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SHORTER ARTICLES

STATUTORY TIME LIMITS, JURISDICTION AND *EMPÊCHEMENT*

Robin Gist

On the proper construction of the Housing (Control of Occupation) Guernsey Law, 1994, the period for bringing an appeal under s 56 of that Law was two months immediately following the date of the notice giving the decision, and that time limit could not be extended pursuant to the court's inherent jurisdiction, the court's Civil Rules or otherwise. While the principle of empêchement might be invoked to "modify" the time limit expressed in the primary legislation, it did not benefit the appellant on the facts of this case.

A. Introduction

1 The question of whether the court retains a discretion, either by virtue of its inherent jurisdiction, customary law or otherwise, to extend the time prescribed for the doing of an act by primary legislation (a "statutory time limit") was recently addressed by the Royal Court in *Carr v Housing Dept (Minister)*.[1]

2 The judgment appears, potentially, to address an issue of particular importance in the Bailiwick given the preponderance of statutory time limits, often in relation to a right of appeal. Section 11(4) of the Aviation (Bailiwick of Guernsey) Law, 2008, for example, sets out that "An appeal under this section shall be instituted—(a) within a period of 28 days immediately following the date of the Director of Civil Aviation's decision." There is no provision within the law for the discretionary extension of that time limit. Interestingly, s 68(4) of the Land Planning and Development (Guernsey) Law, 2005, provides that an appeal to the Planning Tribunal must be made within a time limit of six months for certain decisions (s 68(4)(a)), but provides for time to be extended by agreement in other circumstances (s 68(4)(b)). In an

[1] [2012] Royal Court of Guernsey, 15 August.

altogether different sphere, the Companies (Guernsey) Law, 2008 sets out various time limits without power to extend the same, for example, applications to the court under ss 345 or 346, or an application to apply to set aside an action of the Registrar pursuant to s 511 (although query whether, this time limit being "Subject to any direction given by the Court", there is not in fact provision for extension of this time limit by the court).

B. Housing control appeals

3 The Housing Control laws have contained a right of appeal in relation to decisions made by the Housing Department since their inception. The Housing Control (Emergency Provisions) (Guernsey) Law, 1948 ran to only six sections, one of which—s 2—provided that an appeal shall lie to the Royal Court from any refusal to grant a housing licence. Interestingly, a statutory time limit for such appeal was not introduced until the Housing (Control of Occupation) (Guernsey) Law, 1982 was specifically amended by the Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1990.

4 Since that amendment, the section providing for a right of appeal has remained the same. The current incarnation—the Housing (Control of Occupation) (Guernsey) Law, 1994 (the "1994 Law") sets out by s 56(2) that—

> "An appeal under this section shall be instituted by way of summons which shall set out the material facts upon which the appellant relies and which shall be served upon the President of the Authority within a period of two months immediately following the date of the notice giving the decision of the Authority."

C. Statutory time limits considered

5 In *Carr v Housing Dept (Minister)*, in which judgment was handed down by the Deputy Bailiff on 15 August 2012, the court gave consideration to the question of whether s 56(2) should be construed as providing the court with jurisdiction to entertain a purported appeal in circumstances where the statutory time limit provided by that section had not been complied with.

The facts

6 It was common ground that the Minister of the Housing Department (the "Department") had hand-delivered a "Decision Letter" dated 16 May 2012 to Mrs Carr refusing her request for a housing licence on non-employment grounds. On a strict interpretation of s 56(2), therefore, Mrs Carr had until 16 July 2012 to serve a summons on the

Department in order to institute an appeal. Her summons was not in fact served until 23 July 2012.

7 As a result of the late service, the Department made an application to strike out the purported appeal on grounds that the court had no jurisdiction to hear such purported appeal served, as it was, out of time, meaning that pursuing the matter (the Department argued) would amount to an abuse of process. Mrs Carr, in turn, made a cross-application for an extension of time for service of the summons, attempting to invoke the court's inherent jurisdiction.

Mucelli v Government of Albania

8 The Department, in asking the court to find that a statutory time limit goes to the very jurisdiction of the court, and so is strict and cannot be extended, relied, in the absence of any authority from the Bailiwick, on the House of Lords decision in *Mucelli v Government of Albania*.[2] *Mucelli* comprised two conjoined appeals relating to time limits in appeals under the Extradition Act 2003.

9 The failure, in *Mucelli*, to file a notice of appeal within the very short prescribed period of seven days had the consequence that the purported appellant would be extradited without further right of appeal. This is particularly notable since, in giving the *Carr* judgment, the Deputy Bailiff reminded himself of the warning provided by Southwell, JA in *Perkins v States Housing Auth*[3] that the powers given to the Department under the 1994 Law are draconian and must be exercised with care and sensitivity to avoid any abuse of those powers.

10 The Deputy Bailiff considered the leading judgment of Lord Neuberger of Abbotsbury who, having rejected the contention that powers provided by the CPR can be invoked to extend a statutory time limit or to avoid service required by statute unless the statute so provides, stated—

> "Accordingly, it would be necessary to find some statutory basis for the court having power to extend time, or indeed to dispense with the service which section 26(4) requires. The only arguable such basis is to be found in the words 'in accordance with the rules of court', which, it is contended, incorporate the various provisions of the CPR to which I have just referred. I cannot accept that argument."[4]

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[2] [2009] UKHL2.
[3] CA, (1995) 20 Guernsey Law Journal 66.
[4] *Ibid*, at para 75.

11 As the Deputy Bailiff noted, their Lordships were not, however, unanimous. The Deputy Bailiff, accordingly, considered the dissenting judgment of Lord Rodger of Earlsferry, who felt that with a relatively short but utterly rigid time limit, the potential for substantial injustice was striking—

> "If the intention was, on this occasion, to ignore these realities and impose a rigid deadline for service, I would again have expected the Bill to say so in clear terms. Members of Parliament could then have seen that this was what they were being asked to enact and could have pondered the consequences."[5]

12 The Deputy Bailiff, while reminding himself that the Royal Court need not be bound by the House of Lords' decision could, however, find no reason to adopt Lord Rodger's dissenting view and preferred the majority view. As the Deputy Bailiff pointed out, accepting the Department's submissions, had the legislators intended that there be a discretion to extend time, they would have inserted such a provision in the Law as is seen, for example, in s 17 of the Employment Protection (Guernsey) Law, 1998 (as amended). Indeed, the English cases Mrs Carr attempted to rely upon did not assist her since the relevant legislation in those cases contain provisions allowing such extensions.

No relief from Civil Rules

13 Equally, the Deputy Bailiff found that he could not pray in aid of Mrs Carr the Royal Court Civil Rules, 2007, since those procedural rules (allowing in certain circumstances extensions of time) could not trump the 1994 Law.

No possibility of waiver

14 Accordingly, the time limit set out by s 56(2) of the 1994 Law could not be extended, and the time limit for service expired on 16 July 2012. The Deputy Bailiff further accepted the Department's submission that the time limit was not one that could be waived by the Department (had it wished or attempted to—another point raised by Mrs Carr) for the reasons set out by Lord Denning, MR (as he then was) in *Dedman v British Bldg & Engr Appliances Ltd*[6]—

> "Even if the employer is ready to waive it and says to the tribunal: 'I do not want to take advantage of this man. I will not take any point that he is a day late'; nevertheless the tribunal

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[5] *Ibid*, at para 7.
[6] [1974] 1 All ER 520.

> cannot hear the case. It has no power to extend the time . . . The tribunal is not competent to hear it."

D. *Empêchement*

15 The judgment given in *Carr* is also important for the Deputy Bailiff's findings on the customary law principle of *empêchement d'agir*. This was the last way in which Mrs Carr could avoid her appeal being struck out. The Department "very fairly conceded" that the principle of *empêchement* (literally, impediment) might apply. Mrs Carr argued that there might be two *empêchements* to consider—first that, as a result of human error, she was confused as to the date by which she had to serve her summons; and secondly that, as a result of her impecuniosity, it was impossible to serve the summons before 23 July 2012 (HM Sheriff requiring a fee to effect service).

Human error

16 As to human error, the Deputy Bailiff dismissed this on the evidence before him without needing to consider whether the same could amount in law to an *empêchement* since it demonstrated, in essence, that Mrs Carr was well aware of the date by which she had to serve her summons.

Impecuniosity

17 As to impecuniosity, the Deputy Bailiff took Mrs Carr's submission at its highest. Accepting for the moment that she was in fact impecunious, could this amount to an *empêchement*?

18 The Deputy Bailiff gave consideration to the leading cases on *empêchement*, and adopted, as he directed himself that he must (see, for example *Holdright Ins Co Ltd v Willis Corroon Management (Guernsey) Ltd*[7], and *Yaddehige v Credit Suisse Trust Ltd*[8]), the test as set out by the Jersey Court of Appeal in *Public Servs Cttee v Maynard*,[9] and *Boyd v Pickersgill & Le Cornu*,[10] that—

> "(c) Mere ignorance does not bring the maxim into operation . . . (d) Where there is an impediment creating such a practical impossibility of which ignorance is a part, then the maxim may come into operation and prevent time running." [11]

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[7] 25 August 2000.
[8] 2007–08 GLR 282.
[9] 1996 JLR 343.
[10] 1999 JLR 284.
[11] *Maynard*, *per* Southwell, JA at 354.

and—

> "the epithet 'practical' deployed in *Maynard* softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact, not in theory, possible."[12]

19 The Deputy Bailiff, having noted that he was unaware of any decision pointing to impecuniosity as an *empêchement*, pointed out however that "the maxim can be applied to new circumstances".[13]

20 Nevertheless, the Deputy Bailiff took the view that it would be wrong to extend the maxim of *empêchement* to impecuniosity. He was not satisfied that it amounted to an impediment such that the clock should stop. Even if the Deputy Bailiff was wrong about that, he held that, on the evidence before him, Mrs Carr had not in fact been impecunious, and during the period of time in question her finances could have permitted payment.

All factors together

21 Having considered the two impediments raised separately, the Deputy Bailiff considered whether, taken together and at their very highest (for Mrs Carr), an *empêchement* was made out. However much he tried to fit Mrs Carr's circumstances into the maxim of *empêchement*, however, the Deputy Bailiff could not conclude that it was, at any time, impossible for Mrs Carr to serve her summons on the Department. Accordingly, *empêchement* failed, also, to save Mrs Carr's appeal, which was dismissed.

Robin Gist has recently moved to Guernsey to work for the Law Officers of the Crown. Called to the Bar of England and Wales in 2004, he remains a door tenant of Lamb Chambers, London, where he had established a successful chancery.

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[12] *Boyd*, *per* Beloff, JA at 291.
[13] *Maynard*, *per* Southwell, JA at 351.