

JERSEY / JUDGMENT

Le Boutillier v Min for Planning and Environment [2012] JRC 095 (11 May 2012)

[2012] JRC 095

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judgment

the deputy bailiff: 1. On 20 th December 2011 the Court, differently constituted, sat to consider the Appellant's third party appeal under the modified procedure under Article 114 of the Planning and Building (Jersey) Law 2002 . The Applicant is the owner of the land which was the subject of the application for development, granted by the Minister, in respect of which the third party appeal was brought. 2. The Court heard argument on 20 th December and reserved its decision. Judgment has not been given. Amongst the papers put before the Court were the objections which had been lodged following publication of not only the successful application, but also a previous application in respect of the same site, which had been unsuccessful. The papers in the Court file included a representation from the Development Applications Committee of the National Trust for Jersey, objecting to the development proposed unsuccessfully in 2010. This was signed by Mr Michael Touzel, Chairman of that Committee. The Court file also included a letter signed by the Chairman of the Environment Section of the Société Jersiaise, objecting to the second (successful) application in 2011. The Société Jersiaise had also objected to the unsuccessful application in 2010. 3. Neither the National Trust for Jersey nor the Société Jersiaise are parties to the present appeal, and their representations objecting to the proposals were before the Court for completeness as part of the package of relevant documents related to the planning application now the subject of the third party appeal. Similarly, neither the National Trust for Jersey nor the Société Jersiaise made any further statements or presented any further evidence to the Court. The problem, if it is one, arises simply as a result of the material which we have described. Both letters focused their objections on the fact that the proposal was for development or enlargement of buildings now on the site which is in a zone of outstanding character, and forms part of the extended Green Zone under the Draft Island Plan 2011, subsequently approved by the States. The letter from the National Trust for Jersey, in relation to the 2010 application, expressed strong objections to any further development or enlargement of the buildings now on the site. 4. On reviewing this material the members of the Court, we regret belatedly, focused upon a matter which we felt obliged to draw to the attention of the parties. I am a member of the National Trust in England, which is I believe an associated organisation of the National Trust for Jersey, and I am also a member of the Société Jersiaise. Jurat Kerley is a member of both the Société Jersiaise and the National Trust for Jersey. Neither I nor Jurat Kerley

have or have ever had an executive position in either organisation, and have not expressed any public views as to the objects of either association. Jurat Olsen is not a member of either organisation. 5. There are two other potential issues. Jurat Olsen's wife is a member of the English National Trust, but not of the National Trust for Jersey. Jurat Kerley's wife is not only a member of the National Trust for Jersey but has also been on the general council for that organisation, although not on the executive committee. She does currently chair the committee of the National Trust which considers planning applications, and has replaced Mr Michael Touzel who signed the letter to which I have earlier referred. Jurat Kerley has confirmed that he has not discussed this appeal with his wife. We do not know if she was on the committee at the time Mr Touzel sent in his letter of objection, but as we made clear to the parties, we have proceeded on the assumption that she was. 6. On 13 th January, I asked my secretary to inform the parties of these facts to identify whether any objection was taken to the constitution of the Court. The Court's preliminary view was that there was no bias or perception of bias but it was emphasised that if there were objections, a date would be fixed so that argument could take place on that matter and that the view expressed was a preliminary view only. The Applicant has objected, and hence this hearing was fixed. Normally it would have been fixed with the original Court. Unfortunately however the coincidence of leave and other Court commitments has meant that to reconstitute the original Court for the purpose of hearing these objections would be very much delayed and accordingly I have asked Jurat Le Breton, a senior Jurat, to sit with Jurat Kerley on this hearing. For the avoidance of doubt, it should be added that Jurat Le Breton is also a member of the Société Jersiaise and of the National Trust for Jersey. There are no Jurats available today who are not in a similar position. The parties did not object to Jurat Le Breton's participation. 7. Essentially the position today is this. The Applicant maintains some of his objections. He is no longer anxious about my participation or that of Jurat Olsen, but he is anxious about Jurat Kerley. In his view the connections of Jurat Kerley which I have mentioned are such that he cannot be sure he would receive a fair hearing of the third party appeal. He emphasised that he wished to make no attack on the integrity of the Court and did not assert there was any actual bias against him but he did assert that the constitution of the Court would fail to meet the requirements for an impartial tribunal as there would be a perception of bias. His inherent concerns were, he said, well expressed by the Solicitor General in the analysis in his skeleton argument. 8. The Appellant does not object to the constitution of the Court in December. The Solicitor General, for the Minister, contended that there was no objection that could be properly maintained to my presiding over the Court but there could be an objection to Jurat Kerley sitting as a member of the tribunal as a result of the connection which his wife has with the National Trust for Jersey. However the Minister did not object to the Jurat sitting on the appeal. 9. I now therefore turn to the challenge of the Applicant and consider whether the Court should recuse itself from this appeal. 10. The starting point is Article 6 of the European Convention on Human Rights . The relevant provisions are as follows:- "(1) In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." 11. The Royal Court of Jersey has for some time applied the same tests to this question as have been applied in the Courts of England and Wales. There, as is set out clearly in the judgments of the House of Lords in R -v- Bow Street Metropolitan

Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)

- (1999) 1 All ER 577, the fundamental principle is that a man may not be judge in his own cause. That principle is applied in two ways - it is applied literally if in fact the judge is a party to the litigation or has a financial or proprietary interest in its outcome. It is a principle which also applies where the judge does not have a financial interest in the outcome and is not actually a party, but in some other way his conduct or behaviour gives rise to a suspicion that he is not impartial. It is a doctrine of very long standing. In short hand terms, it is sometimes described as resulting in a two part test - was the judge actually biased, or was there an appearance of bias. In the Pinochet case, the decision proceeded on the test in R -v- Gough
- (1993) 2 All ER 724 - is there in the view of the Court a real danger that the judge was biased? The Convention test is framed in a slightly different way - do the events in question give rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the judge was not impartial? This latter test has been applied in decisions in Canada, Australia and New Zealand. I am not sure whether there is any substantive difference between the two tests but the convention test is certainly the one which has more latterly been applied in the Royal Court - see Syvret -v- Chief Minister and Others

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- and it is the test we apply today. 12. Both I and Jurat Kerley consider that we are not in any way biased in relation to the matters which call for decision in this case. I add this for completeness notwithstanding that actual bias is not asserted. We therefore only approach the matter insofar as concerns the contention that there is a perception of bias - namely whether the fair minded and informed observer would consider that there was a real possibility that the tribunal was biased. 13. We think there is a good summary of the fair minded and informed observer in the judgment of Lord Hope of Craighead in Helow -v- Home Secretary

- [2008] 1 WLR 2416 at page 2418 where he said this:- "(2) The observer who is fair minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious ... Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must seem to be, unbiased. She knows that judges, like anyone else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially. (3) Then there is the attribute that the observer is "informed". It makes the point that, before she

takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." 14. This passage was cited with approval in *Syvret -v- Chief Minister* [Supra]. 15. The case of *Helow* arose out of an immigration appeal by a Palestinian refugee who had been highly critical of the Israeli approach to Palestine. It came before a judge of the Court of Session in Scotland who subscribed to a journal, some issues of which contained articles expressing strong pro Israeli views. The House of Lords accepted that if the judge had shared those views, she would have been bound to recuse herself. There was however no reason to believe that she did. Reliance was placed on the fact that the judge had taken the judicial oath; on the fact that the judge could be assumed, by virtue of the office for which we had been selected, to be intelligent and well able to form her own views about anything she read; on the fact that she could be assumed to be capable of detaching her own mind from things that she read with which she did not agree. The impartial observer would want to know whether the judge had expressed any views about the content of that material and in the absence of evidence of that kind, there was no basis upon which the observer would conclude that there was a reasonable possibility that the judge was biased. 16. Lord Mance considered that the judicial oath was perhaps more a symbol than of itself a guarantee of the impartiality that a professional judge is by training and experience expected to practice and display. Nonetheless a judge's professional status and experience was a factor which the fair minded observer would have in mind when forming his or her objective judgment as to the risk of bias. Lord Mance referred with approval to the case of *R -v- S (RD)*

[1997] 3 SCR 484 where at paragraph 119 it was said:- "The requirement for neutrality does not require judges to discount the very life experiences may so well qualify them to preside over disputes. It has been observed that the duty to be impartial "does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge had no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind". 17. In *Helow -v- Home Secretary* (Supra) Lord Rodger of Earlsferry pointed out that even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Jurors are obliged to swear an oath to decide the

matter impartially and of course they have the advantage of a judge to assist them with how they perform their duty. 18. In this case, the position of Jurat is somewhere between that of a juror and that of a professional judge. In my judgment, it is closer to the position of professional judge, in the sense that the Jurats sit regularly, more than a lay magistrate in the United Kingdom, and probably sitting in court for in excess of 50 days a year - and have that experience year on year during their appointment. Experienced Jurats hear the same directions many times from the professional judge as to how they should go about their business of assessing the facts in a civil case or forming a judgment as to what is or is not reasonable. While we must and should distinguish between the position of the professional judge and that of the Jurats, the fact is that the Jurats are elected by an electoral college on the basis of their ability and integrity and are therefore trusted by that college to be able to perform the duties which the office of Jurat carries. In our judgment, the informed and fair minded observer would have that context very much in mind when considering the facts of any particular case. Membership 19. It is in our judgment well established in the cases to which we have referred that mere membership of an organisation would be an insufficient basis upon which the informed and fair minded observer would conclude that there was a real possibility that the tribunal was biased. The informed and fair minded observer would assume that as a member of the organisation or association, the judge received copies of any journal or other publications which the organisation or association put out to its members. It is obvious that members of organisations do not necessarily agree with everything which is contained in the organisation's journals or periodicals, which frequently reflect the expression of opinion by the individual writer, and not even the organisation itself, or on other occasions reflect the views of the executive committee or general council of that organisation. 20. For these reasons, mere membership of the Société Jersiaise or the National Trust for Jersey, and certainly the National Trust for England is an insufficient basis for asserting that the constitution of the Court fails for that reason the test on perceptions of bias. There would need to be something far more positive to suggest that such periodicals or objects were endorsed by the member of the tribunal for such an argument to get off the ground. 21. Similarly, in our view the alternative argument that membership of the organisation might lead the member of the tribunal to be unduly receptive to the views of the organisation requires one to assume that the tribunal member would put aside the training and experience as a judge or Jurat and not apply a judicial approach to what was being said or what had been read. We reject that contention. Accordingly we reach the firm view that mere membership of the Société Jersiaise and/or the National Trust for Jersey did not disqualify either me or Jurat Kerley from sitting on this appeal. 22. Although this is not critical to the decision which we have reached, we think it is also right to reiterate the words of Southwell J A in *States Greffier -v- Les Pas Holdings Limited*

[1998] JLR 196 at page 203. Commenting on the suggestion of bias on the part of the Deputy Bailiff in that case, Southwell J A said this:- "Having regard to the written evidence which this court has seen, I think it right to make these observations of general import on the developing habit of making *récusation* applications:

- (1) Those who live and work in Jersey have to accept that the administration of justice depends to a great extent on the two senior judges, the Bailiff and the Deputy Bailiff;
- (2) No application for *récusation* should be made without strong grounds to support it, and no such application should be granted unless such strong grounds are clearly established.
- (3) Included in the affidavits filed on behalf of Les Pas were allegations that members of the Court shook their heads in disagreement when things said by Advocate Falle, and nodded their heads in agreement with things said by the Solicitor General. It is entirely normal, particularly for a non-lawyer Jurat, to indicate by movements of the head whether a point is or is not considered to be a good one. That the application for *récusation* was in part based on such a frivolous ground is to be regretted." 23. We emphasise that the Applicant has not made any such suggestion that the Jurats showed bias by movements of the head and we do not include this reference by way of any express or implied criticism of his objections. The passage is repeated merely as an emphasis as to the way in which the Royal Court should approach the issue of perceptions of bias - the legal tests have to be applied, but some reliance can be placed on the fact that in a small jurisdiction of this kind judges whether professional or lay are acutely aware of the need to be impartial and to reach conclusions based on the evidence, and indeed to put any baggage which they may carry at the door of the court and leave it there, before embarking on the judicial process. 24. We now turn to the connection which Jurat Kerley has through his wife's chairmanship of the National Trust for Jersey's applications panel. For the Minister, the Solicitor General contends that the reasonable, informed and fair minded observer would apprehend a real risk of bias on the part of Jurat Kerley because his wife would be regarded as having an interest in the outcome in the sense that she would represent the Applications Panel of the National Trust. Reliance was placed on the comment by Commissioner Sumption in *Syvret -v- Chief Minister and Others* (Supra) that "loyalty to individuals is, or at least might reasonably appear to be more insidious". 25. Commissioner Sumption also went on to say this, at paragraph 35 of his judgment:- "However it is in my judgment... necessary to identify what it is that might lead the judge to decide the case otherwise than on its merits and that there must be a logical connection between that matter and his potential deviation from deciding the case on its merits." 26. The Solicitor General pointed to the case of *In re L (Minors) (Care Proceedings: Solicitors)* 2001 1 WLR 100. In that case, the course of care proceedings involved children of related families. The mother of one of the children became aware that the solicitor with conduct of the care proceedings on behalf of the local authority was co-habiting with the solicitor acting for the other parents with whom the mother was not on good terms. Both solicitors resisted the mother's application that the two solicitors should not personally retain conduct of the proceedings. The Court held that it would declare that the local

authority's solicitor should no longer act for the local authority in the proceedings unless the local authority decided to transfer conduct of the case away from the solicitor concerned. The reason given was that the power of the local authority in care proceedings placed a premium on the importance that they should be seen to act impartially and that intimate co-habitation was different in kind from professional association or social friendship and could give rise to a reasonable lay apprehension of bias. The Solicitor General therefore contends that if the informed observer would be sufficiently concerned that there would not be a fair hearing where mere advocates co-habited, the informed observer would certainly consider there to be a reasonable possibility of bias if one of the Jurats was the spouse or partner of a person whose objections to the planning application would have to be considered in the course of the judicial consideration of the appeal. The link described by Commissioner Sumption as necessary to be established was that the Applications Panel asserted in its objections exactly that which the Court had to determine in deciding the appeal. 27. Against that view, in this case, it seems to us that one can point to these factors:- (i) The National Trust for Jersey is not a party to this appeal. (ii) The National Trust for Jersey in fact has expressed no view about the present application. It only expressed a view about the application in 2010 which was unsuccessful and we do not know whether the National Trust Applications Panel would or would not have expressed the same view about the matter which is now the subject of appeal. (iii) Jurat Kerley's wife was not the Chairman of the Applications Panel which did sit to consider the unsuccessful application in 2010, and we do not know what view she had or might have had about that application.

Conclusion

28. When the Court retired to consider these matters, Jurat Kerley said immediately that he no longer felt comfortable in sitting on this appeal. That view was expressed not because he personally felt in any way biased but because he felt it was essential that all the parties to the proceedings felt they had had a fair hearing. His approach is a testament to the integrity which the Jurats have to have and do have - but I have made it plain that we do not apply the subjective test of what is in the minds of the litigants but the objective test of what the informed and impartial objector would make of it. Of course there are circumstances when the personal embarrassment of a judge is such that he must recuse himself because he cannot do justice but that is qualitatively different from his embarrassment that the litigant does not feel he will obtain justice. The latter is not a reason for recusal. 29. In our judgment, this is a close decision. The factors set out in paragraph 27 are objectively strong reasons why the informed and impartial observer could reach the conclusion that there was no real possibility of bias - because Jurat Kerley could not know if his wife had been present when the 2010 application was considered, nor, if she had been, whether she agreed with the objections generally or with the robust terms of the letter signed by the then Chairman in particular. That being so, and recognising too that spouses do not always agree about everything anyway, the impartial observer might well conclude there was no reason why the Jurat should not sit. 30. However, by a slender margin we have reached the view that the

informed and fair minded observer would be troubled by the fact that, even though it related to an earlier application, the objections of the National Trust for Jersey were expressed in relation to any further development of the Applicant's property, which was also essentially the Appellant's position, and the Court would have to consider that issue in order to reach its own view of the application, as the law requires, before going on to consider whether the Minister's decision was unreasonable. Accordingly we think the informed and fair minded observer might conclude there was a possibility of bias which ought not to be ignored and we accordingly have ordered that the challenge of the Applicant succeeds and the appeal will be reheard before a differently constituted court. Authorities Planning and Building (Jersey) Law 2002. European Convention on Human Rights. R -v- Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)

(1999) 1 All ER 577 . R -v- Gough

(1993) 2 All ER 724 . Syvret -v- Chief Minister and Others

[2011] JRC 116 . Helow -v- Home Secretary

[2008] 1 WLR 2416 . R -v- S (RD) [1997] 3 SCR 484. States Greffier -v- Les Pas Holdings Limited

[1998] JLR 196 . In re L (Minors) (Care Proceedings: Sol icitors) 2001 1 WLR 100. Page Last

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