

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

Between

ANDREW LEONARD BICHARD

Plaintiff

-v-

STATES OF GUERNSEY

Defendants

Judgment of Lieutenant Bailiff Richard Southwell QC

Advocate R I C E Harris appeared for the Plaintiff.
Advocate Jessica Roland appeared for the Defendants.

**Hearing date: 12 June 2006
Judgment handed down: 14 June 2006**

Costs

121. The main judgment on the substantive issues was delivered on 12 June 2006. The Court heard the submissions on costs on the same day, and ordered that Mr Bichard be paid his costs on a full indemnity basis by the States of Guernsey. In this judgment are set out the reasons for such order as to costs.

122. It was common ground that Mr Bichard should benefit from a costs order in his favour. The only issue is whether an order for indemnity costs should be made. Under the Royal Court Civil Rules 1989 Rule 48(1), the Court may make such order as to the costs of proceedings as the Court thinks just. Under Rule 48(3) the Court may, in the circumstances mentioned in paragraph

(4) of Rule 48, order that costs shall be paid on a full or partial indemnity basis. Rule 48(4) reads:

“(4) *the circumstances referred to in paragraph (3) are as follows –*

- (a) *where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the Royal Court (Costs and Fees) Rules, 1981; or*
- (b) *where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court.”*

123. Mr Harris relied on both limbs of paragraph (4). He submitted that there were “special circumstances” within sub-paragraph (a), and that the States had defended the judicial review application “unreasonably” within sub-paragraph (b).

“Special Circumstances”

124. Under this limb Mr Harris relied on paragraph 71 of the substantive judgment, in which I said (inter alia)

“The broad question whether the change of long-standing policy was lawfully made is one which has to be decided in the interests of all the members [of the Pension Scheme] and of the States. Both sides need to know where they stand on this important question, particularly because the evidence shows that the States have further redundancies in mind. The question therefore needs to be decided speedily.”

Mr Harris submitted that, because the question related to all or any members, and because the question had to be decided in the interests of the members and of the States, this amounted to a special circumstance, in the light of which Mr Bichard (or the AGCS which is supporting him in part or in whole) ought to be paid all his costs. Mr Harris referred in support of this to the trust case of *Stuart-Hutcheson v Spread Trustees Co Ltd* (Court of Appeal, unreported) and the judgment in that case of Christopher Clarke JA. There the question to be considered related to the administration of the trust, and the costs of all the parties were necessarily incurred for the benefit of the trust estate viewed as a whole.

125. The present case was different. Mr Bichard challenged both the decision on the new Rule 23(2) policy and the decision adverse to himself. What was said in paragraph 71 of the judgment

was directed to the preliminary question whether this challenge was appropriate for judicial review. In the ordinary way the plaintiff challenging such decisions would be given his costs on a recoverable basis, even though in the Court's judgment the challenge to the decision on general policy needed to be determined in the interests of all concerned. I do not find the analogy of a trust case such as *Stuart-Hutcheson* to be cogent. I doubt whether it would be appropriate to treat what was said in paragraph 71 of the judgment as being a special circumstance within Rule 48(4)(a). But in view of what follows, it is not necessary for me to decide this point.

Unreasonable Defence

126. To deal with this issue involves some retracing of the steps set out in the main judgment. The starting point is in the judgment of Simon Brown LJ (now Lord Brown of Eaton-under-Heywood) in *Unilever* (see paragraph 82 of the main judgment) where he stressed that public authorities "*are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens*", and also Lord Mustill's reference to "*the spirit of fair dealing which should inspire the whole of public life*". As I am now going to explain, it is my considered judgment that the conduct of the PSRC in this matter was not "high-principled" and was not consistent with Lord Mustill's "spirit of fair dealing".

127. It is convenient to approach this by reference to what the members of the PSRC and relevant officers of the public service must have known, or if they did not know, certainly ought to have known, when they met on 17 November 2005:

- (1) The Pensions Consultative Committee, the PCC, of which the PSRC members were also members, had been established in 1988, and continued in existence, as the forum for the discussion of matters concerning "the operation and design" of the Pension Scheme.
- (2) The operation of Rule 23(2) was such a matter. There had been a consistent practice and policy of the Board and then the PSRC since 1988 in the operation of Rule 23(2) to grant maximum enhancements. If that practice and policy was to be changed, prior consultation in the PCC was required.

- (3) On 22 September 2005 at the meeting of the PCC the Chairman of the PSRC (Deputy Le Tocq) assured the members of the PCC present that potential changes in the Pension Scheme would be submitted to the PCC for consultation.
- (4) On 30 September 2005 the redundancy of another public servant took effect, and the PSRC had applied the existing practice and policy in the operation of Rule 23(2) in that person's case in the usual way.
- (5) Before 17 November 2005 there had been no consideration of the factors material to the ending or continuance of that practice and policy, and no consultation in the PCC.
- (6) The PSRC had not considered whether the PCC or the organisations representing members of Pension Scheme ought to be consulted before the operation of Rule 23(2) was changed, and had not even considered whether Mr Bichard should be heard before a decision contrary to the existing practice and policy was made in his specific case.

128. Thus before the decision was reached on 17 November 2005, it appears that no thought was given by the PSRC chairman or members or the officers involved to the fundamental requirement to be fair to the members of the Pension Scheme as a whole and to Mr Bichard in particular.

129. After the decision in November 2005 to adopt the new policy as to the operation of Rule 23(2), the PSRC and the officers failed to consult the PCC about this (paragraph 59 of the main judgment), or any representatives of members of the Pension Scheme, or to inform Mr Bichard about it.

130. Initially Mr Castle failed to give Mr Bichard any reasons for the decision of 17 November 2005 in his case. When he did give reasons on 30 November 2005 (paragraph 43 of the main judgment) he failed to mention the new policy.

131. Nothing was done between 17 November 2005 and 12 January 2006 to ensure that any further decision-making was fair to the members of the Pension Scheme, and to Mr Bichard, except to permit him to attend the January meeting.

132. At the meeting on 12 January 2006 it was kept from Mr Bichard that the PSRC had, before he came into the room, reconsidered and reaffirmed the new policy for the operation of Rule 23(2) (paragraphs 54 et seq of the main judgment). There had been no further consideration of the advantages or disadvantages of the new policy, and still no consultation with the PCC, or otherwise with representatives of the members of the Pension Scheme. The new policy was not disclosed to the PCC when it next met immediately after the PSRC meeting on 12 January 2006.

133. That in summary is the background against which the conduct of the States in defending these proceedings is to be assessed.

134. Whether permission to move for judicial review should be granted was strongly contested by Mr Ferbrache on behalf of the States. This was noteworthy, because Mr Ferbrache accepted from the outset that

- (1) a new policy for the operation of Rule 23(2) had been adopted on November 2005 and January 2006;
- (2) this new policy would affect any member of the Pension Scheme who might be made redundant thereafter;
- (3) the lawfulness of the new policy was being raised in these proceedings by Mr Bichard.

Nevertheless Mr Ferbrache strongly argued (it is to be assumed, on instructions from the States) that the proceedings were concerned solely with Mr Bichard's rights under his contract of employment. As a distinguished and long-serving advocate at the Guernsey Bar, Mr Ferbrache must have appreciated the dichotomy between on the one hand accepting that adoption of the new policy (which was the basis for the rejection of enhancement for Mr Bichard) potentially affected all members of the Pension Scheme, and on the other hand arguing that nothing was involved in the proceedings except Mr Bichard's particular contractual rights. In these

circumstances his strenuous arguments against permission to proceed by way of judicial review gave the appearance at least of an attempt by the States to prevent consideration by this Court of the validity of its new policy and the effect of that policy on members of the Pension Scheme as a whole.

135. Once the hearing moved on to consideration of the lawfulness of the new policy, Mr Ferbrache conditionally abandoned reliance on the decision of 17 November 2005: see paragraph 38 of the main judgment. This was a substantial movement from the position previously adopted on behalf of the States. It was, in my judgment, a change which the States acting reasonably as a public body on the basis of reasonable legal advice ought to have made long before, and certainly before the hearing.

136. As to the decision on the new policy on 12 January 2006, I have dealt with the reasons why that decision could not stand, in summary, in paragraphs 106 and 107 of the main judgment. Mr Ferbrache's arguments on the States' behalf are dealt with, in summary, in paragraph 108. What Mr Ferbrache, on instructions from the States, submitted to this Court was that

- (1) the PSRC could ignore the PCC and the need for consultation, despite this having been recognised by the PSRC Chairman and members as recently as 22 September 2005;
- (2) the PSRC could ignore the need for careful consideration before any consultation took place, and before any decision was reached, including careful assessment of the impact of any redundancies on the finances, present and future, of the States;
- (3) the PSRC could change a long-standing practice and policy on the operation of Rule 23(2), without any prior consideration or assessment or any consultation within the PCC or outside it, simply on the spur of the moment.

137. As indicated in paragraph 108 of the main judgment, it is my judgment that such submissions were without merit. The States acting as a public body with the duties to act in a high-principled way and to deal fairly with the members of the Pension Scheme (paragraph 126

above) in my judgment ought not to have instructed Mr Ferbrache to present submissions so much at odds with those duties.

138. I turn finally to the affidavit of the Chairman of the PSRC, Mr Le Tocq, sworn on 28 April 2006. In paragraph 66 of the main judgment I set out the position in relation to paragraph 22 of the affidavit in which Mr Le Tocq stated on oath that the R&R Fund had “*not been approved for redundancies arising from the 2004 Machinery of Government changes*”. That statement was untrue, because on 28 February 2006 the R&R Fund was approved for use in relation to the mandatory elements of Mr Bichard’s redundancy arising from the 2004 Machinery of Government changes: see paragraphs 63 and 64 of the main judgment. The position was in part remedied by a letter of 15 May 2006 from Mr Ferbrache’s firm, Ozannes. But Mr Le Tocq had not corrected his sworn evidence. I drew this to Mr Ferbrache’s attention during the hearing, in anticipation that Mr Le Tocq would file a corrective affidavit. I drew attention to this in the main judgment at paragraph 66. I drew Advocate Rowland’s attention to this at the costs hearing. But Mr Le Tocq did not correct his affidavit or make appropriate apologies for his incorrect sworn evidence.

139. The legal principles governing the exercise of the Court’s discretion to award indemnity costs were considered by the Court of Appeal in *Hulme v Matheson Securities (Channel Islands) Ltd (No.2)* [1997] 24 GLR 75 in the judgment of that Court which I delivered. Reference was made to English authorities which made it clear that the discretion to award indemnity costs was not to be fettered or circumscribed beyond the requirement that the indemnity basis was to be appropriate in all the circumstances of the case. Reference was also made to the earlier Guernsey decision concerning Rule 48 in *Main v Laughton* [1995] 20 GLJ 62 Court of Appeal. In both Guernsey cases the Court of Appeal emphasised the importance of not fettering the exercise of the discretion under Rule 48, and the requirement that any award of indemnity costs be appropriate in the particular circumstances of a case.

140. Having regard to all the matters set out in the main judgment, and in this judgment above, I am satisfied that the States did act unreasonably in its defence of these proceedings and that an order for full indemnity costs is appropriate in all those circumstances. The Court so orders.

Leave to Appeal

141. Advocate Roland on behalf of the States applied for leave to appeal to the Court of Appeal in case leave might be necessary. I doubt whether such leave is required. But if it is, as I indicated at the hearing, I refuse leave. The reasons for such refusal are apparent from the main judgment and the costs judgment above, and need not be elaborated further.