Litchfield v Director of Environmental Health & Pollution Regulation
Court of Appeal
Case No. 476
10th September, 2014

JUDGMENT 37/2014

Appeal against the decision of the Royal Court refusing the Appellant leave to seek judicial review of the Respondent's decision to issue a licence to the Appellant's neighbour under the provisions of The Environmental Pollution (Guernsey) Law, 2004.

Approved Text
10.09.2014

IN THE GUERNSEY COURT OF APPEAL

CIVIL DIVISION

Between: **HELEN LITCHFIELD** **("Appellant")**

-v-

DIRECTOR OF ENVIRONMENTAL HEALTH AND POLLUTION REGULATION **("Respondent")**

Advocate N J Barnes appeared for the Appellant
Advocate K Hill-Tout appeared for the Respondent

Collas, Bailiff

Introduction

1. The Appellant wishes to appeal the decision of the Royal Court refusing leave to seek judicial review of the Respondent's decision to issue a licence ("the Licence") under the provisions of The Environmental Pollution (Guernsey) Law, 2004 permitting a neighbour of the Appellant to operate a waste wood incinerator and a wood store and also to review a subsequent decision of the Respondent refusing to revoke the Licence or vary the conditions attached to the Licence after receipt from the Appellant of an expert report criticising her earlier decision.

Factual Background

2. The Appellant resides at Vazon Cottage, Rue des Goddards, Castel on the opposite side of the road from a vinery known as "Whispers Vinery" where peppers (capsicums) are grown in glasshouses by the owner of the vinery, B R Langlois and Sons Limited ("Langlois"). The glasshouses are heated by hot water produced by burning waste wood in an incinerator. The waste wood incinerator is within 30 metres of the Appellant's house. The Appellant first complained to the Respondent about the operation of the incinerator in May 2011 and sometime thereafter it ceased operating pending the issue of a licence. Correspondence was exchanged

between the Appellant and the Respondent and the latter met on site with the Appellant and other residents on two occasions in March 2011 and June 2012.

3. The storage and burning of waste wood gives rise to a risk of environmental pollution and is therefore a prescribed operation for the purposes of The Environmental Pollution (Guernsey) Law, 2004. In September 2011, Langlois applied for a licence and a copy of the application was made available to the Appellant on 13 September that year. Langlois carried out modifications to the incinerator such that when it submitted a fresh application for a licence on 7 December 2012, the Respondent issued a Waste Disposal Licence ("the Licence") that same day authorising the storage of waste wood and the operation of the incinerator subject to the conditions set out in the Licence.

4. In order to pave the way for the grant of the Licence, the States of Deliberation had resolved on 30th September 2011:

> *"1. To authorise B R Langlois and Sons Ltd as a person to whom a licence may be issued, by the regulator, for carrying on of waste disposal operations comprising the combustion of waste wood at Whispers Vinery, Rue des Goddards, Castel, GY5 7BG.*
>
> *2. To acknowledge, should the operations so authorised be licensed, that the monitoring, emission and noise standards for the operations are required under the Environmental Pollution (Guernsey) Law, 2004 to satisfy the Best Available Technique and that, in respect of the combustion of waste (ie, non-virgin) wood, the standards set out in Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (the Waste Incineration Directive) can be adopted as a minimum standard."*

5. The second paragraph of the resolution was not in the Environment Department's Report submitted for debate by the Environment Department and was added following a successful amendment.

6. Between the receipt of the application on 7 December and the issue of the Licence later that day, no opportunity was given to the Appellant to comment upon it but she was advised promptly of the issue of the Licence. That much can be seen from letters written on her behalf on (*inter alia)* 14 and 16 December complaining about the issue of the Licence and observing that it did not comply with the requirements of the Waste Incineration Directive ("WID") referred to in the States resolution.

7. Between December 2012 and July 2013, the Appellant continued to make complaints to the Respondent regarding aspects of the operations of the incinerator. As she was of the view that the Respondent had not addressed her complaints satisfactorily she instructed an expert to investigate the level of emissions and received a report in April 2013. However the Appellant was unable to rely on that report because it did not comment on the terms of the Licence as such comment was outside the scope of the expert's expertise. The Appellant therefore commissioned a second report from Fichtner Consulting Engineers Limited ("Fichtner").

8. The conclusions of the Fichtner Report are the basis of the Appellant's complaint and the basis of the grounds on which she seeks to have the Licence set aside or varied. Fichtner is an expert in the licensing and regulation of municipal waste incinerators. The report relies on information supplied by the Appellant including Langlois' application for a waste management licence, the Licence and the decision document issued in support of the Licence. The author of the report noted that he did not have access to Whispers Vinery or to any design information beyond that included in the application.

9. The summary of his conclusions are stated to be:

"4.1 Based on the information provided, we consider that the Castel waste wood incineration facility would fall within the scope of the WID.

4.2 We do not consider that the waste management licence for the facility imposes the requirements of the WID."

Appended to the Fichtner Report is a detailed assessment of compliance both with the English and Scottish application requirements and also with each article of the WID.

10. The Fichtner report was issued to the Appellant on 8 August 2013 and forwarded to the Respondent on 15 August 2013 under cover of a letter from Advocate Barnes in which he wrote:

"I write further to our previous correspondence and enclose a copy of a report prepared by Fichtner Consulting Engineers Ltd concerning the licence for the incinerator.

It appears that the licence does not comply with the waste incineration directive and that therefore it would be necessary to add conditions to the licence in order to impose the requirements of the directive. I would be grateful if you will advise me of the steps that you will be taking in order to add these conditions to the licence."

11. He chased the Respondent for a reply on 12 September 2013 and on 24 September she responded as follows:

"I refer to your letter of 15th August 2013 and the enclosed report prepared by Fichtner Consulting Engineers Limited the contents of which are noted. The licence was issued on 7th December, 2012 so you will appreciate that it would be inappropriate for me now to purport to add to or vary the reasons for that decision."

12. Advocate Barnes wrote again on 28 October:

"Thank you for your letter of 24th September 2013. I attach a copy of the proceedings that my client has instructed me to issue.

Before doing so however I thought you would appreciate the opportunity to reconsider your decision. As I understand it section 1 of the law imposes an ongoing objective to protect the environment and it seems that in the present case that would be best achieved by adopting the requirements of the Waste Incineration Directive, a directive which you have repeatedly said would be applied to the operation at Whispers Vinery.

I look forward to hearing from you within the next 14 days."

13. On 11 November he received a more substantial reply:

"Thank you for your letter of 28th October enclosing a copy of proposed proceedings which you are instructed to issue.

The licence was issued on 7th December 2012 and conditions were attached to the licence in accordance with the Environmental Pollution (Guernsey) Law 2004.

As I stated in my letter of 24th September, I note the contents of the Report produced on your instruction by Fichtner Consulting Engineers Limited. It is, however, based on some erroneous information and I note also that a site visit did not occur to assess the licence conditions.
The Waste Incineration Directive (WID) has not been implemented in Guernsey and is not required to be so implemented under EU Law. The States Resolution of 29th September, 2011 referred to that Directive as a source of standards that can be adopted but my decision on the licence application had to take into account all relevant considerations under Guernsey Law

including proportionality. In fact, the relevant WID standards on emission limit values for the burning of waste wood, the activity which occurs at this site, were included in WML17 as the States of Deliberation were assured would be the case.

Section 17 provides the Director with continuing powers to vary the conditions of a licence. These powers would only be exercised in circumstances where I felt this was necessary to comply with the requirements of Guernsey Law and in particular the Environmental Pollution (Guernsey) Law 2004 and the continuing requirement for a licence holder to ensure that the operation to which a licence relates is using the best available technique for preventing the introduction of pollutants into the environment, or if that is not practical for reducing to the minimum the introduction of pollutants and any environmental pollution thereby caused. I have yet to be convinced that there is any reason for me to vary the conditions of the licence granted. In short, nothing has changed since the issue of WML17."

14. Following receipt of the 11 November letter from the Respondent, the Appellant issued an application for leave to seek judicial review which was first returnable in the Royal Court on 22 November 2013. Before reviewing the application, it is necessary to look at the legislative framework governing the issue of the Licence.

The Legislative Framework

15. The principal Law is The Environmental Pollution (Guernsey) Law, 2004 ("the 2004 Law"), section 1 of which provides:

"Purposes and objectives of this Law.

1. (1) The purposes of this Law are to empower the States to enact, monitor and effectively enforce all such measures as may be conducive to the preservation and enhancement of the environment through the limitation and reduction of pollutants therein.

(2) The primary objective of this Law is to ensure that activities which may give rise to a risk of environmental pollution -

(a) are only carried on if and to the extent that the interests of the community so require; and

(b) are carried on, if at all, using the best available technique for eliminating or reducing to the minimum any such risk.

(3) Secondary objectives of this Law are to ensure, where activities have given rise to environmental pollution -

(a) that those activities -

(i) are discontinued, or

(ii) if their continuation is required in the interests of the community, are continued using the best available technique for eliminating or reducing to the minimum any further pollution; and

(b) where practical and appropriate, that any damage to the environment caused thereby is adequately redressed."

16. The post of Director of Environmental Health and Pollution Regulation was created by section 4 of the 2004 Law. Section 5 enables the States to issue guidance and directions to the Director

of a general or specific character or nature concerning the policies to be followed by the Director. The functions and powers of the Director include the issuing of licences under the Law, subject to such conditions as the Director may determine (sections 6 and 7).

17. Part III of the Law is concerned with the Licensing of Prescribed Operations, being such operations as the States may by Ordinance prescribe. The storage and burning of waste wood are prescribed operations by virtue of section 1 of The Environmental Pollution (Waste Control and Disposal) Ordinance, 2010 ("the 2010 Ordinance"). Section 14 of the 2004 Law requires an application for a licence to carry out a Prescribed Operation to be made to the Director (*inter alia)* and sub-section 14(3) sets out material considerations that are to be taken into account by the Director. Section 15 directs that an application for a licence may be granted if, and only if, a prescribed operation can be carried on without:

    (i) causing serious risk of significant environmental pollution;

    (ii) contravening any Ordinance made under this Law;

    (iii) conflicting with any relevant policy of the Strategic and Corporate Plan; or

    (iv) conflicting with any relevant States' Direction;

18. Section 16 of the 2004 Law imposes an automatic condition on every licence that an operation must be carried on by using the best available techniques in order to prevent or minimise environmental pollution. It includes provision for the Director to attach such other specific conditions as he considers appropriate. Section 17 enables the Director to vary the conditions of a licence from time to time and section 18 includes powers to revoke or suspend a licence.

19. Section 33 deals with the licensing of waste disposal sites on land not owned by the States. Section 2 of the 2010 Ordinance provides that a licence permitting the provision or operation of any site, plant or equipment for the disposal of waste may only be issued to the States of Guernsey or to a person authorised in writing for the purpose by the States.

20. As I have said, the States resolved on 30th September 2011 to authorise that a licence could be issued to Langlois. The requirement in the States resolution (quoted above at para 4) to adopt the WID did not satisfy the criteria contained in section 5 of the 2004 Law and therefore was not issued as States guidance or directions to the Respondent. However, Advocate Barnes submitted its effect was similar.

The Application

21. The Appellant's original *cause* alleged that the Respondent failed to take in to account the following material considerations namely:

    a) the requirements of the WID;
    b) the provisions of section 1 of the 2004 Law;
    c) the requirements of the best available technique; and
    d) the provisions of section 16 of the 2004 Law.

22. It was further alleged that the Respondent later took into account an irrelevant consideration in refusing to vary or add to the conditions of the Licence namely that she had already granted the application.

23. The orders sought by the Appellant in the original *cause* were:

    a) that she be permitted to bring the application;
    b) to cancel and/or set aside the Licence; and

c) to require the Respondent to reconsider the requirements of the WID and the best available technique, to formulate appropriate conditions and to take such steps as may be necessary to vary the terms of the Licence.

24. The Application for leave to bring a claim for judicial review came before Judge of the Royal Court, J R Finch, who was persuaded to have a preliminary hearing to decide whether to grant leave to pursue a claim for judicial review. In correspondence, counsel for the Respondent sought to clarify the terms of the application. As a result, on the day of the hearing, 26 February 2014, the Appellant applied for leave to amend her *cause* to reflect the exchange of correspondence of 28 October and 11 November 2013 and to seek leave to review the decisions communicated in the letter of 11 November. The Respondent opposed the amendment at the hearing but does not wish to appeal the Judge's decision to allow the amendment.

25. The Judge issued a judgment dated 24 March 2014 in which he:

a) accepted that the Appellant had locus to make an application for leave to apply for judicial review but reserved the issue for further argument at any substantive hearing;
b) granted leave to the Appellant to amend her *cause* to reflect the exchange of correspondence of 28 October and 11 November 2013;
c) rejected the Respondent's submission that the application for leave to apply for judicial review be struck out on the ground of delay; and
d) accepted the Respondent's submission that the application for leave to apply for judicial review be refused on the ground that it would achieve no practical purpose for the reason that the decision communicated by the Respondent on 24 September or 11 November 2013 amounted to a reconsideration of the grant of the Licence and hence the Appellant had received the only relief that she could be awarded if her application for Judicial Review were to be successful at a substantive hearing.

26. The Appellant issued a Notice of Appeal against Judge Finch's judgment and the Respondent issued a Respondent's Notice. Judge Finch's judgment was an interlocutory order, in respect of which leave to appeal was required under section 15 of The Court of Appeal (Guernsey) Law, 1961 and leave was granted by the Judge.

27. The grounds of appeal are that the Appellant had not already obtained the relief she sought because the Judge was wrong to hold that the decision communicated in the letter of 11 November constituted an appropriate reconsideration of the Respondent's decision to issue the Licence. Accordingly, the Judge should have granted leave for the 11 November decision to be reviewed. Further, having found that the application should not be struck out on the ground of delay, the Judge should have made an order in respect of the decision of 7 December 2012.

28. The Respondent's Notice contends that the Judge was wrong to reject the arguments on delay as regards the decision of 7 December 2012. It also contends that, whilst the Judge was correct to characterise the decision of 11 November as a reconsideration, he ought then to have considered whether to allow or refuse leave to review and, if the former, should then have granted the Respondent her costs as the amendment seeking such leave was made only at the hearing.

Judicial Review – Procedure

29. The first Guernsey case permitting the remedy of Judicial Review is the Court of Appeal decision in Bassington v H M Procureur [1998] 26 GLJ 86 in which the Court stated that:

"We consider it to be a mark of a modern civilised polity that it is prepared to afford the means whereby the private citizen can challenge those administrative decisions which affect his or her private rights."

In the aftermath of that historic decision, there was some concern that the court might be inundated with applications for judicial review but those concerns have proved to be unfounded and as a result the remedy has not developed to any great extent.

30. There are no Rules of Court detailing the procedure to be followed when making application but following the decision of Day, LB in Old Government House Hotel Limited v IDC and Mighty Mouse Limited (Royal Court, Judgment 58/2003), Practice Direction No 3 of 2004 was issued which gave "guidance" to those seeking the remedy of Judicial Review. It directed that every such claim shall be instituted by issuing a Summons in accordance with the Rules of Court before tabling a *cause* in a Friday Ordinary Court in the normal way. It provided as follows:

> *"2. The Cause must:*
> *(a) seek permission to proceed with the claim for judicial review contained therein;*
> *(b) name the defendant and all other parties considered to have a sufficient interest in the subject matter of the claim.*
> *3. The usual Notice of the proposed tabling of the Cause shall be given to the defendant and other parties named therein by service of a summons in accordance with the Rules.*
> *4. The claim shall include:*
> *(a) details of the decision which it is sought to review;*
> *(b) a detailed statement of the grounds for bringing the claim for judicial review;*
> *(c) details of the remedy being sought (including any interim remedy); and*
> *(d) a statement of the facts relied upon, together with details of any prior communications in respect of the claim with the defendant and any interested party.*
> *5. The facts contained in the statement, or such of them as is appropriate, must be verified by a supporting affidavit which shall exhibit such relevant documents as are then reasonably available.*
> *6. Claimants are reminded that they are under a duty to make full and frank disclosure of all material facts, that proceedings must be instituted promptly, and they must satisfy the Court that they have sufficient interest in the subject matter complained of."*

Paragraph 7 of the Practice Direction concluded with the following:

> *"7. The presiding judge will give such directions as he sees fit with regard to the conduct of the proceedings and the participation of the parties therein. Defendants and other named parties are not to assume that any participation will be necessary on their part, other than responding to the initial summons, until so informed or requested by the Court."*

31. The final sentence of paragraph 7 of the Practice Direction implies that the presiding judge may dismiss the application without hearing from the respondent(s) and in that regard it mirrors CPR r.54.4, the purpose of which is *to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration."* (see para 54.4.2 of the White Book).

32. In Guernsey, the formalities that should be followed before a summons can be issued are such that it should not be possible for a claim to be commenced if it is not fit for further consideration by the court. Where the complainant is legally represented, the Advocate will have regard to the terms of his oath and of the requirements of Practice Direction 3 of 1990 and will not sign the summons if there is no arguable cause. Any unrepresented litigant must obtain leave of the Bailiff pursuant to Rule 90 of The Royal Court Civil Rules, 2007. Application is made to the Bailiff *ex parte* enclosing two copies of the summons. It is highly unlikely that a Bailiff would grant leave to issue a summons seeking permission to apply for judicial review if the case was so defective that after service on the Respondent it could be dismissed on the

papers *ex parte* at the leave stage. Thus, there should be very few cases where an application for permission to seek judicial review does not proceed swiftly to being considered *inter partes.*

33. Then the question will arise as to whether the application for leave is taken as a preliminary point or is heard at the same time as the application for substantive relief. The reason for introducing a requirement to seek leave was explained by LB Day in the OGH judgment, where he said:

> *"34. The first step which this Court should take, on receipt of an application for judicial review, apart from considering the question of the locus of the applicant (and other interested parties), is to determine whether it is right to allow an applicant to proceed to a full hearing for judicial review so as to remedy its complaints. This Court's jurisdiction to proceed in such a summary way is based not only on Rule 55, but also on its historic power to treat causes as privilégiées and its inherent jurisdiction to do justice, which requires inter alia that the Court's time is not wasted on unworthy matters. Thus this Court should adopt the permission (formerly leave) stage present in equivalent proceedings in England and Wales."*

34. The need to ensure that the court's time and resources are not wasted is not the only factor to be considered. Following the introduction of The Royal Court Civil Rules, 2007, the Court must have regard to the Overriding Objective in Rule 1 thereof, in particular sub-Rules 1(1) and 1(2):

> *"1. (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.*
>
> *(2) Dealing with cases justly includes, so far as is practicable –*
>
> *(a) ensuring that the parties are on an equal footing,*
> *(b) saving expense,*
> *(c) dealing with the case in ways which are proportionate –*
> *(i) to the amount of money involved,*
> *(ii) to the importance of the case,*
> *(iii) to the complexity of the issues, and*
> *(iv) to the financial position of each party,*
> *(d) ensuring that it is dealt with expeditiously and fairly, and*
> *(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases."*

35. A judge who is charged with case managing an application for judicial review will have to take into account all relevant considerations, of which the need to ensure the parties are on an equal footing and the need to save expense may be factors similar in importance to the appropriate allocation of the Court's resources. The respondent to a judicial review application will normally have the resources of the Law Officers at her or his disposal whereas the applicant may be legally aided or, as in this case, may be someone who is of limited means but ineligible for legal aid. In order to ensure that a case is dealt with justly, the judge will have to consider all relevant factors and may conclude that a preliminary hearing at the leave stage might be unjust and hence inappropriate especially where a separate hearing at the leave stage may only add to the costs and expense for the applicant and delay in reaching a final conclusion, without achieving any reduction in court time or other appreciable benefit.

Judicial Review – Principles

36. When considering applications for judicial review, the Guernsey courts look to the well-established principles in English law for guidance whilst recognising that in the absence of any specific Rules of Court, we have more flexibility in procedural matters than might be the case in England.

The Present Appeal – *locus* or standing

37. The first issue the Judge had to address was the question of the Appellant's standing to seek Judicial Review. In doing so, he referred to English principles and reached the conclusion that the Appellant had sufficient standing at the leave stage and left the issue for further consideration at any substantive hearing.

38. The Respondent does not seek to review the decision, correctly in my view. The test for standing under the law of England and Wales is statutory, having been laid down in section 31(3) of the Senior Courts Act 1981. There is no equivalent provision in Guernsey statutory law but it seems to me that section 31(3) and the relevant case law provide an appropriate test:

"No application for judicial review shall be made unless the leave of the court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

39. The House of Lords has held that the test for standing involves a two-stage process, see paragraph 54.1.11 of The White Book, 2012:

"At the permission stage, the question for the court is whether a sufficient interest has been shown to justify granting permission. Except in simple cases where it is appropriate at the earliest stage to find that the applicant has no standing, because for example, they are really no more than a "meddlesome busybody" (per Lord Donaldson M.R. in R v Monopolies and Mergers Commission, Ex.p. Argyll Group Plc [1986] 1 W.L.R. 763), it is generally undesirable for the courts to consider standing in detail as a preliminary issue, since the question of sufficient interest must be taken together with the legal and factual context of the claim and whether there has been a breach or failure to carry out statutory or other public duties: see R. v Inland Revenue Commissioners Ex.p. National Federation of Self Employed and Small Businesses Ltd [1982] A.C. 617. If permission is granted, standing can be considered again at the substantive hearing to consider whether the claimant has sufficient interest to maintain their claim for a particular remedy. At this stage, questions of standing frequently overlap with the discretion of the court to grant or refuse a remedy (the Court of Appeal decision in R v Secretary of State ex.p. Presvac Engineering Ltd (1991) 4 Admin. L. Rep. 121 at 133-134)."

40. In the present case, the approach of the Judge was correct in ruling that the Appellant had sufficient standing to allow the claim to proceed to the next stage. If the application were to proceed to a full hearing, the question of the Appellant's standing would have to be considered in the full legal and factual context of the claim. In the Respondent's Skeleton Argument produced for the hearing in the Royal Court, she submitted that the mere fact the Appellant lives close by the licensed site is not necessarily sufficient to establish her standing and reserved the right to raise the matter at any future hearing. The point was not argued before us so we cannot comment definitively upon it but it is difficult to conceive grounds on which the Respondent could successfully argue that a neighbour who lives only 30 metres distant from a plant and hence who may be directly affected by any pollutants released into the atmosphere by the incinerator would not have sufficient grounds to seek judicial review of the decision to issue a licence enabling it to operate.

The Present Appeal – Delay

41. The Respondent submitted that leave to review the decision to issue the Licence should be refused because of the delay of eleven months between the date of its issue and the commencement of proceedings in November 2013. No question of delay arose in relation to the decision communicated in the letter of 11 November, following the amendment of the application.

42. The issue of delay was first raised by the Respondent in her Skeleton Argument of 30 January 2014, as a ground for refusing permission to pursue the application. The Appellant replied in her Skeleton Argument dated 19 February 2014, which contained a substantial amount of factual information which was not set out either in her *cause* or in her first affidavit, so she swore a second affidavit verifying the contents of paragraphs 3 to 6 of the Skeleton Argument.

43. The reasons given by her for the delay were: the lack of any public consultation by the Respondent after the incinerator had been installed and before issuing the Licence (a failing which is also said to be in breach of the WID); the need to obtain expert advice; her limited means (she earned about £300 per week and was not eligible for legal aid); the fact that the expert report in April 2013 did not address the questions of compliance; and the need to find a second expert, Fichtner.

44. In his oral submissions to the Court, Advocate Barnes said the first expert was instructed in February or March 2013. After their report was received, it became apparent that advice was needed specifically on the WID. However, Fichtner was not instructed until July 2013 although they were able to produce a report promptly.

45. The period of delay can be analysed as three separate periods: from 7 December (the date of issue of the Licence) to April 2013 (the date of the first unsatisfactory report); April 2013 to 8 August (the date of the Fichtner report); and 8 August to 15 November (the date on which proceedings were issued and served on the Respondent). Thus there were three periods of delay, two of four months and one of three months, amounting to just over eleven months in total.

Delay- the Legal Test

46. There is no statutory period in which an application for judicial review must be brought in Guernsey; the Practice Direction says simply that *"proceedings must be issued promptly".* In England, the period of three months was introduced by statute (section 31(6) of the 1981 Act) and repeated in the CPR (r.54.5(1)).

47. Judge Finch correctly identified that the English decisions on delay need to be read in the context of the provisions relating to delay in the Act of 1981 and in the CPR. He stated *"there is still a lot of scope for what is a developing remedy in Guernsey law".*

48. In England, section 31(6) of the 1981 Act states that the court may refuse leave to apply for judicial review or refuse the relief sought if the court *"considers there has been undue delay in making an application…if it considers that the granting of relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."* CPR r. 54.5 (1) requires that *"the claim form must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose."*

49. In R v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell [1990] 2 A.C. 738, the House of Lords considered the relationship between the statute and the former RSC O.53 r.3(4) (which was similar to CPR 54.5). Lord Goff of Chieveley held, at page 747B:

"It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration. I imagine that, on an ex parte application for leave to apply before a single judge, the question most likely to be

considered by him, if there has been such delay, is whether there is good reason for extending the period under rule 4(1). Questions of hardship or prejudice, or detriment, under section 31(6) are, I imagine, unlikely to arise on an ex parte application, when the necessary material would in all probability not be available to the judge. Such questions could arise on a contested application for leave to apply, as indeed they did in Reg. v. Stratford-on-Avon District Council, Ex parte Jackson; but even then, as in that case, it may be thought better to grant leave where there is considered to be good reason to extend the period under rule 4(1), leaving questions arising under section 31(6) to be explored in depth on the hearing of the substantive application."

50. Thus in England, the combined effect of the 1981 Act and the CPR (formerly the RSC), is that the criteria to be considered may include: promptness; undue delay; whether there are good reasons for any delay; hardship, prejudice or detriment to any third party; and the requirements of good administration.

51. In Guernsey, there are no statutory criteria and the only guidance that has been laid down is in the Practice Direction: *"proceedings must be instituted promptly".* Judge Finch stated in his judgment, at para16: *"In considering the overall question of delay it is necessary to have regard to the particular circumstances of this case",* a comment with which I respectfully agree.

52. Judicial Review is still a developing area of Guernsey law. Some might think it is developing slowly but that is because, as I have indicated, there have only been a small number of applications that have been brought. Neither the legislature nor the rule makers of the Royal Court have sought to lay down any limitations or to specify any criteria that must be considered.

53. The range of circumstances in which judicial review might be sought are so infinitely varied and the Guernsey case law to date has been so limited that it does not seem to me to be appropriate for this court to be laying down any general criteria. Each case must be reviewed in the light of its own particular circumstances and all the circumstances of the case must be considered. The approach of the Judge in the present case was correct: he looked to English case law for guidance but he remained mindful that those cases must be read in the context of the English statute and rules.

54. It would not be for this court to specify a time period within which an application must be brought (unless good reason can be shown for any delay beyond such period), whether three months or otherwise. I endorse the provisions of the Practice Direction that an application must be brought promptly. In my view, a period of three months may be considered an appropriate guide as to what is meant by "promptly". However, there may be cases which are so urgent that even a delay of three months may be too long.

55. Where there has been delay, the court will have to examine the reasons for the delay and the burden will be on the applicant to show that it can be explained for good reasons. The prejudice or detriment to any third party if the relief is granted will be a factor to consider although the extent of prejudice or detriment may not be known at the leave stage and may have to be considered as part of the substantive decision.

56. The requirements of good administration and the need for administrative consistency may be a factor but I draw attention to the summary of the English position as set out in De Smith's Administrative Law at paragraph 18-052:

"Fortunately, however, Courts traditionally receive arguments based upon administrative impracticability with scepticism. Except where the difficulty caused to the decision-maker is more than inconvenience, and approaches impracticability or where there is an overriding need for finality and certainty, a remedy should not be refused solely upon this basis. Even if,

contrary to Lord Atkin's dictum, convenience and justice are on speaking terms, conversation between the two should be strictly limited."

57. It is to be remembered that Judicial Review is a discretionary remedy and in deciding whether to grant or refuse relief, the Court has a wide discretion which must be exercised judicially and in accordance with any established legal principles.

The Test on Appeal

58. The powers of an appellate court to review a discretionary decision of a lower court are limited to the correction of error in principle, of the taking account of irrelevant matters, of the failure to take into account relevant matters, and to interference if the lower court's decision had plainly been wrong (Carlyle Capital Corporation Limited v Conway [2011-12 GLR 562].

Delay – Discussion

59. Judge Finch approached the issue of delay by looking at the relevant English principles, having regard to their statutory context. His conclusion is to be found at the end of paragraph 16 of his judgment:

"On the facts of this case it is very difficult to find delay as a ground for refusing permission to proceed. Any delay was understandable and rational. Nor is there any cogent material that could invoke the good administration point, which, in any event, is not free-standing. This is not a case with an overriding need for finality, nor replete with the prospects of large-scale administrative chaos. Hence R's submissions in this aspect of the application are rejected."

60. As I have said, there were three periods of delay, two of four months and one of three months. Applying a period of three months as a guide to what might be considered to be the period within which an application should be brought if it is to be brought promptly, explanation is required as to why it took four months to obtain the first, unsatisfactory report and a further four months to obtain the second report that was relied upon by the Appellant. On receipt of the Fichtner report, eight months after the decision had been taken, the Appellant was in a position to issue her proceedings. She then delayed for a further three months while waiting to see if the Respondent would vary her original decision. Advocate Barnes justified that delay by reference to paragraph 6 of Practice Direction No 3 of 2004 which he understood to require him to invite the Respondent to review her decision before proceedings commenced.

61. The Respondent submitted that it was not necessary for the Appellant to obtain expert advice before issuing an application. The Appellant was aware of the requirements of the WID and in correspondence had raised her concerns, including a number of contentions that were repeated in the Fichtner report. The need, or otherwise, of an expert report prior to the issue of proceedings was not specifically addressed in the judgment.

62. In my view, insufficient evidence was adduced on behalf of the Appellant to enable the Judge to understand the reasons why it took so long to produce each of the reports. He appears to have accepted that it was reasonable for the Appellant to have instructed the first expert before going to the second expert for a report that she was able to use. However, he had no evidence as to when the experts were instructed, what were the terms of the instructions, how long they took to prepare their reports and why each report took so long to produce.

63. In my judgment, there was no evidence before the Judge on which he could reasonably have concluded that a delay until 8 August in obtaining that written report was reasonable. The additional information provided to us by Advocate Barnes in his submission showed there were delays of two to three months in instructing each of the experts. Although she was not consulted by the Respondent when the 7 December 2012 application was received, the Appellant had been corresponding with the Respondent for several months and had met her on

site. She was also aware of the terms of the WID and formed an early view that the Licence did not comply with its requirements. The Appellant was in a position to issue an application much earlier, had she chosen to do so.

64. I would also think the Judge in error in failing to take account of the period of delay from August to the issue of proceedings in November. The Appellant was waiting for the Respondent's comments on the Fichtner report but for the reasons I give below, I do not believe that to have been appropriate. She might have believed it to be courteous to allow the decision maker an opportunity to review her decision. However, whilst in some cases a decision may easily be overturned on the basis of an application to that effect, where, as here, the rights of a third party are affected, the Respondent could not easily have revised her decision simply on the basis that an expert for an applicant had taken a different view as to how the WID is to be implemented.

65. The Judge concluded that there was no material before him that could have invoked the good administration point. As I said above, arguments about administrative impracticability must be viewed with scepticism; but the Judge appears to have overlooked or dismissed the general point that it is not good to be reviewing a decision that was taken a long time ago; hence the need for applications to be brought promptly. However, I do not believe it would be good administration to allow a decision to stand if it would have resulted in unnecessary pollution to the environment and to this near neighbour in particular. So there is a balancing exercise to be performed; an exercise that must include consideration of the effect on the third party if the Licence was to be revoked or of the conditions if the Licence were to be varied. The third party did not appear even though it had notice of the application. Any evidence of prejudice or detriment to the third party would have been a matter to be considered at the substantive stage, not the permission stage.

The decision of 11 November – No Practical Purpose

66. The decision communicated in the letter of 27 September was overtaken by the letter of 11 November and hence does not fall to be considered by us.

67. The Respondent submitted that leave should be refused because the remedy available to the court would be to order that the decision to issue the Licence and the terms on which the Licence were issued be reconsidered by the Respondent which, it was contended, she had done as communicated by her letter of 11 November 2013.

68. The letter from Advocate Barnes dated 28 October and the Respondent's reply of 11 November are quoted above. The issue was neatly summarised by Judge Finch at paragraph 17:

"In summary, it is suggested on behalf of R that if successful in obtaining relief, that would be limited to requiring R to reconsider her letter of 24th September, 2013. As paragraph 16 of R's main skeleton puts it – "Events have overtaken" and reconsideration has already taken place in the letter of 11th November, 2013. A counters this by saying this letter does not constitute any reconsideration, it simply declines to reconsider."

His conclusion on the issue is at paragraph 20:

"The letter [of 11 November], despite emanating from a person in an official capacity, must be given its ordinary natural meaning and any attempt to construe it as if it were a revenue statute must be avoided. A fair reading of it, in my judgment, shows that R applied her mind to the relevant considerations, took account of A's report and was "yet to be convinced" of the need for varying the terms of the licence in question. It is not, looked at as a whole, a refusal to reconsider. The fact a decision-maker comes up in such circumstances with the same conclusion as was originally impugned does not equate to such a refusal. Advocate Hill-Tout is

therefore correct in her submission that reconsideration has already taken place prior to the issue of these proceedings."

69. The Judge may have overlooked the fact that if the remedy sought were to be granted, the Respondent would be ordered to reconsider the decision to issue the Licence and would have to do so by looking afresh at all material facts, including Langlois' application, the legislation and the WID. That is not what her letter suggests she has done. The letter suggests that she has merely considered whether anything has changed since the Licence was issued that should cause her to vary it pursuant to her ongoing statutory obligation to ensure that the operation complies at all times with the "best available technique". Hence, her final remark *"In short, nothing has changed since the issue of [the Licence]"*.

70. The difference between reconsidering the application afresh and looking to see whether anything has changed in the meantime is significant. The Respondent was aware of the requirements of the WID when issuing the Licence; it was referred to in the States Resolution, as quoted above [para 4]. The Fichtner report looks solely at the questions of whether the WID applies to the installation and whether the Licence complies with the requirements of the WID. In concluding that the Licence does not comply, the author of the report has placed a different interpretation on the WID than the Respondent. If the Respondent has simply looked at whether anything has changed, she may not have reassessed afresh her original decision.

71. In effect, the Appellant's complaint is that the decision of the Respondent to issue the Licence was unreasonable. In those circumstances, I fail to see the point of Advocate Barnes asking her to reconsider it. First of all, it is unlikely that any decision maker in that situation will willingly admit to having acted unreasonably. Secondly, it would be unusual for a decision-maker voluntarily to write to a third party to revoke or vary a licence on the ground that the decision-maker has revisited the decision to issue it and, on the same facts, reached a different conclusion. I therefore fail to see the purpose of Advocate Barnes' letters to the Respondent inviting her reconsideration, the effect of which was to delay the issue of proceedings.

72. For the reasons I have given, I do not believe that the Appellant had any right to require the Respondent to review the decision of 7 December on the ground that she had identified an expert who disagreed with the Respondent's interpretation of the WID. Hence, she could have no right to seek judicial review of either the decision of 24 September or 11 November. If she was alleging that something had changed after the date of issue of the Licence, she could submit that the Respondent had a statutory duty to review the operation of the incinerator to ensure that it was still compliant with the statutory requirements or the best available technique. However, that is not the situation alleged.

73. For that reason, there can be no complaint that she failed to review the decision and hence any application to judicially review the decision communicated in the letters of 24 September and 11 November must fail.

Postscript

74. In a postscript to the Appellant's case she says that the incinerator is not currently operating and that the Licence has been suspended. Reference is made to a letter dated 1 May 2014 from the Respondent to Langlois. The Respondent submits that this point is irrelevant and denies that the fact of unsatisfactory test results indicates that the appropriate conditions have not been applied to the site, merely that there is non-compliance with existing conditions Advocate Barnes advised us that as at the date of the hearing the incinerator is still not operating. That fact has no bearing on whether the decision of the Judge to refuse leave for judicial review was right or wrong.

Conclusion

75. As regards the decision to issue the Licence, the delay of eleven months that elapsed before proceedings were commenced was excessive. As regards the letter of 11 November, the fact that an expert disagreed with the Respondent's interpretation of the WID did not amount to fresh evidence that might have required her to review the Licence or its conditions under her ongoing obligation to ensure the best available techniques were being applied. For the reasons given in this judgment, I would dismiss the appeal.

76. **McNeill JA**: I agree.

77. **Martin JA**: I agree.