Approved Text
07.04.2021

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

ALAN MICHAEL CHICK — **Applicant**

-and-

THE CHAIRMAN OF THE GUERNSEY FINANCIAL SERVICES COMMISSION — **Respondent**

Application for Leave to Appeal out of time

Judgment handed down: 7th April 2021

Before: Jessica E Roland, Deputy Bailiff

The Applicant represented himself.
Counsel for the Respondent: Advocate S Duerden

Cases, texts & legislation referred to:

The Financial Services Commission (Bailiwick of Guernsey) Law, 1987
The Regulation of Fiduciaries, Administration of Business and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000
The Human Rights (Bailiwick of Guernsey) Law, 2000
The Data Protection (Guernsey) Law
Carr v Housing Department Royal Court 15 August 2012
Y v The Chairman of the Guernsey Financial Services Commission [47/2018]
Mucelli v Government of the Republic of Albania [2009] 3 All ER 1035
Pomiechowski v Poland [2012] UKSC 20
R (Adesina) v The Nursing and Midwifery Council [2013] EWCA Civ 818

Introduction

1. The Applicant by way of an application dated 23 November 2020 (the "Application") has applied to extend time to file an appeal pursuant to section 11H of The Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (the "Law") against the decision of the Respondent dated 31 May 2018 (the "Decision"). The Application is opposed by the Respondent. Pursuant to directions issued by the Court, in addition to the comprehensive application filed by the Applicant, the parties have filed response submissions and reply submissions. The parties agreed that this matter should be considered on the papers and without hearing oral submissions from either side.

Background

2. The Applicant is a former shareholder and former director of companies regulated under The Regulation of Fiduciaries, Administration of Business and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 and came under investigation by the Respondent in 2014. After a protracted process the Decision was issued by the Respondent to the Applicant stating that the Applicant did not satisfy the minimum standards required of those carrying out regulated activities within the Island's fiduciary sector. A financial penalty of £50,000 was imposed together with five years' prohibition from holding or carrying out the function of director, controller, partner or manager in that sector. When the Applicant received notice of the Decision on 31 May 2018 he was advised of his right to appeal within twenty-eight days of the Decision. He did not pursue an appeal at that time. The Applicant paid the financial penalty on 4 October 2018, after civil proceedings were issued to enforce payment.

3. In May 2019, the Applicant issued a claim seeking substantial damages as compensation for the Respondent's alleged breaches of Articles 6, 7 and 14 of the European Convention on Human Rights incorporated into Guernsey law by the Human Rights (Bailiwick of Guernsey) Law, 2000 (the Human Rights Law). On application by the Respondent (after it had filed defences) the Royal Court struck out the claim in its entirety on the ground that the allegations contained therein disclosed no reasonable grounds for bringing the action. On 6 July 2020, the Applicant filed a notice of appeal and grounds of appeal seeking leave to appeal the Royal Court judgment. In a judgment dated 4 August 2020, Lt. Bailiff Collas concluded that the criteria for granting leave to appeal were not met and dismissed the Applicant's application for leave to appeal. The Applicant's leave to appeal application was renewed before the Court of Appeal and on 7 September 2020 McNeill JA sitting as a single judge of the Court of Appeal dismissed the Applicant's renewed leave application. The Applicant renewed the leave application but this was dismissed by the Court of Appeal on 9 October 2020.

The Law

4. The Applicant wishes to appeal under section 11H of the Financial Services Commission Law. The grounds for appeal are found under subsection 11H (2). Subsection 11H (3) sets out the time limits:

> "*A person aggrieved by a decision of the GFSC shall institute an appeal*
> *(a) within a period of 28 days immediately following the date of the notice of the Commission's decision, and*
> *(b) by summons served on the Chairman of the Commission stating the grounds and material facts on which the appellant relies."*

The Parties submissions summarised

5. The Applicant in his extensive submissions contained in his application and reply acknowledges that he did not file an appeal within the prescribed time limit. He sets out at length the reasons why the Court should grant his application for leave relying on what he describes as "*exceptional circumstances surrounding this application*". He relies on not being able to afford an advocate; the inability to analyse the final report in order to formulate and lodge an appeal within the 28 days as a litigant in person and the merits of his appeal which cover all the grounds set out in subsection 11H (2) of the Law. In addition to the documents filed in support of this Application, the Applicant relies on the 9 lever arch files which had been filed in support of his previous cause of action (it having been agreed that the Applicant did not need to refile these papers).

6. He also seeks to rely on a comment by the Deputy Bailiff, as he was then, in his judgment in the case of *Y v The Chairman of the Guernsey Financial Services Commission* [47/2018] at 37 as recognition that the Court could allow an appeal out of time.

> "*For all these reasons, I am satisfied that Y's eighth ground of appeal in relation to the prohibition orders imposed under the suite of Regulatory Laws succeeds. (I am conscious that there may be current prohibition orders of a time-limited duration operating, but I was told that the number of persons potentially affected were I to reach this conclusion is in the mid-teens, and so take the view that the problem is not so extensive that I should worry that my conclusion will lead to a flood of applications to bring appeals out of time, although it is a consequence that I have borne in mind in reaching this decision).*"

7. He also prays in aid the fact that he has not been sitting on his hands since the decision was made as is demonstrated by the extensive litigation which I have set out above, but that despite his efforts and considerable cost, the investigation and decision have yet to be scrutinised by the Court or properly dealt with by the Respondent itself. He has made complaints to the Guernsey Bar Association and has made a data subject access request under the Data Protection (Guernsey) Law all to no avail despite there being what he says is "*not one or two mistakes made by the Respondent but numerous mistakes which simply should not have happened and should be acknowledged and corrected*". Given the very detailed submissions made by the Applicant this is but a brief summary however it does contain the salient points necessary for consideration of this application.

8. The submissions of the Respondent focus on what it says is the lack of power of the Court to extend the appeal period due to the statutory time limit and to the extent that there is any power to extend time (which is not admitted), that the Court should not exercise it in favour of the Applicant. The Respondent relies on the case of *Carr v Housing Department Royal Court 15 August 2012* which considered and applied the decision of the English House of Lords of *Mucelli v Government of the Republic of Albania [2009] 3 All ER 1035* that a statutory time limit can only be extended if the statute provides for this. Further that if the legislators had intended that there be a discretion to extend time, they would have inserted such a provision. In relation to the latter point, Advocate Duerden relies on the conclusions of the Deputy Bailiff (as he was then) in the *Carr v Housing Department (ibid*) that in the absence of a specific power within the legislation Mrs Carr could not rely on the Royal Court Civil Rules, 2007 to extend the statutory time limit in a housing appeal, since the procedural rules could not usurp the operation of the relevant law. To the extent that any of the reasons relied on by the Applicant could amount to an empêchement, i.e. stopping the clock on the 28 days' time limit, she submitted that none of them should succeed. The Applicant was out of time and considerably so and this application for leave should be dismissed.

Discussion

9. The wording of subsection 11H (3) of the Law is clear and unambiguous. The States of Deliberation have chosen to fix a time limit of 28 days for an appeal to be served. It is notable that subsection 11H (4) refers to the "*inherent powers of the Court or to rule 52 of the Royal Court Civil Rules 2007*" (which is the rule in relation to strike out) but the States of Deliberation have quite deliberately not given any equivalent powers to the Court under subsection 11H (3). If the States of Deliberation wish to confer a discretion on the Court to extend the time limit, they may of course do so by specifically conferring such a power in the relevant statute; but if they do not do so, in accordance with the ratio of *Mucelli (supra)* that is the end of the matter.

10. However, in 2012 in *Pomiechowski v Poland* [2012] UKSC 20, the Supreme Court reconsidered the absolutist approach set out in *Mucelli (supra)* and followed in *Carr (supra)* and stated that statutory appeal time limits should be read down in accordance with the Human Rights Act 1998 to achieve compatibility with Article 6 of the Convention and the relevant jurisprudence.

11. Lord Mance held at paragraph 39:

> *"In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time. In these circumstances, I consider that, in the case of a citizen of the United Kingdom like Mr Halligen, the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6(1) in Tolstoy Miloslavsky. The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously."*

12. It was noted in the subsequent case of *R (Adesina) v The Nursing and Midwifery Council [2013] EWCA Civ 818* the *Pomiechowski (supra)* case was an extradition case with particularly grave consequences, short time limits (14 days) which would be dealt with whilst the appellant is likely to be in custody. Nevertheless, it was clear that the decision had wider implications, Lord Justice Kay held at paragraph 15:

> *"If Article 6 and section 3 of the Human Rights Act require Article 29(10) of the Order to be read down, it must be to the minimum extent necessary to secure ECHR compliance. In my judgment, this requires adoption of the same approach as that of Lord Mance in Pomiechowski. A discretion must only arise "in exceptional circumstances" and where the appellant "personally has done all he can to bring [the appeal] timeously" (paragraph 39). I do not believe that the discretion would arise save in a very small number of cases. Courts are experienced in exercising discretion on a basis of exceptionality."*

13. Usefully Lord Justice Kay gave two examples of exceptional circumstances at paragraph 14:

> *"Take, for example, a case in which a person, having received a decision removing him or her from the Register, immediately succumbs to serious illness and remains in intensive care; or a case in which notice of the disciplinary decision has been sent by post but never arrives and time begins to run by reason of deemed service on the day after it was sent…. In such cases, the nurse or midwife in question might remain in blameless ignorance of the fact that time was running for the whole of the 28 day period. It seems to me that to take the absolute approach in such circumstances would be to allow the time limit to impair the very essence of the statutory right of appeal."*

14. This Court having rightly adopted the decision of the majority in *Mucelli* in *Carr v Housing Authority (supra)* and given the incorporation of the Convention rights into Guernsey law by the Human Rights (Bailiwick of Guernsey) Law, 2000, it is my view that this Court should also adopt the development of those principles in *Pomiechowski (supra).* Nevertheless, the *Adesina (supra)* case indicates how difficult it may be for an appellant to convince the Court that his or her circumstances are exceptional and emphasises that the scope for departure from the time limit is extremely narrow. The focus on the exceptional circumstances is on the reason why the time limit was not met and not the merits of the case.

15. In my view the circumstances of this case are not exceptional and the Applicant has not done all he can to bring the appeal timeously. The Applicant was fully aware of the 28 day limit but he failed to institute an appeal. It appears from the evidence filed by the Respondent that the 28 day period for appeal had been provided by the Respondent on a number of occasions prior to the Decision. It is also notable from the Applicant's submissions that although he did not file an appeal within the required 28 days he did on 6 June 2018, thus within the time period for the appeal, send "*a detailed email, with numerous attachments representing the documents already in the possession of the Respondent, to the Chief Minister and his colleagues on the Policy & Resources Committee, ("P&R") responsible for the political oversight of the Respondent seeking their assistance with a review of the flawed processes undertaken by the Respondent during the course of the investigation*". This in my view demonstrates that if the Applicant had been so minded he would have been able to commence an appeal during this period. The fact that he could no longer afford to fund an advocate to help him with his appeal (having used one during the enforcement process) does not make this exceptional. The fact that the Applicant is a litigant in person, has lost his livelihood due to the sanctions imposed upon him, suffered considerable financial losses, has expended considerable amounts of money and that the proceedings had taken its toll on him and his family does not justify the extension of the time limit. The Applicant did issue proceedings against the Respondent (although also considerably outside the appeal time limit) and has obviously focused a great deal of thought and energy on the pursuit of these proceedings. However he went down a route of a claim based on a breach of his human rights and has argued those up to the Court of Appeal. He is able to present his case with what the Court of Appeal described as "*obvious ability*" and as the Lt Bailiff Collas stated at paragraph 60 (and echoed in paragraph 16 of the Court of Appeal judgment dated 9 October 2020):

> *"I have to express some sympathy for Mr Chick who incurred great expense in the enforcement proceedings instigated against him and has a lingering and lasting dissatisfaction with the process. However, his remedy was to pursue an appeal. It is regrettable that he says he did not have the means to afford legal representation but in the presentation of the present case, he has demonstrated that he would have been capable of presenting the appeal himself."*

16. Thus, in all the circumstances I do not consider that the Applicant's case is one where the application of the time limit to the particular facts would *"impair the very essence of the right of appeal" (Pomiechowski)*. I do not consider that there is any evidence that would amount to an empêchement of the 28 day limit. As I have set out in some detail above, the Applicant knew the time limit but decided to deal with matters a different way. I do not consider the obiter comments of the Deputy Bailiff in *Y v The Chairman of the Guernsey Financial Services Commission* (supra) are relevant to the Applicant's case.

Conclusion

17. For the reasons I have set out above I dismiss the Application. When the Respondent applied for a payment into Court on the 15 January 2021, I dismissed the application; however, I warned the Applicant that he was at risk of costs orders being made against him. The Respondent has applied for costs and, given my conclusions, it seems to me that the costs of the action should follow the event. Accordingly, unless either party makes an application within 14 days of the finalised judgment being handed down seeking some different order, I would be minded to order that the Applicant pay the Respondent's costs on a recoverable basis.