JERSEY / JUDGMENT

Pitmans -v- JEP and 1st Jersey Limited [2013] JCA 236 (27 November 2013)

[2013] JCA 236

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Court of Appeal 27 November 2013 Before : James W. McNeill, Q. C., President; John Martin, Q. C., and; Sir David Calvert-Smith, Kt. Between Mrs Shona Pitman First Applicant Mr Trevor Mark Pitman Second Applicant And Jersey Evening Post Limited First Respondent st Jersey Limited Second Respondent Application for leave to appeal out of time. The Applicants on their own behalf. Advocate D. P. Le Maistre for the First Respondent. Advocate D. S. Steenson for the Second Respondent.

JUDGMENT

calvert-smith ja: 1. This is the renewal of an application for leave to appeal out of time against a decision of the Royal Court following refusal by Beloff JA, sitting as a single judge. The chronology so far 2. The first applicant has been a Deputy in the States since 2005. The second applicant, who is her husband, was sworn in as a Deputy in early December 2008. 3. On 24th December, 2008 the Jersey Evening Post ("JEP") carried a Christmas advertisement from an agency wishing its clients a Happy Christmas and informing the public of the date on which its offices would reopen after the holiday. It took the form of a cartoon depicting a number of Jersey personalities including the applicants. 4. The depiction of the applicants consisted of a rosette with their surname on it which was drawn below their faces. Pound signs were drawn on the "petals" of the rosette. Above their heads was written "4 x the salary darling!" 5. The applicants took exception to the advertisement and sued the JEP and its parent company, the first and second Respondents, for defamation. 6. The trial took place in April 2012 in the Royal Court before Sir Charles Gray, Commissioner, and Jurats Le Breton and Milner. The Court announced its decision at the end of the trial. The reasoned Judgment was delivered on 10th May, 2012. The claim was dismissed with costs. 7. 5 days after judgment was given the second applicant asked questions in the States of Jersey of the Attorney General concerning a Report compiled by the former Chief Executive Officer of Buckinghamshire Council - the "Sharp Report" - regarding members of staff at Victoria College and the failure, as the applicant put it, to take appropriate action against a member of staff in 1996. Though no reference was made in the States to the present proceedings, the juxtaposition in time suggests that this request was the beginning of an attempt to use the present case as a vehicle for questioning the suitability of individual Jurats, such as Mr Le Breton, to sit on cases; Jurat Le Breton having been Vice-Principal of the school the subject of the report. 8. Two days before the time for an appeal expired on 10th June, the then

advocate for the applicants wrote to the Bailiff concerning the possibility of an appeal based upon "connections" between the two Jurats and the Guiton group of companies - of which the respondents are part - which were "close enough to have made it inappropriate [for Jurat Le Breton] to have sat on the case". The letter was worded in such a way as to try to preserve the position of the applicants in case they needed to make an application to appeal out of time. The Deputy Bailiff replied in a detailed letter explaining the policy and practice of Jurats who consider that they may be conflicted in respect of a case and referring to the need, if an appeal is being contemplated, to disclose the correspondence to the Court of Appeal. In the applicants' bundle is a document recording an internet search of the Guiton Group of companies recording the directors of the group. The search was carried out on 1st July. 9. The correspondence involving the advocate continued. The last letters to her, of which we are aware, are dated 3rd and 11th July 2012. Sometime between that date and the 15th July 2012 it seems that the applicants dispensed with her services and have continued to pursue matters on their own. It was not disputed before us that the applicants had also engaged specialist defamation counsel from England during the trial. 10. On 25th July, 2012 the Bailiff replied to a letter from the plaintiffs of 15th July (which is not in the bundle) informing them once again in the plainest terms that, if they wished to allege bias on the part of one or other of the Jurats, they should do so by way of appeal to this court. The Notice of Appeal with which we are concerned was dated almost one year later, 5th July, 2013. 11. Correspondence then continued, throughout the rest of the year 2012 until May 2013, between the applicants and various parties in an attempt to persuade, respectively, the civil authorities in Jersey, a Minister of Justice in England, and the Chief Minister and the Lieutenant Governor of Jersey, to take steps to annul or void the trial owing to actual or perceived bias on the part of the Jurats, in particular Jurat Le Breton. All the respondents referred the applicants to the need to mount an appeal if they wished to challenge the decision of the Royal Court. 12. The time for lodging a notice of appeal had of course expired on 10th June, 2012, one month after judgment. The Notice of Appeal was served on 5th July, 2013. The question of leave to appeal out of time was considered by Beloff JA who gave judgment on 30th July, 2013. He refused leave. Notice of their intention to renew their application was submitted on 4th September, 2013. 13. In October 2013 the applicants submitted applications asking the Court:- (i) To ask certain witnesses to attend to be cross-examined by the applicants at their appeal. (ii) To order disclosure of information concerning the directors of the Guiton Group. (iii) To adduce further documents. 14. The applications were refused by McNeill JA, sitting as a single judge, on 11th November, 2013 in respect of i) and ii) and some of the documents in iii). The admissibility of the remaining documents in iii) was to be decided in due course if the application for leave to appeal out of time was granted. The judgment of Beloff JA 15. Although not an appeal from the judgment of Beloff JA, it is only appropriate for us to refer to his own approach. Having, by way of preliminary observation, noted that the grounds of appeal did not complain of any misdirection of the Jurats or perversity in the verdict, Beloff JA set out the factors, drawn from paragraph 10 of the judgment of the Court of Appeal in England in Sayers v Clarke Walker

[2002] 1 WLR 3095 , which should guide a court considering application to appeal out of time. We repeat them here:- "Under the pre-CPR regime the practice of this court was conveniently summarised in note 59/4/17 of the 1999 edition of the Supreme Court Practice in these terms: "It is entirely in the discretion of the Court to grant or refuse an extension of time. The factors which are normally taken into account in deciding whether to grant an extension of time for serving a notice of appeal are : (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if time for appealing is extended and (4) the degree of prejudice to the potential respondent if the application is granted (see CM Stillevoldt BV v El Carriers Inc [1983] 1 WLR 297 ...) ... Where the delay in serving notice of appeal is short and there is an acceptable excuse for it, an extension of time will not be refused on the basis of the merits of the intended appeal, unless the appeal is hopeless: Palata Investments Ltd v Burt & Sinfield Ltd

[1985] 1 WLR 942. In Norwich & Peterborough Building Society v Stead [1991] 1 WLR 449 and Mallory v Butler [1991] 1 WLR 458 the Court of Appeal held that: ...

(4) The settled practice of the Court is to assess and take into account the merits of the proposed appeal in deciding whether or not to grant an extension of time for appealing (subject to the qualification in the Palata case (above)." 16. Beloff JA went on to point out that the courts in this jurisdiction have consistently adopted a similar approach, citing the cases of Barker v Barclays Bank plc

[1989] JLR N 2B and B v N 2002/135. No suggestion has been made to us that these are not the appropriate considerations. We have therefore examined them and Beloff JA's findings in respect of them:- (i) Length of delay. It was incontestably the fact that more than a year elapsed between the court's decision and the first Notice of Appeal. (ii) The reasons for the delay. The grounds now relied on came to the attention of the applicants in the summer of 2012. The last information on any matter concerning the Jurat's fitness to sit on the case was clearly in the hands of the applicants by mid-July 2012. If the Notice of Appeal had been put in soon after that with an explanation for the delay it may be that the Court would have granted the necessary extension. As it was very nearly a year went by - as the applicants concede - while they implemented a conscious decision to pursue an extra-judicial route rather than to appeal. That decision cannot amount to an excuse for delay. The suggestion that the applicants as non-lawyers had no means of pursuing the appeal does not hold water. They had access during the trial and after it to lawyers of great competence. They are Deputies of the States of Jersey and not in the class of citizen, as the second applicant has demonstrated before us, who cannot express themselves or argue a case. It is the case that at times during the last 18 months the applicants have suffered bereavements, and illnesses both of themselves and of close relatives. With those problems, like Beloff JA, the Court has great sympathy. However they do not stand, and are not really put forward, as justifying the decision to ignore the clear route to appeal and to expend time and energy on the "extra-judicial" or "political" route they pursued until July of 2013. (iii) The chances of the appeal succeeding if time for appealing is extended. This

is where the applicants have focused their attention and is the consideration upon which Beloff JA's judgment focused. In short he found that:- (a) The mere fact that Jurats will have encountered parties to proceedings, let alone people with a possible interest in the outcome of proceedings is hardly, in a small jurisdiction like this one, likely to raise eyebrows. (b) There was no evidence of the acquaintance being such that a "fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased." (Lord Hope in Porter v Magill

[2002] 2 AC 357 at paragraph 103). In coming to that conclusion he examined the evidence of the relationship between the Jurats and a woman named Sally Le Brocq. The evidence before him - and before us - revealed:- (1) That until 2012 Ms Le Brocq had been a non-executive director of the Guiton Group which owns, among things, the company JEP. (2) That until 2010 Ms Le Brocq had been a Jurat. (3) That Jurat Le Breton had enjoyed the hospitality, with others, of Jurat Le Brocq once in 2009 and once in 2011 (4) That Jurat Le Brocq had been a guest, with others, at the home of Jurat Le Breton and his wife in 2011. (5) That Jurat Le Breton, although he knew that there had been a time when Jurat Le Brocq was connected to Guiton Group, had no knowledge of the length or the nature of that connexion. (6) That Jurat Milner is slightly acquainted with Jurat Le Brocq. She believed that Jurat Le Brocq may have or may have had a connexion with the JEP but she has never accepted hospitality from her. 17. In addition to the allegation that Jurat Le Breton and Ms Le Brocq were too closely acquainted Beloff JA considered the allegation that was made against Jurat Le Breton alone. The facts alleged in support of this allegation are - in summary:- (i) In 1998 when he was appointed a Jurat, Jurat Le Breton was unsuitable for such appointment because of acts or omissions of his and others' in connection with a scandal involving a teacher at the school of which he was then (in 1996) the Vice-Principal. Thus, it is said, any decision of his, but certainly this one, in that 14 years' service is tainted by those acts or omissions. (ii) Even if, since the existence of these acts and omissions was then unknown to members of the Electoral College, he was properly appointed, his appointment should have been terminated once the Sharp report, which exposed the alleged omissions of the Jurat and others at the school, became known within government circles on the Island. 18. In his judgment Beloff JA found that:- (i) It is not for this court to go behind the decision of the Electoral College to appoint a particular Jurat, let alone, retrospectively, somehow to disqualify a retired Jurat and annul all or some of the decisions to which he was a party. (ii) In any event the complaint is "parasitic" , depending on an allegation that if the Jurat once behaved over-favourably to a friend in the past he may have done so again in the case of Jurat Le Brocq. 19. The applicants submit that the facts support their principal grounds of complaint, and, in support of this application, that Beloff JA's summary of facts was erroneous. The renewed application for leave to appeal 20. The grounds of this application, as we understand it from the submissions made to us, are now 7 in number. In summary they allege:- (i) A failure to apply the criterion in Porter v Magill properly in respect of the relationship between Jurat Le Breton and Jurat Le Brocq. (ii) A failure properly to assess the weight of the Sharp

Report in respect of Jurat Le Breton, a consideration which should result in any decision in which he was one of the decision makers over his fourteen years in office being quashed if challenged on appeal. (iii) The fact that the applicants are well-known on the island for their part in campaigning against child abuse, such as to incur the hostility of many. (iv) Errors of fact and assessment of the evidence within the judgment of Beloff JA. The applicants submit:- (a) To rely, as Beloff JA did, on the decision of the Electoral College to appoint him as a complete answer to their complaint about Jurat Le Breton being allowed to sit as a Jurat at all, was wrong, since the findings of the Sharp Report would not have been known to the College in 1998; (b) Beloff JA accepted the opinion of the Bailiff, Sir Michael Birt, as to the abilities and integrity of Jurat Le Breton as though this were demonstrable fact rather than mere opinion, and that a balanced and fair look at the material now supplied to the court belies that statement of opinion. (c) The judgment accepts the respondents' submissions on the nature and strength of the relationship between Jurat Le Breton and Jurat Le Brocq, and suggests in particular that material provided by them suggests that Jurat Le Brocq is (or at least was at the time of the trial) still a director of the Guiton Group. (v) Inadequate representation by the advocate instructed at trial and subsequently on behalf of the applicants; who was perhaps unwilling to "take on" the establishment on the Island. We note that whilst suggested in written argument this was not seriously pursued before us. (vi) The judgment of the Royal Court does not satisfactorily explain how the conclusion of the Jurats was reached that the advertisement was not defamatory, and, in oral argument, a complaint that there was no alternative to a finding that the words were in fact defamatory. (vii) The facts:- (a) that contradictory evidence as to the intended meaning - rather than the effect - of the part of the advertisement complained of was given by the editor Mr Bright and Mr Trower the author of the words complained of; and (b) that the Commissioner wrongly, on 26th March, 2012 refused permission to allow evidence to be called from witnesses to say what meaning they attributed to the words of the advertisement. 21. The applications were resisted by both respondents, represented by Advocates Le Maistre and Steenson, who suggested that this late application to appeal is an attempt to put off the day when the applicants have to pay the costs ordered following the trial. Both rely on the reasoning of the single judge, reminding this court that the single judge found not only that the Appeal was far too late but that there was no or no realistic prospect of the appeal succeeding. They asked us also to consider dicta on the role of Jurats from the case of Le Boutillier v Minister of Planning and Environment

[2012] JRC095, at paragraphs 18 and 23:- "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." And a little later from Paragraph 23:- "……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." Decision 22. As to Grounds i-iii - the "Jurat" points:- We have carefully reconsidered the evidence supplied to us and the treatment of this issue in the judgment of the single judge and have come to the same conclusions as he did. The facts summarised above (paragraph 16(iii)(b)) go nowhere near establishing the sort of interest and relationship between the two former Jurats or between Jurat Le Brocq and the respondents as to give rise to the conclusion set out in Porter v Magill (above). 23. Although the point made on the chronology by the applicants is correct in that it is clear that the conclusions of the Sharp Report would not have been known to the Electoral College at the time of the election of Jurat Le Breton, the key finding, namely that it is not a matter for this court to "disqualify" Jurats appointed by the College, is in our judgment correct, for the reasons given by Beloff JA and by others in the exhibited correspondence. The fitness of a Jurat generally to be a Jurat is not a matter for this Court. The propriety of a Jurat taking part in a particular trial may be. In addition we agree with Beloff JA's finding that this complaint is in any event "parasitic" and does not bite on the main complaint. We have read the Sharp Report and the three mentions in it of Jurat Le Breton. We note that there is no criticism, express or implied, of the Jurat in the Report, and nothing in it to lead to the conclusion that it made the continued service of Jurat Le Breton as a Jurat improper. 24. Ground iii, like grounds v-vii, is new, having not been raised in the original grounds in front of Beloff JA or supported since by evidence predating the trial. It is clearly put in very late as a make-weight and it has no bearing on the allegation of bias which was based on the fact that the Jurat complained of was a friend and colleague of a person later convicted of sexual offences. 25. As to Ground iv: It is wrong to state that Beloff JA accepted the commendation of those who spoke at the retirement of Jurat Le Breton as being justified. Neither the Bailiff in the exhibited correspondence, nor Beloff JA in his judgment, were, on a proper construction of their words, doing anything more than inform the applicants that there was no other evidence of potential for bias or of unsuitability for office of Jurat Le Breton in his 14 years' service of which they were aware. Indeed the applicants have not put before the court any previous case in which the Jurat's fitness to serve over that period of service has been called into question because of the Sharp Report findings. 26. The suggestion that as the great granddaughter of the founder of the JEP Jurat Le Brocq would have attempted to influence the finding of a court hearing an action for defamation is unsupported by any evidence. 27. As to Ground v: This

allegation is also made, so far as the court is aware, for the first time in this appeal. If the applicants wished to complain of the conduct of their advocate in respect of their appeal they should have done so long ago so that they could if they wished have waived their privilege and the advocate concerned could then have responded to the complaint. In oral submissions the applicants did not put this forward strongly in any event. We therefore can attach no weight to it. 28. As to Ground vi: After setting out the evidence and the arguments on both sides, the judgment of the Royal Court makes it clear (at paragraph 32) that the Jurats considered the following relevant considerations against the burden and standard of proof which the applicants needed to discharge:- (i) This was an advertisement, not an article in the political section of the newspaper. (ii) The advertisement was in the form of a Christmas card and contained references to other public figures in a humorous context. (iii) Politicians such as the applicants will be expected by reasonable members of the public to be robust in the face of comment and dispute. (iv) The applicants are in fact well paid as Deputies. (v) The words and the expressions on the faces of those depicted and the overall content of the advertisement. (vi) The "threshold of seriousness." It is abundantly clear therefore that the Jurats were properly instructed to consider relevant matters and came to their conclusion by weighing them and applying the burden and standard of proof upon which they had been directed. This ground, if it was to be argued, could and should have been set out in a Notice of Appeal within days of the judgment when the applicants were still legally represented. 29. Accordingly we find nothing in these Grounds to support the contention that the ultimate decision is inexplicable. 30. As to Ground vii:- The Commissioner specifically, and, if we may say so with respect, entirely correctly, directed the Jurats (paragraph 31 of the Judgment) that the intention of those who published the advertisement was entirely irrelevant, as was the attitude of the applicants. What the Jurats had to consider was whether the plaintiffs had proved on the balance of probabilities that "the words and/or images complained of would make the ordinary reasonable reader think the worse of the plaintiffs" . (Paragraph 14 of the Judgment). Accordingly the fact that different witnesses may have put different interpretations on the meaning of the words in the cartoon was neither here nor there and the Commissioner was also right to rule out the evidence sought to be called by the applicants as to what they thought the words meant. The cases are clear, as the passages from Gatley on Libel and Slander (11th ed) put before us make plain. 31. In short, a finding that the words meant what the applicants then contended and have contended before us they meant does not mean that any reasonable tribunal would find them to have been defamatory once the context was considered. Once again this Ground, if it had any validity at all, should have been the subject of a Notice of Appeal either before the trial or, at the very latest, before 10th June, 2012, when the applicants were still legally represented. General considerations 32. As was made clear to us in the oral submissions of the Applicants, their view after the decision against them was that the justice system had failed them and they determined to follow a political route. They were entitled to take that view. The fact that the political route did not produce the result for which they hoped neither indicates that there are inherent problems with the political

route, nor results in the judicial system being obliged to permit an otherwise time-barred appeal to proceed. The Applicants and their advisors were well aware of the time-limits. They were also aware of arguable grounds of appeal relevant to the decision against them within or close to those time-limits. It appears that for more than a year they made a conscious decision not to follow the judicial route, but well within that year they were aware that the political route had not delivered the result they wanted. There is no reason apparent to us for their failure to pursue the judicial appeal process apart from their view that the justice system had failed them. In our opinion that is not a relevant justification for excessive delay. The applicants' choice was rational; but the fact that it has not yielded a result satisfactory to them does not provide justification for their not pursuing the most obvious ground of an aggrieved litigant - of which they were well aware - that of an appeal. 33. This application for leave to appeal out of time is therefore dismissed. Authorities Pitman-v-JEP and 1 st Jersey Limited

[2013] JRC 092 . Pitman-v-JEP and 1 st Jersey Limited

[2013] JCA 149 . Sayers v Clarke Walker

[2002] 1 WLR 3095 . CM Stillevoldt BV v El Carriers Inc

[1983] 1 WLR 297. Supreme Court Practice 1999 Edition. Barker v Barclays Bank plc

[1989] JLR N 2B. B v N 2002/135. Porter v Magill

[2002] 2 AC 357 . Le Boutillier v Minister of Planning and Environment

[2012] JRC 095 . Gatley on Libel and Slander 11th ed. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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