STATES OF JERSEY

EX GRATIA COMPENSATION PAYMENT: MR. AND MRS. R. PINEL (P.29/2009) – COMMENTS

Presented to the States on 30th March 2009
by H.M. Solicitor General

STATES GREFFE

2009 Price code: B P.29 Com.(2)

COMMENTS

LEGAL ADVICE FILED BY HER MAJESTY'S SOLICITOR GENERAL

INTRODUCTION

1. This document contains legal advice for the benefit of the Assembly on legal aspects of the Report annexed to Proposition P.29/2009 ("the Report"). Whether or not this Proposition is accepted is of course entirely a matter for the Assembly and naturally no view on that is expressed in this advice.

2. The Report refers to 2 cases that were heard by the Royal Court (one of which went to the Court of Appeal) and makes observations about those cases and draws inferences about the conduct of the Court that heard them, and in particular about the conduct of the Bailiff who presided in both cases. Some of those observations or inferences may come, in my opinion, from an incomplete understanding of the cases, the procedure of the courts, and the legal principles that apply. The purpose of this document, therefore, is to offer legal advice on those matters and consequently a legal opinion on some of the comments and inferences about the cases made in the Report.

3. The 2 cases were (using the description of the parties set out in the Report):

   A. Mr. A and Mrs. A (Applicants) v Minister for Planning and Environment (Respondent) heard on 17th November 2006 before the Bailiff sitting alone ("**the Leave Application**"); and
   B. Mr. A and Mrs. A (Plaintiffs) v Reg's Skips Limited (Defendant), judgment given on 11th December 2007, before the Bailiff (presiding) and Jurats Tibbo and Morgan ("the ***Voisinage* Case**").

   Furthermore, the Report also deals with an argument and decision about costs at the end of the *Voisinage* Case ("the **Costs Argument**") and this is also mentioned below.

CONCLUSIONS

4. I will set out the advice and reasons in more detail below but, in summary, on an analysis of the judgments of the court in the two cases in my opinion:

   A. On the facts of the Leave Application it was correct application of the law for the Bailiff to refuse leave on the grounds that there was an adequate alternate remedy and to tell Mr. A and Mrs. A what that remedy, in his opinion, was. His function as a judge in such a matter required him to do so.

   B. On the available information no adverse inference can safely be drawn about the reasons for the decision of the Bailiff to make no order as to costs.

   C. I am unable to draw any inference from facts of the Leave Application or as stated in the Report about whether or not the Bailiff should, in all the circumstances and applying the correct test, have recused himself from sitting. The judgment in the Leave Application does not,

however, suggest or lead to the inference that the Bailiff was in fact biased in favour of Mr. A and Mrs. A as he determined that application against them.

D. On the facts of the *Voisinage* Case the Bailiff as a matter of law and practice was not prevented from sitting on that case by reason of the fact that he had previously sat on the Leave Application. Mr. A and Mrs. A and/or Reg's Skips Limited had the opportunity to apply to the Bailiff to recuse (disqualify) himself. They did not apply to do so.

E. From the judgment of the *Voisinage* Case it cannot be inferred that the Bailiff made any findings personally about the quality of Mrs. A. as a witness or about any other witness. The findings expressed by the Bailiff in the judgment as findings of fact would have been the findings of the Jurats.

F. From the judgment of the Court of Appeal in the *Voisinage* Case I can see no basis to suggest that the Court of Appeal did not deal fully, independently and correctly with the case before it.

G. From the judgment of the *Voisinage* Case it is clear that the Royal Court had considerable sympathy for the predicament of Mr. and Mrs. Pinel.

H. The Court of Appeal Judgment in the Costs Argument makes it clear that the order for costs against the Minster for Planning and Environment was set aside on legal principle and the non-involvement of the Minister in the litigation and not, as inferred in the Report, because a "dangerous" precedent would be set.

DISCUSSION

The Leave Application

5. To understand what the Court did in the Leave Application it is necessary to understand the nature of that case. It was an application for leave to bring a case of Judicial Review. In other words Mr. and Mrs. A were seeking the permission of the Court to bring a case before it in which they would then ask the Court to overturn a decision or decisions of the Planning and Environment Department. There are certain features of all applications for leave to bring a case of Judicial Review:

A. Such applications in Jersey are always dealt with by a judge sitting alone. Sometimes the judge deals with such an application and grants or refuses leave in chambers on the strength of the documents submitted by the applicants alone and without hearing the parties. Sometimes, as here, the judge deals with the application in open court and allows the parties to make submissions.

B. The judge makes no findings of fact. He assumes, for the purposes of the application, that the facts alleged by the applicants are correct unless they are obviously not so. Accordingly, he hears no evidence,

merely argument on the assumption that the facts as stated by the applicants are correct.

C. The judge is exercising a discretion as to whether or not to grant leave. He must determine whether or not the applicants have passed a threshold test before he gives leave.

D. Among the matters that a judge must consider is whether or not the applicants have an adequate alternative remedy available to them. Judicial Review is a last resort and leave will not be granted if such an alternative exists. If an adequate alternative remedy is available the judge will invariably refuse leave.

E. If the Judge grants leave then he will give directions to enable the Judicial Review to be dealt with. He would not, in such circumstances, be prevented from sitting on the main case simply because he had dealt with the application for leave.

F. If the Judge refuses leave then the applicant can appeal against that refusal.

6. In the present case it is clear that the Bailiff decided the Leave Application by refusing leave on the basis that there was an adequate alternative remedy. A review of the judgment reveals that it was understandable why he did so. The applicants had themselves spoken in their application about a private law "nuisance" claim and did not give any reason as to why such a claim had not been pursued.

7. The fact that the Bailiff, when refusing leave, characterised the alternate remedy as a claim not in "nuisance" but as a claim in "*voisinage*" was echoed by the court in the slightly later case of Gale and Another v Rockhampton Apartments Limited and Another [2007 JLR 27] in which the Bailiff set out the law relating to *voisinage* and stated, amongst other things, that the English technical terms such as "nuisance" should not be used in cases relating to *voisinage* as they are "apt to mislead". That case was upheld on appeal by the Jersey Court of Appeal in Rockhampton Apartments and Another v Gale and Another [2007 JLR 332] (Beloff, Vaughan and McNeill JJ.A. sitting).

8. It would have been wrong, in my opinion, for the Bailiff to refuse the application of Mr. A and Mrs. A. for leave to bring a case of Judicial Review on the grounds that they had an adequate alternate remedy available but then not to have told them what he believed that remedy was. He had an obligation to explain his reason for refusal.

9. The statement that there was an adequate alternate remedy to pursue does not suggest that such a case if brought would be successful. It is a simple statement that in the opinion of the Court the applicants have another avenue to pursue instead of Judicial Review to seek to establish their position. Mr. A and Mrs. A were legally represented during the Leave Application. Accordingly they should have been entirely aware that the judge was not and could not have been suggesting that any case they brought would not have all the attendant risks of litigation, including the risk that they might not be successful.

10. **Accordingly, in my opinion, it was a correct application of the law for the Bailiff to refuse the Leave Application on the grounds that there was an adequate alternate remedy and to tell Mr. A and Mrs. A what that remedy, in his opinion, was.**

11. The order about costs: It is queried in the Report why the Bailiff did not order costs against Mr. A and Mrs. A when he refused their application for leave. No reasons appear in the judgment of the court and accordingly I can draw no certain inferences. By way of general observation, however:

A. Who pays costs and to what extent is entirely within the discretion of the Court.

B. Costs are usually awarded in favour of the successful party but it is far from unusual for costs to be apportioned or for there to be no order as all as to costs (meaning each party bears his own costs).

C. It is not clear from the judgment whether or not any order for costs was sought by the Minister for Planning and Environment. It may not have been. It would be unusual for the court to make an order for costs if it was not asked to.

D. The application was against the Minister for Planning and Environment and the hearing was short.

12. **Accordingly, in my opinion, on the available information no adverse inference should be drawn from the decision of the Bailiff to make no order as to costs in the Leave Application.**

13. Conflict: The Report questions whether or not it was in order for the Bailiff to sit to hear the Leave Application because of what is said to be a "close family connection" with Mr. A and Mrs. A. As no point was taken about that matter in the Leave Application itself it is difficult to comment and I can draw no certain inferences. By way of general observation, however:

A. A judge would be expected to be alive to any matters that may make it difficult to exercise his office impartially.

B. A judge would be expected to consider questions of conflict and if the judge believes that there are any such matters that would impinge upon the duty to deal with the matter impartially he is able to step down or "recuse" himself from the case.

C. If a party wishes to challenge a judge on the basis that he should recuse himself then the party can do so.

D. The Royal Court (Commissioner Southwell presiding) in the case of Hirschfield v Abacus (C.I.) Limited and others [2000 JLR 420] set out principles dealing with the recusal of a judge (it is always the judge presiding who considers first whether or not he should step down although a decision by that judge could be appealed). Amongst the principles he identified were the following:

i. If a judge has a direct personal interest in the outcome of the case bias is presumed to exist.

ii. If the judge has no direct personal interest in the outcome then the question arises as to whether or not there exists what is described as an "apparent bias".

iii. The test to be applied in deciding if there is "apparent bias" is the objective test of "reasonable suspicion" namely, would a reasonable, objective and informed person on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.

iv. The burden is on the applicant to establish bias.

v. The reasonableness of that apprehension must be assessed in the light of the oath of office of the judge to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.

vi. An impartial judge is a fundamental prerequisite to a fair trial and he should not hesitate from recusing himself if there are reasonable grounds on the part of the litigant for apprehending that the judge was not or will not be impartial.

vii. Judges should not accede with too much readiness to suggestions of apparent bias.

viii. No application should be made to recuse a judge without strong grounds to support it.

14. It would have been open to Mr. A and Mrs. A or to the Minster for Planning and Environment to apply to the Bailiff to recuse himself from sitting had they wished to do so. In deciding any application to recuse himself the Bailiff would, amongst others, have had regard to the principles set out above. No such application was made.

15. The Bailiff refused the Leave Application of those persons with whom the Report states that he had a "close family connection". In effect Mr. A and Mrs. A lost.

16. **Accordingly, I am unable to draw any inference from the facts of the Leave Application or as stated in the Report about whether or not the Bailiff should, in all the circumstances and applying the correct test, have recused himself from sitting. The judgment in the Leave Application does not, however, suggest or lead to the inference that the Bailiff was in fact biased in favour of Mr. A and Mrs. A. as he determined that application against them.**

The *Voisinage* Case

17. It is suggested in the Report that the Bailiff should not have sat in the *Voisinage* Case because of the information that he had received whilst presiding over the Leave Application. In placing this in context and by way of general observation:

    A. The Leave Application hearing had taken place a year before the *Voisinage* Case. It was set out in a reported judgment and available to the public. I am aware of no reason why it would not have been open to Mr. A and Mrs. A or to Reg's Skips Limited to apply to disqualify or recuse the Bailiff because of his prior involvement in the Leave Application had they wished to do so. Had such an application been made, in deciding whether he should stand down the Bailiff would have applied the principles set out above (paragraph 13D). Reg's Skips Limited had the benefit of legal advice. No such application was made. If any point about conflict is to be taken it is the obligation on the person taking the point to raise the issue at the earliest opportunity.

    B. As mentioned above, in the Leave Application the Bailiff made no findings of fact. Such was not his function; he would have presumed the facts as stated to be correct in order to decide whether or not leave should be granted.

    C. The *Voisinage* Case was the first occasion on which any disputed facts were to be decided on by the Court.

    D. The Court comprised the Bailiff and two Jurats. In the Royal Court it is the Jurats and the Jurats alone who decide the facts of a case. The presiding Judge is only involved in the decision on the facts if the Jurats cannot agree and are therefore deadlocked.

18. It is not unusual for a judge who has sat on a preliminary part of one case (for example an application *ex parte* for an interim injunction where he receives evidence from one side only) to continue to preside over the same case in the main hearing. As in the Leave Application he is not required to make any finding of fact – merely to be satisfied that the facts as alleged (and assuming for the purposes of his decision but not otherwise that they are true) meet a threshold test sufficient to grant the order sought. He can then go on and preside over a hearing in which those facts are challenged and disputed. The determination of the facts is, as said, made by the Jurats.

19. **Accordingly, in my opinion as a matter of law and practice the Bailiff was not prevented from sitting on the V*oisinage* Case simply by reason of the fact that he had previously sat on the Leave Application. Both Mr. and Mrs. A and Reg's Skips Limited had the opportunity to apply to the Bailiff to recuse himself. They did not do so. The fact that the Bailiff had presided over the Leave Application had been public for approximately one year.**

20. The law of *Voisinage*. The Report refers to the law of v*oisinage* as a "subjective law". It is not apparent what this means so I am unable to assist the Assembly with comment. By way of general observation, however, when a court deals with a matter of this nature it generally has to determine what the applicable law is, determine what the facts are, and decide how the law applies to the facts. All of these aspects involve analysis and judgment. I make no further comment on *voisinage* in Jersey law as this is a now the subject of a reference to the Jersey Law Commission following P.1/2009. However, irrespective of whether or not the law of *voisinage* should remain unaltered, in the light of the various judgments of the courts it is clearly currently a significant part of the law of Jersey.

21. Findings of Fact: As mentioned above it is the Jurats who were the judges of fact in the *Voisinage* Case. They will have formed an assessment of the witnesses. The Report asserts correctly that the Bailiff stated of Mrs. A that:

> *"It was clear that she was a person not given to complaining".*

By way of general observation:

A. The presiding judge always gives the judgment of the Court. The Jurats do not deliver a separate judgement on the facts or say anything during the hearing. All interaction between the Court and the parties is conducted through the presiding judge;

B. Any comments made by the Court about the veracity of the witnesses would have been made a result of the Jurats' determinations and views and would not usually be an expression (other than incidentally) of the Bailiff's view.

22. **Accordingly, in my opinion it would be incorrect to infer that the Bailiff made any findings personally about Mrs. A as a witness. The findings expressed by the Bailiff in the judgment as findings of fact would have been findings of the Jurats.**

23. The Court of Appeal: As the Report states, the *Voisinage* Case was appealed by Reg's Skips Limited to the Jersey Court of Appeal (Reg's Skips Limited v Mr. A and Mrs. A [2008 JCA077B] (Dame Heather Steel presiding, Jones and McNeill JJ.A)). The decision to appeal was a matter for Reg's Skips Limited acting with the benefit of legal advice on the merits of any appeal.

24. The Report states that none of the judges of the Court of Appeal had a specific background in the Jersey Law of *voisinage*. Whereas that might be correct, such would also be true of many cases dealing with many issues in the Court of Appeal or even before the Judicial Committee of the Privy Council. The Privy Council is the final court of appeal from Jersey as from many other countries and has to determine the law applicable to and in different jurisdictions. The Judges of the Court of Appeal (as indeed of the Privy Council) are experts in legal analysis and are well versed in identifying the law from the material put before them. In the present case they received the benefit from the submissions of counsel for both parties.

25. In the *Voisinage* Case before the Royal Court the parties accepted that the law of *voisinage* applied to the facts of the case. In the Court of Appeal Reg's Skips Limited changed that position and argued, amongst other things, that the law of *voisinage* did not apply. The Court of Appeal considered all of the arguments advanced by Reg's Skips Limited and upheld the judgment of the Royal Court.

26. **Accordingly, on the available information I can see no basis for any inference that the Court of Appeal did not deal fully, independently and correctly with the case before it.**

The Costs Argument

27. The Report makes a number of points about how the Royal Court dealt with the costs of the *Voisinage* Case. The Report states that the Bailiff was showing some sympathy for the predicament of Reg's Skips Limited in the position that the Court took on costs.

28. It is clear that the Royal Court was indeed sympathetic to the predicament of Mr. and Mrs. Pinel. It said as much in the judgment (paragraph 32 of the judgement) when it said of Mr. and Mrs. Pinel:

> *"We reach this conclusion not without considerable sympathy for Mr. and Mrs. Pinel. They were permitted, if not encouraged, by the Planning Department, to establish their business at Heatherbrae Farm, which they did in good faith."*

In the context of that statement the Court gave the direction that costs should be dealt with after a directions hearing to consider whether or not any other party should be convened.

29. That costs determination took place on 29th April 2008 and the Court subsequently ordered that Reg's Skips Limited should pay the costs of Mr. and Mrs. A on the standard basis but that 25% of those costs could be recovered by Reg's Skips Limited from the Minister for Planning and Environment.

30. **Accordingly the judgment of the Royal Court in the Costs Argument and the terms of its judgment in the *Voisinage* case show that that Court had sympathy for Mr. and Mrs. Pinel's position.**

31. The Minister appealed against that finding to the Court of Appeal and in its judgment of 27th November 2008 that court (Dame Heather Steel presiding with McNeill and Montgomery JJ.A) allowed the appeal and overturned that part of the Royal Court's costs order that provided for a contribution by the Minister.

32. It might be noted that in its judgment in the appeal in the *Voisinage* Case the Court of Appeal had already ordered that a portion of Mr. A and Mrs. A's costs (those relating to a half day wasted by a late change of case) be paid to Mr. A and Mrs. A by the legal advisers of Reg's Skips Limited. The legal advisers were not a party to the proceedings but of course closely involved with them.

33. The final position relating to the costs of the *Voisinage* Case both in the Royal Court and the Court of Appeal is that, except for the portion of costs mentioned in the preceding paragraph, they are due to be paid by Reg's Skips Limited to Mr. A and Mrs. A on the standard basis. This is the usual order that a court will make, to the effect that a successful party receive his costs.

34. As mentioned above the matter of costs is within the discretion of the court and the Royal Court has a full power to determine by whom and to what extent costs are to be paid (Article 2 of the Civil Proceedings (Jersey) Law 1956). Accordingly the Royal Court had the power to order that costs be paid by a person whether or not that person was a party to the proceedings. It was in that context that the Royal Court directed that the Minister be convened and that he be ordered to contribute to the costs.

35. The Report states that the costs order was "vigorously defended by Planning" on the basis that they were "not a party involved in the case…" Whilst this is not inaccurate it is incomplete. The appeal against that order by the Minster was brought in fact on a number of grounds both on principle and related to the facts of the case. The Minister argued that there was no real or sufficient connection with the actions of the Minister and the litigation to justify an order for costs against him nor was there a causal link to the proceedings. He also argued that to expose the Minister to costs by reason of the grant by him of a Planning permission would make the discharge of his duties under the Planning Law extremely difficult. The Minister argued that it was difficult to justify an order for costs against the Minster in these circumstances in the light of the provisions of the Planning Law and the intention of the States when it passed that law. In essence the Court of Appeal accepted that the Minster had not caused the litigation and that the arguments raised under the Planning Law were important points of principle.

36. There is, however, no doubt that a costs order can be made in principle against a person who was not a party to a case. The Royal Court has done so in the past and the Court of Appeal in the Costs Argument set out at some length the circumstances where it might be appropriate to do so. Those circumstances would, however, be exceptional.

37. The Report refers to "consternation amongst the legal community". I cannot comment on that and was unaware of it. If, however, such consternation had been widely expressed it would have been against an unfamiliarity with the law relating to costs orders against a non-party as identified by the Court of Appeal in the Costs Argument.

38. The Report voices the opinion that the "action for Planning to contribute costs was lost on the basis that a dangerous precedent would be set rather than on the merits of the individual case". The Court of Appeal gave a detailed judgment of the reasons for overturning the decision of the Royal Court in the Costs Argument. It determined that the actions of the Minister were not such that put him within the circumstances where it would be appropriate in law to exercise a discretion to order costs against him as a non-party.

39. **Accordingly in my opinion the order for costs against the Minster for Planning and Environment was set-aside on legal principle and not because a "dangerous" precedent would be set.**

H.M. Solicitor General

26th March 2009