

Application for Judicial review of the conduct of the Guernsey Bar in relation to the administration and dismissal of a complaint made against the conduct of an Advocate

[2020]GRC007

IN THE ROYAL COURT OF GUERNSEY

Between:

A

Applicant

-AND-

THE GUERNSEY BAR

Respondent

Application in relation to Judicial Review

Case was heard on: 24th January, 2020

Decision handed down on: 14th February, 2020

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

The Applicant “A” represented himself.

Counsel for the Respondent: Advocate A. Davidson

Cases and Materials referred to in Judgment:

The Guernsey Bar (Bailiwick of Guernsey) Law, 2007, sections 1, 2, 18, 20, 21, 23, 25 and 38

De Smith’s Judicial Review (Eighth Edition) paragraphs 7-067, 7-125, 16-044 - 16-069

The (English) Civil Procedure Rules, r54.4

Practice Direction No. 3 of 2004

IFS Investments Limited v Manor Park (Guernsey) Limited, etc. 2003-04 GLR 77;

Litchfield v Director of Environmental Health and Pollution Regulation (Court of Appeal, 37/2014);

Old Government House Hotel Limited v IDC and Mighty Mouse Limited (Royal Court, 58/2003)

Sharma v Brown-Antoine [2006] UKPC 57.

ECHR – Article 6

Introduction

1. This is an application by A to judicially review the conduct of the Guernsey Bar in relation to the administration and dismissal of the complaint made 1st April 2016 against the conduct of Advocate “X”. At the hearing on 24th January, 2020 the Royal Court heard from A in person and Advocate Davidson represented the Bar. This was a first hearing, not a substantive determination of the whole issue; the points for consideration were the question of whether *in camera* proceedings were to be ordered and a submission on behalf of the Bar that the application should fail at that point, as it had not (in effect) reached the first hurdle.
2. There has been earlier litigation connected with this matter. A raised a complaint against Advocate X and the Chambre de Discipline heard this on 28th November, 2017. A’s claim was found unproven (although it is fair to say that A would prefer the words “The claim brought on [his] behalf was found unproven”). On the 5th July 2018, the Registrar of La Chambre de Discipline appealed this decision before the Royal Court. On 26th July, 2017, the learned Deputy Bailiff in a full and detailed judgment dismissed the appeal, also giving general guidance on the disciplinary process in the “Final Comments” at the end of his judgment. A considers that the matter heard by La Chambre and the Deputy Bailiff is a “corrupted complaint” not representing his allegations. At paragraph 82 of his judgment the Deputy Bailiff stated that “The President and the Registrar chose not to progress what the complainant had alleged, which I read as being an allegation of deceit, but instead to refer to a complaint of misleading”. The Deputy Bailiff went on to say that the “greater” offence of deceit encompasses the “lesser” offence of misleading. But, “on an allegation of misleading all that matters is whether or not the Court had in fact been misled”. On the other hand an allegation of “misleading” could not be enhanced to “deceit”. The Deputy Bailiff (at paragraph 76), giving a summary of his reasons for dismissing the appeal and upholding La Chambre’s finding stated: “As soon as La Chambre made a finding that it was not sure that the Court had been misled, that complaint was bound to be found not proven and dismissed.” None of La Chambre’s findings could be interfered with on what was before them and, as stated, the Royal Court dismissed the appeal.
3. On 20th June, 2019 A, to use his words in paragraph 4.06 of the facts in his Cause, “reiterated my true complaint” by letter to the Bâtonnier. The Bâtonnier responded on 11th October, 2019, that she was meeting the President of La Chambre and “we have agreed to consider your complaint further”. On 4th December 2019 the Bâtonnier stated that she and the President, “agreed to treat the complaint as if it was received upon the date of the first complaint, i.e. 1st April, 2016. The last of the events which led to the complaint occurred on 3rd September, 2015 and thus the complaint is out of time”. The Bâtonnier passed it to the President to consider whether “exceptional circumstances existed which justify the making of the complaint outside of the time period”. The President wrote on 2nd December, 2019 that she had considered this point and taking account of paragraph 90 of the Deputy Bailiff’s judgment, which was to the effect that A was not only aware of the timing requirements for making a complaint “before they expired”, but did not act expeditiously in the circumstances set out, could not conclude “exceptional circumstances” permitting the making of a complaint outside the 6 month period existed. (The time-limit is found in section 21(2) of the Guernsey Bar (Bailiwick of Guernsey) Law, 2007). No complaint “shall be entertained if it is received more than 6 months after the last of the events giving rise to the complaint unless the President is satisfied that exceptional circumstances exist which justify the making of the complaint outside that period”. A asked for reconsideration on 13th December 2019 and the Bâtonnier responded on 19th December, 2019 that she had discussed this with the President and the President “is not in a position to revisit her decision”. In his Cause, A makes a number of detailed points averring his view that this decision and the failure to reconsider it are fatally flawed.
4. A’s application to issue a summons against the Guernsey Bar, which led to the matter now under consideration, was considered by the Bailiff under the provisions of rule 90 of the

Royal Court Rules, 2007, which requires leave when the summons is not signed by an Advocate of the Royal Court. Leave was granted, with the following observation:

“In doing so, I make no finding as to whether The Guernsey Bar is the correct Respondent nor whether the draft Summons fully complies with the requirements of Practice Direction No. 3 of 2004. Those issues, and others, will have to be addressed after the return of the Summons and at the stage where a judge decides whether to grant leave to proceed with the Claim for Judicial Review.”

The Issues

5. The question of whether the hearing should be held *in camera* was to be considered, but Advocate Davidson, on behalf of the Bar, submitted that the whole application is flawed and should die at the hearing, thus making the *in camera* point unnecessary to resolve. At the hearing I had the benefit of well-prepared documents from A, together with eloquent oral submissions, as well as the able and experienced Advocate Davidson’s concise observations. The nub of what was put forward on behalf of the Bar was that the Cause was bad; the Bar was not responsible for the administration and disposal of complaints. A, amongst other points, suggested that it was the Bar’s officers who had created a wall of secrecy. Overall the system is faulty and the body corporate, i.e. the Bar, is at the top.
6. Before considering the main questions, it is necessary to refer to Practice Direction Number 3 of 2004, mentioned by the Bailiff. Judicial review then was still a recent arrival in Guernsey and this set out the procedure to be followed, including a requirement (to mirror that in England) that the Cause must “seek permission to proceed with the claim for judicial review contained therein”. At the hearing it was forcefully submitted, as stated, that permission should not be given, as the case was fatally flawed.

Permission

7. This was considered by Collas P in Litchfield v Director of Environmental Health and Pollution Regulation (Court of Appeal 37/2014), where a decision of mine at first instance (which apparently had its flaws) was nevertheless upheld. This approved Day LB’s observations in the important case of Old Government House Hotel Limited v IDC and Mighty Mouse Limited (Royal Court 58/2003):

“The first step which this court should take, on receipt of an application for judicial review, apart from considering 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.”

Day LB went on to say that this is based on the Court’s:

“Inherent power 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.”

(Putting it briefly, for A’s benefit, locus or standing is established when the person applying shows a sufficient interest to justify granting permission. It is a test designed for “simple cases” to avoid individuals who are no more than a “meddlesome busy body”).

8. As the position, in practical terms, is the same as in England it is helpful to consider some of the principles distilled there from the plethora of cases put forward for judicial review. In the

leading text *De Smith's Judicial Review* (8th edition) the question of permission is dealt with at paragraphs 16-044 to 16-069. At 16-048 it is stated that one of the purposes served by the permission stage is to deter or eliminate “clearly ill-founded claims without the need for a full hearing of the matter”. The most recent figures given (for 2017) show that permission has been granted on paper in around 18% of cases and on oral renewal in 27% of cases. The present matter of course, has been considered at the first return date of the Summons at a hearing where directions are given and preliminary matters decided.

At 16-049 it is set out that:

“What is tolerably clear is that the test for permission is whether the application is “arguable” or “has a realistic prospect of success”.”

And:

“To be arguable means more than to be potentially arguable on a purely speculative basis and in the hope that the case may strengthen when more documents are obtained.”

(It is pointed out that these propositions are derived from the important case of Sharma v Brown-Antoine [2006] UKPC57).

9. Advocate Davidson submitted that the Bar is not responsible for the administration and disposal of complaints about Advocates. The Bar does not investigate or determine complaints, there is an independent (emphasis supplied) complaints procedure. The decisions that A seeks to challenge were not taken on behalf of the Guernsey Bar as a corporate entity. It is, as stated, a “bad Cause”. La Chambre is not a part of the Bar and the Bar did not hear or determine the complaints. The Guernsey Bar Law was referred to. In section 1 (“Incorporation of the Guernsey Bar”) the Bar was made a body corporate, which may sue or be sued in its name and exercise the requisite powers. The objects are set out in section 2. The Litchfield case was referred to, where at paragraph 31 Collas P referred to paragraph 7 of the Practice Direction already cited, which he said: “implies that the presiding judge may dismiss the application having regard to the English Civil Procedure Rules r54.4, the purpose of which was:

“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.”

The Litchfield case is binding upon me and I will follow it.

10. The terms of the Guernsey Bar Law are important. Part II deals with “Discipline of Advocates”. The Law deals with La Chambre and its constitution. There is an Appointments Committee comprising the Bailiff, the Senior Jurat and the Bâtonnier at the time. A complaint shall be heard by a Chambre consisting of one Member from each of three categories: a lay person, an Advocate and a senior lawyer (as defined in section 18(2)). There is also provision for a President (section 19) and a Registrar (section 20). The President selects the Members who constitute La Chambre for the hearing of a complaint (section 23). The submission made on behalf of the Bar (see paragraph 8 above) amounted, simply, to the proposition that the Bar is not La Chambre and has no control over it. The Bar does not consider complaints. A’s closing submission was that overall the system is failing; and there is the Bar, a body corporate, at the top (as summarised in paragraph 5 above). When one goes over the detailed set of facts in his Cause it can be seen that the persons against whom he may have an issue are the President and the Bâtonnier. The Bâtonnier has a

rôle in relation to complaints in conjunction with the President (sections 21 and 22). The essence of A's case, as I understand it, is that his complaint against Advocate X was "never ventilated" and "corrupted into something else" and dismissed.

11. A well understands (from his professional training) the concept of "body corporate", as was evident from his oral submissions. Hence it was not necessary to go through the exercise of discussing legal personality at the hearing. But Advocate Davidson's key observation that it was "not the Bar who did this" is unassailable. The Bar as a legal person is not responsible for the situation A complains of. The word "independent" was underlined in paragraph 9 above and it is a correct description of the disciplinary process. The Bar does not control La Chambre, they are two different institutions – La Chambre's decisions are **not** the Bar's decisions. In those circumstances what was submitted on behalf of the Bar is accepted. Turning to the law on the granting or refusal of permission to proceed, it follows that the application does not have a realistic prospect of success, as the Bar is the wrong Respondent. Accordingly permission to proceed with the claim is refused.

In Camera?

12. The Bar takes a neutral view, it is "a matter for the court". The Deputy Bailiff highlighted the confidential nature of proceedings in La Chambre in his very thorough judgment (see paragraph 4). It was A's firm submission that the proceedings should not be *in camera*, and he relied upon a robust decision of Day LB in IFS Investments Limited v Manor Park (Guernsey) Limited, etc 2003-04 GLR 77, which stressed the fundamental principle of open justice. There was an onus on the person seeking to persuade the court to sit *in camera* that justice required it and could only be served if the case was heard privately. Day LB, however, alluded to exceptions to this general rule found in legislation (paragraph 6). In the Law we first turn to section 38, which makes disclosure of "any matter" by a Chambre Member, or person present at a sitting in private, an offence. Section 25 provides that La Chambre shall hear any complaint in private, but may hear it in public. If in the "interests of justice to do so". Section 25(3) provides, as do other unrelated statutes, for the protection of the identity of persons under 18 "concerned in that complaint". There is, to my mind, no conflict between these provisions and (having drafted some legislation myself when I first came to Guernsey, albeit not on a high level) nothing remiss in the drafting. Section 25(3) is a standard provision to protect young persons, and the main requirement is set-out in section 38(1). It was A's strongly expressed view that in the light of Day LB's decision there is no special privilege for members of the Bar and privacy was not required.
13. The hearing took place in private, on the basis that if it were held at first in public then the whole point of having the case determined *in camera* (were that ordered) would be vitiated. But it transpired that the first argument was an attack on behalf of the Bar to the very basis of the case put forward by A. Advocate Davidson made a good point, namely that Advocate X should, if the case proceeded, be afforded the opportunity to address the Court on whether the full hearing should be in private or not. This is right and, added to the Bar's neutrality on this aspect of these proceedings, no final view could properly be taken without Advocate X having the right to participate. If it is of any assistance (particularly bearing in mind that A is representing himself) one's first inclination might be to consider a full hearing should be *in camera* as that would be consistent with sections 25(1) and (2). Nevertheless, as A suggested, there are other considerations, including ECHR Article 6. As *De Smith* (supra) points out, at 7-125:

"It is for the court to ensure the hearing is in compliance with art. 6 and to determine if the public interest in a public hearing outweighed the parties' wishes for continuing privacy."

As is made clear in 7-067, preliminary hearings (such as the one being dealt with now) are “frequently held in private”. If we did proceed to a full hearing a decision would have to be made, taking every relevant consideration into account, including any representations by or on behalf of Advocate X. No final view is put forward.

Conclusion

14. For the reasons given it is evident that A is not able to proceed with his claim for judicial review with the Guernsey Bar as Respondent; they are not the correct party to this application. The question of a full hearing being *in camera* does not arise in view of this conclusion, and, any future full hearing of a claim for judicial review involving private proceedings in La Chambre will need to grapple with this. Should A contemplate any further court action he should consider, and might well wish to take advice on the question of delay. This is a major aspect of judicial review procedure. So in *De Smith* at 18-053 there is a quote from an English case that “there is an interest in good administration independently of hardship or prejudice to the rights of third parties”. There is a need for finality and delay is a ground upon which permission for judicial review to proceed can be refused. Whilst the state of judicial review in Guernsey may be akin to that of an infant having just learnt to walk, in England it is a venerable grandfatherly figure; the Guernsey courts so far have applied English case law in this area. This particular matter now under consideration has now been going on in various forms for a long period.
15. I am grateful to A for his courteous and well-crafted submissions and to Advocate Davidson for his concise and easily-understood arguments. These made the judicial task less onerous than it could have been.

Costs

16. These normally follow the event. Advocate Davidson sought costs if his case succeeded. I was inclined to grant this application, but before making my mind up would invite A to put in written submissions relating to costs within the 7 days of the date this judgment is handed down.

Result

17. A’s application to judicially review the Guernsey Bar fails for the reasons set out and permission is refused.

**J R Finch, O.B.E.,
Judge of the Royal Court**