

**Judgment 47/2007 Canivet Webber Financial Services Ltd v Guernsey
Financial Services Commission – Royal Court (Civil
Action File 1094) – 5 December 2007**

Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 – appeal from decision of the Commission - failure to comply with time limit for bringing an appeal – judicial discretion to extend time limit – order for security for costs under Rule 48 of the Royal Court Civil Rules, 1989

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil 1094

The 5th day of December, 2007, before Miss Catherine Mary Newman, Q.C., Lieutenant Bailiff; sitting alone.

In the matter of

CANIVET WEBBER FINANCIAL SERVICES LIMITED

Appellant

- v -

GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

In the matter of the proposed appeal by the Appellant from a decision of the Respondent, and the Respondent's applications for strike out and for security for costs filed on the 19th day of April, 2007;

THE LIEUTENANT BAILIFF, having on 13 September 2007 heard Mr A.D.C Webber, director of the Appellant, and Advocate J.M. Wessels, for the Respondent, thereon, this day ISSUED JUDGMENT in the terms attached hereto and: -

1. REFUSED the application to strike out the appeal
2. ORDERED the Appellant to lodge security for costs in the sum of twelve thousand pounds by 4.30pm on 28 December 2007, subject to the conditions more particularly set out in paragraph 16 of the attached Judgment; and
3. DIRECTED that Counsel for the Respondent shall file a written argument setting out his proposals for the procedures to be applied to this appeal, to

reach the Appellant and the Greffe by 14 December 2007, and the Appellant to have an opportunity to comment upon it in writing by 4.30 pm on 21 December 2007

4. ORDERED that directions for the future conduct of the action will be set once security has been provided as ordered or agreed.

K H TOUGH
Her Majesty's Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY COURT

BEFORE LIEUTENANT BAILIFF CATHERINE NEWMAN QC

5th December 2007

IN THE MATTER OF

CANIVET WEBBER FINANCIAL SERVICES LIMITED

Appellant

And

THE GUERNSEY FINANCIAL SERVICES COMMISSION

Respondent

RULING OF THE COURT ON APPLICATIONS TO STRIKE OUT AND FOR
SECURITY FOR COSTS

Strike out

1. The Appellant was formerly licensed to carry on business as an insurance intermediary in the Bailiwick of Guernsey. Its licence was suspended by consent with effect from 20th January 2004.
2. The Respondent gave notice of its decision to revoke the Appellant's licence under Section 9 of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law 2002 ('the Intermediaries Law') by letter dated 2nd March 2007.
3. By letters dated 8th March 2007 and 14th March 2007 the Appellant requested a written statement of the reasons for the Respondent's decision. This was provided by letter dated 26th March 2007.
4. By letter dated 14th March 2007 the Appellant asked HM Greffier for details as to how to institute an appeal pursuant to Section 43 of the Intermediaries Law. The Greffier responded the same day, drawing the Appellant's attention to the need to apply for permission to issue a Royal Court summons and supplying it with an application form and guidance notes relating to the Royal Court (Signing of Summonses) Order 2003 ('the Order'). By letter dated 29th March 2007 the Appellant lodged an application pursuant to the Order for leave to issue a Royal Court summons. This application was granted on 11th April 2007. The Appellant

delayed issuing the summons and was given an extension of time for doing so with which he complied.

5. Section 43(5) of the Intermediaries Law provides that an appeal such as this shall be instituted within 28 days of the decision under challenge by means of a summons served on the Chairman of the Respondent. This plainly did not happen. However, because the Appellant is not legally represented it was not able to issue the summons without first obtaining the Order. It applied for the Order in time, but leaving very little time for the administrative work to be done to issue the Order. Even if the Order had been granted almost immediately the Appellant would have been in difficulties in issuing the summons in time, but in theory it would have been possible. Whether the Appellant would have acted quickly had Mr Webber appreciated the risk that a late appeal might be impossible cannot now be known. In fact by the date upon which the Order was granted the time for appealing had run out.
6. On 18th April 2007 the Respondent issued an application to strike out. This application came before me for hearing on 13th September 2007 as the second of three applications which I heard that day (the first was dealt with and ruled upon on the day and I need say nothing more about it). The question therefore, is whether the Court has jurisdiction to hear the appeal, given that it was issued out of time or whether it should be struck out. The Intermediaries Law does not specify that the Court should have power to extend the time limits therein specified. But that is not necessarily fatal. In R v Soneji [2005] UKHL 49 at paragraph 14 ff Lord Steyn described the difficulties presented by situations where the legislature prescribes time limits without setting out the consequence of a failure to comply with them. The modern approach, at least in England, is to look at the role played by the time limit in the scheme of the Act, and look at whether the legislature could fairly be said to have intended that the consequences of non compliance with the time limit should be that the step to be taken within that time limit could not be taken outside the time limit, even with the permission of the court. Lord Rodger of Earlsferry gave two exquisitely ordinary and contrasting examples of the importance of time limits when he said, at paragraph 30, *'If your young daughter wants to go out with friends for the evening and you agree, but tell her that she must be home by eleven o'clock, she is under a duty to return by then. But this does not mean that her duty is to return by then or not at all.*

Rather, even if she fails to meet your deadline, she still remains under a duty to return home. On the other hand, if you contract with a conjurer to perform at your daughter's birthday party, you want the conjurer and his tricks only for the party. His duty is accordingly limited to performing at the party held on your daughter's birthday and, if he fails to turn up, he cannot discharge that duty later'.

7. Whether or not the Royal Court should follow the modern English approach, no Guernsey authority has been cited to me which requires me to take a different approach. In my judgment the Royal Court should follow the modern English approach in this case. That is not to say that it must do so for each piece of legislation which lays down time limits for acts to be done; each act in each piece of legislation must be considered on its own merits. Nothing that I say in any way conflicts with, for example, the Guernsey decision (cited to me) of Cable and Wireless Guernsey Limited v the Director General of the Office of Utility Regulation and Others (24th May 2007) where consideration was given to the question of whether a tribunal had authority to extend time limits laid down by Section 15 of the Regulation of Utilities (Bailiwick of Guernsey) Law 2001 ('the RoU law'). The time limits governed the period for bringing challenges to decisions of the Director General of the Office of Utility Regulation. The particular type of tribunal involved in that case was not a standing tribunal but one appointed on a case by case basis from a panel of potential members. The Director General had power to appoint tribunals in specified circumstances, which, the Deputy Bailiff held, were not engaged when the time limits were not adhered to. A tribunal such as the Utilities Appeal Tribunal had no jurisdiction to extend its own jurisdiction. A decision of the Tribunal to extend time would therefore be ultra vires. In marked contrast, the Royal Court is a permanent institution with its own inherent jurisdiction.
8. There is a public interest in the finality of decision making which requires appeals against the decisions of regulatory bodies to be brought within a time limit. Equally, there is a public interest in ensuring that time limits do not work substantial injustice. I do not take the States to have intended that the time limit for appealing decisions of the Respondent should be operated in a manner which would tend to create injustice. It is necessary to temper the requirements of certainty with a method of dealing with potential injustice. The way to do this is to

allow the court to exercise a discretion to extend the time limit laid down by the legislature in cases where not to do so might well work injustice.

9. In the present case, the chronology undoubtedly shows that the Appellant must take some share of the blame for the delay in issuing the summons. But, given that it is not legally represented and there was some delay, for which it was not responsible, in issuing the Order during which time the limit for appealing expired, it would in my judgment work injustice were it to be shut out from appealing.
10. I have considered the fact that an extension of time for service was sought and granted without this point about lack of jurisdiction having been raised. Had I found that there was in fact no jurisdiction to extend time for service, the fact that there had been an extension could not have operated to create one and would thus have been immaterial. But given that in my judgment the Royal Court does have jurisdiction to extend time for service in suitable cases, the fact that an extension of time was sought for doing so and granted by the court without this point being taken cannot assist the Applicant which now seeks to strike out.
11. I refuse the application to strike out this appeal. But the Appellant is under a duty to prosecute the appeal without any further delays.

Security for Costs

12. The third application before me is an application by the Respondent to the appeal seeking security for costs in the sum of £15,600 as more particularly described in its draft Bill of Recoverable Costs. Rule 48(1) of the Royal Court Rules provides that the court may '*in any action.....(b) order any party to give security for costs in such amount, on such terms and in such manner, as the Court thinks just*'. It was not submitted to me that this proceeding, by which a decision of the Respondent is challenged by way of summons brought in the Royal Court at first instance, is not an '*action*' within the meaning of the Rule. It was not suggested that the Court does not have jurisdiction to grant security in this type of case.
13. The application for security is supported by an affidavit sworn on 18th April 2007 by Diane Colton of the Respondent to the appeal. Ms Colton is the Director of Insurance of the Guernsey Financial Services Commission. Ms Colton draws attention to and relies on the following points which seem to me to be material:
 - a. The Appellant has not traded since 2005 and its last management accounts provided to the Guernsey Financial Services Commission are for the nine

months ended 30th September 2004. These accounts are exhibited to her affidavit. They show a negative turnover in 2004 and no turnover in 2005.

b. Since the end of that period the Appellant claims to have incurred further expenses, according to the evidence which Mr Webber gave to the Guernsey Financial Services Tribunal. These expenses could only be met because Mr Webber was making his own resources available to the Appellant.

c. There is therefore cogent evidence that the Appellant would be unable to meet the costs of an unsuccessful appeal.

14. The ruling of the Guernsey Financial Services Tribunal dated 20th February 2007, and in particular paragraphs 51, 63, 64, 94d, together with the accounts themselves which are annexed thereto, bear out what Ms Colton says. At the oral hearing it was suggested that a third party might be willing to inject capital into the company, but subsequently that offer appears to have been withdrawn.

15. In my judgement it is clear that the Appellant will only be able to pursue this appeal by utilising whatever resources Mr Webber is prepared to devote to it. It is also clear to me that, were the appeal to be unsuccessful, it will be unable to meet the costs of the Respondent. These circumstances were not disputed and it was not suggested that, as a matter of principle, the court should not order security. Nor was it submitted that an order to give security would have the effect of stifling the appeal unfairly. When Mr Webber made submissions about the amount of security to be ordered he asserted that the draft Bill was excessive, but in the course of his own submissions he revealed that he was minded, should the court permit it, to call live witnesses; he wanted at least 3 days in court, 8 weeks of preparation (at 2-3 days per week at 6 hours per day) all of which would combine to make the Respondent's draft Bill seem conservative even taking into account that as a non-lawyer Mr Webber might well spend longer preparing than a qualified person would have to do.

16. I am of the view that the court is justified in ordering security for the costs of the appeal. As to the amount of security, the Respondent's draft Bill does not seem extravagant; but I am unconvinced that witnesses will be permitted, or, if permitted, necessary or desirable. I will therefore exclude £1950 from the total requested as this is the amount which it is said will be needed for the interviewing of witnesses and the preparation of proofs of evidence. The resulting figure,

£13,650, may not be fully recoverable, and the amount of security which I shall order is £12,000. This is to be paid into court by 4.30 pm on 28th December unless (1) the parties before that time agree upon an alternative mode of providing security (for example a bank guarantee satisfactory to the Respondent) or (2) an application for an extension of time to pay is made in writing, setting out in full the grounds upon which it is made. Any such application must be lodged at the Greffe and served on the Respondent by no later than 4.30 pm on 14th December 2007. Until the security is given the appeal is to be stayed, subject to one matter which I set out below.

Directions

17. Advocate Wessels told the court that there are no established procedures for appeals of this nature. I would therefore be grateful if he would prepare and circulate a written argument setting out his proposals, on behalf of the Respondent, for the procedures to be applied to this appeal. Matters which I would like to see covered include the following:

- a. Section 43(4) of the Intermediaries Law provides that the grounds of an appeal under Section 43 shall be that the decision of the Respondent was ultra vires or an unreasonable exercise of the Commission's powers. I take it therefore that the procedure must be appropriate to a true appeal and is not akin to that applicable to a rehearing?
- b. Should there be a document akin to a notice of appeal setting out the grounds relied upon and a respondent's notice?
- c. What principles should be applicable to the question of whether or not the court should hear the evidence of witnesses?
- d. What should the appeal bundle contain?
- e. What should be the constitution of the court when it sits to hear such an appeal?

18. This list is not exhaustive, and there may be other matters which ought to be considered. Any matters which Advocate Wessels might like to raise should be canvassed. It would be helpful if such a document could be prepared and sent to the Appellant and the Greffe by 14th December, and the Appellant should then have an opportunity to comment upon it in writing by no later than 4.30 pm on 21st December 2007. If necessary I will then rule in writing on the procedure to be

adopted, and in any event, I will set directions for the future conduct of the action once security has been provided as ordered or agreed.