

JERSEY / JUDGMENT

Bretagne Angleterre Irlande SA v Minister for Sustainable Economic Development

[2024] JRC 297 (31 December 2024)

[2024] JRC 297

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the COMMISSIONER: 1. This judgment contains my decision in respect of an application by DFDS / AS ("DFDS") to set aside the leave I granted on 20 December 2024 to Bretagne, Angleterre, Irlande S. A. ("Brittany Ferries") to bring judicial review against the decision of the Minister for Sustainable Economic Development ("the Minister") on 3 December not to award a long-term ferry contract to Brittany Ferries, and instead to award it to DFDS. 2. This judgment follows on from my decision of 20 th December and my judgment dated 24 th December reported at Bretagne Angleterre Irlande SA v Minister for Sustainable Economic Development

[2024] JRC 292 ("the Leave Judgment") when I granted leave to Brittany Ferries to bring judicial review proceedings to challenge the Minister's decision of rd December to award a contract to DFDS on the grounds of procedural unfairness and apparent bias. By the same judgment I refused leave to challenge the Minister's decision to terminate the Channel Islands procurement process and instead to commence a Jersey procurement process. The Leave Judgment sets out the background to the present dispute which I adopt for this judgment as well as my reasons for the decisions I reached in granting leave 3. This judgment has been determined on the papers because of the urgency of this matter. As I recognised, at paragraph 133 of the Leave Judgment, the importance of the decision to award a new ferry contract for Jersey meant that the Court and the parties had to make every effort to have matters resolved as soon as possible. Having read the Skeleton Arguments and affidavits filed by DFDS in support of its application, and the Skeleton Argument and affidavit filed in opposition by Brittany Ferries, I concluded that an oral hearing was not necessary to determine the application by DFDS. 4. The application by DFDS sought to set aside my decision of 20 December on the basis of delay. The application relied firstly on the ground that the application was not made sufficiently promptly and secondly that if the relief sought were granted, it would be likely to cause substantial hardship or substantially prejudice the rights of DFDS. 5. The Skeleton Argument of DFDS made the following points. (i) Brittany Ferries, in their application, beyond noting that delay was a discretionary bar and having made a positive assertion of

having acted promptly, failed otherwise to deal with questions of delay. (ii) Secondly, the first affidavit of M. Mathieu did not either engage with delay nor possible prejudice arising from the application or relief sought if granted. 6. The detailed point relied upon by DFDS was that the facts giving rise to the complaint arose in the context of the Channel Islands Procurement Process and were fully known to Brittany Ferries at the time it engaged with the Jersey Procurement Process. It relied upon the decision of O'Connor Limited v Gambling License Authority

- [2004] JRC 178 in support of its arguments. 7. DFDS' Skeleton summarised what was known to Brittany Ferries in the following way: "(a) The decision to terminate the first procurement process took place on 6 November 2024 and was notified to Mr Mathieu by Mr Scate by telephone;
- (b) A letter confirming that decision was sent to Mr Mathieu on 7 November 2024 which recorded that the Minister had concluded that there was no tender capable of meeting Jersey's requirements to accept. Mr Mathieu then queried the reasoning;
 - (c) By 8 November 2024, Mr Scate had written to Mr Mathieu stating that Jersey would not enter discussions regarding the terminated process;
 - (d) A similar letter from the Chief Minister on 13 November 2024 confirmed that reasons would not be given and that Jersey remained in a process with DFDS. This noted that Mr Mathieu was alleging bias at Ministerial and officer level. [G432] Mr Mathieu's affidavit records that he found this letter "very concerning";
 - (e) On 13 November 2024, the Respondent made the public statement about the DFDS tender response being the better of the two as well as other matters which the Respondent asserts are indicia of bias;
 - (f) On 13 November 2024, the IPNP was issued and the Applicant was invited to tender in the second Jersey-only process;
 - (g) On 15 November 2024, a meeting took place between the Government of Jersey representatives and the Applicant's representatives including Mr Mathieu at which further information about the preference for the DFDS tender was given." 8. This led to the submission that, according to DFDS, Brittany Ferries knew it had legal remedies in respect of matters now complained of but instead chose to continue with the Jersey procurement process. Instead, what it should have done was to have sought rectification of the situation before the Jersey procurement process commenced, either through dialogue with the Government of Jersey or by way of judicial review. 9. In relation to the prejudice suffered by DFDS, these were summarised in the Skeleton Argument of DFDS as follows: "23. In reliance on the validity of the procurement process and the award, DFDS has already committed to the chartering of vessels at a rate of €32-35,000 per day upon delivery (paragraph 10). Other DFDS vessels which could be chartered or sold remain stood idle waiting for deployment for the concession. DFDS also needs to commit to refurbishment of one of its vessels at a cost of

in excess of €1 million (paragraph 16). It needs to enter into agreements with ports, stevedores and linesmen (paragraph 17), all before the end of January.

24. Of critical importance is the question of whether DFDS may safely publish its timetable and open its booking system to customers. This is already overdue (paragraph 11 and FH1/1- 2). The proceedings are impacting its reputation.
25. If matters are put on pause, Mr Hermann states that DFDS will lose substantial revenues: €30-35 million has been projected for the first three months of operation (paragraph 20).
26. If a further procurement process is required, DFDS will be placed at a significant disadvantage to the Applicant. This is because the Applicant can simply continue its existing services. DFDS will in all probability not be able to mobilise in time.
27. Any hiatus in ferry services will be costly and disruptive to the public of Jersey and may lead to costs in the region of £1 million per month of interim or contingency service: see paragraph 23." 10. Brittany Ferries in opposition contended that there was no delay. The decision not to award Brittany Ferries the contract was made on 6/7 November 2024. Between 14 November 2024 and 3 December 2024, Brittany Ferries was participating in the Jersey procurement process. 11. On 3 December 2024 it was seeking information about the Minister's decision, engaging lawyers and conducting pre-action correspondence with the Minister. 12. As the outcome of the Jersey procurement process was not known until early December 2024, DFDS could not argue that Brittany Ferries failed to act sufficiently promptly between the announcement of the outcome of the Jersey Procurement Process and the claim being brought to challenge that outcome. 13. Brittany Ferries therefore characterised DFDS' argument as one based not on delay but on waiver or acquiescence, namely that Brittany Ferries should have challenged the procurement process earlier and because they failed to do so, this led DFDS to believe that the Minister's decision to commence the Jersey procurement process and the Jersey procurement process itself were lawful. 14. This led Brittany Ferries to submit that they had not made any unequivocal election not to claim a right or raise an objection which it was open to that party to claim or raise (see *Millar v Dickson* [2002] 1 WLR 1615). Brittany Ferries however participated in the Jersey procurement process while expressly reserving its rights to challenge the Minister's conduct. 15. Furthermore, Brittany Ferries did engage in dialogue with the Minister to understand the reasons for the Minister's decision. 16. Brittany Ferries felt it had little option but to participate in the Jersey procurement process. Had it sought judicial review proceedings at that stage, it contended it was inevitable that those proceedings would not have been progressed while the Jersey procurement process remained on foot (see *Joseph Gleave and Son Limited v Secretary of State for Defence* [2017] EWHC 238 (TCC)). 17. Even if Brittany Ferries had gone down the route suggested by DFDS, the different in timings would have been a few days only. 18. In relation to the effect of the proceedings on DFDS, Brittany Ferries emphasised that DFDS was a very substantial

commercial operator and was well aware of the risk of a potential challenge to a procurement process. Brittany Ferries also contended it was unclear what binding steps had been undertaken by DFDS at this stage as distinct from possible future detriment. M. Mathieu, in his second affidavit, set out a detailed explanation as to why any such steps were taken at the risk of DFDS as an informed commercial operator. 19. Finally, Brittany Ferries relied on a proposal set out in M. Mathieu's second affidavit for an extension of Condor's existing service, or alternatively an interim service provision by Brittany Ferries to late October 2025. By reference to M. Mathieu's second affidavit, the current situation is that it will be possible to offer Jersey an extension of the existing contract. Discussion and decision 20. The application for leave is brought under Royal Court Rule 16/6 which provides as follows: "(1) Any person served under Rule 16/4(2) who did not appear before the Bailiff to make representations prior to the granting of leave may, within 14 days of service, apply to the Bailiff sitting as sole judge and constituting the Inferior Number to have the leave set aside by making an application substantially in the appropriate form set out in Schedule 5 and the Bailiff may make an order setting aside the leave if satisfied that the applicant did not disclose all material facts in the application or that for some other substantial reason it is just to make such an order.

- (2) Notice of any application made under paragraph (1) must be accompanied by an affidavit verifying any facts relied upon. The notice and any accompanying affidavits must be served on the applicant and any other person served under Rule 16/4(2)." 21. This right arises because while DFDS were present in an observation capacity, at the stage of the hearing on 20 December, they had not been given permission to take part in the hearing. What was ordered on 20 December was permission to Brittany Ferries to serve DFDS with a copy of the proceedings brought by Brittany Ferries, the Act of Court of 20 December 2024 and M. Mathieu's first affidavit. Informally DFDS already had access to the court bundle and the arguments and affidavits filed by Brittany Ferries and the Minister. DFDS have also seen the judgment dated 24 December 2024. 22. In relation to the applicable test on an application under Rule 16/6, I have reminded myself that I am still determining whether or not the threshold for leave is met as set out at paragraph 71 of my judgment of 24 December 2024. That threshold, in summary, is arguability. I refer to this because Rule 16/6 contemplates that an order granting leave may be set aside if the applicant did not disclose all material facts or for some other substantial reason it is just to make such an order. 23. I therefore consider that the onus is on DFDS to satisfy me that one of these two grounds exists. I reach this conclusion by reference to the language used in Rule 16/6. In the short time available no authority was drawn to my attention on how the test set out in Rule 16/6 should be applied. I consider that this should be a high hurdle because otherwise Brittany Ferries would be deprived of the right to challenge the decision of 3rd December. Party with an arguable case should not be deprived easily from having that case determined by a court. 24. As far as non-disclosure is concerned, that non-disclosure in my judgment should be sufficient to persuade me that the test for arguability is no longer met. In relation to the reliance on some other substantial reason the reason should be sufficiently serious that it would be just

to prevent Brittany Ferries from bringing judicial review proceedings 25. In relation to the application by DFDS, and the decision by Brittany Ferries to challenge the decision to award a Jersey contract to DFDS, I agree with Brittany Ferries that there is no delay in making that application. To be fair to DFDS, they did not argue otherwise. 26. While this is sufficient to deal with the challenge on the grounds of delay, I should also deal with the argument that what Brittany Ferries should have done was to have issued a challenge at an earlier date. However, all of the material facts relied upon by Brittany Ferries were set out in the first affidavit of M. Mathieu. This enabled me to summarise the key events in my judgment of 24 December 2024. I therefore clearly understood that Brittany Ferries had not made a challenge earlier and instead had reserved their rights while taking part in the Jersey procurement process. 27. I also agree with the analysis of Brittany Ferries by reference to the case of *Gleave*. While that case relates to a different procurement process, at paragraphs 46 to 48, the Court stated as follows: "46 There are a number of practical considerations which, on analysis, also support the conclusion that an expedited trial should not be ordered. 47 First, as set out in section 4 above, the claimant may still be awarded this contract. Accordingly, until the outcome of the tender process is known, the precise nature of the claimant's claim will not be known. I have already pointed out the difficulties the claimant may face if it was awarded the contract but still wished to maintain its challenge to the tender documents. Moreover, on that scenario, any claim for damages, which has not been separately pleaded, would be in a lesser sum and would not, on any view, be urgent. 48 In addition, it would be very unsatisfactory for there to be an expedited trial at the same time as the tender evaluation/contract award process. I consider that that would create real difficulty and prejudice for the defendant, who would have to deal simultaneously with both the award process itself, and a trial challenging the basis of that process. Although Mr Coppel said that there was no specific evidence about the prejudice that would be caused, it is I think obvious enough to be readily inferred. Of course I accept that, because of the need for speedy relief in procurement disputes, there will be times when such an unattractive proposition for a defendant represents the only sensible (or the least worst) solution to the problem. But for the reasons I have given, that is not this case." 28. In my judgment, had Brittany Ferries brought to bring a similar sort of challenge, I consider it likely that such a challenge would not have been progressed while the Jersey procurement process remained on foot because, as in *Gleave*, any loss of damage would have been avoided if Brittany Ferries had succeeded in being awarded a Jersey contract. 29. I also consider that this case is distinguishable from the case of *O'Connor Limited v Gambling License Authority* on which DFDS relied. That concerned an application to bring judicial review proceedings two months after the Gambling Licensing Authority had granted a provisional betting office license to a rival bookmaker. While the Court accepted that the applicant in that case had a sufficient arguable case to be given leave to bring judicial review proceedings, the applicant did nothing for two months. In the interim, the bookmaker to whom permission had been granted had undertaken financial transactions in business in reliance upon the license granted and in the absence of any "inkling" that the validity of the license might be challenged. 30. That case is very far from the present case. The decision where I have given

leave is in respect of the decision made on 3 December 2024. Brittany Ferries have acted promptly in relation to challenging that decision. Their application was made on 18 December and was accompanied by a very extensive affidavit. Brittany Ferries had also been engaged in correspondence seeking to understand the reasons why it had not been successful. That is an understandable and correct approach to take before launching any proceedings. They certainly did not sit on their hands and do nothing. 31. Both the likely outcome of any earlier application for leave made prior to conclusion of the Jersey Procurement Process and the prompt nature with which Brittany Ferries acted thereafter therefore means that any reliance on delay itself does not in my judgment reach the required threshold on grounds of delay to set aside the order I made on 20 December. 32. In relation to the alternative ground that for some other substantial reason the leave granted should be set aside because it would not be just to make such an order, I am not persuaded that DFDS have established such a reason. To reach such a conclusion at this stage is a high threshold because it would require me to determine that the reasons relied upon were such that any application for judicial review was no longer arguable or did not merit a trial. 33. The conclusion I have reached however is that, while there is clearly some risk to DFDS if the contract awarded to it is later cancelled or the signing of it is delayed, it is not possible for me on an application to review the granting of for leave to determine the extent of that risk. There is force to the submissions made by Brittany Ferries, supported by the second affidavit of M. Mathieu, that some of these risks are normal commercial risks accepted by anyone seeking a licence to operate a long-term ferry service and that steps would be taken to address such risk in relation to tendering of ferries. 34. In addition, many of the risks only crystallise at the end of January, by which time, subject to any appeals, it is hoped that any challenge by Brittany Ferries would have been determined. At present, that challenge is due for hearing on 13 and 14 January. 35. I should however add that in reaching this conclusion, I have not been able to attach very much weight to the proposed offer by Brittany Ferries to operate a service until the end of October 2025. This is because it is not clear to me from the affidavit filed whether such an offer has been made or what the Minister's reaction to it might be, given that Brittany Ferries previously were asked to grant such an extension and refused to do so. 36. I should also make it clear that the present application is not an application by Brittany Ferries for interim relief which would require me to apply the relevant test on the granting of such interim relief (see for example *Sutton v Constable of St Brelade*

[2021] JRC 173 at paragraph 43). If such an application were made, that would require a more detailed assessment of the different views of DFDS and Brittany Ferries and would need an oral hearing. I would also have to consider the question of delay. The present application however only requires me to consider whether the threshold set out in Rule 16/6 is met to set aside the leave previously granted to Brittany Ferries. For the reasons set out in this judgment, I am satisfied that that threshold has not been met. Leave to appeal 37. In relation to the decision that leave to appeal is also refused because I am not satisfied that the threshold for leave to appeal is met in respect of this decision. I have taken the step of

making this decision without further submissions from the parties because my decision of 20 December and the judgment of 24 December is already subject to an urgent application for leave to appeal. Any challenge to this decision should also be a matter for the Court of Appeal. *Authorities Bretagne Angleterre Irlande SA v Minister for Sustainable Economic Development*

[2024] JRC 292 . *O'Connor Limited v Gambling License Authority*

[2004] JRC 178 . *Millar v Dickson*

[2002] 1 WLR 1615 . *Joseph Gleave and Son Limited v Secretary of State for Defence*

[2017] EWHC 238 (TCC) . *Sutton v Constable of St Brelade*

[2021] JRC 173 Page Last Updated: 02 Jan 2025 Back to top About JLIB Accessibility Contacts Copyright Disclaimer Feedback Privacy policy Site map BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2024/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/bretagne-angleterre-irlande-sa-v-minister-for-sustainable-economic-development-2024-jrc-297-31-december-2024>

Prepared on 22 October 2026 · Esheria