*brief*". A brief summary would have been sufficient. If that was impossible, I heard nothing from Advocate Hay to explain why CWGL was unable to comply substantially with the requirements of the Rules of Procedure. I therefore do not accept that the requirements were as onerous as CWGL argued.
70. As for the "inequality of arms" argument, I do not accept that CWGL was deprived of the right to a fair hearing simply because it had to issue a summons within 14 days when the OUR had 42 days to reply. That is especially so in this case where CWGL had known since June that it was to be refused a licence.

Conclusion

71. In conclusion therefore, I answer "*no*" to the first question in the Reference and "*yes*" to the second question. It follows that CWGL's Appeal to the UAT was not validly instituted.

72. I have been informed that substantial work has been undertaken to prepare for the appeal which is now almost ready for hearing. Indeed, Advocate Hay even argued that because so much work had been undertaken and so much expense incurred in connection with the appeal, it should be allowed to proceed. That cannot, in my view, be correct. If the UAT was never validly constituted in relation to this appeal, it has not become validly established simply as a result of the lapse of time and the amount of work undertaken in the meantime.
73. There is one further issue on which I must comment. If the UAT was not validly appointed, could it validly have made the Reference to the court and what is the validity of this judgment?
74. It is necessary to consider the request for intervention filed with the UAT by GAL dated 16 November 2006, in which GAL raised a preliminary objection that the appeal was out of time and that no extension of time can be granted by the UAT, which had no power or discretion to condone any delay or to extend any time. I understand all parties considered how best to deal with the preliminary objection and concluded it was preferable that the UAT should seek clarification from the Royal Court by means of a reference, in the manner that it has done.
75. Had the UAT not made the Reference, GAL could have referred the matter to the court (perhaps by way of judicial review) and the parties would have had the same opportunity to present their argument as they have done under the UAT's Reference. So, even if there has been an irregularity in the procedure, I do not believe that any party has been thereby inconvenienced or denied the opportunity to present its case to the Royal Court. The court had to have the opportunity to rule upon the issues raised in the Reference.
76. My decision on the Reference is:-
1. The UAT does not have the power to extend the 14 Day Period within which an appeal shall be instituted under section 15(4) of the RoU Law.
 2. The Appeal which has been brought outside the 14 Day Period is a nullity for that reason and/or otherwise incapable of proceeding to determination by the UAT.
77. I will hear any application from the parties in relation to costs and any other issues arising out of this decision.