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UPDATE

Developments in the remedy of judicial review in Guernsey

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This update considers two notable recent decisions of the Guernsey Court of Appeal and Royal Court that provide helpful guidance on the time limits within which any claim for judicial relief should be made.

Judicial review was recognised as an available remedy in Guernsey in December 1998 in the case of *Bassington Limited et al v Her Majesty's Procurer*. In the aftermath of that historic decision, there was some concern that the courts might be inundated with applications for judicial review, but those concerns have proven to be unfounded. The number of such cases is still low.

The last 12 months have, however, seen the significant decisions of *Litchfield v Director of Environmental Health and Pollution Regulation* (Court of Appeal, 10 September 2014) (Litchfield) and more recently, *Mrs Susan Groucutt v The Minister of the Environment Department of the States of Guernsey and Lavinia Holdings Limited* (Royal Court, 3 July 2015) (Groucutt). In their respective judgments, the Guernsey Court of Appeal and the Royal Court have provided helpful guidance by elucidating, in particular, the very important issue of delay, and the time limits within which any claim for judicial relief should be made.

Time limits for bringing an application

In Guernsey there is no specific time limit for bringing an application for judicial review. The 2004 Practice Direction provides that an application must be made 'promptly'. No further guidance is given as to what 'promptly' means.

In England and Wales, the Civil Procedure Rules also provide that an application must be made 'promptly', however, the CPR additionally states that, in any event, such an application should be made no later than three months after grounds first arose (or within six weeks when dealing with the decision of a planning authority or the Secretary of State). However, the Royal Court is not bound by such defined limits and flexibility is favoured.

Delay

In Litchfield, the Guernsey Court of Appeal confirmed that what is 'prompt' depends upon the circumstances of the particular case, and whilst a period of three months may be an appropriate guide 'there may be cases which are so urgent that even a delay of three months may be too long'. In that case, the applicant was appealing a decision of the Royal Court to refuse leave for the judicial review of a decision to issue a licence (by the Director of Environmental Health and Pollution Regulation) for permission to use a waste wood incinerator to heat glasshouses.

The applicant had taken four months to obtain an expert's report in support of their application and a further four months to obtain a second more satisfactory report. The applicant then delayed a further three months to see if the respondent would change its position. The application was eventually filed three months later (11 months after the decision had been taken).

The Court of Appeal decided that there was insufficient material before it to conclude the delay was reasonable. No evidence was filed to explain why it took so long for each expert report to be produced and

the court did not consider it reasonable for the applicant to delay issuing her application by three months, whilst awaiting the respondent's comments on the second expert report.

Litchfield therefore, reaffirms the court's flexibility to determine promptness. It is prudent for any prospective applicant to progress their application swiftly. Where there has been delay, the burden is on the applicant to show good reasons for that delay. Any prejudice or detriment to a third party (if relief is granted) is a factor for the court to consider, although the extent of any prejudice or detriment may not be known until the substantive decision is heard.

The 2015 position: Groucutt

The case of Groucutt concerned the grant of planning permission to Lavinia Holdings Limited (Lavinia), by the board of the Environment Department (the Board), for the redevelopment of a private residential plot in Guernsey. Most planning decisions in Guernsey are made by officers under delegated powers, but due to the sensitivity of the project, Lavinia's planning application was heard by the Board at an open meeting, at which objectors (including the applicant) made representations.

The proposed works were extensive and involved the demolition of an existing dwelling and the rebuilding of a substantial private dwelling in its place. Planning permission was granted subject to numerous stringent conditions, all of which were acceptable to Lavinia. The neighbour of the property immediately abutting the redevelopment site, Mrs Groucutt, complained that her enjoyment of her property would be affected if the development was permitted. She objected to the Board's decision on the grounds that the decision makers did not have sufficient information before them.

Mrs Groucutt was not a party to the Lavinia's planning application and so had no remedy to appeal the Board's decision under local planning laws. She therefore, sought judicial review of the Board's decision to grant Lavinia planning permission.

Following Litchfield, the court considered Mrs Groucutt should have had the period of three months 'firmly in mind' when considering whether to bring an application and 'that this might be a case where even greater urgency will be required'.

However, nine weeks after the Board's decision to grant planning permission, the applicant sent a letter before action to the Environment Department inviting them to reconsider their decision. The court considered this approach to be misguided, given the requirement for prompt action under the 2004 Practice Direction. The Environment Department provided a detailed letter of reply one week later and specifically reserved their right to raise delay in the event proceedings were issued. Lavinia also submitted that leave should be refused because the applicant had taken far too long to bring her application.

The applicant's Cause was filed 12 weeks after the grant of planning permission. Unfortunately, the application did not comply with the 2004 Practice Direction because it was not accompanied by affidavit evidence. Evidence was eventually filed 10 days later, more than three months after the date of the planning permission.

The court found that there was undue delay on the part of the applicant and declined to grant leave for judicial review. The court considered that the circumstances of the case were such that a period of 10 weeks from the date of the decision was ample time within which the perfected application should have been made. In his judgment, Deputy Bailiff McMahon confirmed that the court 'requires the parties to cooperate with each other to ensure that cases are dealt with justly … however, it is important for the parties to be realistic and to have in mind any deadlines by which action must be taken'.

If a party chooses to send a letter before action in a judicial review matter, it runs the risk that the court will conclude it has chosen an inappropriate course of action, given the requirement to act promptly. In the case of planning decisions, the court confirmed that any approach to the decision maker should be made almost immediately. In any event 'the reasonableness to engage with the decision-maker will depend upon the likelihood of getting a positive outcome'. In Groucutt, the court found there was really no scope for the Environment Department to reconsider its decision to grant planning of its own motion. This was because Lavinia's third party rights were engaged and because the statutory framework for Guernsey planning decisions gave little scope for such a course of action.

Conclusion

An application for judicial review must be brought without delay, and regard had to the full provisions of the 2004 Practice Direction. Whilst a period of three months from the decision complained of may be taken as a long stop indicator, there is no fixed time limit within which an application should be issued in Guernsey. The circumstances of the case may require action to be taken within a much shorter time frame. A period of three months should not be relied upon. The advice to anyone aggrieved by a public law decision which they consider adversely affects their rights, is to get advice immediately. Applications for relief against planning decisions should be treated with particular urgency. If applicants 'sit on their rights' and do not take prompt action to issue an application for relief, then whatever the merits of their substantive case, the Royal Court may not provide them with a remedy because the application has not been made 'promptly'.

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