Judgment 7/2008 **Bate v Minister of the Housing Department – Royal Court (Civil Action File 1153) – 8 February 2008 and 27 February 2008**

(i) Housing (Control of Occupation) (Guernsey) Law, 1994 – Appellant had been granted an employment related housing licence – appeal from decision of the Department not to reconsider an earlier decision not to grant a non-employment related licence – construction of s.6 of the Law - decision of the Department held to be ultra vires and unreasonable – appeal allowed and Department directed to consider the Appellant's application

(ii) Royal Court Civil Rules, 1989 (Rule 48) – application for costs on indemnity basis – recoverable costs awarded.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1153

The 8th day of February 2008 before John Russell Finch Esquire, Lieutenant Bailiff alone

MARY ELIZABETH BATE

Appellant

v

THE MINISTER OF THE STATES OF GUERNSEY HOUSING DEPARTMENT

Respondent

Whereas on 21st January 2008 the Lt Bailiff considered an appeal under Section 56 of the Housing (Control of Occupation) (Guernsey) law 1994 and heard thereon Advocates St. J Robilliard and R J McMahon respectively the Lt Bailiff this day handed down judgment in the terms attached hereto and

(i) Declared that the decision contained in the letter (dated 24th September 2007) *ultra vires* and unreasonable;

(ii) Directed that the Respondent considers the Appellant's Application contained in the letter of 6th June, 2007; and

(iii) Declared that the Appellant's appeal that was commenced on 6th June 2007 is still ongoing.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text
08.02.08

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between	**Mrs MARY ELIZABETH BATE**	**Appellant**
	And	
	THE MINISTER OF THE STATES OF GUERNSEY HOUSING DEPARTMENT	**Respondent**

Date of hearing: 21st January 2008

Judgment handed down on: 8th February 2008

Before: John Russell FINCH Esquire, Lieutenant-Bailiff

Advocate for Appellant: St J A Robilliard
Advocate for Respondent: R J McMahon

Cases, texts and statutes referred to:

Cases referred to:

R v St Pancras Vestry (1890) 24 QBD 371, CA
Perkins v Housing Authority (1995) Civil Appeal No. 216

Statutes referred to:

Housing (Control of Occupation) (Guernsey) Law, 1994, as amended, Sections 2, 6 and 56.
Interpretation (Guernsey) Law, 1948, Section 1(b)

Text referred to:

Halsbury's Laws, Fourth Edition, Vol 1(1) p 45, para 29.

JUDGMENT

Background

2. This is an appeal under Section 56 of the Housing (Control of Occupation) (Guernsey) Law 1994 ("the Law") by Mrs Mary Elizabeth Bate (hereafter "A") against the Minister of Housing (hereafter "R"). It was accepted that the appeal raised matters of law only, which fell to be determined by myself alone. The appeal concerns R's letter of 24th September 2007 ("the letter") to the effect that it would not consider A's application for a Housing Licence under the Law, as amended. The application was contained in A's Advocate's letter of 6th June 2007. A asks the Royal Court to:-

    (i) declare the decision contained in the letter is ultra vires and/or unreasonable;
    (ii) direct that R considers A's application contained in the letter of 6th June 2007;
    (iii) declare that A's appeal that was commenced on 6th June 2007 is still ongoing; and
    (iv) give such other directions that it considers just or expedient.

    (Ground (iii) was inserted, without objection, at the beginning of the oral argument on 21st January 2008. Ground (iii) of the original summons was therefore renumbered (iv)).

3. The facts are not in issue. Both parties submitted Skeleton Arguments and supporting bundles (referred to as "A's Skeleton" and "A's Bundle" and "R's Skeleton" and "R's Bundle" hereafter). The arguments were developed in considerable detail in painstaking oral submissions made by both Advocates.

4. The chronology of the matter is set out in A's Cause. The relevant documentation is copied in A's Bundle. However, we can start with A's letter to R of 16th March 2007 (item (i) in the Bundle). In summary, A is the child of Open Market residents and would have become qualified after 20 years lawful residence in the Island. She had completed 18½ years, but this had lapsed by virtue of the Law (See section 10(2)(k)). Items (ii) and (iii) in A's Bundle, are further letters she wrote in support of her application. Her application was refused by A's letter of "*May 2007"*, item (iv). A commenced an appeal on or about 6th June, 2007 (item (v)). On that date, her Advocate wrote a detailed letter asking R for a reconsideration (item (vi)). R sought further information on 25th June 2007 (item (vii)). Next A's Advocate duly provided this information (item (viii)) by letter dated 29th June 2007.

5. A's attempt to obtain a Housing Licence was based under Section 6(2)(b) of the Law – which can be summarized as local connections of *"sufficient strength to justify the grant of a housing licence"*. She had also obtained a job as Financial Controller of a prominent company, the International Energy Group, and an application for an employment-based licence under Section 6(2)(a) was received by R on 23rd July 2007 (pp 16 – 17 of R's Bundle). This was for a limited five year licence. We next need to consider R's letter of 20th July 2007 (item (ix) in A's Bundle), which agreed to grant such a licence. This letter went on to state (quoted in A's Cause at para 6):

> *"It is therefore assumed that, as the Department has agreed to grant an employment related licence to Mrs Bate, no further action is required by the Department in relation to the request for a reconsideration of its earlier decision not to grant a licence to her.*
>
> *It is also assumed that the Appeal Summons issued in relation to that decision will not be pursued."*

6. A's Advocate wrote to R on 25th July 2007 (item (x)) asking what her position would be after the expiry of the limited 5 year licence, or if it terminated earlier. R responded on 1st August 2007, indicating that any subsequent applications would be considered on the merits "*at that time"* and that it was unable to make any commitment as to the likely outcome in such circumstances. The letter went on to say (quoted in para 8 of A's Cause):

> *"I would be grateful if, having consulted with your client regarding the contents of this letter, you could confirm your client's intentions in relation to the request for a reconsideration of the Department's earlier decision not to grant a non-employment related licence to her and also in relation to the Appeal Summons issued in relation to that decision."*

7. On 9th August 2007, A's Advocate wrote to R asking for her earlier application, i.e. that based on what could be broadly summarised as "*local connections"* to be considered without prejudice to the employment-related 5 year licence. The letter observed *"I appreciate that this is unusual, but nevertheless Mrs Bate's is a fairly unusual case ……".*

8. Eventually, on 24th September 2007, R responded to this in detail. It is this letter which sets out the basis of R's case, what was developed in the oral submissions at the hearing in great detail. Broadly summarized, the letter indicated:

   (i) that the employment-related licence under Section 6(2)(a) should, by virtue of the Law, be considered *"before all other types of application";*

   (ii) the Department had determined the applications in accordance with the provisions of the Law. Mrs Bates was in possession of a Housing Licence and the Law only provides for one licence,

not concurrent licences – in accordance with Section 2(1) of the Law (which refers to a person wishing to obtain a licence).

9. A now submits (para 11 of her Cause) that the decision was *ultra vires* and/or unreasonable for the reasons set out. These are, in effect:

    (a) nothing in Section 2 of the Law precludes an application under Section 6(2)(b) if a licence has also been issued under Section 6(2)(a);

    (b) R is under a duty to either grant or refuse the application in accordance with Section 3 of the Law; and

    (c) the use of the word *"firstly"* in Section 6(2) of the Law does not entail the consequence that if a licence is granted under section 6(2)(a) that precludes a separate application being considered under Section 6(2)(b).

Appellant's Submissions

10. After considering the chronology and correspondence, Advocate Robilliard developed his written Skeleton. The *"legitimate expectation"* point was not relied upon at the hearing. It was submitted that on the 20th July 2007, A was not covered by any licence at all. There had been no determination. Housing then took it upon themselves to deal only with the employment-based application. The issue of the 5 year licence, does not preclude Housing from considering other matters, and nothing in Section 56, which covers appeals, prevents her applications proceeding. Indeed, Housing should have considered her Section 6(2)(b) application at their meeting on 19th July 2007. It was submitted that A's Section 6(2)(b) application should have been considered and that her connection set out in the first appeal summons (item (v) of A's Bundle) are strong; that application was not responded to.

11. Under Section 6 of the Law, it was submitted that there is no priority given to employment-based applications when employment and non-employment type applications are made. The use of the word *"firstly"*, relied upon by R, does not preclude considering Section 6(2)(a) and Section 6(2)(b). There is nothing in the wording of the Section to show that (a) obviates (b). A decision still has to be made. A was entitled to be considered in her own right at the 19th July, 2007 meeting.

12. Counsel further submitted that where a public body is charged with making decisions, it is under a legal duty to make a decision, unless there is clear authority to say it need not make a decision. Nothing in the Law expressly deals with this matter. Various aspects of R's letter of 24th September 2007, (item (xiii)) were alluded to, especially references to the "*shortest route"* for A to become a qualified resident being by way of employment-related licences. It was suggested that the Law does not put Housing in a paternalistic role in deciding between options and it was not open to Housing to select

between desirable avenues under the statute. In essence, Housing had to consider all the matters before it, and did not do so.

Respondent's Submissions

13. The substance of R's response is to be found in the last sentence of R's Skeleton, para 12:

> *"By having granted a housing licence to the Appellant, there was no longer any separate or distinct "application" left for it to determine, which is why it neither purported to reject or grant a licence by considering Section 6(2)(b)."*

14. When considering A's situation, you cannot give both grounds (i.e. Section 6(1)(a) and Section 6(1)(b)) of her application an independent existence; if granted on one basis R has fulfilled its statutory duty. Housing has granted A a licence; she is lawfully housed and therefore R has not failed to do what it is obliged to do under the Law.

15. Section 6 of the Law is the key provision and the outcome arising is to decide whether or not to grant a Housing Licence. The scheme of the statute makes it clear that where the application is under Section 6(2)(a) – employment, that will be considered rather than the generality which is Section 6(2)(b). The construction favoured by R is correct, even if there is nothing explicit in the legislation. If A's argument were accepted, that would create a position whereby R would be obliged to determine an individual's licence position explicitly under the two grounds set out in Section 6 of the Law. That would give an independent existence to the two principal bases of considering a person's licence position. In A's case, she sought a licence under her personal circumstances, they were insufficient and she then took a job and an employment-based licence was granted. A is no longer a person wishing to obtain a Housing Licence, within the meaning of Section 2(1) of the Law. Accordingly, R has done everything it was required to do under the Law. A's position is likely to strengthen rather than weaken under an employment-based licence (a proposition advanced in R's letter of 24th September 2007, second page, at item (xiii)).

Applicable Legal Principles

16. A good place to start is with the wording of Section 6 of the Law (where relevant):

> *"**Procedure for consideration of applications***
>
> *6. (1) The Authority, upon receipt of an application under section 2, shall proceed to decide whether or not to grant a housing licence or to grant a housing licence subject to conditions in accordance with the provisions of this section.*

> *(2) The Authority shall firstly consider-*
>
> *(a) where the application is made in order to enable a person to occupy a dwelling so that he may undertake employment in Guernsey, all or any of the following matters –*
>
> *(i) whether the employment of that person, by reason of his qualifications, skill or experience, or whether that employment, is of sufficient essentiality to the community to justify the grant of a housing licence;*
>
> *(ii) the number of people appearing to the Authority to be resident in Guernsey and lawfully available to undertake employment of the type concerned;*
> *(iii) the number of people for the time being entitled to occupy a dwelling under a housing licence of the type concerned; or*
>
> *(b) in any other case, all or any of the following matters-*
>
> *(i) whether the person who would be permitted by the housing licence to occupy a dwelling has familial or like connections with Guernsey of sufficient strength to justify the grant of a housing licence;*
> *(ii) without prejudice to the generality of subparagraph (i), the periods during which and the circumstances in which that person has been resident in Guernsey or elsewhere.*
>
> *(3) The Authority, having considered the appropriate matter set out in subsection (2) (a) or (b), may decide to refuse to grant a housing licence.*

17. Upon reading this part of the Section, I consider that there is nothing in the wording which precludes R from considering an application under Section 6(2)(b) and an application under Section 6(2)(a). The use of the word *"firstly"* does not mean that (to use the word employed by Counsel) (a) *"obviates"* (b). On a plain reading, it simply means that R must *"firstly"* consider the employment-based licence and *"in any other case"* the *"familial or like connections with Guernsey"* licence. The fact that Housing must consider an employment-based licence first does not entail that they cannot consider the other type of licence. No decision on Section 6(2)(b) was taken at the meeting on 19th July 2007.

18. It was submitted (see paragraph 9 above) on behalf of A that where a public body is charged with making a decision, it is under a legal duty so to do, unless there is clear authority to say it need not. Section 6(1) of the Law is clear in its terms: Housing *"shall proceed to decide whether or not to grant a Housing Licence …… in accordance with the provisions of this section"*. I therefore consider that R was under a duty to consider A's application under Section 6(2)(b). There is nothing in the Section to overcome this. In the words of Halsbury's Laws Vol 1(1), Fourth Edition, at paragraph 29, p 45:

> *"A wrongful failure to exercise a discretion may occur because the deciding body has misconstrued the scope of its own powers, believing it lacks the discretion vested in it".*

19. Somewhat of an analogous situation was found in *R v St Pancras Vestry (1890) 24 QBD 371, CA* (a public authority wrongly believing it had no discretion as to the amount of a pension it could award).

20. R emphasized the use of the word *"a"* in the phrase *"a housing licence"* in Section 2 of the Law: see the letter of 24th September, 2007, item (xiii), 2nd page. This is developed at paragraph 7 of R's Skeleton as follows:-

> *"However, once a Housing Licence has been granted to an individual in respect of the occupation of a specified dwelling, that person is no longer a person "wishing to obtain a housing licence" (Section 2) for the simple reason that s/he already has one. This is not the Department precluding itself from consideration of "an application". The application has already been determined".*

21. In this case, and in all other matters, the Court must have regard to the provisions of the interpretation (Guernsey) Law 1948. Section 1(b) states:

> *"1. In this Law and in every other enactment, whether passed before or after the commencement of this Law, unless the contrary intention appear –*
>
> *(a) ……..*
>
> *(b) Words in the singular shall include the plural and words in the plural shall include the singular."*

22. Accordingly, it seems to me, that when considering the wording *"Housing Licence"* in the Law, that can cover the plural. No contrary intention, which should be a plain one in my view, appears in that legislation. This is evident from the phrase *"unless the contrary intention appear"* in the Interpretation Law. On considering Sections 2 and 6 of the Housing Law there is nothing, to my mind, which inhibits a person from making an application under more than one head. It was submitted, with some force, on behalf of R, that if A's arguments were accepted, this would create a position where Housing would be compelled to determine an individual's licence position explicitly on the separate bases set out in Section 6(2) of the Law. That would give an

independent existence to the two principal bases of considering a person's licence position. It follows, it was suggested, that you therefore cannot give both grounds of A's application an independent existence – if granted on one basis. R has therefore fulfilled its statutory duty in the present matter. With great respect, I do not see that this is so terrible a scenario. It does not logically follow that the existence of one basis for seeking a licence somehow nullifies the existence of any other. In addition, there is nothing in the scheme of the Law which inhibits a person theoretically from being qualified and granted a licence on more than one ground.

23. As was submitted on behalf of A, on the 19th July 2007, when the relevant meeting was held, A was not in possession of a licence. The only decision taken until then was to reject her earlier application, despite her admitted 18½ years period of earlier lawful residence. Housing, to use Advocate Robilliard's words, *"took it upon themselves",* to deal only with the employment licence. When considering the terms of R's letter of 20th July, 2007 (item (xiii)), I see force in the submissions that the Law does not put Housing in a *"paternalistic"* role in deciding between options and under the statute, it is not open to them to select between desirable avenues. The letter of 6th June, 2007 (item (vi)), sent by A's Advocate and the supplementary information demanded by R (item (viii)), were not considered properly or at all, in the light of the response from Housing.

24. I make no apology for referring to the familiar Court of Appeal decision of *Perkins v Housing Authority (1995) Civil Appeal No. 216*. At page 1 – H, Southwell JA said:

> *"The Housing Control Laws give the Authority draconian powers to control the occupation of premises in Guernsey."*

25. After citing the ECHR case of *Gillow (1987*), he went on to say:

> *"The existence of powers such as these is unusual in a democratic society and must be exercised with care and sensitivity to avoid any abuse of those powers".*

26. Whilst the States have given R an onerous job to do, such is the importance of its decisions to individuals that the courts must carefully review those matters brought before them in the light of established legal principles and previous binding decisions. In this particular case, I am relieved that the result seems to be a just one, when considering the factual background.

Decision

27. Accordingly, A is entitled to the relief she seeks. Upon considering paragraph 12 of her Cause, I therefore:

    (i) declare that the decision contained in the letter (dated 24th September 2007) is *ultra vires* and unreasonable;

(ii) direct that the Respondent considers the Appellant's Application contained in the letter of 6th June, 2007; and

(iii) declare that the Appellant's appeal that was commenced on 6th June 2007 is still ongoing.

28. I will make any further direction under (iv) should there be submissions on it. At the moment it is not necessary, in the absence of any specific point.

Costs

29. Costs follow the event. I am provisionally minded to award A her recoverable costs in this matter, subject to any written submissions by either party within seven days of the date of this judgment, or such other period as the Court may approve.

J R Finch

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1153

The 27th Day of February 2008 before John Russell Finch Esquire, Lieutenant Bailiff; sitting alone

Between

Mrs. MARY ELIZABETH BATE

Appellant

And

THE MINISTER OF THE STATES OF GUERNSEY
HOUSING DEPARTMENT

Respondent

Whereas on 8th February 2008 the Lieutenant Bailiff found in favour of the Appellant and reserved the question of costs and whereas the Lieutenant Bailiff

subsequently considered written submissions on costs the Lieutenant Bailiff this day gave judgment in the terms attached hereto and AWARDED costs on the recoverable basis to the Appellant for the period 20th July 2007 to the conclusion of the hearing on 8th February 2008.

S M D ROSS
H.M. Deputy Greffier

Approved Text
27.02.08

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between	**Mrs MARY ELIZABETH BATE**	**Appellant**
	And	
	THE MINISTER OF THE STATES OF GUERNSEY HOUSING DEPARTMENT	**Respondent**

Date of hearing: 8th February 2008

Judgment handed down on: 27th February 2008

Before: John Russell FINCH Esquire, Lieutenant-Bailiff

Advocate for Appellant: St J A Robilliard
Advocate for Respondent: R J McMahon

Cases, texts and statutes referred to:

1. In Re Gibson's Settlement Trusts [1981] Ch. 179
2. Hulme v Matheson Securities (Channel Islands) Ltd (No. 2) [1997] 24 GLJ 75
3. Halsbury's Laws, 4th Edition (2007), Volume 10, para 23, note 8

APPENDIX

DECISION ON COSTS (Issued 27th February 2008)

29. I have now had the opportunity to consider the parties' written submissions on costs, referred to in paragraph 28 of above.

30. The hearing took place on 8th February, 2008. As I understand the submissions, there is an issue on the dates to be determined, and, if the Appellant succeeds in that aspect, I then have to consider whether the relevant award should be on the normal recoverable basis, or for full indemnity costs. It was contended by the Appellant that she is entitled to indemnity costs for the period 20th July 2007 to 24th September 2007. The Respondent submits that recoverable costs are payable, but only from 24th September, 2007, which is the date of the decision letter that was the subject of the appeal. Accordingly, I take it from the submissions that there is no dispute that the Appellant is entitled to recoverable costs for the period 24th September 2007 to the conclusion of the hearing on 8th February 2008.

31. The matter is governed by Rule 48 of the Royal Court Civil Rules, 1989. This refers to the *"costs of the proceedings"*. In considering this, I have derived assistance from the judgment of Megarry VC in *In Re Gibson's Settlement Trusts [1981] Ch. 179* at 187-G:

> *"If the proceedings are framed narrowly, then I cannot see how antecedent disputes which bear no real relation to the subject of the litigation could be regarded as being part of the costs of the proceedings. On the other hand, if these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then I cannot see why the taxing master should not be able to include these costs among those which he considers to have been "reasonably incurred"".*

32. A perusal of the correspondence shows that from 20th July 2007 (the date of a letter from the Respondent) to the letter of 24th September 2007, issues that were relevant to the appeal and the factual matrix surrounding it were ventilated. Accordingly, matters that were *"some degree relevant"* to the case arose and were considered in correspondence in that period. The Appellant

therefore succeeds in this element of her claim. Costs will run from 20th July, 2007 to the hearing's conclusion on 8th February 2008.

33. The next question for determination is the nature of the costs order for that period. The application of Rule 48 has been examined by the Court of Appeal in *Hulme v Matheson Securities (Channel Islands) Ltd (No. 2) [1997] 24 GLJ 75*. In the words of Southwell JA at p 81-B:

> *"This Court is here concerned with the application of Royal Court Rule 48. The discretion under this Rule is also not to be fettered or circumscribed, and is a discretion to be exercised judicially in the light of the particular facts of each case"*.

34. As in England I take the position to be that the award of costs on the indemnity basis is generally reserved to cases where the Court wishes to indicate its disapproval of the conduct of the paying party. In the words of Halsbury's Laws, 4th Edition (2007), Volume 10, para 23, note 8:

> *"Indemnity costs may be awarded against a party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation: Reid Minty (A Firm) v Taylor [2002] 2 All ER 150"*.

35. In this case there was a justiciable issue which was placed before the Court by means of full legal argument. The Appellant succeeded, but the circumstances are such that they fall short of those where indemnity costs should be ordered. Although all cases are different, it is apposite to consider the strong facts in the *Matheson* case (supra) and compare them to this matter. To put it another way, the Respondent's conduct, in my judgment, cannot be characterized as *"wholly unreasonable"* or an *"abuse of process"*. The basis of the costs award is therefore limited to recoverable costs.

36. Accordingly, my decision is that the Appellant is entitled to her recoverable costs from 20th July 2007 until the conclusion of the hearing on 8th February, 2008.

Judge J R Finch

