

JERSEY / JUDGMENT

Buckley v Minister for Treasury and Resources and Ors [2023]

JRC 254 (18 December 2023)

[2023] JRC 254

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judgment

the commissioner: 1. This judgment contains my reasons for various decisions following on from the substantive judgment in this matter reported at

[2023] JRC 209 ("the Substantive Judgment"). 2. The issues I had to determine were: (a) Whether the Applicant had brought an application for judicial review as permitted by the Substantive Judgment within time. (b) If the Applicant had not brought an application for judicial review in time, whether time should be extended to permit the Applicant to do so. (c) Whether the Applicant should be permitted to apply for leave to appeal those parts of the Substantive Judgment refusing leave, or whether the application for leave to appeal leave is out of time. (d) If the application for leave to appeal was out of time, whether time should be extended. (e) If the application for leave to appeal was either within time or time was extended, whether leave to appeal should be given. (f) Costs of and incidental to the Substantive

Judgment.

3. I will deal with each of these arguments in turn, but before I do so it is necessary to set out a chronology relating to the handing down of the Substantive Judgment and steps subsequently taken by the Applicant to apply for judicial review and to seek leave to appeal.
4. The hearing of the Applicant's application for leave took place at a one day hearing on 27 July 2023.

Judgment

was reserved at that hearing. 5. A judgment was sent in draft to the parties in the usual way by an email from the Bailiff's Chambers on 26 October 2023. That email included the following wording: "Dear Advocates I now enclose a draft of the judgment in the above case. You are provided with the current draft of the judgment in PDF format to review. Also attached is a word copy in order for you to mark up, in colour, any amendments . It is supplied on the usual terms and, for the avoidance of doubt, these are as follows:-

1. The judgment remains a draft judgment until formally handed down. It follows that the Court may make any changes which it wishes prior to the formal handing down.
2. The draft judgment is confidential. It may be shown, in confidence, to the parties and other legal advisers but only for the purpose of obtaining instructions and on the strict understanding that the judgment, or its effect, is not to be disclosed to any other person.
3. Because the judgment is a draft, and may be amended, the parties may not rely upon it for any purpose until it is formally handed down. The primary purpose of supplying the judgment in draft is to enable the parties to consider the judgment and decide what consequential orders, if any, they seek. A secondary purpose is to enable the parties to submit suggestions to the Court about typing errors, factual errors, wrong references and other minor corrections of that kind. You are requested to submit these in writing (or by e-mail) to me, not later than 5pm on Wednesday 1st November 2023. If you have no comments, you should confirm this by the same deadline . Once all comments have been received, the Court will make any amendments necessary before distributing final approved versions of the judgment and it is that version only which may be relied upon and disclosed to others. Please note that Commissioner Thompson would like a 1 hour hearing to be arranged in order to hand down this

judgment.

Please contact the Bailiff's Judicial Secretary, Rebecca Traisnel, to arrange a suitable date and time." 6. Counsel for both parties on 1 and 2 November responded with their comments and asking the Bailiff's Judicial Secretary for a date to hand down the judgment. 7. However, on 7 November 2023 the final version of the Substantive Judgment was handed down electronically to the parties. The email sending the judgment also stated, "A costs hearing can be fixed if not already arranged" . 8. The Substantive Judgment refused leave in respect of grounds 1 and 2 of the Applicant's application for leave and gave leave on grounds 3 and 4 but on a limited basis as set out in the judgment at paragraphs 153 to 155. The Second and Third Respondents were discharged from the proceedings. 9. On 20 November 2023, an Act of Court setting out the orders made by the Substantive Judgment was distributed to the parties. The Act of Court was dated 7 November 2023 and stated as follows: "Now this day, for reasons set out in a judgment delivered by the Commissioner, the Court:-

1. refused the application for leave to apply for Judicial Review on Grounds 1 and 2;
2. granted the application for leave to apply for Judicial Review on Grounds 3 and 4 against the First Respondent on the limited basis set out in the said judgment at paragraphs 153-155;
3. discharged the second and third respondents from the proceedings;
4. directed that any final hearing shall take place in 2024; and
5. left over the matter of costs." 10. This Act of Court was issued because I wished to know whether or not a costs hearing was going to be fixed and I realised that an Act of Court had not been produced. The covering email distributing the Act of Court stated: "Dear Advocate Meiklejohn and Advocate Brown, Apologies for the delay but please find attached the Act of Court following the handing down of the Commissioner's decision. Could you update the Court as to the position on costs please. The Commissioner is mindful they were left over. Kind regards,..". 11. On 21 November 2023 at 16.31, Advocate Brown for the Applicant emailed the Viscount's Department, copying in Advocate Meiklejohn counsel for the Respondents. 12. The email stated: "To: viscount@courts.je <viscount@courts.je> Cc: Steven Meiklejohn (Law Officers) <s.meiklejohn@lawofficers.je> Subject: 2023/092: Buckley v Minister Dear Sirs, I would be grateful if you could please serve the attached on Advocate Steven Meiklejohn on behalf of the Respondent(s). I will call to arrange for payment of the appropriate fees." 13. The email to the Viscount received an automatic reply which stated: "This inbox is reviewed periodically during the working day and you should receive a response within 24 hours." 14. For enforcement matters the email also referred the parties to Mr Paul Stephens. 15. At 16:38 on 21 November 2023, Advocate Brown wrote to Advocate Meiklejohn requesting an extension of time, which email included the following: "My client has instructed me to file for judicial review, and to file an appeal but on review of the relevant rules etc. it would appear that there is an argument that any appeal filed now would be out of time. In my view neither would be out of time, since both the time limit for filing for judicial review and for leave to appeal should not start to run until the order of the Court is received." 16. The application for leave to appeal was filed with the Court on 22 November 2023. 17. The application for judicial review was ultimately served on Advocate Meiklejohn on 22 November 2023. 18. I now turn to deal with each of the issues set out at paragraph 2 of this judgment. (a) Whether the Applicant was in time for bringing the judicial review application on the limited basis permitted by the Substantive Judgment. 19. The time limit for bringing an application for judicial review where leave is granted is to be found in Royal Court Rule 16/4(1) which provides as follows: "(1) When leave has been granted to make an application for judicial review, the application must be brought, within 14 days from the date on which leave was granted , by serving through the Viscount a notice substantially in the appropriate form set out in Schedule 5, together with a copy of the order granting leave and a copy of the statement and accompanying affidavit in support of an application for leave under Rule 16/2." (emphasis added) 20. The argument raised by the First Respondent (being the only remaining Respondent for the application for judicial review) was that because the Substantive Judgment was handed down on 7 November, the application for judicial review

was out of time because it was only served on 22 November which was more than fourteen days after the date upon which leave was granted. 21. The Applicant's argument was that until the Applicant received a copy of the order time did not start to run, because a copy of the order was necessary for the application for judicial review to be served. 22. Both parties also contended as a matter of construction that Rule 16/4(1) was clear. However Advocate Meiklejohn contended that leave was granted when the Court's decision was communicated when the final judgment was handed down whereas Advocate Brown argued, that the Court's decision was communicated when an order was released. 23. In relation to the construction question, I preferred the argument of Advocate Meiklejohn. In my judgment, what is meant by when leave has been granted is a factual issue which will vary from application to application. Leave may be granted at an oral hearing; it may be granted in writing on the papers, or it may be granted when the Court's final judgment is released to the parties. The purpose of an order is to reflect the decision that has been made to grant leave. The difficulty with Advocate Brown's argument is that it leads to the position that time only starts to run when an order is received by the parties. Her argument also does not deal with the reality of orders in many cases being produced after the decision has been made (possibly within a few hours but it can be longer) albeit in this case that process was delayed due to an administrative error. 24. To hold that time only starts to run from the date of an order also raises the question of whether that means the date of the decision or whether it means that the order is produced. If the latter, then that runs the risk of creating uncertainty. The construction argued for by Advocate Meiklejohn in contrast creates certainty because it makes it clear that time starts to run from the date leave is granted. It matters not how that is communicated, whether at an oral hearing, in writing or by a judgment being released electronically. In those circumstances, the date of leave being granted is clear. 25. However, to avoid any future misunderstandings, where judgments are released electronically in judicial review proceedings, the accompanying email handing down the final version of the judgment should make it clear that time for the purposes of Rule 16/4(1) of the Royal Court Rules starts to run from the date the judgment is released to the parties. 26. While I deal with the question of leave to appeal later in this judgment, I wish to add at this stage that the same email should also make it clear that if a party wishes to appeal any refusal of leave then they should make an immediate application to the Bailiff's Judicial Secretary for a hearing where the question of leave to appeal can be considered. This guidance applies to any decision released electronically where leave to appeal is required. 27. In this case there is another difficulty with the Applicant's position. Paragraph 157 of the judgment stated: "For all these reasons the application for leave is refused on the first two grounds but is granted in respect of the third and fourth grounds against the First Respondent only on the limited basis set out in this judgment." 28. The limited basis was that set out at paragraphs 153 to 155. 29. It is therefore clear that the Applicant knew on 7 th November that leave had been granted albeit on a limited basis only. By reference to the above chronology, the release of the judgment on 7 November was the Court making its decision. This is clear from the parties having already provided comments and from the parties being invited to fix a costs hearing if a date had not already been fixed. The fact that

the Court order was not produced until some time later due to administrative oversight does not alter the knowledge of the Applicant or his adviser. Time therefore starts to run for the purposes of Rule 16/4 from 7 November and accordingly the application for judicial review on the limited basis permitted is out of time. 30. Advocate Brown sought to respond to this difficulty by contending that there was a difference between the judgment and the order which was issued to the parties on 20 November. In my judgment, there was no difference between the judgment and the order in relation to the limited basis upon which the Applicant was permitted to bring judicial review proceedings and so I was not persuaded by this submission. (b) Should time be extended for the application for judicial review? 31. In relation to the power to extend time under the Royal Court Rules, this is found in Rule 1/5 as follows: "(1) The Court or the Viscount may, on such terms as either thinks just, by order extend or abridge the period within which a person is required or authorized by rules of court or by any judgment, order or direction to do any act in any proceedings.

- (2) The Court or the Viscount may extend any period referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
- (3) The period within which a person is required by rules of court or by any order or direction to serve, file or amend any pleading or other document may be extended by consent in writing without an order being made for that purpose." 32. Advocate Brown also argued as an alternative that I possessed a power under Rule 10/6 of the Royal Court Rules to waive any irregularity. This was on the basis that the Respondents were on notice of the application to bring judicial review proceedings on the grounds permitted by virtue of Advocate Meiklejohn being copied into the email to the Viscount's Department requesting service. She further relied on the case of *Shinzo (Jersey) Limited v Minister for the Environment*

[2020] JRC 236 and the discussion at paragraphs 20 to 23. 33. In my judgment, there is no material distinction between the effect of an extension of time under Rule 1/5 or a ruling that there has been a waiver of an irregularity under Rule 10/6 in this case. On balance, however, I prefer the former approach because *Shinzo* is capable of being distinguished because in that case service was effected on a representative of the Minister by email, as distinct from the Respondent in this case simply being copied into a request for service through the Viscount's Department. 34. What is clear is that under both Rule 1/5 or Rule 10/6 I possess a discretion whether or not to extend time or waive an irregularity. The grounds relied upon by the Applicant as to whether I should do so were the same. 35. Advocate Meiklejohn was critical of the Applicant for leaving service of the application for leave to the very last minute. He pointed out that Advocate Brown had received the act of court required to effect service the day before the expiry of the relevant time limit but only sent an email some half an hour before close of business. He contended that the Applicant did not appear to have made any attempts to contact the Viscount before this time limit. He also pointed out that the Applicant could have asked for an act of court at any time if the Applicant wished to pursue the application for judicial review as permitted by the Substantive

Judgment.

36. In support of his position, he relied on the Royal Court's decision of *Minister for Planning v Herold*

[2014] JRC 020 . However, the Herold decision concerned the Court's power to grant an extension of time for appeals made outside time limits contained in a statute (the Planning and Building (Jersey) Law). The present case is not dealing with time limits determined by statute, but rather time limits contained in the Royal Court Rules where the Court possesses a general power to extend under Royal Court Rule 1/5. 37. Where I accept Herold is relevant to the discretion vested in me is that, in Herold , the Court was clear that the fact that the respondent was not served in that case was not the fault of the appellant. The appellant had done everything she could for service to be effected and it was not her fault that service was not effected in time. In this case, it is not clear why the Applicant left it until 16.32 on the date the time limit expired in order to serve his application for judicial review. It is also not clear why Advocate Brown only sent an email and did not attempt to call the Viscount to ensure that service could be effected that day. She also only emailed Advocate Meiklejohn at 16.38 to see if an extension of time could be agreed. This was leaving matters too late. In my judgment she should have made more of an effort than she did to ensure service was effected. 38. However, I have been persuaded to extend time for service of the application for judicial review for the following reasons: (i) I accept that initially it was contemplated that a hearing should take place for the judgment to be handed down which position then altered and where a hearing for costs ultimately was not fixed. This was not the fault of the Applicant. (ii) I also accept that the Act of Court recording the Court's decision which was necessary to be served only arrived twenty-four hours before expiry of the time limit. Although the Applicant could have asked for a copy of this order earlier, the fact that it arrived one day before the time limit was due to expire may have contributed to the request for service being left until the last minute; in that regard Advocate Brown explained that she was not due to be working that week and was without childcare; and (iii) In the Substantive Judgment, I ruled in any event that the hearing of the application for leave should not take place until 2024. Accordingly, there is no prejudice in allowing the application for judicial review to proceed. 39. Accordingly, I extended time to close of business 23 November 2023 so that the Applicant's application for judicial review is within time. (c) The application for leave to appeal. 40. I next deal with the question of whether the application for leave to appeal was within time. Unlike the application for judicial review, an application for leave to appeal to the original presiding judge does not need to be served through the Viscount. 41. In relation to the relevant time period for bringing an application for leave to appeal against a refusal of leave to bring judicial review proceedings, it was common ground that where a party intends to appeal against a refusal of leave permission is needed from the court at first instance. 42. This position is set out in Rule 4(3) of the Court of Appeal (Civil) (Judicial Review) Rules 2000 ("the Judicial Review Rules") which provides as follows: "(3) Where a party intends to appeal against the refusal or grant of leave inter partes, the party shall

apply to the court below for leave to appeal to the Court at the hearing before the court below." 43. The difference between the parties was when a party should apply for leave to appeal. 44. In circumstances where an application for leave is refused at the hearing itself, then Rule 4(3) makes it clear that leave should be sought at that hearing because of the reference to "at the hearing before the Court below" . 45. However, where in a complex matter such as the present, where judgment is reserved, in my judgment Rule 4(3) does not deal with the position where judgment is reserved and where the judgment is released electronically. I therefore agree with Advocate Brown that Rule 4(3) is drafted on the assumption that there will always be a hearing handing down a judgment. While that was the position in 2000, it is not necessarily the position in 2023. The Judicial Review Rules therefore do not reflect that judgments may be handed down electronically which then places an obligation upon the unsuccessful party to seek a hearing for leave. 46. While Advocate Brown did not help herself by not immediately asking for an application for leave, I am left in the position that the Judicial Review Rules are silent on any applicable time limit for a party to seek leave for judicial review. The general twenty-eight day time limit contained in Rule 3 of the Court of Appeal (Civil Rules) 1964 as amended ("the 1964 Rules") does not assist because the 1964 Rules do not apply to Rules 3, 4 or 5 of the Court of Appeal (Civil) (Judicial Review) Rules 2000 (see Rule 1(2) of the 1964 Rules). Nor does the Court of Appeal Consolidated Practice Direction No. 05/01 assist because that simply determines that applications for leave to appeal should be made whenever possible at the time when the decision of the lower Court is delivered. This Practice Direction also does not address making applications for leave where a judgment is released electronically. 47. I accept that my conclusion creates an anomaly with Rule 4(5) of the Judicial Review Rules because if leave to appeal is refused at first instance then a party only has seven days to apply to the Court of Appeal for leave to appeal. However I cannot insert a time limit that is not there. 48. In my judgment, the way to address this difficulty is in deciding whether or not to grant leave, the question of how long an applicant has left it before bringing an application for leave is a factor that the Court should take into account in deciding whether or not to grant leave. Delay alone however is not a reason to refuse the application for leave to appeal where there is no express time limit for doing so in the circumstances of a judgment being released to the parties electronically. 49. Accordingly, I determined the application for leave to appeal on its merits. (d) An extension time for the application for leave to appeal. 50. In case I was wrong in my conclusion on whether or not the application for leave is within time, I granted an extension of time to determine the application for leave to apply. This was firstly because in my judgment no prejudice arises to granting an application for leave to be made at this stage, whereas if leave was refused, the Appellant's ability to pursue matters further would be extremely limited indeed. Secondly, although I agreed with Advocate Meiklejohn that the provision of the Act of Court on 20 November was a red herring, the Applicant thereafter acted promptly, including indicating that she would be applying for leave within the time limit (albeit only just) and seeking an extension of time if one was required. The delay in not asking for a date for a leave to appeal hearing was not sufficient to prevent an extension of time from

being granted. 51. In extending time, I was also satisfied that I have jurisdiction to do so under the Court's inherent jurisdiction. I refer to this point because Advocate Meiklejohn raised whether I possessed a power under Rule 7(1) of the Judicial Review Rules to extend time. While that submission appeared to be correct, I consider that it is necessary for the judge at first instance to have the power to extend time to consider an application for leave to appeal which might otherwise be out of time. Again, however, the Judicial Review Rules would appear to need amendment because Rule 7(2) does permit the Royal Court to extend time for an appeal against a substantive order, but not to extend time for an application for leave. (e) The application for leave. 52. Advocate Meiklejohn reminded me that the application for leave required the Applicant to show, by reference to *Crociani v Crociani*

[2014] 1 JLR 426 , one of the following: "(a) he has a real prospect of success;

(b) a question of general principle was to be decided for the first time; or

(c) there was an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage." 53. I carefully considered the grounds of appeal set out in the draft notices of appeal. Adopting the headings used in the notice of appeal, I reached the following conclusions applying the *Crociani* test. 54. In relation to the section dealing with the justiciability of legislative decisions of the States, I was not satisfied that there was a question of general principle to be decided for the first time or there was an important question of law upon which further argument by decision of the Court of Appeal would be to the public advantage. I considered that the decisions in *Burt* and *Pearce* referred to in the Substantive Judgment determined the point in issue and were binding upon me. If therefore the Applicant wishes to pursue these arguments further, he must seek leave to appeal from a single judge of the Court of Appeal. 55. In relation to the human rights arguments and the interpretation of Article 1 Protocol 1, I accept that the scope of this Article has not been considered by the Court of Appeal previously, and therefore that the threshold for there being an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage could be met. However, the arguments raised under Article 1 Protocol 1 were also raised out of time for the reasons set out at paragraph 146 of the Substantive

Judgment.

In my judgment, the threshold was not met for granting leave to appeal in respect of delay and accordingly leave is refused in respect of the interpretation of Article 1 Protocol 1 because this argument was advanced out of time. 56. In relation to my findings in respect of retrospectivity, and fairness, none of the *Crociani* tests, in my judgment, were met and accordingly leave was refused. The notice of appeal simply repeats the arguments that I rejected. 57. In relation to grounds 3 and 4, I was satisfied that the arguments raised give rise to an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage. 58. Leave to appeal is therefore granted in respect of the arguments the Applicant

wishes to advance in respect of grounds 3 and 4 but is otherwise refused. The Applicant therefore has seven days from 14th December to renew an application for leave to appeal on any other grounds he wishes to advance. (f) Costs. 59. In relation to costs, the parties were agreed that the applicable principles on costs were set out in *Holmes v Law Society of Jersey*

[2018] JRC 053 at paragraphs 4 to 6 as follows: "4. The principles applicable to the award of costs against an applicant who is unsuccessful in applying for leave to apply for judicial review when a hearing on 'ex parte' had taken place were considered by the Royal Court and the Court of Appeal in *Larsen-v-Comptroller of Taxes*

[2015] JRC 001 ; Court of Appeal *Larsen and Others-v-Volaw*

[2016] JCA 139 . I do not need to set out substantial excerpts from either of those judgments because I agree with the characterisation of the principles established by those two decisions set out by Advocate Kelleher on behalf of the Law Society and the Bâtonnier in his Skeleton Argument. 5. They are, in my view, as follows:- (i) The Court has the power to award costs in the circumstances pursuant to Article 2(1) of the Civil Proceedings (Jersey) Law 1956; (ii) An applicant for judicial review should not ordinarily be made to pay the costs of a failed application for leave; (iii) This is a starting point only and applies whether the application is dealt with on the papers or disposed of after an oral hearing - even if the oral hearing was requested by the applicant and even if it follows a refusal on the papers; (iv) That starting point can be departed from. The Court, in the exercise of a broad discretion as to costs, may depart from it if it considers that there are exceptional circumstances that justify doing so; (v) A useful guide to the circumstances which might justify such a departure may be found from *R-v-Mount Cook Land Limited-v-Mount Eden Land Limited* and *Westminster City Council*

[2004] CP Rep 12 in which the court said:- "Exceptional circumstances may....consist in the presence of one or more of the features in the non-exhaustive list: (a) The hopelessness of the claim; (b) The persistence in it by the claimant after having been alerted to facts and/or of the Law demonstrating its hopelessness; (c) The extent to which the court considers that the claimant in the pursuit of his application has sought to abuse the process of judicial review for collateral ends - a relevant consideration as to costs at the permission stage as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and (d) Whether as a result of the deployment of full argument and documentary evidence by both sides of the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim." 6. In the *Larsen* case the Royal Court had made an order for costs against the unsuccessful applicant for leave to bring an application for judicial review. The Court of Appeal, at paragraph 16 of its judgment (cited above) said this of that decision:- "The circumstances of the present case were on any footing unusual. The application was plainly long out of time. It represented a further challenge to a notice whose validity had been upheld by the domestic court system at all levels. Although the prior challenge had failed, it had raised questions of substance and difficulty. Whilst it was very unlikely that

the new application could raise any new point or could survive a long delay in bringing it, the Bailiff was entitled to take the view that the interests of justice required a hearing at which the merits of allowing the application to proceed could be properly investigated. What the hearing made clear, however, was that there was no basis for a further judicial review. The timing of the new application was material not only for its own sake, being over two years after the issue of the notice, but also because it gave rise to the inference that it was a last ditch attempt to keep alive a challenge that had been rejected by the domestic courts. The Bailiff's remarks at the conclusion of the hearing, set out in paragraphs 6 above, demonstrates an awareness of both these factors. They amply justify his view not only that the delay could not be overcome but also that the notice was not susceptible of a further challenge immediately after the failure of the prior judicial review. But they also justify his decision to make an adverse cross order; the application was hopeless, it had been persisted in despite the appellants knowing the comptroller was taking the point about delay, and amounted to an abuse of process. These are three of the factors identified in paragraph 76.5 of the judgment in Mount Cook as capable of amounting to exceptional circumstances justifying the departure from the ordinary practice." 60. Where the parties disagreed was on the application of those principles. Advocate Brown boldly contended that the application made by her client had been successful because leave had been granted. 61. In the alternative, she contended that no exceptional circumstances to depart from the usual order on judicial review proceedings where leave is refused. She argued that the grounds advanced were not hopeless, and nor did the Applicant persist with the case after it had been demonstrated that the position was hopeless. 62. To the extent it was necessary, she also contended that the hearing before me had not been a substantive hearing of the claim where leave had been refused and there were further arguments that could have been deployed and could be deployed if my decision on leave was overturned. This was a reference to ground (d) of the Mount Cook case referred to at paragraph 5(v) of the Holmes decision. 63. Advocate Meiklejohn argued that simply because leave was given on a limited basis, that should not prevent the Respondent to an application for leave from seeking an order for costs if the threshold in Holmes was met where grounds were advanced which failed even if a much more limited basis succeeded. To hold otherwise would fetter the court's discretion on costs and would encourage applications which might, on a narrow basis, have some merit but where parties could force respondents to deal with other arguments which were hopeless. 64. In this case, he contended that Grounds 1 and 2 were hopeless and were bound to fail because they were a challenge to the power of the States to make legislation. In addition, the Applicant had been put on notice that such a claim was bound to fail. 65. The conclusion I reached was that the application was only successful to a limited degree. What the Applicant sought was permission to set aside in its entirety the legislation passed by the States or, alternatively, permission to contend that the legislation should not be enforced at all. By contrast, the permission I gave was only to review the direction issued by the First Respondent on two specific grounds. If this were an ordinary civil case, I would have had no hesitation in determining the Respondents as the clear winner in

relation to the application I determined leading to the Substantive Judgment. 66. However, that is not enough to makes a costs order in favour of a successful respondent who resists an application for leave at a hearing. What is required as set out in Holmes are exceptional circumstances and a useful guide is set out in the Mount Cook case. 67. To find exceptional circumstances, it is necessary to consider each case on its merits. The conclusions reached in Larsen which were about delay and an abuse of process do not therefore assist in relation to what costs orders should be made where the merits of an application for leave are bound to fail. I consider that the discretion vested in me is not limited to cases of procedural abuse, but also permits me to make a costs order against an unsuccessful applicant where the merits relied upon are hopeless. 68. In this case, in my judgment, Grounds 1 and 2 of the application were hopeless and were bound to fail. This is clear from the analysis at paragraphs 113 to 132 of the Substantive Judgment. I refer in particular to paragraphs 113 and 131 where I make criticisms of the Applicant's approach in those paragraphs. 69. In addition, the Applicant was on notice that the Respondent considered the grounds relied upon to be hopeless. The fact that those arguments might have developed in written and oral submissions does not detract from the clear warning given before significant costs were incurred. 70. In relation to the other arguments advanced by the Applicant which were unsuccessful, these however do not meet the threshold of exceptional circumstances. This includes the arguments on Article 1 Protocol 1, delay, retrospectivity and unfairness. The Applicant was also successful in part in relation to Grounds 3 and 4 as I have noted. 71. What this means is that the Applicant should only pay a proportion of the Respondent's costs, with the balance being left over until determination of the judicial review proceedings. In my judgment, exercising the discretion vested in me, 50% represents a fair proportion of the costs incurred based on my evaluation of the written and oral submissions made to me, as well as the extent of the reasoning in the judgment on the issues which were bound to fail and those which were arguable. 72. Finally, I stayed enforcement of the costs order I made until determination of the judicial review proceedings that I have permitted, or which might be permitted on any appeal, because if either any appeal is successful or whatever judicial review proceedings finally take place are successful then there may be costs orders in favour of the Applicant. I ruled that the costs of this hearing be costs in the cause. Authorities *Buckley v Minister for Treasury and Resources* and *Ors*

[2023] JRC 209 . Royal Court Rule 16/4. *Shinzo (Jersey) Limited v Minister for the Environment*

[2020] JRC 236 . *Minister for Planning v Herold*

[2014] JRC 020 . Planning and Building (Jersey) Law. Rule 4(3) of the Court of Appeal (Civil) (Judicial Review) Rules 2000. Appeal (Civil Rules) 1964. Court of Appeal (Civil) (Judicial Review) Rules 2000. Court of Appeal Consolidated Practice Direction No. 05/01. *Crociani v Crociani*

[2014] (1) JLR 426. *Holmes v Law Society of Jersey*

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