

JERSEY / JUDGMENT

Le Cornu and Risoli -v- AG

[2015] JRC 051 (05 March 2015)

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judgment

the commissioner: 1. The third respondent ("Mr Wickenden") applies for his costs arising out of the applications of the applicants ("Mr Le Cornu" and "Mr Le Risoli") to declare a casual vacancy in the election held on 15 th October, 2014, for three deputies in the St Helier District No 1 or to declare the whole of that election void, which application was dismissed on 20 th November, 2014, for the reasons set out in the Court's judgment of 23 rd December, 2014, (Le Cornu and Risoli-v-AG

[2014] JRC 256). 2. It was not in dispute in the substantive hearing that Mr Wickenden's nomination form had not been completed in accordance with Article 20(4) of the Public Elections (Jersey) Law 2002 ("the Elections Law") in that one of the nine required seconders had in August 2014 moved a short distance out of St Helier District No 1 and signed the nomination form thinking that she was still resident in St Helier District No 1. It was also not in dispute that the electoral officer for the parish of St Helier solicited the nomination form from Mr Wickenden (and the other candidates) specifically for the purpose of checking that they had been correctly completed and he had confirmed to Mr Wickenden that his form was in order. Mr Wickenden relied on those checks and representations as to the validity of his nomination form. The Court said this at paragraphs 39 and 40:- "39. Each case will turn on its own particular

facts.

We do not wish to diminish in any way the need for candidates to comply with the requirements of the Elections Law and to be responsible for the validity of their nomination forms. Here, we had a candidate who was eligible, i.e. qualified to be and not disqualified from being a candidate, who had completed the requisite nomination form in a responsible manner and had it confirmed by the electoral officer (at the latter's invitation) that it was in order and had then been admitted as a candidate at the nomination meeting and thus presented to the electorate as such. He had subsequently been elected in a general election as deputy. There was no criticism of the way that he had conducted himself in his election campaign. We concluded that on these facts, including in particular that the electorate had spoken; the inadvertent and technical defect in his

nomination form could not be regarded as a matter of substance. 40. Furthermore, because we did not regard it as a matter of substance, we concluded that it did not affect the result of the election. There was no evidence that Sarah Tompkins' name on the form as a seconder had in any way affected any of the electorate; the electorate, like everyone else in the process, was wholly unaware that she did not qualify. Taken in the round, the reality is that the electorate has expressed its choice freely and that is the result. It would have been disproportionate for the Court to have interfered with that free choice as a consequence of what was an inadvertent technical error." 3. Mr Wickenden had instructed Baker & Partners to represent him in the application and had incurred costs with that firm of approximately £20,000 excluding this costs hearing. He sought an order for the payment of his costs on the standard basis by the applicants, or failing them, by the Constable of St Helier or failing him, by the public out of central funds. There were no other applications for costs. Mr Le Cornu and Mr Risoli had represented themselves, assisted by the fact that Mr Le Cornu is a lawyer by training. The Attorney General had been convened as "partie publique" in order to assist the Court and was not a proper party as such (see *Ani v Barclays Private Bank and Trust Limited and AG*

[2004] JLR 165). The other respondents had rested on the wisdom of the Court and none of them attended the costs hearing apart from the Constable of St Helier. 4. Advocate Thomas, for Mr Wickenden, approached the matter on the basis that these were civil proceedings to which the well-known principles set out in *Watkins and Connell v Egglisshaw and Four Others*

[2002] JLR 1 (as approved by the Court of Appeal in *Flynn v Reid*

[2012] (2) JLR 226) apply. I will not set out those principles here but he said the application had failed, and as the successful party, Mr Wickenden should have his costs. 5. Although I did not have an affidavit of Mr Wickenden's means, I was informed that his sole source of income was his salary as a deputy and his sole asset was his home, which was mortgaged. Although Baker & Partners are not taking the position (as far as I am aware) that these costs have to be paid now, it was clear that the only way Mr Wickenden could discharge them now was by taking out a second charge on his house with the additional interest burden that would flow from such a borrowing. Whatever accommodation might be reached between him and Baker & Partners, it is the case that this liability to his own lawyers represents nearly one half of his annual salary; a very substantial proportion. 6. Advocate Thomas argued that it was entirely reasonable for Mr Wickenden to have sought legal representation, because:- (i) He is not legally qualified. (ii) His immediate professional future was at stake. (iii) He was subject to a tight case management timetable in which he was required to produce an affidavit and legal submissions to assist the Court in the course of one week. (iv) The issues raised required legal analysis of the provision of the Elections Law and in particular the interaction between article 61(2) and 61(3). (v) The challenge raised issues under the Article 3 of the first Protocol of the European Convention on Human Rights. (vi) The disputed allegations contained in each petition required witness evidence and exhibits to be gathered, marshalled and placed before the Court. 7.

Mr Le Cornu and Mr Risoli resisted any order being made against them. They pointed out that the application raised an issue of public importance; that they had not conducted themselves in an unreasonable manner (there had been no criticism of their actions by the Court) and the issue they had raised was a serious one - Mr Wickenden had not complied with the Elections Law. The responsibility for that lay with him (see paragraph 24 of the judgment of the Court in AG v Pearce

[2007] JRC 223A). Advocate White, for the Attorney General, agreed with these submissions. The applicants went on to say this at paragraph 62 of their skeleton argument:- "62 To impose a costs order upon the Applicants would have a chilling effect on democracy in Jersey. The judgment in this case would be cited in future and act as a deterrent to parties seeking to resolve an election dispute. Candidates or electors with a genuine grievance will recoil at the prospect of an adverse costs order before they even contemplate an application to the Royal Court for relief." 8. Advocate White said this in his skeleton argument:- "(v) an order of costs against the Applicants may cause a "chilling effect" that would dissuade people (whether candidates or otherwise) from raising legitimate issues over public elections, which are of public importance." 9. Mr Le Cornu referred me to the decision of the English High Court in Pilling and others v Reynolds and others

[2008] EWHC 316 (QB) which was concerned with a disputed ballot paper. The petitioners were unsuccessful and the respondents sought their costs against them. The English High Court recognised that costs were to be awarded in the discretionary judgment of the court in accordance with normal civil principles, but it capped those costs in order to ensure that they were proportionate and did not unduly deter access to the courts in appropriate cases of dispute. Blake J said this at paragraph 39:- "39 We are extremely grateful to all counsel for the efficient and effective manner in which the arguments were presented to us, but were concerned that a hearing which in the end took half a day of the court's time should generate Respondent's costs of £55,000. In our judgment, public law principles for the award of costs are an appropriate guideline in the case of a legitimate and serious challenge to a ballot paper which was decisive of the outcome of an election. There is an important public interest in clarifying the legitimacy of the ballot and the vote on which the disputed paper depends. It would be contrary to the public interest to deter such scrutiny because of the disproportionate consequences in costs for any unsuccessful petitioner. There is some analogy with the court's concerns to limit the costs consequences of public interest challenges in environmental litigation or on other important [law] public law claims: see per Carnwath LJ in R (England) v LB Tower Hamlets

[2006] EWCA Civ 1742 20th December 2006 and the report of Sir Maurice Kay "Litigating the Public Interest" (July 2006) noted at [14]." 10. Blake J had observed that no protective costs order had been made in that case. Protective costs orders are not frequently made in this jurisdiction but there is very helpful discussion about their use in the judgment of Bailhache, then Deputy Bailiff, in Flynn v Reid

- [2013] JRC 112 , a private law case in which he made a protective costs order in the context of an appeal which raised a matter of public interest, namely the relevance of acting on legal aid where costs order came to be considered. He ordered that the costs of both the plaintiff and the defendant in the appeal should be paid out of public funds. Having summarised English case law, and in particular, the Court of Appeal decision in *R (Corner House Research) v Secretary of State for Trade and Industry*
- [2005] EWCA Civ 192 , the leading English authority in this area, he concluded at paragraph 25:- "Other than in children cases, I am not aware of any public law cases, however, in which Protective Costs Orders have so far been made in Jersey in advance of the hearing. Nonetheless in my judgment there is absolutely no reason why, in an appropriate case, they should not be made, and most of the principles in the English cases which I have mentioned above would seem to have just as much force in Jersey. In my judgment, it is right in an appropriate case that they should be applied." 11. The particular issue in *Flynn v Reid* was whether a protective costs order was appropriate in a private law case, an issue which does not arise here. Bailhache summarised the decision in *Corner House* in this way at paragraph 5:- "5. The Court of Appeal made a full order, protecting *Corner House* from having to pay any costs if it lost. The basis for the decision was that if the Court had not taken that course, the issues of public importance that arose in the case would have been stifled by the fear of an adverse costs order, and the case would never have been brought. The guidance given by the Court of Appeal was in these terms:- (i) A Protective costs Order (PCO) may be made at any stage of the proceedings, on such conditions as the Court thinks fit, provided that the Court is satisfied that: (a) The issues raised are of general public importance; (b) The public interest requires that those issues should be resolved; (c) The applicant has no private interest in the outcome of the case; (d) Having regard to the financial resources of the applicant and the respondent, and to the amount of costs that are likely to be involved it is fair and just to make the order; and (e) If the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. (ii) If those acting for the applicant are doing so pro bono, this would be likely to enhance the merits of the application for PCO. (iii) It is for the Court, in its discretion, to decide whether it is fair and just to make the order in the light of these considerations. (iv) It is likely that a cost capping order for the claimant's costs will be required in all cases other than those where the claimant's lawyers are acting pro bono and the effect of the PCO is to prescribe in advance that there will be no order as to costs in the substantive proceedings whatever the outcome. When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the Court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a party with the benefit of a conditional fee agreement is concerned, of any additional liability. The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and

a fee for a single advocate of junior counsel status that are no more than modest. The overriding purpose of the exercise of this jurisdiction is to enable the applicant to present its case to the Court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the Court considers that it is in the public interest that an order should be made. In the course of giving his judgment, Lord Phillips MR referred to the Law Commission Consultation Paper Administrative Law: Judicial Review and Statutory Appeals (Law Com No. 126) (1993) in which the Law Commission picked up upon suggestions that judges should have the power to award costs out of central funds in civil cases, particularly where there was no other source from which they could be paid and the interests of justice so required, and that the Court should be empowered to grant legal aid for the application for leave or for the substantive hearing. Indeed the Commission itself recommended that costs should be available from central funds for a successful party and in favour of an unsuccessful applicant where the case had been allowed to proceed to a substantive hearing on the basis of a public interest challenge or for the purpose of seeking an advisory declaration. However the Commission's proposals were not accepted by government, which at that time was perceived to have led to a gap in the Court's ability to do justice." 12. Considerable doubt has subsequently been expressed by the English courts as to the requirement that the applicant should have no private interest in the outcome of the case as discussed in the judgment of Bailhache at paragraphs 10-13. 13. There can be no doubt that in the applications brought by Mr Le Cornu and Mr Risoli, an issue of general public importance was raised. Advocate White rightly described these as "public proceedings", addressing an undetermined and important question of law, which affected the validity of the election. There was a requirement that the public should have confidence in the election. 14. Mr Le Cornu and Mr Risoli submitted, and I accept, that they had no personal pecuniary interest in the application. They would, of course, have benefited if the application had been successful in the sense only that they could have put themselves forward again as candidates in any new election that was ordered, as could any other qualified person, but in my judgement, that does not constitute a private interest in the sense described in *Corner House*. 15. The possibility of applying for a protective costs order was not known to Mr Le Cornu and Mr Risoli, who continued with their applications and by so doing exposed themselves to very considerable financial risk. The issue of all of the parties' exposure to costs should have been raised and considered at the earliest opportunity. There are a variety of orders that can be made, and each case will turn on its own facts, but in my judgment, Mr Le Cornu and Mr Risoli, having raised an issue of general public importance, would have had a good case for being protected against an adverse costs order. 16. It was important that the validity of Mr Wickenden's election, having been questioned publicly on what were *prima facie* valid grounds, be resolved in early course and not be subject to the possibility of Mr Le Cornu and Mr Risoli either not bringing the application or having brought it, withdrawing the same out of fear of the financial implications, which as can be seen, can be very considerable. They were representing themselves and were not given the opportunity of seeking such protection.

For this reason, and taking into account the circumstances of the case in general, I do not think it fair that Mr Le Cornu and Mr Risoli should be ordered to pay Mr Wickenden's costs. 17. At the same time, I do not think it is fair that Mr Wickenden, who was successful, should have to pay his costs. I accept that on the facts of this case it was reasonable for him to seek legal representation, representation that was of assistance to the Court, although it must not be assumed that it will always be reasonable for respondents in his position to do so. The benefit of an early hearing in relation to costs is that these issues will be flushed out, hopefully enabling parties to know in advance what financial risks they are taking. 18. The issue then arises as to who should pay Mr Wickenden's costs. Mr Le Cornu questioned whether the Court had the power to make any order for costs under the Civil Proceedings (Jersey) Law 1956 ("the Civil Proceedings Law") as we said these were not civil proceedings in the ordinary sense. There is no merit in that suggestion as made clear in the decision of Sir Michael Birt, then Bailiff, in *Larsen Oil and Gas Drilling Limited v Comptroller of Income Taxes*

[2015] JRC 001 , where it was held that Article 2(1) of the Civil Proceedings Law applied to "all proceedings" unless they are a criminal cause or matter. The applications brought by Mr Le Cornu and Mr Risoli are therefore civil proceedings, giving the Court full power under Article 2(1) to determine by whom and to what extent costs are to be paid. 19. It is the case that the electoral officer of the parish made an error in confirming that Mr Wickenden's nomination form was valid and the Constable confirmed to me that the Parish was insured to meet any order that might be made against it. As Advocate White pointed out, however, the Court has made no findings against the Parish and although the Constable was present in Court, I do not feel that I have had the benefit of full argument as to why the Parish should be penalised, particularly, when as made clear in *Pearce* , the responsibility for the validity of the form rests ultimately with the candidate. 20. In *Channel Island Knitwear Company Limited v Hotchkiss*

[2001] JLR 570 , the Court of Appeal confirmed that it could exercise a jurisdiction pursuant to Article 16 of the Court of Appeal (Jersey) Law 1961 (which is similar to Article 2(1) of the Civil Proceedings Law) to make an order that the costs of the respondent be paid out of public funds, notwithstanding that the State was not in any form a party to the proceedings. In what were private law proceedings, it was held that the jurisdiction to order the costs of a party to be paid by the States was only to be exercised in the most exceptional cases, namely where serious injustice had occurred in the lower court, causing severe financial hardship to the litigant seeking the order. That stricture has no application to a case such as this, which raises an issue of general public importance. 21. In *AG v Dunlop*

[2015] JRC 007 , the respondent was given her costs out of public funds. The case was concerned with whether she qualified for admission to the Bar, but the Attorney General's application raised an issue of statutory interpretation, which went beyond the private interests of the respondent. As mentioned above, in *Flynn v Reid* , a private law case, an order was made

for the payment of the parties' costs out of public funds. The Solicitor General had been convened and neither contested the jurisdiction of the Court to make that order nor the exercise of the Court's discretion. 22. In this case, the Attorney General, whilst here to assist the Court, was not convened as a proper party as such, nor had any other public authority, apart from the Parish of St Helier (through the Constable), been convened, and as Advocate White observed, there has been no finding against any public authority. That does not detract from the power of the Court to order costs to be paid out of public funds in an appropriate case. As Bailhache pointed out in Flynn and Reid at paragraph 31, the Civil Proceedings Law permits the Court to make an order against the States for payment of costs notwithstanding that the States are not, under any emanation, a party in the proceedings. In my view, it is appropriate to make such an order here. I therefore order that Mr Wickenden's costs of and incidental to the applications of Mr Le Cornu and Mr Risoli be paid out of public funds on the standard basis. Authorities Le Cornu and Risoli -v- AG

- [2014] JRC 256 . Public Elections (Jersey) Law 2002. Ani v Barclays Private Bank and Trust Limited and AG
- [2004] JLR 165 . Watkins and Connell v Egglshaw and Four Others
- [2002] JLR 1 . Flynn v Reid
- [2012] (2) JLR 226. AG v Pearce
- [2007] JRC 223A . Pilling and others v Reynolds and others
- [2008] EWHC 316 (QB). Flynn v Reid
- [2013] JRC 112 . R (Corner House Research) v Secretary of State for Trade and Industry
- [2005] EWCA Civ 192 . Civil Proceedings (Jersey) Law 1956. Larsen Oil and Gas Drilling Limited v Comptroller of Income Taxes
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