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EDITORIAL MISCELLANY

THE INCREASINGLY STRIDENT CRIES OF WOOLF

Lawyers and all concerned with the administration of justice in Jersey should take note of a passage in the report annexed to the recently published Planning and Building (Jersey) Law 200- ("the new Planning Law"). The Planning and Environment Committee state -

"The Committee has found that the system of appeal against a planning decision to the Royal Court is invariably a slow and expensive process which effectively denies a right of appeal to those of limited means, or makes an appeal unworthwhile where the cost of the works to be undertaken are significantly less than the exposure to costs in an appeal to the Royal Court. Accordingly, the Committee proposes the setting up of a Planning Appeals Commission".

When the new Planning Law was debated and adopted by the States on June 6th, 2001 the passage excited no comment and was clearly accepted by members as a self-evident truth. As a result, appeals to the Royal Court from decisions of the Planning and Environment Committee will be abolished and will be replaced by a Planning and Building Appeals Commission which is likely to cost the taxpayer dear. Even the Committee estimated the annual cost at £250,000; some creative accounting assumed that there would be "significant on-going savings" in the administrative costs of the Royal Court but it is not clear how these savings will materialize. In addition no account has been taken of third party appeals, now included as the result of the adoption of an amendment proposed by Deputy Scott-Warren. The annual cost of the new Appeals Commission is unlikely to be much less than £1 million.

The notion that others can do better than courts to resolve disputes between citizens and the state is of course not new. Many jurisdictions introduced Ombudsman-type mechanisms in attempts to resolve disputes involving individuals and departments of the public administration more quickly and cheaply than by recourse to litigation[1]. In Jersey the Administrative Decisions (Review) (Jersey) Regulations were first adopted in 1972. The provisions of those regulations have now been re-enacted in the Administrative Decisions (Review) (Jersey) Law 1982. Under the 1982 Law complaints against administrative decisions may be referred to a Board of three persons selected from a panel appointed by the States, although the decision of such a tribunal is not binding in law upon the respondent committee. Until 1997 the panel was composed of presidents of States committees and other senior members, the theory being that a decision would be submitted to peer review and, if found wanting, would in fact be reversed. The reform of the panel so that it consisted of independent non-States members was thought to enhance the likelihood of committees' accepting the verdict if a particular decision was found to be unreasonable. In practice that has not happened and committees have often maintained decisions in the face of adverse findings; the process of review has thus served only to enhance the dissatisfaction of the aggrieved individual.

Ironically the committee most prone to ignore the finding of a review tribunal has been the Planning and Environment Committee which has now proposed the establishment of the Planning and Building Appeals Commission. Yet under the new Planning Law any

commissioner will have the power to overrule a decision of the Committee and that decision will be final. The persons to be appointed as commissioners must have "the experience and qualifications" [whatever they may be] "necessary to enable the person to carry out the duties of a Commissioner in a professional and impartial manner."[2] One assumes that these persons will be planning experts from England. Whether their decisions will lead to greater satisfaction either on the part of the public or indeed of the committee remains to be seen.

Other tribunals are however also in prospect. The States have approved in principle the establishment of an Employment Tribunal[3] and the creation of a Race Discrimination Tribunal is also said to be under consideration. Again the underlying rationale is the perception that recourse to the courts is too time-consuming and expensive. It must be conceded that this latent criticism of lawyers and the judicial process is not confined to laymen. In *Re Esteem Settlement*[4] the Court of Appeal was highly critical both of counsel and the Royal Court. Southwell JA stated -

"Before I turn to consider in detail the issues arising on the appeal and the application for leave to appeal it is appropriate to make some general observations on the management of these and other proceedings by the Royal Court and by the advocates appearing in that Court:-

(1) The 1999 Action has in truth not been managed at all. Nothing appears to have been done between August and November 1999. Thereafter misconceived pleading points (which I described pejoratively in the course of argument as "playing expensive games with pleadings") have so bogged down the progress of the 1999 Action, that one year after the Court of Appeal's order of August 2nd, 1999 there is no finality even in the first pleading, GT's Particulars of Claim, and according to the lax timetable laid down by the Royal Court the time for the filing of Answers is still at least two months in the future.

(2) There is apparently as yet no appreciation that the time when it was acceptable for advocates to play interlocutory games, passing from the Royal Court to the Court of Appeal and back again several times before pleadings were closed, and perhaps more times before the stage of trial was reached, has gone. Such conduct of civil proceedings is unacceptable in the 21st century, because usually the only beneficiaries of such procedures are the lawyers, and not their clients. Indeed it seems to have been assumed that whatever happens the trust fund will bear the costs of all the lawyers. That assumption should no longer apply.

(3) From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be to progress those proceedings to trial in accordance with an agreed or ordered timetable at a reasonable level of cost, and within a reasonably short time".[5]

Viewed in the round the standard of judicial decision-making in Jersey is reasonably high. But in order to produce justice that is accessible to all the process must be simpler, quicker and cheaper. The trend towards creating tribunals which are perceived to have these qualities is unfortunate for at least two reasons. First, the courts are the traditional guardians of the rights of the individual. Both by training and experience judges and magistrates are accustomed to hold the scales of justice between private interests and the requirements of the state. In the context of planning appeals will the decisions of the proposed commissioners be more or less likely to achieve that balance which is the hallmark of an ordered society? The

mechanical application of planning principles is all very well; but the reasonableness of that application in the context of the conflicting demands of the environment and the community is quintessentially a matter for judicial determination.

Secondly, there is the question of expense. The resolution of disputes within the context of the courts naturally has a cost. But the cost of administering the courts is relatively static. The pressure of business and hence the availability of court time may fluctuate but the cost of the system to the taxpayer remains much the same. The creation of parallel bureaucracies of registrars and officials, the provision of premises and support services, not to mention the salaries or fees and expenses of tribunal members will be expensive. So why engage in this process?

The answer seems to lie in the perception that the courts cannot supply the rapid and inexpensive (to the consumer) resolution of disputes which is required. What can be done? Other jurisdictions have shown that the judicial process can be reformed. In England the Woolf reforms have resulted in a substantial shift away from a lawyer-dominated system to one where the judge is clearly in charge not only of the hearing but also of the pre-trial process. Considerable savings in time and cost are said to have resulted. In Singapore the reforms have been even more far-reaching. Most civil actions in that country are now settled or subject to adjudication within twelve months.

In Jersey too some reforms are in prospect which offer hope that the reputation of the courts may be enhanced. Amendments to the RCR 1992 have been drafted and circulated for consultation amongst representatives of the Law Society. The broad purpose of the amendments is to confer power on the Court to manage the litigation. When the time limited for filing pleadings has expired, a plaintiff will be required to issue a summons for directions. If the plaintiff fails to do so, the defendant or other party may issue a summons or apply for the action to be dismissed. In default of any action by the parties, the Court may act of its own motion. At the hearing the Master may consider the preparations for trial and give such directions as to the future course of the action as appears best suited to secure its just, expeditious and economical disposal. The parties and their legal advisers will be under a duty to give such information and to produce such documents as will enable the Court properly to deal with the summons for directions. The draft rules are expected to be approved by the Superior Number of the Royal Court as this issue of the Review goes to print.

Reform of Part XII of the RCR which deals with appeals from administrative decisions is also under active consideration. The existing time-limits are far too long and the whole pleading process is too complicated. Appeals currently take twelve months or more to come on for hearing.[6] This is unacceptably slow. There is no reason why most administrative appeals should not be disposed of within three months from the filing of the notice of appeal. The procedures for judicial review, now to be found at Part XIIA of the RCR,[7] could well be adapted to achieve that end.

Following the enactment of primary legislation increasing the jurisdiction of the Petty Debts Court[8] and the drafting of Rules now under consideration by the Royal Court, it has been mooted that small claims (say under £1000) might be subject to a special regime. That regime would involve an accelerated process possibly involving mediation and a more robustly inquisitorial approach by the Magistrate who would have power to summon witnesses and call for documents off his own bat. The participation of advocates (whose costs can quickly exceed the amount of small claims) would be discouraged, probably by a refusal to award

costs other than in exceptional circumstances. Experience in other small jurisdictions (e.g. Isle of Man and Singapore) has shown that the speedy resolution of small claims leads to much greater satisfaction both on the part of businesses and consumers.

Of course the speedy resolution of disputes is not an end in itself. Some disputes involve complicated issues of law and/or fact and may take longer to resolve. It is a just result that is the aim of the judicial process. But the courts must be able to provide justice within a reasonable time and at a reasonable cost if they are to serve the needs of the community.

EXCESSIVE COSTS AND PUBLIC POLICY

In the preceeding note[9] there is reference made to the problem of legal costs. Because the legal system in Jersey (and, for that matter, that in England and other common law countries) is very man-intensive, it is more expensive than systems elsewhere. Discovery is only one of the processes identified by Lord Woolf as leading to delay, complication and expense. This note refers to a recent decision of the French *Cour de Cassation*[10] in which the French legal system had to consider its reaction to a costs' order obtained in the English courts.

In 1988 a French citizen, Gustave Pordéa, brought defamation proceedings against Times Newspapers Ltd. in the English High Court. The defendant sought, and obtained, an order that Mr Pordéa provide security for the defendant's costs in the sum of £25,000. This security was not provided, and as a result his action was struck out. The defendant then sought, and obtained an order that the plaintiff pay its costs. The costs were taxed at £20,078 plus VAT. The defendant then sought to enforce this order of the English High Court against the plaintiff in France pursuant to Article 31 of the Brussels Convention 1968. The *Cour d'Appel* of Bordeaux declared the judgment enforceable in France against the plaintiff under article 31 of the Convention. Mr Pordéa appealed to the *Cour de Cassation*, which quashed the decision of the lower court on the basis that that court had disregarded article 27(1) of the Brussels Convention and article 6(1) of the European Convention on Human Rights.

Under the Brussels Convention, article 34(2), an application for enforcement of a foreign judgment may only be refused for one of the reasons specified in article 27 and article 28. Article 27(1) provides that a judgment shall not be recognised "if such recognition is contrary to public policy in the State in which recognition is sought". Article 6(1) of the ECHR provides for a fair trial and, in broad terms, for "access to a court". The *Cour de Cassation* referred to article 27(1) of the Brussels Convention and article 6(1) of the ECHR, and criticised the *Cour d'Appel* for holding that the costs' order could be enforced in France, because:

"It was apparent, without it being necessary to review the substance of the foreign decisions, that the substantial amount of the costs thus awarded against Mr Pordéa, whose claim had not even been considered on the merits, was a matter which objectively presented an obstacle to his free access to justice".[11]

In other words, the operation of the English costs' rules in this case infringed Mr Pordéa's rights under article 6 of the ECHR, and thus rendered it contrary to public policy in France within the meaning of article 27(1) of the Brussels Convention, with the result that the English High Court order could not be enforced there.

A number of criticisms can be made of this reasoning, and doubtless our readers are even now reaching for their computer keyboards to write to us about it, but we would just observe that, whatever the merits of the Court's legal reasoning, it does point up a significant difference between the English (and Jersey) legal systems and those on the continent of Europe, i.e. that the legal costs involved in litigation are much higher. And, if the Court is right to say that excessive costs' liabilities objectively impede access to justice sufficiently to engage, and indeed infringe, the rights contained in article 6 of the ECHR, then there is no need for the issue to arise only in the context of the enforcement of a foreign judgment. It could arise even in domestic cases. Once the Human Rights (Jersey) Law 2000 comes into force, will it be open season on the Jersey costs' rule?

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[1] De Smith, Woolf and Jowell, *Judicial Review of Administrative Action,* 5th ed. 1995, paras 1-092 to 1-112; *Halsbury's Laws of England* 4th ed. reissue, vol. 1(1), paras 41- 49

[2] Article 107(4) of the new Planning Law

[3] See States Minutes 1999 page 185 and 2000 page 804

[4] 2000 JLR N-41, July 27th, 2000 unreported

[5] *Ibid* at para 31

[6] *Le Maistre v Planning & Environment Committee* (noted at page 306 of this issue) took 15 months from the filing of the notice of appeal to judgment. *De Gruchy & another v Planning & Environment Committee* (interlocutory proceedings in which resulted in a judgment from the Master on April 4th, 2001) was an appeal filed on March 28th, 2000. As this issue went to print it had still not come on for hearing.

[7] See R&O 10/2000

[8] Petty Debts Court (Miscellaneous Provisions) (Jersey) Law 2000

[9] [2001] 5 JL Review 226

[10] *Cass. 1er Civ. 16 mars 1999, N° 92, Pordéa c/ Société Times Newpapers*

[11] [2000] 1 L Pr 762 at 765