

**Judgment 27/2010**

**Bird v Environment Dept. – Royal Court  
(Civil Action File 1160) - 18<sup>th</sup> June, 2010**

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**Island Development (Guernsey) Law, 1966 – appeal from refusal of application to erect a replacement radio mast – application for leave to amend cause to allege a breach of Article 1 of the European Convention on Human Rights – procedure for pleading a Human Rights point – application for leave to amend adjourned for full argument as part of the hearing of the substantive appeal. (See Judgment 6/2008)**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

18th day of June, 2010, before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

Civil 1160

Between:

RICHARD ANTHONY BIRD

Appellant/Applicant

and

THE MINISTER OF THE STATES  
ENVIRONMENT DEPARTMENT

Respondent

On the application of the Appellant/Applicant in the terms attached hereto;

WHEREAS THE COURT on the 30<sup>th</sup> day of May, 2008, having heard Advocates N.J. Barnes and K.E. Walder, DIRECTED that further written submissions be filed by Counsel and ADJOURNED the application for consideration upon receipt of the aforesaid further submissions;

AND WHEREAS THE COURT having considered the further written submissions of Counsel;

THE COURT this day handed down judgment in the terms attached hereto and ALLOWED the amendment to the cause, and RESERVED COSTS.

M A TOSTEVIN  
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between

Richard Anthony BIRD

Applicant

-v-

THE MINISTER OF THE ENVIRONMENT DEPARTMENT

Respondent

APPELLANT'S APPLICATION TO AMEND

Judgment handed down on: 18<sup>th</sup> June 2010

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for the Applicants: N J Barnes

Advocate for the Respondent: K Hill-Tout

**Cases, texts & statutes referred to:**

Ogier v Grand Havre Holdings Limited [2000] 29 GLJ

Marckx v Belgium (1979) application no. 6833/74

Van Der Mussele v Belgium application no. 8919/80

Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms

**Introduction**

1. I have previously issued a judgment in connection with this appeal and do not need to repeat in this judgment the factual circumstances giving rise to the appeal.
2. The Appellant seeks leave to amend his Cause by adding a new paragraph 11:  
*“The Appellant contends that the Department’s decision was unreasonable in that its effect was to deprive him of the reasonable expectation that planning permission would be granted in view of the fact that permission had been granted in 1968 which the Department admits enured for the benefit of the land and all persons interested in it so that the refusal of permission constituted a breach of the Appellant’s rights under Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms”.*
3. In support of the application to amend, Advocate Barnes submitted:
  - (i) In general an amendment ought to be permitted where it can be made without prejudice to the other party.

- (ii) Where planning permission has been “lost” because the structure to which it relates has disappeared through circumstances beyond the owner’s control that is a matter to which the Department ought to have regard when deciding whether re-erection is to be permitted.
- (iii) The Department ought to have had regard to Article 1 of Protocol 1 of the Convention because refusal of permission constituted an unjustified interference with the Appellant’s property rights.
- (iv) The amendment raises an issue which is at least arguable so it should be permitted.

4. The Department’s response was, in summary:

- (i) A Human Rights point must be properly pleaded in accordance with Practice Direction 1 of 2006 and the application to amend was brought too late in the proceedings to be granted.
- (ii) Planning permission had not been “lost” because the original mast had been removed from the Appellant’s premises as a condition of granting permission to erect a new mast on a nearby site and by the time the Appellant applied for planning permission, the structure was no longer in place.
- (iii) Article 1 Protocol 1 is not engaged because the possibility of acquiring planning permission at a future date is not a protected right and, furthermore, the Appellant had no property right in a mast as the mast did not exist.
- (iv) Human Rights issues should not be allowed to “muddy the water” when the point is legally unsustainable.
- (v) The Department should not be put to the trouble and expense of arguing a point that is unsustainable.
- (vi) The Department does not accept that planning permissions enure for the benefit of the land after they have expired and have ceased to be valid.

5. In reply, Advocate Barnes lodged a further submission that Article 1 Protocol 1 is made up of three rules:

- (i) The first permits the peaceful enjoyment of possessions.
- (ii) The second permits the deprivation of property subject to certain conditions.
- (iii) The third permits the control of property for certain purposes.

6. He also submitted that:

- (i) Refusing to re-erect a structure where the original is no longer present through the design of the owner would constitute interference with the first rule and control within the third.
- (ii) The question then is whether a fair balance was struck between the demands of the community and the requirement of the protection of the individual’s fundamental rights and it is arguable, at least, that has not occurred were the individual has suffered a substantial reduction in the value of his property through no fault of his own.

(iii) Did the refusal of permission constitute the exercise of control of the use of the property that was not necessary in accordance with the general interest.

7. The legal principles to be applied when considering an application to amend are well established. They were summarised succinctly by Sumption J A in Ogier v Grand Havre Holdings Limited [2000] 29 GLJ at page 42 C:

*“Whether a litigant (represented or unrepresented) should be allowed to amend his pleadings depends on what justice requires in the particular case. Over elaborate definition is probably undesirable.”*

8. He then identified three matters that broadly reflected the practice of the Courts of this Island. They include that *“an amendment should not be allowed if the case introduced by it can be seen to have no realistic prospect of success”*, the test for which he said was broadly the same as the test for striking out a pleading under rule 36 of the 1989 rules then in force.
9. I have had difficulty in satisfying myself, on the authorities produced to me, that the case that would be introduced by the proposed amendment would have a realistic prospect of success in that I am unsure as to whether Article 1 Protocol 1 is engaged. I regard the planning permission that was granted in 1968 for the erection of a mast on the Appellant’s premises as being no longer valid for the reasons I gave in my earlier judgment. Furthermore, the Department’s submission that the possibility of acquiring a planning permission in the future is not a protected right sounds highly plausible and appears to be correct. Crown Advocate Hill-Tout cited Marckx v Belgium (1979) application no. 6833/74 and Van Der Musselle v Belgium application no. 8919/80 as authorities for the proposition that Article 1 of Protocol 1 relates only to existing possessions, which I accept.
10. I struggle with any proposition that the Department have interfered with the Appellant’s right to peaceful possession of his land when it seems to me that it is the party who physically removed the mast who should be responsible. The third element of Article 1 of Protocol 1 may possibly be engaged. The refusal of permission to re-erect the aerial appears to be a control on the use of the Appellant’s land. Such control would be permitted where it is in the general interest and the question would be whether the Department has struck a fair balance, as Advocate Barnes submitted. I am not sure that raises any issue other than whether the Department has correctly and reasonably interpreted and applied the planning legislation.
11. From the authorities counsel have submitted in connection with this application to amend, I am not clear as to the nature and degree of interaction between the Convention and planning legislation. I have some sympathy with someone who, apparently through no fault of his own, has lost the benefit of a structure that formerly stood on his land, the loss of which is likely to have materially reduced the value of the land, and who says that he reasonably expected that permission would be granted to replace the mast. I think that is likely to be the reaction of many a lay person who finds themselves in the position of the Appellant and who might not understand that the legal position may well be different from what the lay person would expect.
12. My task in deciding this application has not been made any easier by my attempt to deal with the matter on the papers without hearing further argument from counsel. The authorities submitted to me do not, in my opinion, establish that the Appellant’s arguments are wholly unsustainable although it is difficult to form a view as to whether there is a reasonable prospect of success.
13. I had considered setting a hearing date for hearing oral submissions but I now think that the justice of the matter requires that there be full argument as part of the hearing of the substantive appeal.

14. I am thereby avoiding having to reach a conclusion as to whether the amendment would introduce a case with a reasonable prospect of success. I believe that is permissible where the over-riding principle of doing justice so requires. This appeal involves some unusual factual circumstances which appear to raise issues that have not been considered since the coming into force of The Human Rights (Bailiwick of Guernsey) Law, 2000.
15. I consider that justice will be better served by allowing full argument. I therefore allow the amendment and would propose that costs be reserved unless the parties wish to apply for a different order.
16. Hitherto, where an appeal has raised questions of reasonableness that are for the presiding judge, rather than the Jurats, to decide, the practice has been to hear those at a preliminary hearing in front of the judge alone. Following the coming into force of the Royal Court (Reform) (Guernsey) Law, 2008, the presiding judge and Jurats retire together at the conclusion of the appeal and deliver a reasoned judgment. In my view, it is no longer necessary to separate the issues if it is more convenient to hear them all together, as I believe is the case in the present appeal. I would ask that counsel liaise with Deputy-Greffier Simmonds with a view to obtaining an early hearing date for the substantive appeal.
17. I apologise to the parties and to counsel for the substantial delay in producing this judgement, due largely to the fact that I was unsure what order to make but also to pressure of other work.