

**Judgment 9/2008**

**(i) Richard John Bach and  
(ii) Karen Bach  
- Royal Court (Criminal Appeal 15 of 2007) –  
12 March 2008**

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**Island Development (Guernsey) Law, 1966 – carrying out development without permission – appeal from conviction before the Magistrates Court – conversion of adjoining dwellings with a single dwelling – held that prescription did not apply against the Crown or the Law Officers in criminal matters – no unjustifiable delay such as to constitute abuse of process – European Convention on Human Rights (Article 6) – no breach of right to a hearing “within a reasonable time” - appeal dismissed**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 12<sup>th</sup> day of March, 2008 before John Russell Finch, Esquire, Lieutenant Bailiff; sitting alone.

No15 of 2007

In the action of THE LAW OFFICERS OF THE CROWN against RICHARD JOHN BACH and KAREN BACH (“the Appellants”) to pursue the appeal of which the said Appellants gave notice against the conviction imposed upon them by the Magistrate’s Court on the 14<sup>th</sup> day of September, 2007 in the terms attached hereto;

WHEREAS on the 26<sup>th</sup> day of February, 2008 THE COURT heard Advocate N.J. Barnes for the Appellant, and Advocate L. Roffey for the Crown and ADJOURNED the matter for a written Judgment to be handed down;

THE COURT this day handed down Judgment in the attached terms and DISMISSED the Appeal;

AND THE COURT granted leave to the Law Officers to apply for costs, to be considered on written submissions within seven days of the date of the said Judgment, or such other time as the parties may agree.

S M SIMMONDS  
Her Majesty's Deputy Greffier

Approved Text  
12 March 2008

## In the Royal Court of Guernsey

### Appeal against Conviction

**Richard John BACH**

**And**

**(Appellants)**

**Karen BACH**

**-v-**

**THE LAW OFFICERS OF THE CROWN (Respondents)**

**Date of hearing: 27<sup>th</sup> February, 2008**

**Date of Judgment handed down: 12th March 2008**

**Before: John Russell Finch Esq., Lieutenant-Bailiff**

**Advocate for the Appellants: N J Barnes**  
**Advocate for the Respondents: L C Roffey**

#### **Convention referred to:**

The European Convention on Human Rights, Article 6.

#### **Statutes referred to:**

- 1 The Island Development (Guernsey) Law 1966, Section 14(1)(a)
- 2 The Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988, Section 8(1)

#### **Guernsey Cases referred to:**

- 1 In Re Clemens Appeal [1985] 2GLJ 20
- 2 Smith v Harvey [1981] Civil Appeal No. 9

#### **English Cases referred to:**

- 1 R v Buzalek [1991] Crim LR 115
- 2 R v R [1994] Crim LR 948

#### **Strasbourg Cases referred to:**

- 1 Deweer v Belgium (1980) 2 EHRR 30
- 2 Ecke v Germany (1982) 5 EHRR 1

3 ILJ, GMR and AKP v United Kingdom (2001) 33 EHRR 225

**Texts referred to:**

- 1 Blackstone's Criminal Procedure (2006 Edition), para 10.42
- 2 Human Rights and Criminal Justice (Emmerson et al) 2<sup>nd</sup> Edition (2007), para 14.41

**Decision**

**Background**

- 1 This is an appeal by Richard and Karen Bach (hereafter "A"), against their convictions on 14<sup>th</sup> September, 2007 by the Magistrate's Court for carrying out unauthorized development, contrary to Section 14(1)(a) of the Island Development (Guernsey) Law, 1966. Each Appellant was fined £1,500. The Law Officers were represented by Advocate Roffey and "A" by Advocate Barnes who both also appeared in this appeal. The grounds of the appeal are that the learned Magistrate wrongly decided that:
  - (i) the proceedings were not prescribed;
  - (ii) the proceedings should not be struck out as an abuse of process as a result of delay; 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.
- 2 I have had written submissions from the parties and the opportunity of considering the transcript of the trial, together with the associated documents and exhibits. The facts are not in dispute and set out lucidly by the Magistrate at pages 62–E to 64–H of the transcript, which I gratefully accept for the purposes of this decision.

*"I think it important to set down my findings of fact before turning to the three submissions of Advocate Barnes. I say "findings" but in fact for the most part the facts are agreed. 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.*

*I do not think it essential to my decision today, but for what it is worth, 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 over simplistic perhaps 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 to which I have already made reference. If they had merged sometime before 1984 into a single unit why were the connecting arches and doorways still all bricked up? It could be that they had only recently been bricked up following the recent death of Mrs Cooke, but would that not have been evident to Mr and Mrs Bach at the time, and were they not in a position better than anyone else to know the recent history of the occupation of the two halves of the original house?*

*I say I do not think this is essential to any of my decisions today because 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 22<sup>nd</sup> 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. That is evidence of the facts stated therein to the like extent of direct oral evidence of the same facts, and just as it would be with oral evidence, it is open to challenge in the same way. 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. In evidence Mr Bach said he thought perhaps this ought to be by February 1997 rather than by February 1996. 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 11<sup>th</sup> April 1996.*

*On or shortly before 26<sup>th</sup> 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. I should state why I make mention of these applications and appeals. I do not treat them in any way as admissions by the Bachs that they had acted at any time in breach of the Island Development Committee Laws. They 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. That deals with the historical background to the prosecution."*

I propose to deal with each of the grounds of appeal in the order they were presented to the Court.

### **Prescription**

- 3 The case relied upon by the Respondents (hereafter "R") is in *Re Clemens' Appeal [1985] 2 GLJ 20*, a decision of the Deputy Bailiff on appeal from the Magistrate's Court on a criminal case, where it was held that "Prescription now had no application against the Crown or the Law Officers in criminal matters". The Deputy Bailiff found that after the abolition of "causes en ajonction", which was purely a procedural matter, there was no longer any limitation on criminal cases. This is well set out by Sir Godfray Le Quesne in the case of *Smith v Harvey [1981] Court of Appeal, Civil Appeal No. 9 at page 11*:

*“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 Relative aux Causes présentement poursuivies aux Petit Criminel, 1861** the procedure, subject to certain exceptions, became a purely civil matter without the adjunction of the Crown Officers. Eventually it was entirely abolished by the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950.”*

- 4 I would also note the reference to “**causes en ajonction**” at page 48 of the Commissioners’ Report, para 33 ( mentioned in the Court of Appeal judgment) in the evidence of Advocate Robert MacCulloch:

*“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”.”*

- 5 It seems to me that the authorities support the Clemens decision and that it should continue to be followed. In any event, the year and a day prescription appears to have been confined to “*positive intentional acts either of physical violence or of language*”, as stated in Smith v Harvey (*supra*). I have considered this aspect of the appeal very carefully, as Advocate Barnes is respected at the Bar as an expert in the customary law, and is equipped to hack his way through the sometimes dense thickets presented by Terrien, Le Marchant and Laurent Carey. However, with respect, Clemens represents the law today and is based upon sound foundations of both law and policy.

### **Abuse of Process**

- 6 As previously indicated, the facts in the case are unchallenged. The offence was committed between 31<sup>st</sup> October 1994 and 1<sup>st</sup> March 1996. The IDC became aware of the alleged infraction on or shortly before 26<sup>th</sup> February, 2002. The mischief complained of is the conversion of the two dwellings Beaumont (purchased by “A” in 1984) and Avondale (purchased

by them in 1994) into one. Retrospective applications to authorize this conversion were made and refused in June 2002 and March 2003, and an appeal to the Royal Court in relation to the latter application failed in March 2005. Another application to authorize two units of accommodation on the site was refused in September 2005. However, in December 2005, the IDC granted an application to create a dwelling house and flat, on condition the flat was available as a separate unit of accommodation by June 2006. At A's request, this was extended to November 2006. Thereafter, A sold the property to Castle View Investments, they being the beneficial owners of this entity. In November 2006 A's Advocate wrote to Environment (the successors of the IDC) indicating that they no longer intended to create a flat at the property. The case was referred to the Police for investigation in December 2006.

7 The Magistrate considered (page 70 of the transcript, H):

*"I do not consider, in conclusion, that any period of delay in this case amounts to an abuse of process of the Court".*

8 This followed an exhaustive analysis of the English cases. The principles which can be distilled from the cases seem to me to be that:

(i) in the words of Blackstone (2006 edition) at para D10.42, p. 1438:

*"It seems that, where the accused allegation of abuse of process is based on delay, he must show that as a result of the delay he will suffer serious prejudice to the extent that no fair trial can be held"*

The case of *R v R [1994] Crim LR 948* is one of those cited in support of this proposition and the Court of Appeal there 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"*;

(ii) regard must be paid to the nature of the case; see *R v Buzalek [1991] Crim LR 115*, which turned on documents, rather than e.g. eye witness accounts of an affray, assault, or road traffic accident.

9 It is difficult in a case of this nature, where the issue is not one of evaluating whether a defendant glassed someone outside licensed premises on a dark night, but what the state of realty was over the years, to show there has been prejudice to A's rights. Each case varies and has to be looked at on its own facts, but this is not a situation where Mr and Mrs Bach were somehow inhibited from making their own investigations. I agree with the Magistrate's comments on this aspect of the case (transcript, page 70, E – H). On the facts there has been no unjustifiable delay in this case and, when one takes a step backwards and looks at the overall fairness of the proceedings, it seems to me that Environment and its precursor, the

IDC, behaved with moderation and sought to achieve a satisfactory outcome without recourse to the resort of criminal proceedings.

## Article 6

- 10 Under Article 6 of the ECHR defendants in criminal cases have a right to a hearing within a reasonable time. In the words of the textbook “*Human Rights and Criminal Justice*” (Emmerson et al) 2<sup>nd</sup> Edition (2007), at page 495, para 14.41:

*“In determining what constitutes a “reasonable time” for the purposes of Art 6, regard must be had to the circumstances of each case including, in particular the complexity of the factual or legal issues raised by the case; the conduct of the applicant and of the competent administrative and judicial authorities; and what was “at stake” for the applicant”.*

- 11 The case of *Deweere v Belgium (1980) 2 EHRR 30*, shows that time begins to run from point of charge. “Charge” means when the defendant has been “officially notified” of the allegation or his situation “has been substantially affected” by official actions in respect of the case (*Eckle v Germany (1982) 5 EHRR 1*).
- 12 The Magistrate alluded to the fact that the actions of the IDC, which commenced in February 2002 “did not involve the determination of a criminal charge”. As stated, the case was not passed to the Police for investigation until December 2006, after a letter on behalf of A was received by Environment in November 2006 to the effect that they no longer intended to create a flat at the property. Thereafter, Mr and Mrs Bach met with the Police on 5<sup>th</sup> February 2007 and subsequently Mr Bach produced a written statement dated the 27<sup>th</sup> February 2007. Mr and Mrs Bach were summoned to appear before the Magistrate’s Court in May 2007 and the trial took place on 14<sup>th</sup> September, 2007.
- 13 In the circumstances, I consider the case is rather analogous to the situation in *IJJ, GMR and AKP v United Kingdom (2001) 33 EHRR 225*. There it was found that time did not run from the date of the Applicants’ interviews with DTI Inspectors, as that did not involve the determination of a criminal charge, but from the commencement of the criminal proceedings proper. This is also the view taken by the Magistrate (transcript, page 72, D – F). Even if I am technically incorrect in my assessment of the application of Article 6 in this case, I am firmly of the view that the proceedings overall were not unfair to the Appellants.

## Conclusion

- 14 Contrary to Advocate Barnes’ submissions, I conclude that prescription is not available, there was no undue delay or abuse of process and that Article 6 was not breached. Accordingly, this appeal fails, and is dismissed.

## **Costs**

- 15 Under Section 8(1) of the Magistrate's Court (General Appeals) (Guernsey) Law, 1988, I have a limited power to award costs. If the Law Officers wish to apply I will consider this on written submissions within seven days of the date of this judgment, or such other time as the parties may agree.

**J R Finch**