



XABC V The Guernsey Financial Services Commission
Royal Court
16th January 2017

JUDGMENT
3/2017

Permission to proceed with claim for Judicial Review.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

IN THE MATTER OF AN APPLICATION
FOR PERMISSION TO PROCEED BY WAY OF
JUDICIAL REVIEW

Between:

- (1) X LIMITED**
- (2) INDIVIDUAL A**
- (3) INDIVIDUAL B**
- (4) INDIVIDUAL C**

Applicants

-and-

THE GUERNSEY FINANCIAL SERVICES
COMMISSION

Respondent

Application heard on: 26th October 2016

Judgment handed down: 17th November 2016

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Applicants: Advocate A

Counsel for the Respondent: Advocate B

Cases and Materials referred to in Judgment:

De Smith's Judicial Review, (7th Edition), paragraphs 3-025 and 16-063;

Wade's Administrative Law (11th Edition), pages 471 and 518;

The White Book (2016), paragraphs 54.4.2 and 54.4.4

The Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended, Section 11H

Lanes Group plc v Guildford Toy Infrastructure Ltd [2011] EWCA Civ 617;

Locabail (UK) Ltd v Bayfield [2000] QB 451;

Otkrittie International Management Investment Ltd v Urumov [2014] EWCA Civ 1315;

Porter v Magill [2002] 2AC 357;

R v Preston [1985] AC 835;

R (Birmingham Care Consortium) v Birmingham City Council [2011] EWHC 2656 (Admin);
R v Birmingham City Council ex parte Ferrero Ltd [1993] 1 All E.R. 530;
R v Chief Constable of Merseyside ex parte Calverley [1986] 1 QB 424;
R v Falmouth and Truro Port Health Authority ex parte South West Waste [2001] QB 445;
R (on the application of Willford) v Financial Services Authority [2013] EWCA Civ 677;
Sengupta v General Medical Council [2002] EWCA Civ 1104
Virdi v Law Society [2010] EWCA Civ 100;
Wiseman v Borneman [1971] AC 297.

DECISION

Introduction

1. This is a decision following an oral hearing on 26th October, 2016, in which the Applicants, (“A”) renewed their application for permission to proceed with a claim for Judicial Review (“JR”), the original application having been dismissed on the papers by the Deputy Bailiff on 2nd September, 2016. The proceedings follow the Act of Court dated 16th September, 2016, in which the Deputy Bailiff set out the procedural steps to be taken. In the present hearing oral submissions were made by counsel for A and the Respondent Guernsey Financial Services Commission (“R”). Comprehensive skeleton arguments and authorities had already been supplied on behalf of both parties and considered prior to the hearing.
2. A’s Cause, dated 12th August, 2016 is a lengthy one, amounting to 22 pages and sets out A’s position in considerable detail. A further guide to the history of the case can be found in the chronology in R’s bundle, Tab 2. It will be seen that what has taken place has been over a number of years, R’s first regulatory step (a first Notice) being issued on 21st February, 2012. As this is an application for permission it has been considered necessary to deal with the matter as concisely as possible, it is not, of course, a substantive JR application. Nevertheless it has to be approached judicially, giving full attention to the respective arguments of the parties.
3. The factual background can be concisely summed-up. On 27th June, 2016 a Senior Decision Maker (“SDM”) appointed by R issued a “Notice of Proposal to Impose Sanctions” (a “Minded To Notice”) proposing to exercise R’s enforcement powers and impose Prohibition Orders and financial penalties on each of the individuals appearing as Applicants and to make a public statement. The next procedural, and indeed final, step in the decision-making process, is for the SDM to re-consider the Minded To Notice in the light of any further evidence and representations put forward on behalf of A, and make a final decision. A sought and now seeks once more, permission to bring a JR claim challenging, on the grounds of apparent (not actual) bias and/or pre-determination by the SDM the Minded To Notice as well as the SDM’s decision not to recuse himself and of R not to remove the SDM. As R’s skeleton (A3) puts it, “The practical effect of this remedy sought by [A] would be to require R to appoint a new SDM to consider the matter afresh”.

The Decision on 2nd September, 2016

4. The Deputy Bailiff’s judgment is located in R’s bundle at 3, and consists of 8 pages. It is necessary to point out that the present hearing is not on appeal or review of that judgment and that the matter must be considered afresh. Nevertheless it is relevant to consider what was said, and, in particular the reasoning of the Deputy Bailiff, which is assailed on behalf of A and backed-up by R. At page 6 it was said:

“... the matter that has exercised my mind the most and the reason why I will refuse permission for these Applicants to proceed, relates to whether or not there is any legal effect to what has happened thus far.”

The judgment then refers to the well-known textbook ‘De Smith’s Judicial Review’ at paragraph 3-025, which begins with the observation that, “Judicial Review is generally ‘concerned with actions or other events which have, or will have, substantive legal consequences: for example by conferring new legal rights or powers, or by restricting existing legal rights or interests’.”

5. Following on at page 7, the Deputy Bailiff stated:

“My understanding of the legislative scheme under which the Commission operates is that, until it issues a final decision, there are no legal effects of the type of direct legal effect referred to in De Smith in respect of these four Applicants or four Plaintiffs.”

Dealing on the same page with the contention put forward on behalf of A that serious factual findings have been made without testing in cross-examination the Deputy Bailiff commented:

“However, as the Senior Decision Maker correctly notes, it is open to the Plaintiffs/Applicants, and here I broaden what he says in the way I describe it, to request an oral hearing, at stage 4.” (i.e. the next stage)

6. Finally, for the purposes of this application, it is necessary to consider the Deputy Bailiff’s observations on the recusal issue (page 8):

“If one draws an analogy with a judicial process, an application to recuse a judge can be made and rejected. It is not normal, and I would regard it as extraordinary, for the aggrieved person to seek to stay the proceedings before that judicial officer and challenge that decision itself. More likely the case will proceed, a decision will be reached and if the outcome is adverse at that point the aggrieved party will appeal it, introducing a challenge to the recusal decision as part of those grounds, if appropriate.”

Whilst these observations are not binding on the present Court, they may nevertheless offer some clear illumination of the issues.

The Test

7. An arguable case has to be demonstrated, which merits a full investigation. As paragraph 54.4.2 of the White Book (R’s divider 5) helpfully puts it, “In essence the Court will need to be satisfied that there is an arguable ground of appeal which has a realistic prospect of success and where there is no discretionary bar to a remedy such as delay or an alternative remedy.”

At paragraph 54.4.4 it is said:

“The court may also refuse permission in the exercise of its discretion. In particular, the court will not normally grant permission to apply for judicial review where an adequate remedy existed which the claimant could use or could have used.”

And:

“The courts may however grant permission to apply for judicial review in exceptional circumstances, or where the alternative remedy is not adequate in the circumstances, or where there is some other reason which makes judicial review proceedings particularly appropriate.”

Outline of the relevant Decision-Making Process

8. It is helpful to consider this in the light of R's chronology (divider 2 of R's bundle). Also relevant is the "Guidance Note" issued by R, and included in A's bundle 1 of 2 submitted for the hearing before the Deputy Bailiff. In summary, the process involves various stages, and Stage 3 "First Consideration of the Decision-Maker (internal)" has been reached. Stage 4 is "Second Consideration of the Decision-Maker". The "Minded To" notice at Stage 3 invites the affected parties to make representations and put forward any further evidence. The chronology sets out the rather involved process prior to the issue of this document on 27th June, 2016. The long Minded to Notice is attached to Individual B's affidavit in A's documents bundle for the previous hearing. Both the covering letter and paragraph 7 of the Minded to Notice set out the 28-day period for A to make written or oral representations. It is possible to appeal to the Royal Court against the Final Decision under Section 11H of the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as amended. The grounds are that the decision was (in summary):

- (a) ultra vires or there was some other error of law;
- (b) unreasonable;
- (c) made in bad faith;
- (d) lacking in proportionality; or
- (e) there was a material error as to the facts or the procedure.

A draft of the Minded to Notice had been sent on 13th June 2016, with an accompanying letter, also exhibited to Individual B's affidavit in the earlier application before the Deputy Bailiff. This indicates that the availability of A's Advocates is sought and details as to witnesses that may be called. Following the mention of possible JR, the SDM wrote on 2nd August, 2016 (also exhibited). Paragraph 10 (pages 182-183 of bundle) in particularly relevant terms stating (inter alia):

"I do not accept that the language in which I have expressed my conclusions objectively gives rise to any real doubt that I will consider fairly, properly and with an open mind any new material placed before me."

And also:

"Whilst Advocate [Individual]'s clients may have concluded that they cannot change my conclusions, if that is because they think I would not or will not consider fairly and with an open mind such evidence and/or representations that they may put before me, then that assumption is wholly wrong and is unjustified."

The SDM also mentioned that it was necessary under the statutory process to set out the reasons or grounds (see Section 11H of the Law of 1987).

Natural Justice/Bias

9. Advocate A referred to this as his "strongest point" in his oral submissions. The Minded-To Notice indicates pre-determination and apparent bias, which taints it. It was stressed that this was apprehended, not actual bias. The notice sent is the wrong side of the line, and a judicial act susceptible to JR, which is a more appropriate remedy here than the statutory appeal process. Advocate B submitted that the whole process should be looked at and that this allegation "gets nowhere". In addition the SDM is a very experienced QC, with judicial experience and bias is highly unlikely. A's most detailed submissions are found in paragraphs 49-62 of their extensive cause. As paragraph 49 puts it, "A fair-minded observer would consider that there is a real possibility that the SDM has pre-determined this case" and cites the well-known case of Porter v Magill [2002] 2 AC 357. R contends that the SDM has merely reached a provisional view, disclosed to A as required by the legislation (paragraph 49 of R's skeleton). This requires the SDM to set out the provisional findings he would make in the absence of further evidence or

representations. Advocate A submitted that in the absence of review his only remedy is to go back to the SDM and say he has made a mistake. He cannot get a re-hearing on the facts on the statutory appeal route. The SDM should have recused himself.

10. A number of authorities were cited in both sides' cases, but it is not proposed to refer to all of them in the circumstances of this application. In relation to this head of the argument the leading case was Locabail (UK) Ltd v Bayfield [2000] QB 451 (A's authorities, tab 12). A referred to Viridi v Law Society [2010] EWCA Civ 100 (A's tab 17), and paragraph 67 of the Cause. This is in support of A's contention that it is ordinarily desirable for a challenge to the impartiality of a tribunal "to be dealt with at the time it arises". R submitted (H of R's skeleton) that this does not avail A, as the point in Viridi was raised for the first time on appeal, without any complaint at the time the impugned decision was made. The issue of apparent bias should have been put forward there and then and not taken for the first time on appeal. R relied upon two cases: Lanes Group plc v Guildford Toy Infrastructure Ltd [2011] EWCA Civ 1617 and Otkrittie International Management Investment Ltd v Urumov [2014] EWCA Civ 1315 (R's skeleton bundle at tabs 13 and 12). A seeks to distinguish both these cases on their facts, see paragraph 61 of the cause and paragraph 38, especially (3) and (4) of A's skeleton.

11. In the Lane's case, Jackson LJ's observations at paragraph 56 are of interest:

"There is nothing objectionable in a judge setting out his or her provisional view at an early stage of the proceedings so that the parties have an opportunity to correct any errors in the judge's thinking, or to concentrate on matters which appear to be influencing the judge. Of course, it is unacceptable if the judge reaches a final decision before he is in possession of all relevant evidence and arguments which the parties wish to put before him. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional view which is disclosed for the assistance of the parties."

12. In the Otkrittie case Longmore LJ gave a helpful outline of the legal position at paragraph 13, which contained the following:

"... The general rule is that he should not recuse himself unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasize, that the issue of recusal is extremely fact-sensitive."

R referred to paragraph 22 of the same judgment (see especially paragraph 47b of R's skeleton):

"There is a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences."

13. It is not necessary when considering the present application to explore the other cases referred to on this topic, beyond a reference to Sengupta v General Medical Council [2002] EWCA Civ 1104, mentioned in A's cause at paragraph 42. At paragraph 34, Laws LJ dealt with the situation where a decision-maker was only called upon "to make a preliminary decision" and indicated that recusal should be limited to where a decision was expressed:

“In such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called on to revisit it.”

Destitute of Legal Effect/Prematurity

14. This question was examined in the Deputy Bailiff’s judgment (R’s skeleton, tab 3, pages 7-81) for example:

“The scheme is such that stage 4 of the enforcement process could, and I can put it no higher than that, address some or all of the concerns that these Applicants have.”

And concluding:

“I am satisfied, therefore, because there is no decision that has no (sic) immediate effect, because there is no final decision in this case involving [the SDM] as an officer of the Commission that it is premature to bring these proceedings”

15. Reference was made to De Smith’s text book, at paragraph 16-063:

“Seeking permission prematurely is almost as common a ground for refusing permission as delay. Judicial review may be premature for several reasons: the decision-maker may not yet have determined the facts, or completed assessment of relevant factors or the impugned decision may be merely preliminary to a final decision. The court’s general approach is to reject challenges made before the conclusion of a hearing in formal proceedings”

The case of R (Birmingham Care Consortium) v Birmingham City Council [2011] EWHC 2656 (Admin) (R’s skeleton, tab 6) is also relevant. At paragraph 33 Beatson J said:

“The court is likely to be working on incomplete materials if it deals with a matter before the administrative process is complete. It is also, as Mr Baker submitted, likely that if there is a judicial review and the decision is then complete, there may be a further judicial review in which the court will have to look at matters again.”

And at 35:

“... There are cases in which judicial review has been thought appropriate in respect of a preliminary decision. Those are where the preliminary decision has a permanent judicial effect on the person affected”

Availability of Alternative Remedy

16. There are two important cases to consider under this heading. The first is R v Falmouth and Truro Port Health Authority ex parte South West Water [2001] QB 445 and next R (on the application of Willford) v Financial Services Authority [2013] EWCA Civ 677. The latter seems more significant. The former is to be found in R’s skeleton authorities at tab 9; the latter at A’s authorities, tab 19. It is only necessary to refer to one quote from the Falmouth case, at 473-D, Simon Brown LJ said:

“... If the applicant has a statutory right of appeal, permission should only exceptionally be given; rarer still will permission be appropriate in a case involving public safety. The judge should, however, have regard to all the relevant

circumstances, which typically will include, besides any public health consideration, the comparative speed, expense and finality of the alternative processes, the need and scope for fact finding, the desirability of an authoritative ruling on any point of law arising, and (perhaps) the apparent strength of the applicant's substantive challenge."

17. Willford is discussed by both parties in some detail, see A's Cause, especially at paragraphs 65 and 66, and A's skeleton at G(5) to (12), and R's skeleton at 26-36. As R points out, the case is "directly analogous" to the present application, since it involved an attempt to bring a JR on a decision of the F.S.A. to issue a decision notice in pursuance of its enforcement powers. At paragraph 20 Moore-Bick LJ said:

"It was common ground that the court has a discretion whether to give permission to proceed with a claim for judicial review and consider the substance of the claim. It was also common ground however, that where there is an alternative remedy available to the claimant the court will not ordinarily allow him to proceed by way of judicial review, save in exceptional circumstances, usually because it is satisfied that the alternative remedy is for some reason clearly unsatisfactory"

In paragraph 23 Moore-Bick LJ referred to the well-known case of R v Chief Constable of Merseyside ex parte Calverley [1986] 1 QB 424. There JR was granted by the Court of Appeal due to delay in the appeals process. But May LJ expressed the view that it is necessary to guard against granting JR in cases where there is an alternative appeal remedy, merely because it may be more convenient and effective to do so. Moore-Bick LJ, having referred to this, added:

"In my view these are important words of caution to bear in mind, because to allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision in question risks undermining the will of Parliament."

18. Moore-Bick LJ gave further guidance at paragraph 36, which concluded:

"A remedy by way of judicial review, although relatively quick to obtain, simply returns the parties to their original positions. It does not enable the Court to determine the merits of the underlying dispute. In a few cases strong reasons of policy may dictate a different approach (citation omitted); but such cases are themselves exceptional and do not in my view detract from the general principle. Ultimately, of course, the court retains a discretion to entertain a claim for judicial review, but whether it will do so in any given case depends on the nature of the dispute and the particular circumstances in which it arises."

Pill LJ at paragraph 54 opened his concurring judgment by agreeing that the existence of an alternative remedy "is an important factor when considering, in a particular statutory context, judicial review of a decision was possible". Also involved as a factor is "the underlying purpose of the statute".

A seeks to distinguish Willford from the present case, due to the different procedural stages, see especially paragraph G(6) in the skeleton. R submitted that Mr Willford could have gone to the Upper Tribunal, and here A can go to the Royal Court (as has been done in other cases). In other words, any legitimate complaint by A is capable of being remedied by way of the statutory appeal.

Observations on the Authorities

19. The cases are consistent, and of high persuasive authority in Guernsey, where JR is still developing. Counsel for A has sought to distinguish them but it is difficult to do so – even a

mundane case of burglary or simple breach of contract action will have its own individual facts, and to distinguish important decisions such as in Willford is, with respect, artificial. Looking at the facts in this case simply there is a Minded To Notice, the product of a pretty involved process, where A was engaged at all times and rather forcefully legally represented. The SDM is obliged to send out such a notice and A has the opportunity to deal with it. There was, as R submitted, a two year process, in itself somewhat protracted, with a full opportunity to make representations. R also submitted that “something new on the table” is needed since the decision of the Deputy Bailiff, but A was correct in responding that they do not need to bring anything new – this is not an appeal. But the Deputy Bailiff was, with respect, right in his decision. The question is neatly put in Wade’s Administrative Law (A’s skeleton authorities, tab 4) at page 471: “The question must always be whether looking at the statutory procedure as a whole, such separate step is fair to persons affected.” One well-established, and on the facts, rather strong case is cited in Wade, Wiseman v Borneman [1971] AC 297 involving the operations of a tax tribunal. The Revenue had to show a prima facie case to the tribunal, which refused to allow the taxpayer to be represented or even see the evidence submitted to it. The House of Lords upheld this, because the taxpayer would have a full opportunity to put his case in the later proceedings. Lord Reid said that every public officer in such a situation has to decide if there is a prima facie case, but no-one supposes he need consult the accused. The procedure, however, must pass the test of fairness at each and every stage. In the present case, by way of contrast, not only has A been involved and represented throughout, but the final decision can only be reached after an opportunity to participate fully.

20. Wade also (at page 518) makes the very sensible point that, “If confusion and complication are to be avoided, judicial review must be accurately focused upon the actual exercise of power and not upon mere preliminaries”. The courts do however favour the observance of natural justice in the making of preliminary investigations and reports, which may lead to “serious legal consequences to some person”. Wade then quotes a number of examples (at page 471), which are summarized as really “instances of the right to know the opposing case”. Plainly A has full knowledge of what the case involves and how the SDM sees the issues at the stage reached.
21. A reading of Wilford shows that R’s submissions are fully in accord with the judgments given in that case. In paragraph 22 of his judgment Moore-Bick LJ quoted a very clear observation of Lord Scarman in R v Preston [1985] AC 835 at 852:

“My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal, where parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.”

At paragraphs 25-28 of his judgment Moore-Bick LJ referred to R v Birmingham City Council ex parte Ferrero Ltd [1993] 1 All E.R. 530 (R’s skeleton bundle, tab 6). There Taylor LJ said, at 537b (referring to dicta in the Calverley case):

“There are very strong dicta, both in this court and in the House of Lords as cited, emphasizing that where there is an alternative remedy, and especially where Parliament has provided a statutory appeal procedure, it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the statutory appeal in the context of the particular case.”

22. Breaking down this application further, there is one particular aspect which does not accord with common sense. On the logic of A’s submissions any Minded To letter would be subject to JR and allegations of pre-judgment and bias. It cannot have been the intention to provide for the issuing of a bland, circumspect and unspecific type of letter, which would then, should an

adverse determination be finally issued, rightly be criticised for not being fair to the named parties. The procedure must be workable. It has the advantage of allowing individuals in A's position to have the opportunity to make further representations before a final (appealable) decision comes out. R is, in reality, being impeached for following a procedure designed to be fair to those affected by it. In simplistic terms, does this therefore mean that every Minded To letter containing adverse observations must be reviewed for "bias"? SDM's would be liable to recusal at a considerable rate. The SDM's conclusions on this aspect of the case cannot be criticized.

Conclusion

23. For the reasons set out, which have emerged at rather greater length than originally intended, A's application for permission fails and is refused.

Costs

24. There is reason to consider whether there should be an element of indemnity costs in all the circumstances. Accordingly, counsel are requested to send in any written representations on costs within 7 working days following the date of handing-down of this decision. Once received, the question will be fully considered.

J R Finch
Judge of the Royal Court