



**Torgeir Nordbø v Edric Baker and Diane Baker**  
Court of Appeal  
26<sup>th</sup> October 2016

**JUDGMENT**  
**44/2016**

Conditional leave to set down out of time and disclosure.

**IN THE COURT OF APPEAL OF GUERNSEY**

**CIVIL DIVISION**

**BETWEEN**

**TORGEIR NORDBØ**

**Appellant**

**and**

**EDRIC BAKER AND DIANE BAKER**

**Respondents**

**Decision of a Single Judge**

**Mr David Anderson, Q.C.**

**ANDERSON JA:**

1. I am asked to determine, as a single Judge, applications made by each of the parties to this appeal, neither of whom was legally represented for the purposes of the written submissions made to me. Those applications are:
  - (a) by the Appellant, for the Court of Appeal to order the Respondents to provide documents (application dated 7 April 2016); and for leave to set down his appeal out of time (dated 17 July 2015); and
  - (b) by the Respondents, for any future progress in this matter to be conditional on the payment by the Appellant of the £15,567 awarded to the Respondents by the Court of the Seneschal on 22 May 2014 (letter dated 9 May 2016).

**History of these proceedings**

2. The Appellant occupied a house in Sark on a tenement which, from 2003, was owned by the Respondents. A Notice to Quit was served by the Respondents on the Appellant, by way of the Prévôt of Sark, on 14 June 2013, but disputed by the Appellant.
3. The Respondents brought enforcement proceedings in the Court of the Seneschal on Sark. On 15 November 2013, the Seneschal (CJ La-Trobe Bateman) refused to accede to the plea that he should recuse himself from hearing the case because the Court of the Seneschal “was not a human rights compliant instrument”. In a subsequent judgment of 16 May 2014, the Seneschal declared that the lease had expired, that the property had reverted to the Respondents and that they had permission to use the services of the Prévôt to evict the Defendant from the property with immediate effect. An order for removal of the applicant’s property was made on 25 July 2014.
4. An appeal from the Court of the Seneschal was rejected by the Royal Court (John Russell Finch, Esq.) on 5 September 2014, whereupon the present appeal was lodged in the Court of Appeal. That appeal raises various alleged violations by the Court of the Seneschal of Article 6(1) of the European Convention on Human Rights (ECHR), which requires civil courts and tribunals to be independent and impartial. Included among these is a submission that the content of various communications between the Respondents and the Court of the Seneschal of Sark, listed in part B of a statement of costs by the Plaintiffs to the Court of the Seneschal of Sark dated the 13<sup>th</sup> of May 2014, had been “kept secret” from the Appellant.

### **Proceedings in the United Kingdom and in Strasbourg**

5. The compatibility of the Court of the Seneschal with Article 6(1) was considered by the High Court of England and Wales in a challenge to the Reform (Sark)(Amendment) (No. 2) Law 2010: *Barclay No. 2* [2013] EWHC 1183. The High Court found that the untrammelled power of the Chief Pleas to reduce the Seneschal’s remuneration was incompatible with Article 6(1), and granted a declaration that a decision of the Committee recommending approval of the 2010 Law was unlawful for that reason. But the Supreme Court of the United Kingdom ruled on 22 October 2014 that the High Court should not have exercised its discretion to hear the case, on the basis that the courts of the Bailiwick of Guernsey were better placed to assess the issues.
6. Also in October 2014, the Appellant in this case brought an application before the European Court of Human Rights in Strasbourg (Application no. 67122/14 *Torgeir*

*Nordbø v United Kingdom*). He submitted that the Court of the Seneschal was not independent or impartial, as required by Article 6(1) of the ECHR, and that proceedings before the Seneschal were unfair for other, more specific reasons. Among the allegations advanced were that the Court of the Seneschal failed to provide the Appellant with the case file. Complaints were also made under Articles 8 and 13 of the ECHR. The case was communicated to the United Kingdom Government by the First Section of the European Court on 1 March 2016, together with a Statement of Facts, a summary of the Appellant's complaints and three questions to the Appellant and to the United Kingdom Government, relating both to the admissibility of the application (to which this appeal was said to be relevant) and the merits of the complaints under Article 6(1) of the ECHR.

7. The three questions addressed by the European Court to the United Kingdom Government are as follows:
  1. Having regard to the appeal pending before the Court of Appeal in Guernsey and to the possibility of seeking a declaration of incompatibility under the Human Rights (Bailiwick of Guernsey) Law 2000 from that court, in particular as explained by the Supreme Court of the United Kingdom in its ruling in *Barclay (no 2)* [2014] UKSC 54, has the applicant exhausted all effective domestic remedies, as required by Article 35§1 of the Convention?
  2. Was the court of the Seneschal independent and impartial, as required by Article 6§1 of the Convention?
  3. Did the applicant have a fair hearing in the determination of his civil rights and obligations, in accordance with Article 6§1 of the Convention? Further or in the alternative, did the refusal of the Royal Court to rule on the applicant's Article 6 complaints amount to excessive formalism depriving the applicant of access to a court, contrary to Article 6§1 of the Convention?"

As appears from Questions 2 and 3, the European Court is provisionally interested not only in the institutional independence of the Court of the Seneschal (the issue at stake in *Barclay No. 2*) but in the fairness of the procedure before that court.

8. The judgment of the Royal Court is a final judgment from which no leave to appeal is necessary under the Court of Appeal (Guernsey) Act 1961. I note however in passing that the communication of a case to the Government by the European Court has been said in the writings of experienced officials of that Court to occur only "when a Convention issue is considered to arise requiring further examination" (K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 4<sup>th</sup> edn. 2011, I-012), or if the lawyer charged with assessing the case "considers that the

application discloses an arguable violation of the convention” (P. McCormick, *Bringing a Case to Strasbourg*, Law Society’s Gazette, 4 November 2013).

### **Submissions of the parties**

9. The Appellant at section 3.1 in a lengthy submission of 7 April 2016 repeats a request that he made to the Royal Court for what he describes as a full copy of the case file at the Court of the Seneschal of Sark, “including but not limited to various items listed in Plan B [sic] of the submission by the Plaintiffs (by advocate Le Tissier) to the Court of the Seneschal of Sark dated the 13<sup>th</sup> of May 2014”. He points to authority from the European Court of Human Rights (Application no. 38267/97 *HAL v Finland* §45, Application no. 28301/03 *SH v Finland* §33, Application no. 21055/03 *Gaspari v Slovenia* §50) to the effect that the concept of a fair hearing requires the parties to have knowledge of all evidence adduced or observations filed with a view to influencing the court’s decision. He claims to seek these documents for the purpose of finalising both his Notice of Appeal in this matter and his complaint at the European Court of Human Rights.
  
10. The Respondents by letter of 9 May 2016 expressed puzzlement at this application, and emphasised that they had “never withheld anything from Mr Nordbø”. They did however state that “Of the £15,567 awarded to us from the Seneschal’s court on 22<sup>nd</sup> May 2014 to date nothing has been paid to us by Mr Nordbø”, and asked that he pay that debt in full before proceeding with this appeal. This appears to be a reference to the full indemnity costs in respect of the Respondents’ Advocate’s fees that were awarded to the Respondents (together with the sum of £1000 towards their incidental costs of pursuing the claim) in the judgment of the Seneschal dated 16 May 2014. A letter from the Prévôt of Sark to the Appellant dated 16 June 2014 indicated that unless that debt was settled within 15 days, the monies would be taken from an arrested bank account, forwarded to the Prévôt of Sark and used to offset the debt.
  
11. The Appellant requested permission to respond to this letter, which I granted, and did so by a written submission dated 1 June 2016 and received by the Greffe on 10 June 2016. In that submission, he reiterated his request for disclosure and engaged in a lengthy attack on the credibility of the Respondents. He did not claim that the debt arising out of the judgment of the Court of the Seneschal had already been paid, but refused to pay it on the basis that the judgment of that Court was “in obvious violation of the Convention” and that it was “not final”.

12. An Act of the Court of the Seneschal of Sark dated 26 September 2014 ordered that certain Goods and Effects be disposed of and that the proceeds, together with the sum of £996.75, arrested from the Appellant's HSBC bank account, be made over to the Respondents, less Court costs. Enquiries made of the Sark Prévôt indicate that the proceeds of the auction were some £2,990 but that after deduction of all costs, a substantially smaller amount was paid to the Respondents. It appears therefore that only a small proportion of the sums awarded to the Respondents by the Court of the Seneschal on 22 May 2014 has actually been paid over. The precise amount still owing should be definitively ascertained by the Sark Prévôt and made known to the Greffe in Guernsey.

### **Orders sought**

#### ***Condition of proceeding***

13. I have first to determine the application by the Respondents that the sums ordered to be paid to them by the Court of the Seneschal in its judgment of 16 May 2014 be paid in full before this appeal be set down.
14. There is no specific provision in the Court of Appeal (Guernsey) Law 1961 akin to CPR 52.18(1), which allows the English Court of Appeal to impose or vary conditions upon which an appeal can be brought where there is a compelling reason to do so. But on the footing that an equivalent power is exercisable under the inherent jurisdiction of this court, it seems to me that there are compelling reasons in all the circumstances of the case to require the payment into court of such sums as the Appellant was ordered to pay to the Respondents in the judgment of the Seneschal dated 16 May 2014 but which have not yet been paid to the Respondents. I have in mind, in particular, that:
- a. Those sums are principally accounted for by an order dating back almost 2.5 years for the Respondents' costs to be paid on an indemnity basis.
  - b. The Appellant (who notified the Court on 19 July that he would be moving from Thailand to Sweden with effect from 31 July 2016) resides outside the jurisdiction and has taken no steps to satisfy the Order of the Seneschal in relation to the amount still owing.
  - c. In his response of 1 June to the Respondents' application, the Appellant did not provide adequate reasons for his failure to comply with the Order of the Seneschal.

In particular, he did not claim, or produce evidence, that the outstanding sum had been paid, that he was unable to pay it, or that paying it would prejudice in any way his ability to pursue this appeal.

- d. There has been no attempt to suspend the order of the Seneschal pending the resolution of this appeal.
15. In the circumstances, I order that the setting down of this appeal should be made conditional on the payment into court by the Appellant of the balance of the monies due to the Respondents pursuant to judgment of the Court of the Seneschal dated 16 May 2014, such sum to be calculated by the Prévôt of Sark and notified to the Greffe.

*Leave to set down out of time*

16. The Respondents make no objection to extension of the time for the setting down of this appeal. In the circumstances, and so as to allow time for the payment into court that I have ordered to be a condition of this appeal proceeding, I am prepared to grant the necessary extension until the end of 2016.

*Disclosure*

17. Save in special circumstances which have no application to these proceedings, parties to litigation are entitled to see copies of the evidence and submissions that were filed at court and that may potentially form a basis for the court's decision. This has been expressed as an obligation on the court to communicate to the parties "all documents on file, even if only potentially relevant to the outcome of the matter": *HAL v Finland*, §45.
18. In England and Wales, obligations rest on the parties as well and are not limited to formal witness statements and submissions. As the English Court of Appeal said in *R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2010] EWCA Civ 158, "It is an elementary rule of the administration of justice that none of the parties to civil litigation may communicate with the court without simultaneously alerting the other parties to that fact." I take this statement to be reflective also of the position in Guernsey, and to apply to any direct contact with members of the court in relation to the subject-matter of a case before them, as well as to any other contact that goes beyond a routine administrative enquiry of the court office and that has the potential to influence a judicial decision, whether procedural or substantive.

19. Part B of the Plaintiffs' submission to the Court of the Seneschal dated 13 May 2014, the document specifically identified as relevant by the Appellant, is an itemised Statement of Costs principally consisting of fees incurred by Advocate Le Tissier over the previous 12 months. It appears from section 4.2.8 of the Notice of Appeal to this Court that the documents principally of interest to the Appellant are communications between the Respondents and the Sark Prévôt, the Sark Greffier and the Seneschal, including both emails and recordings or transcripts which it is alleged or assumed were made of telephone calls.
  
20. This application has the look of a fishing expedition. It is likely (1) that the communications referred in Part B of the Submission of 13 May 2014 contained neither evidence nor submissions, and (2) that to the extent they may have constituted anything more than routine administrative enquiries, reasonable steps were taken to coyn or to notify the Appellant or his representatives at the time. Even if that was not so, it would not necessarily follow that the judgment of the Court of the Seneschal is to be impugned. This would be a question to be examined in all the circumstances. There is not the slightest reason, on the evidence currently before me, to question the propriety either of Advocate Le Tissier or of the judicial authorities on Sark in relation to these matters.
  
21. Nonetheless, the situation is that both this Court (subject to satisfaction of the order I have indicated) and the European Court of Human Rights are seised of applications to the effect that the Appellant did not receive a fair hearing before the Court of the Seneschal, and that the European Court has indicated by communicating the case (and three specific questions) to the United Kingdom Government that it does not consider that application to be manifestly ill-founded.
  
22. I do not consider it appropriate in the circumstances to make any specific order in relation to disclosure of the documents or alleged recordings referred to by the Appellant. I am mindful that the appeal has not been set down, and that its future progress will depend on the satisfaction of the condition which I have imposed. But when the time comes for the Respondents to answer the appeal, I have no doubt that they will wish to explain the nature of the communications referred to by the Appellant and to support that application, if so advised, by affidavit evidence that it would be open to this Court to admit. Any further application could then be considered by this Court in the normal way.

David Anderson Q.C.  
26 October 2016