Judgment 32/2008 **(i) Richard John Bach and (ii) Karen Bach – Court of Appeal (Criminal Appeal 384) – 18 September 2008**

Island Development (Guernsey) Law 1966 – Magistrate's Court (Civil Appeals) (Guernsey) Law, 1988 – offence of unauthorised development – appeal from conviction before the Magistrates Court – whether prescription in criminal offences was still effective and applicable – whether abuse of process by reason of delay – European Convention on Human Rights, Article 6(i) – held that prescription was not available, there had been no undue delay or abuse of process and Article 6 of the European Convention on Human Rights was not breached – appeal dismissed

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Criminal 384

The 18th day of September, 2008 before The Hon Michael Jacob Beloff, QC presiding, Michael Scott Jones, Esq., QC and John Vandeleur Martin, Esq., QC

RICHARD JOHN BACH

and

KAREN BACH

Appellants

-v-

THE LAW OFFICERS OF THE CROWN

Respondents

In the appeals, with leave, by the Appellants from their conviction by the Magistrate's Court on 14th September 2007 for the offence of carrying out unauthorised development, their appeals to the Royal Court having been dismissed on 12th March 2008;

THE COURT, having on 15th and 16th September 2008 heard Advocate N J Barnes for the Appellants and Her Majesty's Procureur with Advocate L Roffey thereon, this day GAVE JUDGMENT in the terms attached hereto and DISMISSED the appeals

K H TOUGH
Registrar of the Court of Appeal

Approved Text 6
October 2008

IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY

CRIMINAL DIVISION
(Appeal against Conviction)

18 September 2008

Before: The Hon Michael Jacob Beloff, Esq., QC, President
Michael Scott Jones, Esq., QC
John Vandeleur Martin, Esq., QC

Between: RICHARD JOHN BACH
and
KAREN BACH — Appellants

v

LAW OFFICERS OF THE CROWN — Respondents

Advocate N J Barnes representing the Appellants
Advocate L Roffey for the Crown

Cases: -
Smith v Harvey [1981] Court of Appeal, Civil Appeal No. 9
Re Clemens' Appeal [1985] 2 GLJ 20
R v R [1994] Crim LR 948
R v Buzalek [1991]] Crim LR 115
Central Criminal Court, ex parte Randle [1991] 1 WLR 1087
R v CCC&S Randle 1991 1 WLR 1087 at p.1111
ex parte Bennett 1994 1 AC 42 at p62
R v Brentford Justices, Ex parte Wong [1980] 1 QB 445
John v Bryce Ltd 1976 1WLR 512
Deweer v Belgium Application No. 6903/75
Eckle v Germany Application No.8130/78
I.J.L. and Others v. The United Kingdom Judgment Application no. 29522 ("HL")
Dyer v Watson 2004 1 AC 379

Texts: -
Island Development (Guernsey) Law, 1966
European Convention on Human Rights, Article 6
Terrien: Commentaries on Norman Law, Rouen 1574
Le Marchant: Remarques et Animadversions sur L'Approbation des Lois, Guernsey 1826
Commission of Inquiry into the Criminal Law in the Channel Islands, Second Report, 1848
Pallot: *Prescription Criminelle* Jersey Law Review 2008
The Planning and Development (Guernsey) Law 2005 (not yet in force)
Human Rights (Bailiwick of Guernsey) Law 2000
A-G's Reference (No. 2 of 2001)
Dawes: Laws of Guernsey, Oxford 2003

DETERMINATION

Beloff JA

BACKGROUND

1. This is an appeal by Richard and Karen Bach ("the Appellants") against the refusal by the Royal Court on 12th March 2008 of their appeal against convictions on 14th September 2007 by the Magistrates' Court for carrying out unauthorized development , contrary to Section 14(1)(a) of the Island Development (Guernsey) Law, 1966 ("the 1966 Law"). Each Appellant was fined £1,500.

2. On 19th August 2008 leave to appeal was granted by the Bailiff sitting as a single Judge of this Court. He said:

> "*In the light of the current practice in this Island regarding criminal prosecutions in planning cases it is of some importance in view of the grounds of appeal that there should be a decision of the Court of Appeal."*

GROUNDS OF APPEAL

3. The grounds of appeal are that the Royal Court wrongly decided that:

(i) the proceedings were not prescribed; ("Prescription")

(ii) the proceedings should not be struck out as an abuse of process as a result of delay; "("Abuse of Process")and/or

(iii) the proceedings did not constitute a breach of the Appellants' rights to a fair trial within a reasonable time in accordance with Article 6 of the European Convention on Human Rights ("The Convention") ("Article 6").

The Appellants' case on these issues has been consistent throughout the proceedings. It is for us to determine now whether they are also correct.

4. The facts are not in dispute and are set out lucidly by the Magistrate at pages 62-E to 64-H of the transcript, which I will gratefully accept in material part for the purposes of this decision.

> *"There is in Havelet, St Peter Port, a building which has at different times been a single residential unit or two residential units. As a single unit it has been known as Beaumont or Beaumont House and referred to by both of those names in the documentation, so they are interchangeable. When two separate units, the units have been known respectively as Beaumont House and Avondale.*

Mr and Mrs Bach suggest, and it has not been contradicted, that the building was originally built as a single residential unit. This seems to me to be logical from the fact that arches and doorways connecting the two halves of the building were at one time bricked up. As Mr Bach points out, if the building had originally constituted two separate units then walls not arches would have divided them. In 1924 at the latest the building became two separate units of accommodation. These two units remained in separate and apparently unconnected ownership until 1971. In 1971, one Grace Cooke purchased Beaumont. At that time Mrs Cooke's son and daughter-in-law, already owned Avondale, having purchased it from Mrs Cooke herself.

It seems to me to be a logical inference that the two properties remained as separate and distinct units of accommodation despite coming within the ownership of the same family. The initial inference that the mother would have lived in one unit and her son and daughter in the other becomes stronger when one considers that at the time Mr and Mrs Bach purchased Beaumont in February 1984, the two buildings were at that time separated by the bricked up doorways and entrances. If they had merged some time before 1984 into a single unit why were the connecting arches and doorways still all bricked up?

By all accounts from 1984 to 1994 the two halves of the original house were indisputably separate and distinct units of residential accommodation after Mr and Mrs Bach had purchased Beaumont House in 1984. In 1994 Mr and Mrs Bach purchased Avondale. The building was, therefore, now in single ownership for the first time since 1924.

On 22nd November 1994, a meeting took place between Mr Bach and a representative of the Island Development Committee, with regard to possible development of the building. A note of that meeting prepared by the Island Development Committee Officer at that time has been admitted under the provisions of the Criminal Evidence & Miscellaneous Provisions (Bailiwick of Guernsey) Law 2002. Mr Bach says in evidence that he does not substantially dispute the contents of that note but feels that its emphasis is wrong and that it is incomplete, in that the merger of the two halves of the building into a single unit of residential accommodation was only one of the possibilities he was contemplating at that time. I accept Mr Bach's evidence in this regard.

According to the statement he presented to the police during their investigation of the offences alleged, Mr Bach stated that by February 1996 the brickwork from the existing doorways giving access between Avondale and Beaumont House had been removed, effectively, physically, reuniting two properties as a single unit of residential accommodation. It seems to me that February 1996 is likely to be the correct date as the Cadastre assessment of the building as a single dwelling house rather than two separate dwelling houses is dated 11th April 1996.

On or shortly before 26th February 2002 the then Island Development Committee became aware of physical work carried out to the building, apparently converting it to a single dwelling. On that day they wrote to Mr and Mrs Bach enquiring about the position.

In June 2002 and March 2003, Mr and Mrs Bach applied for retrospective approval for the conversion if I can put it that way. Both applications were refused but appeals to the Royal Court were lodged against the refusals, one of which, I am told by Mr Bach, was not pursued and the other of which failed in March 2005. These applications and appeals are relevant primarily because they are advanced as a reason why a prosecution was not pursued at an earlier stage.

> ***Similarly, it is stated that a prosecution was still not pursued after the date of the dismissal of the appeal by the Royal Court because other applications were pursued in December 2005, and May 2006, for a different kind of conversion of the building, to split it into a main house and a separate flat. Applications that were granted but ultimately not taken up. By letter received from the Bachs' Advocate the Environment Department were advised in November 2006 that it was not intended to carry out this approved development. In fact, no further substantial alternation (sic) has taken place to the use of the building since that time.***
>
> ***(My emphasis)***

5. To complete this short history, the case was then passed to the Police for investigation in December 2006, after a letter on behalf of the Appellants was received by Environment in November 2006 to the effect that they no longer intended to create a flat at the property. Thereafter, the Appellants met with the Police on 5th February 2007 and subsequently Mr Bach produced a written statement dated 27th February 2007. The Appellants were summoned to appear before the Magistrates' Court in May 2007 and the trial took place on 14th September 2007.

6. I now turn to deal with the three grounds of appeal, all of which focus one way or another on the time it had taken to bring these charges to Court.

Prescription

7. Prescription in criminal offences was a recognised phenomenon of Guernsey customary law: for some crimes there was a twenty year period; for others a period of a year and a day. The Appellants contend that (materially to their appeal) the latter regime is still effective and applicable: the Respondent contends that it has been repealed or it is obsolete and (in any event) inapplicable.

8. *Terrien* "the last and greatest commentator on the Grand Coutume" [Gordon Dawes. Laws of Guernsey ("Dawes") p.7] stated in his commentaries on Norman Law

> "*Plainted'excez et mal facons de corps se doit faire dedans l'an et jour du delict mais suite d'homicide et d'autre crime publique ne se prescrit que par le laps de vingt ans comme il est dit de crime de faux"* (p.502)

I draw attention to the division by *Terrien* of crimes into two categories only and to the character of the crimes in each category.

9. Le Marchant in a critical commentary on the Order in Council of 1583 which gave legal force to the Approbation des Lois, which itself had sought to identify what part of Norman Law was effective in Guernsey, Livre XII at p.164 [see generally: Dawes: op. Cit. at pp 7-9] states:

> "*Tort fait à une personne est l'origine et source de tous procès et actions criminelles. Or, comme on peut faire tort à un homme ou en sa personne ou en ses biens, ainsi y a-t-il deux sortes de causes criminelles, l'une est personnelle, pour tort fait à la personne, et l'autre de possession, pour tort fait à la possession de quelqu'un; et quant aux actions criminelles personnelles, comme on peut offenser une personne de fait ou de paroles, ainsi aussy il y a deux espèces d'action personnelle criminelle, l'unne de fait et l'autre de dict. Sur tout quoy il faut observer qu'il y a deux sortes d'actions criminelles, tant à cause de la matière d'icelles qu'à raison de la procédure qu'on y tient; l'une est ditte simple, qui procède de simple délict, ou crime plus léger, et tend à réparation simple et amende pécuniaire; l'autre est ditte criminelle, criminellement intentée, qui naist de délict énorme, comme de meurtre ou mehain, (c'est à dire, de blesseure à sang et playe, et dont pourroit ensuivre perte de membre,) et tend à punition corporelle contre la partie coulpable".*

10. I draw attention first to the division by Le Marchant also of crimes into two categories only "*énorme*" (or serious) and "*simple"* (or minor) second to his elaboration of the content of these categories; third to his identification of the "simple" category with offences that had both a civil and criminal element, potentially giving rise to both fines and compensation.

11. In 1848 there was a Commission of Inquiry into the Criminal Law in the Channel Islands. A series of written questions was put to a number of witnesses. The twelfth question posed was

> "*Is there any, and what, limitation as to time, reckoned from the Commission of an offence within which a prosecution must be instructed? Is there any, and what, distinction in this respect, between difference offences?"*

The Guernsey witnesses were all of high standing and likely to be well equipped to answer the questions put.

On question 12, Peter Stafford Carey, Bailiff said

> "*With respect to crimes properly so called, the period of limitation is twenty years. But a penalty cannot be sued for, nor "a cause en adjunction" commenced after a year and a day."* (p69)

The Jurats said

> "*Public crimes must be prosecuted within twenty years of its commission: assaults, batteries and minor offences within a year and a day."* (p70)

Robert McCulloch Advocate said:

> *"A prosecution for a public crime must be instituted within twenty years of the commission of the offence. Batteries, assaults and other offences of the same nature, not sufficiently grave to amount to public crimes, must be presented within a year and a day."* (citing *Terrien*) (p76)

He also said:

> *"There are certain actions which, although brought with reference to civil rights are treated as partaking of the nature of criminal proceedings, and are termed mixed*

> *actions; such are actions for the recovery of damages in cases of battery, assault, libel or slander, termed "causes en adjunction".*" (p48)

Henry Tupper Advocate said that:

> "*Prosecution of crimes must be entered within twenty years of the Commission. Prosecution of batteries, and other offences, not amounting to public crimes, are limited to a year and a day.*" (p77)

John de Havilland Utermarck Controller said:

> "*No prosecution at the instance of the Law Officers of the Crown can be instituted after the lapse of twenty years from the date of the commission of the offence. Actions "au Petit Criminel" (described below in Answer 15) are prescribed by the lapse of a year and a day from the date of the injury complained of*". (Citing *Terrien*) (p74)

He then developed a taxonomy of criminal proceedings at Answer 15 which include the following material observation:

> "*Cases for the recovery of penalties for infringement of Acts of Parliament or of local ordinances are called "actions pour amendes." In these, the Law Officers may sue jointly or separately, as public prosecutors, or separately with an informer, and the offender may defend himself by counsel. If found guilty, he is condemned to the whole or a portion of the fine mentioned in the Act of Parliament or ordinance on which he is sued, and his person or property may be taken in execution on the judgment.*
>
> *Cases of slander, libel, assault, and battery, for "crimes ou délits privés qui n'intéressent que les particuliers qui se trouvent offensés et non le repos et la tranquillité publique," are called "causes au petit Criminel," and are prosecuted by one of the Law Officers and the plaintiff thus: "A.B." (plaintiff) "et Officiers de la Reine joints," the other Law Officer being heard for the defendant, and both receiving fees from their respective clients. Should the defendant be found guilty, the Court invariably sentence(s) him to pay a fine to the Crown, in addition to the damages payable to the plaintiff, and costs."* (p75)

and in his oral evidence referred again to *Terrien*.

The Bailiff in the same session of oral questions and answers responded to the inquiry:

> "*In matters of Police correctionelle, is not a year and a day the of time of limitation?*

With these words:

> *"No: that is in cases en adjonction. All cases en adjonction are limited to a year and a day, and also cases au Police correctionelle for assault, petty cases."* (p230)

We also draw attention to an additional answer given immediately after the Bailiff's by the Procureur:

> "*In the case of actions upon Acts of Parliament for penalties, the limitations would be provided for by the particular statutes."*

12. It is possible to debate the precise meaning of the vocabulary deployed in these various answers, as Advocate Barnes did with restraint and skill. But to my mind certain themes emerge: first an association between the prescriptive period of a year and a day with cases en adjunction, that is to say both those with a criminal and civil aspect, inviting penalty (for the public purse) and compensation (for the private); second, a distinction between crimes against the public and crimes against particular persons and their property; third, the exclusion of public crimes from the category of those to which the shorter prescriptive period attached; fourth, the absence of any suggestion that such shorter period applied to breaches of the various Ordinances, which, as the Commission noted, by that time had become a feature of the legal structure of the island. The same themes emerge from the answers of other Jersey witnesses which are listed in a scholarly article by Pallot. The limits (if any) of "Prescription Criminelle" Jersey Law Review 2008.

13. It is therefore clear that customary law did not, according to this testimony attach such prescriptive period to offences in the nature of breaches of the planning law, which have no affinity to the type of offence expressly mentioned by some of these witnesses (and earlier commentators), assault, battery, libel or slander.

14. In *Smith v Harvey [1981] Court of Appeal, Civil Appeal No. 9:* [which was an action for damages for personal injury based on negligence], the Court of Appeal, in discussing prescription said:

> "*Another area in which a prescription of a year and a day was recognised by Terrien is that of minor crimes. In certain such cases an award of damages could be made to the injured individuals, but the grounds of action were plainly limited to positive intentional acts either of physical violence or of language, sometimes identified as assaults, batteries, libel and slander. This limitation can be traced in Denisart's* ***Collections des Decisions Nouvelles*** *(II p. 557) and in the Commissioners' Report (p. 48 para. 33). The prosecution of such wrongs was of a double character, both civil and criminal, prosecuted at the same time by the injured party and by the Procureur and leading, if successful, to an award of reparation for the victim and of a penalty paid to the King (Terrien Bk. XII p. 507; Le Marchant Vol. II p.165). The procedure came to be known as a* ***cause en ajonction.*** *It was noted and discussed in the Commissioners' Report and plainly existed in 1848 as a recognised form of remedy. By the* ***Loi Relativeaux Causes présentement poursuivies aux Petit Criminel, 1861*** *the procedure, subject to certain exceptions, became a purely civil matter within the adjunction of the Crown Officers. Eventually it was entirely abolished by the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950.*
>
> *It appears reasonably certain that* ***causes ajonction*** *were prescribed in a year and a day. This can be traced in Terrien (Book 12 p. 502) in Le Marchant (II p.209 section 6) and in the Commissioners' Report (p.69 Answer 12). This short description was no doubt appropriate to the special character case, being of minor importance and requiring the support of the Procureur. These are not considerations which*

> *encourage any extension of the short prescription to actions of damage outside the limits of those particular kinds of wrongdoing which could be prosecuted in a cause en ajonction." (*p11)

15. In my view the Court of Appeal were recognising that it was the civil component of "minor crimes" as explained in Le Marchant – they expressly referred to the relevant passage cited above - which engaged the year and a day prescriptive period. They clearly regarded any application of that period to offences of a different character as inconsistent with its underlying rationale.

16. In *Re Clemens' Appeal [1985] 2 GLJ 20*, (a prosecution for a motoring offence) 12th December 1985) the Deputy Bailiff on appeal from the Magistrate's Court on a criminal case, concluded that prescription had no application against the Crown or the Law Officers in criminal matters. He said:

> "*Mr Barnes and the Comptroller referred me to authorities including Terrien, Le Marchant, Laurent Carey, the Commissioners' Report and the Guernsey Court of Appeal Case, Civil Division of Smith v Harvey. It is clear from these authorities that, at any rate up to the time of the Commissioner's Report, it was settled law that serious crime like murder was prescribed by the lapse of twenty years and that lesser offences, dealt with by way of "causes en adjunction", were prescribed by the lapse of a year and a day. Mr Barnes argued that other petty offences and minor infractions were also limited by that same period. He argued that the French word "crime" means serious crime of the rank of felony which was not susceptible to process between individuals as the only category of crime to which the twenty year rule applied. The Comptroller argued that since the abolition of causes en adjunction all crime publicly prosecuted is prescribed by the lapse of twenty years.*
>
> *Of those two arguments I prefer the Comptroller's. Causes en adjunction were actions which were combined civil and criminal action. Their abolition was procedural and did not affect the continued existence of the criminal offences nor the civil rights of redress accorded by the Courts. The civil element of these actions continued to be limited by the prescriptive period of a year and a day. (See Smith v Harvey.) Once the criminal element was liberated from the civil element, the criminal element was no longer limited by the civil element's restrictive period. In support of the Comptroller's view I would add this: I have practised and been concerned with the law since 1960 as an Advocate in private practice, as a Law Officer of the Crown and as Deputy Bailiff. In none of these capacities have I ever heard it said that crime is prescribed by any period at all and it was never a consideration raised by other members of the Bar, by defendants, by the police as the source of prosecution activity, nor by any member of the public at large.*
>
> *If year and a day prescription were part of our law there would be doubtless much learning on breaking prescription, deferring prescription by absence from the Island or incapacity, there would be an active consideration of the issue in the many cases which come before the Courts. I have no knowledge of any such learning.*
>
> *Even if the reasoning that I have set out is at fault the period of time during which criminal prescription has been absent from our consideration is itself sufficient reason to say that it has gone from our law. Normal Customary Law and Guernsey Customary Law is mutable in circumstances where change is reasonable and sensibly develops the law. That change has come about. The loss of criminal prescription as a defence enures to the benefit of the public at large and meets the above criteria. In my judgment, therefore, the issue of prescription has no application against the*

> *Crown or the Law Officers in criminal matters. The Courts have the power to deal with offences where they are prosecuted in circumstances of vexatious delay and individuals are thereby protected from abuse of court process. As I have already said the appeal is dismissed."*

17. In short the Deputy Bailiff interpreted *Smith v Harvey* as determining that once the criminal and civil elements of "*causes en adjunction"* were decoupled, those criminal cases of a minor nature previously attracting a civil remedy as well as a criminal penalty no longer enjoyed the benefit of a short prescriptive period which derived from that civil facet. He also considered that the disappearance of such prescriptive period was a reasonable development of customary law. [Pallot construes this decision as reflecting that "prescription criminelle was in desuetude because its continued existence in any form was no longer acknowledged."] (op. cit.]

18. The Royal Court in the present case said; faithful to that analysis,

> "*It seems to me that the authorities support the Clemens description and that it should continue to be followed … Clemens represents the law today and is based upon sound foundation both of law and policy."* (para 5)

19. On the second day of the hearing we had the advantage of submissions from HM Procureur. The thesis that he wished, if necessary, to develop was that Guernsey criminal law, up to the mid-nineteenth century the creation of custom in the French mode, adopted in lieu the English mode of (re)creation by statute and that, although there was no express legislative abolition of the customary prescriptive periods, they had fallen into desuétude and no longer applied. He drew our attention to the implications for the domestic criminal justice system if a twenty year prescriptive period for crimes such as murder or rape was still in place. Advocate Barnes for his part disputed the thesis that customary law, could simply lapse and contended for its survival into the twenty-first century in the absence of any general statutory override.

20. The issues raised by such debate are very substantial. They involve not only fundamental matters as to the development of criminal law in Guernsey, but also as to the rise and fall of customary law in both the criminal and civil sphere. I would be reluctant to express any view on them in the absence of more fully researched submissions than we have received, especially when, as is our conclusion, the outcome of the appeal does not depend on their resolution. I therefore decline to do so. If anyone wishes to explore in future the line of argument opened up by Advocate Barnes, he or she must do so in another case. In so saying I am not to be taken as encouraging anyone to embark on such exercise.

21. In my view Advocate Barnes' submission can be addressed on a more limited basis: The planning regime is statutory. There is no limitation period enacted. It is for Advocate Barnes to persuade us that the prescriptive period for which he contends would clearly have applied

to offences against that regime and still applied at the date of the Appellants' prosecution, that is to say that the year and a day prescriptive period was so well established that those who drafted the 1966 Law would have assumed that it would apply to such Law. He has failed to do so.

22. Furthermore, breaches of modern planning law, a product of the twentieth century, have no affinity at all with the minor crimes mentioned by Terrien, explained by Le Marchant, and discussed before the Commission. Not only do they not have both civil and criminal elements, they are not offences against particular person or property, but against the public or a section of it. Advocate Barnes' argument had an anachronistic aroma.

Abuse of Process

23. The principle which can be distilled from the English cases which we consider to be reflected in the laws in Guernsey, is exemplified by *R v R [1994] Crim LR 948* where the Court of Appeal stated that:

> *"no stay of proceedings should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, i.e. that the continuance of the prosecution amounts to a misuse of the process of the court";*

In particular regard must be paid in this context to the nature of the case. There are obvious differences between cases whose factual resolution turns on documents, and those where it turns on eye witness accounts [see *R v Buzalek [1991]] Crim LR 115 and Central Criminal Court, ex parte Randle* [1991] 1 WLR 1087. One pertinent factor to be taken into account as to whether the criminal proceedings are abusive by reason of delay is the perceived presence or absence of any defence to the charge *R v CCC&S Randle* 1991 1 WLR 1087 at p.1111.

24. Prejudice to a fair trial, in short, is intrinsic to the concept, of abuse of process save where the prosecution behaviour has been (unusually) in some way so oppressive or unconscionable as to amount to a serious abuse of executive power, so that it is unfair to try the defendant even if his trial itself could be fairly conducted. (ex parte Bennett 1994 1 AC 42 at p62)

25. I agree with the Royal Court – and Advocate Barnes conceded - that it is difficult in a case of this nature where the factual issue is as to the state of a building over the years, to show there has been any prejudice to the Appellants. They were not inhibited from making their own investigations as to the building's state. Clearly the case relies primarily on documents and not on eye witnesses. Indeed given that all the material facts of the case were before the courts below the delay has manifestly caused the Appellants no prejudice whatsoever**.**

26. Still less has there been any abuse of power, serious or otherwise. It seems to me that Environment Department and its precursor, the IDC, behaved with moderation and sought to achieve a satisfactory outcome without recourse to criminal proceedings. It cannot be said to be oppressive behaviour by the authorities to date to seek, in accordance with existing Guernsey practice, to resolve the breach of planning law by means other than prosecution. How can it have served the Appellants interests to have been prosecuted as soon as their breach had been ascertained rather than being permitted to seek by various applications, albeit in the event unsuccessful, to regulate their position?

27. I note in this context that in The Planning and Development (Guernsey) Law 2005 (not yet in force) there is express provision to require abstinence from or suspension of criminal proceedings where a person is challenging a compliance notice by civil means, (Section 62(2)) which is a legislative recognition of the criminal process as a sanction only to be deployed when all else has failed.

28. Advocate Barnes referred to the judgment in *R* v *Brentford Justices, Ex parte Wong [1980] 1 QB 445 ("Wong")* where Donaldson L.J. cited with apparent approval an observation of May J., in ex.p *John v Bryce Ltd 1976 1WLR 512* at p. 520:

> *"In my view the six months' limitation provision in section 104 of the Magistrates' Courts Act 1952 is to ensure that summary offences are charged and tried as soon as reasonably possible after their alleged commission, so that the recollection of witnesses may still be reasonably clear, and so that there shall be no unnecessary delay in the disposal by magistrates' courts throughout the country of the summary offences brought before them to be tried."*

Advocate Barnes suggested that this dictum established or reflected a general principle that summary offences – which he equated with a minor offences - should be swiftly dealt with.

29. I am for my part unable to read across from a situation where there is a statutory limitation to one when there is not. Where a legislature has specified a short limitation period for prosecution, its reason is no doubt that described in the dictum cited above. Where a legislature has not done so, there is no justification for a court to step in and create one of its own volition. Absent a statutory time limit, the only issue for the court on timing is whether any delay impairs the fairness of the trial process.

30. Significantly, the decision in *Wong* involved the prosecutor deliberately laying an information before a decision had been taken on whether to prosecute, in order to avoid a statutory time limit. The manoeuvre, in clear frustration of the statutory scheme, was deemed to be an abuse of process. There was no analogous deliberate act or motivation in this case by the Guernsey authorities concerned with the Appellants case.

ARTICLE 6

31. The European Convention on Human Rights ("the Convention") was incorporated into Guernsey law on the 1st September 2006 by the Human Rights (Bailiwick of Guernsey) Law 2000; and therefore fell to be considered (as it was) by the Courts below.

32. Under Article 6(1) of the Convention, defendants in criminal cases have "*a right to a fair hearing within a reasonable time*.

33. Two major issues arise from this limb of Article 6: first identification of the moment from which time started to run: second assessment of the reasonableness or otherwise of the time which passed from that moment until the conclusion of proceedings. Although the majority of the cases mark the moment *a quo* as the laying of a charge, Advocate Barnes submitted that that was not a comprehensive test. In A-*G's Reference (No. 2 of 2001*) Lord Bingham of Cornhill indeed said:-

> *"As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him. This formulation gives effect to the Strasbourg jurisprudence but may (it is hoped) prove easier to apply in this country. In applying it, regard must be had to the purposes of the reasonable time requirement: to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods."*

34. Advocate Barnes cited in particular *Deweer v Belgium* (Application No. 6903/75) 1980 (Deweer) The Court said at para 42:

> *"The concept embodied in the French expression "accusation en matiére pénale" is, however, "autonomous"; it has to be understood "within the meaning of the Convention" (see notably the König judgment of 28 June 1978, Series A no. 27, p. 29, par. 88), more especially since the English text of Article 6 par. 1 (art. 6-1) – like that of Article 5 para. 2 (art. 5-2) – employs the term "charge" which is very wide in scope.*
>
> *In "criminal" matters, the "reasonable time" stipulated by Article 6 par. 1 (art. 6-1) "necessarily begins with the day on which a person is charged" (see the Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, par. 18). And the "reasonable time" may on occasion "start to run from a date prior to the seisin of the trial court, of the 'tribunal' competent for the 'determination … of [the] criminal charge'" (see the Golder judgment of 21 February 1975, Series A no. 18, p. 15, par. 32). The Wemhoff and Neumeister judgments of 27 June 1968 and then the Ringeisen judgment of 16 July 1971 took as the starting-point the moment of arrest, the moment when the person was officially notified that he would be prosecuted and the moment when preliminary investigations were opened, respectively (Series A no. 7, pp. 26-27, par. 19; Series A no. 8, p. 41, par. 18; and Series A no. 13, p.45, par. 110)."*

35. In Deweer, (which involved breach of the regulations setting the price of pig meat), although the outcome of investigation there in play did not necessarily involve criminal proceedings -

indeed the inspector offered Mr Deweer the chance of avoiding prosecution by payment of a sum of money - the Court decided that in all the circumstances (which we need not set out in full) the inception of the investigation was an official notification to Mr Deweer of an allegation that he had committed a criminal offence.

36. Advocate Barnes also referred to *Eckle v Germany* Application No.8130/78:

(which concerned a prosecution for breach of pricing controls in the building trade) the Court said:-

1. Commencement of the periods to be taken into account

73. In criminal matters, the "reasonable time" referred to in Article 6 par. 1 (art. 6-1) begins to run as soon as a person is "charged"; this may occur on a date prior to the case coming before the trial court (see, for example, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, par. 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, par. 19, the Neumeister judgment of the same date, Series A no. 8, p. 41, par. 18, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, par. 110). "Charge", for the purposes of Article 6 par. 1 (art. 6-1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see the above-mentioned Deweer judgment , p. 24, par. 46).

In that case the Court decided that it was not the date when investigations with a view to possible prosecution started, but the later date when the Applicant was officially notified of such investigation.

37. In *I.J.L. and Others v. The United Kingdom Judgment* – Application no. 29522 ("HL") a more modern case, arising out of the notorious Guinness affair, where the issue was whether time started to run upon appointment of Inspectors under the Companies Act the Court said at para 131:

"131. Nor for the reasons given earlier can the Court accept that time should be taken to run as from the date of the applicants' interviews with the inspectors. It reiterates that in criminal matters the "reasonable time" requirement in Article 6 § 1 begins to run as soon as a person is "charged": this may occur on a date prior to the case coming before the trial court, such as the date of the arrest, the date when the person concerned was officially notified that he was to be prosecuted or when the preliminary investigation was opened. The term "charge", for the purposes of Article 6 § 1, may be defined as "the official notification given to an individual by the

> *competent authority of an allegation that he has committed a criminal offence" a definition that also corresponds to the test whether the situation of the suspect has been "substantially affected" (see the Hozee v. the Netherlands judgment of 22 May 1998, Reports 1998-III, p.l 1100, § 43). The Court confirms in this context its view that the inspectors were not engaged in the determination of criminal charges against the applicants. It further recalls that it has rejected the applicants' submissions that the inspectors were acting in collusion with the authorities in an attempt to lay the basis of their subsequent prosecution. For these reasons, the Court considers that time should be taken to run for the purposes of calculating the relevant period as from the date of the laying of charges against the first and second applicants and the date of arrest of the third applicant, namely: 8 October 1987, 13 October 1987 and 30 September 1987 (see paragraphs 24, 25 and 20 above)."*

38. In summary the Strasbourg cases pose alternatives (not necessarily sequential or even exhaustive) date of arrest, date of official notification of prosecution, date of opening of preliminary investigations with a view to possible prosecution, that date (if more than one is available) being selected which is most favourable to the accused or suspect. Underlying all these examples is the need for the accused's or suspect's situation to have been substantially affected.

39. What then are the facts material to this third issue? By letter of 26 February 2002, to which I have already made brief reference, Ms Hare, Principal Planning Officer, wrote to the Appellants:

> "*Dear Mr & Mrs Bach*
>
> *The Island Development (Guernsey) Laws 1966 – 1990*
>
> *Beaumont House & Avondale, Havelet, St Peter Port*
>
> *I refer to your current application to install rooflights in Beaumont House and ask for your assistance in clarifying the extent of the dwelling house and whether Avondale and Beaumont House have been altered and converted to a single dwelling house. The conversion of two dwellings to one is work which requires Island Development Committee approval and I have no record of such permission being granted since alterations to the separate, self contained dwellings in 1995. The need for planning permission was, I note, discussed in 1994.*
>
> *I request that you reply within 14 days and shall hold the current application in abeyance in the meantime*."

40. I do not consider that the letter of 26 February 2002 qualified as an official notification of an allegation of commission of a criminal offence. With reference to the Strasbourg jurisprudence it seems to me that *IJL* provides a closer model than *Deweer,* especially since in Guernsey the Planning Department and Law Officers are distinct agencies and only the latter has power to prosecute.

41. There were, in my analysis, two investigations: the one (administrative) which started in 2002; the other (criminal) which started only in 2006. I do not need, accordingly, to consider whether any period prior to 1st September 2006, could have been taken into account if (contrary to my view) the clock started to run for the purposes of the "reasonable time" requirement from February 2002 – a matter on which we were not addressed. But even if Advocate Barnes could surmount the first hurdle, in our judgment his argument falls at the second.

42. In *Dyer v Watson* 2004 1 AC 379 Lord Bingham cited Strasbourg jurisprudence to the effect that "*the precise aim of the reasonable time requirement was to ensure that accused persons do not have to be under a charge for too long and that the charge is determined.* at para 31 While emphasising that *"the reasonable time requirement(s) confers important rights on the individual and they should not be watered down or weakened* (para 51) he mentioned in the same section of his speech the classic Convention theme of "*the striking of a fair balance between the demands of the general interest of the community and the requirements of the protection of the individuals fundamental rights"* and added "*the threshold of providing a breach of the reasonable time requirement is a higher one not easily crossed"* (para 52). He then mentioned three factors of importance in the context of such a fact-specific issue: the "*complexity of the case"* (para 53) "*the conduct of the defendant"* (para 54) and "*the manner in which the case has been dealt with by the administrative and judicial authorities* (para 55).

43. Of these the third appears to me to be of particular significance in this matter. The search, I emphasise again, by those public authorities cognisant of the Appellants' breach, was for a resolution which did not involve the remedy of last resort, that is to say, criminal proceedings. The Appellants were given latitude to seek to regularise their position with retrospective effect. It was only when this search proved fruitless that the criminal process was instituted. Their behaviour seems to me to have been entirely proper. The Appellants were the beneficiaries, not the victims of such behaviour. In all the circumstances, the delay was not unreasonable.

Conclusion

44. Contrary to Advocate Barnes' submission, we therefore conclude that prescription is not available, there was no undue delay or abuse of process and that Article 6 of the ECHR was not breached. These were the only issues in the appeal. It is undisputed that there were breaches of the planning law.

45. Accordingly, this appeal fails, and is dismissed. The conviction and penalty must both stand.

