Judgment 27/2012

Ferbrache et al v Chief Officer of the Guernsey Police and Judge John Russell Finch – Civil Action File No 1509
- Royal Court
- 31st August 2011

Application to adjourn judicial review proceedings – granted.

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

The 31st day of August 2011 before Sir de Vic Carey, Lieutenant Bailiff alone,

(1) MARK GERARD FERBRACHE
(2)PAUL RICHARDSON
(3)SARA MALLET
(4) SIMON ROBERT GUILLE

Applicants

v

(1)CHIEF OFFICER OF THE GUERNSEY POLICE

1st Respondent

(2)JUDGE JOHN RUSSELL FINCH

2nd Respondent

Whereas on 30th and 31st August the Lieutenant Bailiff considered an application by the first respondent for an adjournment and heard thereon M G Ferbrache and P Richardson in person and Crown Advocate F Raffray on behalf of the first Respondent, the Lt Bailiff this day handed down judgment in the terms attached hereto and adjourned the matter until 26th September 2011.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between

(1) MARK GERARD FERBRACHE
(2) PAUL RICHARDSON
(3) SARA MALLETT
(4) SIMON ROBERT GEALL

Applicants

-and-

(1) THE CHIEF OFFICER OF THE GUERNSEY POLICE

First Respondent

(2) JOHN RUSSELL FINCH

Second Respondent

Judgment of Lieutenant Bailiff Carey
on the First Respondent's Application to adjourn

Dates of hearing: 30th & 31st August 2011
Decision handed down: 31st August 2011

Cases referred to:

Le Huray v States of Guernsey (Judgment 10/2011)
London Borough of Islington v Camp (2004) LGR58

1. This is an application from Advocate Raffray that I should adjourn judicial review proceedings brought by the four partners of the Law practice of Atkinson Ferbrache and Richardson ("AFR") against the actions of the then Chief Officer of Police and Judge Finch which resulted in a warrant being issued to search their office premises in the early hours of 5th June 2010. The basis of the application is that following a decision of the Deputy Bailiff in another case Le Huray v States**,** there are real issues in law as to the extent of the responsibilities of the Chief Officer for actions of officers under his command. Le Huray is under appeal to the Court of Appeal on 12th September and Mr Raffray wants these proceedings adjourned until the Court of Appeal has delivered its judgment therein, which it is anticipated will be by the end of this month if not before. This is strongly opposed by AFR.

2. As my decision is finely balanced I need to recite the somewhat unhappy history of these proceedings to date and summarise the issues before the Court at the present time.

3. The Plaintiffs' original application for leave to bring these proceedings was tabled before Lieutenant Bailiff McMillen on 2nd July 2010 and adjourned for hearing before me on 5th July 2010. It rehearsed the history of the matters based on material that was then available to the Plaintiffs, the Respondents having declined to furnish a copy of the information submitted to Judge Finch. It was supported by an affidavit swearing as to the truth of the facts contained

therein and annexing pre-application correspondence. I gave leave, although I was clearly in the dark as to the circumstances in which the application was made. A copy of the information was furnished to the Plaintiffs on 12th July, albeit that it was only on 29th July that it was confirmed as being a true copy. There then followed an unfortunate delay whilst the Court searched to find the original. The original cause tabled on 5th July contained the names of certain clients of AFR and it was agreed it would be redacted the redacted version being lodged on 12th July.

4. Further correspondence was exchanged thereafter culminating in the Plaintiffs notifying the Respondents' counsel on or about 28th September that they wished to amend the cause. This was responded to by Mr Raffray in a letter dated 8th October. The amendments concentrated on recording further developments since the issue of proceedings and Mr Raffray opposed their inclusion but helpfully produced a schedule of amendments he was prepared to agree. In later correspondence it was accepted that the cause could properly include reference to the information which had not been seen prior to commencement of proceedings.

5. It is convenient that for the sake of completeness and understanding how this matter has developed that I should summarise the information and in so doing I will endeavour to limit reference to then AFR client to the minimum at this stage. On the afternoon of 4th June the client was asked to go the police station. He arrived accompanied by an advocate employed by AFR. He was arrested and cautioned. He was spoken to about a serious offence. During the interview it became apparent that it would be necessary for the police to examine and seize computer equipment situate at the address where the client lived. A search by consent having been refused on legal advice, an authority under S 13 PPACE was granted. After being let into the house the police carried out a search without anyone else present. The police concluded that computer equipment had been there and had been recently removed. The other members of the household were arrested on suspicion of perverting the course of justice. Their response to the police was that they understood the client's laptop, mobile phone and home computer were, on the advice of an advocate to be taken to the offices of AFR. Further questioning which only emerged after midnight elucidated from them that the relevant items had been taken to AFR before the client attended for interview. The warrant was then applied for, granted and executed later that night.

6. The warrant was expressed in the following terms [after reciting the laying of an information]:

> "to enter and search premises at AFR Advocates [address given]
>
> And search for: Computer equipment and a mobile phone
>
> AUTHORITY IS HEREBY GIVEN for any police officer
>
> TO ENTER the said premises on one occasion only within one month …. and TO SEARCH for the articles or persons in respect of which the above application is made"

7. I have noted that in their pleadings AFR make no claim that the computer and phone was theirs, or that it was lawfully in their possession, as being properly held for a client. I am not at this stage suggesting they should have done so. In his letter of 8th October Mr Raffray correctly in my view mentioned that until outstanding investigations are concluded in respect of possible offences by the (now former) client and the advocate employed by AFR he cannot see that detailed directions for progressing the review can be concluded. [It was on 21 January 2011 that Mr Hill informed AFR that no criminal proceedings would be taken against the advocate or their former client – AFR deny receipt].

8. On 22nd December the Plaintiffs sought to list the application for leave to file an amended cause on 24th December. They were advised that I would not be sitting which is perhaps not surprising

the day before Christmas. The file shows that efforts were made to list the application before me during the first three months of the year. Then nothing happened until the Deputy Greffier emailed the parties on 11th April expressing my concern that it had been nine months since the matter came on and that I felt it might be appropriate to hold a review. I have noted the response received from both sides and I can make no comment on the fact that communications between me and the Deputy Greffier were such that I do not seem to have been fully appraised of the developments that had taken place. As a result matters only came to a head when as the parties were advised by the Deputy Greffier on 9th June I called the matter in (not for substantive hearing – that would not have been possible) for review on 16th June. On that day the proposed amendments were the principle live issue and I felt it would assist to have skeleton arguments from both parties. Mr Hill, who was now dealing with the matter on behalf of the Chief Officer, had however already raised by email on 13th June the issue of adjournment of the case until the Court of Appeal had adjudicated on Le Huray. He continued to make the point and it was left that it would be considered when the application to amend was heard. After skeletons were exchanged on the amendment issue the earliest date which suited counsel for the hearing was 22nd August. In the meantime AFR proposed to Mr Hill that the amendment application be adjourned sine die and that directions be given for a timetable for filing evidence. Mr Hill agreed with not proceeding with the amendment application if the Plaintiffs were prepared to deal with the issues raised in the amendments in evidence or argument, in which event the application could be withdrawn, but that did not find favour with the Plaintiffs.

9. The Plaintiffs accordingly persisted on 22nd August with their application to adjourn the application to amend. I also chose to raise the procedural issue of appointment of one of their number as spokesperson of the plaintiffs before I started the hearing – there were also some preliminary issues on notice which do not now require detailed consideration. My real concern was the application to adjourn the application to amend. I expressed support for the view that the cause should concentrate on the events leading up to the warrant and its execution including the terms of the information. Mr Richardson seemed to accept this and I sent the parties away for half an hour to agree an amended cause, which they did. In the event the amended cause differed little from that which Mr Raffray had agreed to in October. We then went on to consider adjourning or staying, as Mr Raffray called it, the proceedings until after the Court of Appeal judgment in Le Huray. I frankly could not at that stage see why the matter could not proceed on the basis that any amendments including substituting or adding respondents could be addressed later. Mr Raffray asked for further time to make submissions so I adjourned until 30th August. He offered to submit detailed submissions in 48 hours which duly arrived. The Plaintiffs responded with requests for disclosure which they have not pursued. They have gone on to lodge a substantial skeleton argument with authorities in support of their argument that no adjournment should be allowed.

10. In Le Huray, the Deputy Bailiff decided that the States were not vicariously liable for acts of Police Officers who allegedly had misconducted themselves in the way that they handled the arrest of the Plaintiff some ten years previously. The Deputy Bailiff reached his conclusion after having considered both the Guernsey Law that established the salaried Police Force in 1922 and certain English decisions absolving local authorities from liabilities or actions of the Police and certain statutory developments whereby the Chief Constable had been made liable to action as a joint tortfeasor in respect of tortuous actions of officers in his force. *Obiter*, the Deputy Bailiff acknowledged that there was no similar legislative provision extending to the Chief Officer of the Guernsey Police and as a result the Chief Officer finds himself in some difficulty when actioned for judicial review and damages in respect of actions taken by individual officers of his force.

11. In particular, in this case, a named Police Inspector can be identified as the officer who laid the information before Judge Finch in accordance with the provisions of Section 8 and the schedule to The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003.

12. Mr Raffray raises the issue of who is liable for the actions of Police Officers under Guernsey Law, the officers themselves, the Chief or the States and who is responsible for the unlawful actions of Police Officers under Guernsey Law in the context of judicial review. The decision in Le Huray, is, I accept, a supervening event arising since the issue of the original proceedings. In his submission, the Chief is not in a position to respond to the Application until Le Huray has clarified the legal position. Mr Raffray is asking for a delay until the Court of Appeal judgment is handed down and he has grounds for anticipating that this will be available for this Court to consider by the week beginning 26th September. Any adjournment would be until then. Clearly, how the action should proceed cannot be mapped out in advance of knowing what the final outcome is in Le Huray, but there is no suggestion that if one or other of the parties is dissatisfied with the decision, the Chief Officer should have grounds for asking that there be a further delay until the matter has been considered by the Privy Council or the ECHR.

13. Mr Richardson resists the Application for a stay and says that if there is to be an Application, it should be one for an adjournment and I therefore treat this as an application for an adjournment. He has a number of reasons for resisting the Application, although he does not argue that he and his colleagues will be severely prejudiced by any delay of two to three weeks.

14. Mr Richardson canvassed the possibility that this was one of those situations where both respondents should take a neutral stance and the Court should reach its own conclusion citing Islington v Camp. The situation here is quite different and I did not in any event detect an expectation on the part of the first respondent that he would be removed as an interested party. The Chief Officer's problem is that Le Huray as currently decided leaves doubt in his mind as to the extent of his responsibility for the actions of his subordinates and he is asking for this short adjournment in the hope which may or may not be well founded that the wisdom of the Court of Appeal will clarify the position and make answering the Plaintiffs' case a more succinct task.

15. I have had some formidable material submitted by Mr Richardson in support of his arguments. He has tried to persuade me that Le Huray may have been wrongly decided on the basis of judgments from other parts of the Commonwealth and certain academic writings. I confess that I have not studied these in the time available to me and to defer judgment until such time as I have, would be self defeating and in itself cause further delay. The short point is that it is not for me to second guess what the Court of Appeal will conclude in Le Huray or to allow speculation on that decision to give weight to my decision whether or not to grant this short adjournment

16. What Mr Richardson says with some force is that any decision in Le Huray will not impact on a number of the matters before the court in a judicial review application. He takes a strong line that the failure of Judge Finch to give reasons is indefensible and therefore an answer on that point should be made at this time as if it is fatal to the respondent's case then that will be an end to the matter.

17. In reply to this particular point, Mr Raffray drew my attention to a judgment in a case of Re Q which was dealt with by the Court of Appeal a few months ago, but unfortunately has not yet seen the light of day because of difficulties in anonymising the judgment. I do not want to be unfair to AFR and I cannot give weight to Mr Raffray's argument on this without AFR having had the opportunity of seeing the judgment. However, Mr Raffray's submissions do reinforce what I understand the Law to be, that whilst reasons are desirable and indeed expected, failure to give them will not necessarily be fatal. This will be very much a live issue at trial. I will not rehearse all the points in the Application which do not, on the face of them, appear to be likely to be affected by any decision in Le Huray. However, once we started trying to separate out points that could perhaps be dealt with separately, we ran into difficulties. We are dealing with wrongful acts of Police Officers and if they are indeed on their own in defending such claims, then it is not for the Chief Officer to be conducting their defence. They have got to be identified and brought into the action.

18. It is, I accept, for the Plaintiffs to identify the parties who must respond to their Application. However, there is a dilemma for them in that they do not have knowledge of who precisely it was within the Police Force instigated the actions which resulted in the alleged unlawful application. We do not know whether Inspector Davis was as appears to have been the decision maker who drafted the information and approached Judge Finch, or whether he was the night watchman who happened to be around at 3.00 am in the morning when the Warrant had to be applied for. Sergeant Zierlinger carried out the search, but it is not clear how far he had any individual responsibility when he was authorised by a Warrant signed by Judge Finch. I do see real practical difficulties if this litigation pans out to being an action against all the individual Police Officers who contributed to the alleged unlawful act of applying for the Warrant and I can only surmise that it was because of the difficulties of separating responsibility in this way in an age where Police operations were collective and more complicated than in the old days, that Chief Constables were required by law to assume joint responsibility with their subordinates. Be that as it may, there is a serious issue in law here which does have ramifications for the good government of the Island. Mr Raffray has just persuaded me that I should grant his application for an adjournment. In so doing I acknowledge all that Mr Richardson has said about issues unaffected by refinement of the Le Huray decision and work can continue in St James Chambers to enable an early response to be filed.

19. Although I am not persuaded by the arguments I have heard from Advocate Richardson, I am concerned at the delay and I would not be prepared to go on and grant an adjournment to Mr Raffray were I not assured that once the Court of Appeal have adjudicated on the decision in Le Huray, the Chief Officer will have to nail his colours to the mast of that decision, whether or not it is to be further reviewed, and defend himself on behalf of the Police or alternatively, disclose to the Plaintiffs which members of his force, he says, are the persons who should be actioned. Although I find this conceptually quite difficult, I can only assume that this is a matter that has properly considered and that there will be real benefit in enabling the Chief Officer to crystallize his defence at the end of the month when all is revealed by the Court of Appeal.

20. It also seems to me that the bulk of the gathering of evidence concerning the surrounding circumstances of the application of Inspector Davis must already have been carried out and therefore Mr Raffray must understand that I am not going to be sympathetic to any further delay.