12 pages.

ROYAL COURT
(Samedi Division) 62A
28th March, 1996
Before: The Judicial Greffier

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| Between | John Arthur Burnett Bower | Appellant |
| And | The Planning & Environment Committee of the States of Jersey | Respondent |

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**Application by the Respondent to strike out the Appellant's Notice of Appeal and Case pursuant to Rule 6/13 of the Royal Court Rules 1992, as amended, and pursuant to the inherent jurisdiction of the Court.**

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Advocate N.M. Santos-Costa for the Respondent;
Mr. J.A.B. Bower appearing personally.

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JUDGMENT

THE JUDICIAL GREFFIER: In November, 1994, it was brought to the attention of the Respondent that certain works were being undertaken, or had been undertaken, for which development permission had not been granted. Eventually, after some correspondence between the parties, on 19th July, 1995, the Respondent, exercising the powers conferred on it by Article 8(1) of the Island Planning (Jersey) Law, 1964, as amended, served upon the Appellant a Notice to either:

(a) *Face the existing unauthorised blockwork wall at Les Buttes, bordering La Rue des Buttes, St. Mary, with granite; remove the gate and pillars, and seal up the existing unauthorised access by construction of a granite faced wall of the same height as the remainder of the roadside wall, all to the satisfaction of the Planning & Environment Committee. or*

(b) *Reduce the height of the existing unauthorised wall bordering La Rue des Buttes, St. Mary, to the height which existed before the unauthorised work took place; remove the gate and pillars and seal up the existing unauthorised access by construction of a granite faced wall of the same height as the remainder of the roadside wall, all to the satisfaction of the Planning & Environment Committee, before the : 22nd October, 1995.*

On 19th September, 1995, the Appellant served a copy of a Notice of Appeal on the Greffier of the States. The Notice of Appeal read as follows:

*"TAKE NOTICE that in exercise of the right of appeal conferred by Art.21, Island Planning Law, 1964.*
*I am appealing to the Royal Court against your decision on to comply with the alternative set out in the attached notice on the grounds that work on granite facing is already in progress but owing to problems with the contractors it is unreasonable to expect completion by the 22nd. October, 1995.*

*See attached Affidavit"*

The Affidavit which was attached to the Notice of Appeal began as follows:-

" *AFFIDAVIT*

*I, John A.B. Bower of Les Buttes, St. Mary, do hereby state and swear:*

*That consequent upon the enforceed sale of land to the East of the property "Les Buttes" which area is designated "Jardin De L'est" agreement on access to Les Buttes was reached between the then owner of Les Buttes, A. Le B. Bower and the I.D.C. Committee at that time.*

*The Agreement was that the existing "Breque" on to Rue Des Buttes be retained and defined of walls would be adjusted to the height of the wall owned by Mr. Bower dividing the properties. I J.A.B. Bower as Tennant at the time was consulted on these matters and in detail."*

It appears from these documents that although the ground of appeal specified in the Notice of Appeal was in relation to the fact that the Notice served by the Respondent was to expire on the 22nd October, 1995, and alleged that that gave insufficient time to complete either of the alternatives set out in the Notice, the Affidavit contained an additional ground of appeal which was to the effect that an agreement was reached between the IDC of the day and the Appellant's father in relation to an opening on to Rue des Buttes and in relation to the height of the wall adjoining Rue des Buttes.

The Committee subsequently lodged its Statement and the Appellant instead of lodging a document entitled "Appellant's Case" lodged a document entitled "Reply to Committee's

Statement Submitted as a Matter of Courtesy". Paragraph 3 of that document reads as follows:-

> *"3. Of (3). Whereas it is not disputed that information was received, or that a site visit may have occurred, it is averred that permission to restore and regularise the roadside and adjacent boundaries was agreed with a former Committee during the period 1976-77 during the development of Jardin de l'est, and will be shown in discovery."*

Paragraph 3 mentioned above appeared to be clarifying the allegation contained in the Affidavit attached to the Notice of Appeal.

The Respondent issued a Summons dated 5th and 14th March, 1996, in which the Respondent sought to strike out the Appellant's claim under Rule 6/13 (a), (b) and (d) of the Royal Court Rules, 1992, as amended. Paragraph 2 of the Summons sought additionally or alternatively that I make such Order as I considered fit. The Respondent, in its Summons, did not expressly appeal to the inherent jurisdiction of the Court in relation to striking out but it seemed to me that the wording of paragraph 2 of the Summons together with the general intention under paragraph 1 of the Summons to strike out was sufficient to allow this to be brought into play.

Mr. Peter Charles Field Thorne, the Director of Planning and Building Services and an officer of the Respondent, had sworn an Affidavit in support of the application which Affidavit was dated 5th March, 1996. Paragraph 3 of that Affidavit reads as follows:-

> *"3. **THAT** the Reply refers in paragraph 3 thereof to an agreement with the Respondent during the period 1976 to 1977 in respect of restoring and regularising the roadside and adjacent boundaries during the development of Jardin de l'Est. I can confirm that as far as we are aware from the documents on the relevant files we have no evidence, whether documentary or otherwise, to support such an agreement nor has the Appellant at any time provided any such evidence."*

Paragraph 4 of the Affidavit reads as follows:-

> *"4. **THAT** after examining the said files carefully it is clear that the Respondent was adamant that no entrance/exit*

*onto La Rue des Buttes be allowed and this is confirmed by the following:-*

*(i) Condition 3 contained in the Planning Permission granted in respect of application E dated 13th June 1974 in connection with Field 572, Rue des Buttes, a copy of which is exhibited hereto and marked "PCFT1", reads as follows:-*

> *"That the formation of a new vehicular access onto the main road on the south side of the site is not approved, and all means of vehicular access to the site is to be confined to the existing private road on the north boundary of the site." (emphasis added);*

*(ii) A letter dated 13th June 1974 from John Beaty on behalf of the Respondent addressed to Advocate Clyde Smith in relation to application E, a copy of which is exhibited hereto and marked "PCFT2", which emphasises that the Respondent was not prepared to agree to the formation of a new vehicular access onto the main road; and*

*(iii) Condition 5 contained in the Approval of application E dated 28th November 1974, a copy of which is exhibited hereto and is marked "PCFT3", reads as follows:-*

> *"That the roads and footpaths are to be laid to the standard specification of the Department of Public Building and Works and are to comprise a road of 16' in width with a footpath on one side, and the provision of a turning head of appropriate size. 14 days notice is to be served on the Department of Public Building and Works before commencement of work on the site."*

*This condition refers only to an access onto a minor road as opposed to La Rue des Buttes as was illustrated on the plan that was submitted with this application."*

The Appellant swore an Affidavit in response to Mr. Thorne's Affidavit which was dated 26th March, 1996. In paragraphs 4 and 6 of that Affidavit he raised new points and issues which had not been mentioned either in the Notice of Appeal or in the Affidavit attached thereto or in the Reply to the Respondent's Statement.

However, in paragraph 5 of that Affidavit Mr. Bower, quite rightly, made the point that any conditions imposed upon the planning permission dated 13th June, 1974 granted to Balcon Limited or in the development permission dated 28th November, 1974, granted to Balcon Limited were not strictly binding upon the property "Les Buttes" which was retained by the Appellant's father and which is now owned by the Appellant. That submission is undoubtedly correct. However, the point that Mr. Thorne was seeking to make in his Affidavit was that the fact that various conditions were attached to the above-mentioned consents and the terms of the letter written by Mr. Beaty to Advocate Clyde-Smith dated 13th June, 1974, were an indication, in themselves, that it was most unlikely that any consent would have been given for the opening of any new entrance on to La Rue des Buttes from the property "Les Buttes" retained by the Appellant's father.

In Paragraph 7 of Mr. Bower's said Affidavit he states that it was not possible for him to formulate a comprehensive appeal as the Respondent had been refusing him access to the files which they held. In his submissions, the Appellant indicated that there were files held by the Respondent, by Messrs. Ogier & Le Masurier, who had formerly acted for the Appellant's father, and by the lawyers who had previously acted for the Jurats who had been appointed in the *Remise des Biens* of the Appellant's father which had led to the sale of land and outbuildings to the east and to the north of the property "Les Buttes" currently owned by the Appellant. It is to be noted, in this connection, that the correspondence between the Respondent and the Appellant commenced in November, 1994, and that at the date of the hearing of this Summons, the Appellant had had sixteen months in which to seek to obtain access to any relevant papers held by Messrs. Ogier & Le Masurier or on behalf of the said Jurats in the Remise. It is also clear from the Affidavit sworn by Mr. Thorne that the Planning & Environment Committee files do not hold any documents which would tend to disclose any agreement along the lines alleged by the Appellant.

In his verbal submissions to me the Appellant gave an account of what had happened in relation to the areas to which the Notice served by the Respondent relates. The Appellant said that originally there was a wall of uniform height running along the boundary with La Rue des Buttes and that inserted in the wall, at one point, was what he described as a "breque". This was actually a kind of step in the wall to enable a person to step up from La Rue des Buttes and then to step over the wall into the garden in front of "Les Buttes". The height of the ground was always higher inside the wall than it was on the surface of La Rue des Buttes. In 1974 or 1975, he had lowered the height of the existing wall in the area of the "breque" so that the top of the wall was about the height of the ground of the garden in front of "Les Buttes" and had inserted some gates therein. The purpose of this was so that a tractor could drive off the main

road on to the front garden of "Les Buttes" in order to deliver manure, etc. Once the sale of land and outbuildings to the east and to the north had taken place, the area to the south of the property "Les Buttes" being the front garden thereof, could not be reached without going through the house. Subsequently, about six years ago the Appellant had constructed a block wall on the inside portion of the remainder of the wall adjoining La Rue des Buttes of the same height as the eastern boundary wall of "Les Buttes" and the height of this was no more than five foot ten or five foot eleven above the level of the ground of the front garden of "Les Buttes".

During his original submissions to me, the Appellant made no substantial points in relation to the question as to whether he had been given sufficient time in order to complete the work required in the Notice. However, later he indicated that the contractor owed him some money and that he was trying to get him to do the work as part of what was owed.

In relation to the matter of the alleged agreement, the Appellant said that during the negotiations which had been taking place for the sale of the land and outbuildings to the east of "Les Buttes" in 1974, a Mr. Lyons had been the financier behind the development company. The issue had arisen as to how the Bower family were to gain access for manure, etc, to the front garden of "Les Buttes" once the sale had been completed and the issue also arose as to the height of the boundary walls to the south of the said garden adjoining La Rue des Buttes. The Appellant said that Mr. Lyons had said that he would see Mr. John Beaty, an officer at that time of the Island Development Committee, and that he subsequently told the Bower family that what they wanted to do had been agreed with Mr. Beaty. There was no allegation on the part of the Appellant of any direct conversation or correspondence on the matter between himself or his father and Mr. Beaty. The Appellant also accepted that no formal application had ever been made to the Island Development Committee in relation to what the Bower family proposed to do.

It would have been of great assistance to me if all this had been set out by the Appellant in his Affidavit. Nevertheless, in making my decision in relation to this matter I was able, thanks to the Appellant's frankness in relation to these matters, to make an assessment of the strength of his case.

There now exists, in Jersey, a line of cases in relation to the inherent jurisdiction of the Court in Jersey on a striking out application and in relation to the test as to whether a case is frivolous, vexatious or an abuse of process of the Court and should therefore be struck out. Unfortunately, all these cases were heard before me and have not yet, to my knowledge, been tested before the Royal Court. The first such case was that of

Le Cocq v. Gillespie (1991)JLR N.5. The brief report reads as follows:-

*"PLEADING - striking out - extent of court's jurisdiction.*

*There is a close link between striking out a matter as being frivolous, vexatious or otherwise an abuse of the process of the court and exercising what is known as the court's inherent jurisdiction to stay any proceeding. The court has inherent jurisdiction going beyond the strict interpretation of r.6/13 of the Royal Court Rules, 1982, which is comparable to the full breadth of like jurisdiction afforded in England, provided that such jurisdiction is not incompatible with the Rules. Thus, after admission of affidavits and examination of the facts, the court may strike out any action which the plaintiff clearly cannot prove and which is without solid basis and/or any proceeding based solely on speculation (1 the Supreme Court Practices 1991, para. 18/19/18, at 339-341, considered)."*

The second case was Mauger v. Batty (9th October, 1995) Jersey Unreported. In that case, after correcting an error which existed in the Le Cocq v. Gillespie Judgment which had become apparent after the Bastion Offshore Trust Company Limited v. Finance & Economics Committee case (1991) JLR Notes 1, I went on to quote the relevant principles from the 1995 White Book as follows:-

*"Accordingly, I am proposing to apply those principles and I am now quoting various relevant sections from the 1995 White Book beginning with part of section 18/19/36 but omitting most case references, as follows:-*

*"(1) 18/19/36 Inherent Jurisdiction - Apart from all rules and Orders, and notwithstanding the addition of para. (1)(d), the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process. In such cases, it will strike out part of an indorsement of a writ; or set aside service of it or will stay, or dismiss before the hearing, actions which it holds to be frivolous or vexatious; and removes from its files any matter improperly placed thereon. And this jurisdiction is in no way affected or diminished by this rule.*

*(2) 18/19/37 Exercise of jurisdiction -*
*(1) Discretion - The power to stay or dismiss an action under the inherent jurisdiction of the*

*Court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O.18, r.19. The jurisdiction is not limited to cases in which the facts are not in dispute. A judicial discretion must be used as to what proceedings are vexatious; for the court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle. The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed.*

*(2) Evidence - When application is made to the inherent jurisdiction of the Court, all the facts can be gone into; and affidavits as to the facts are admissible; Remmington v. Scoles [1897] 2 Ch.1, where it was only by extraneous evidence that Romer J. was convinced that it was a sham defence that ought to be struck out as an abuse of the process of the Court. In a proper case the Court will exercise the power, even though the application be out of time. In a case where an alleged infringement of patent was based on what the plaintiffs reasoned (without any evidence) that the defendants must have done, it was held that on the question of inherent jurisdiction, the Court is entitled to look at evidence, and after looking at evidence that the plaintiff's case was speculation, and accordingly the action was struck out (Upjohn Co. v. T. Kerfoot and Co. Ltd. [1988] F.S.R. 1).*

*(9) Spurious claim - Any action which the plaintiff clearly cannot prove and which is without any solid basis, may be stayed under this inherent jurisdiction as frivolous and vexatious. Thus, the House of Lords dismissed an action which appeared to it to have been brought to try a hypothetical case, but with no costs to either side. And when either party to an action has made repeated frivolous applications to the Judge or Master, the Court has power to make an order prohibiting any further application by him without leave. But if the action be clearly vexatious or oppressive, the proper course is to dismiss it."*

*Advocate Begg, on behalf of the Plaintiff, urged me not to strike the action out as this would have the effect of depriving the Plaintiff of the ability to cross-examine the Defendant and Mr. Frankel on their affidavits.*

*It is clear to me that the Plaintiff will have great difficulty in proving her case in the face of the affidavits which have been sworn by the Defendant and by Mr. Frankel to the effect that no individual was identified in any conversation and to the effect that nothing defamatory was said or understood of the Plaintiff. However, I have to ask myself the question as to whether the Plaintiff's case is so based on speculation and a case which the Plaintiff clearly cannot prove and which is without any solid basis so as to permit it to be struck out under the inherent jurisdiction.*

*I have come to the conclusion that, although the Plaintiff's case is weak, it is not so speculative or so hopeless as to warrant my striking it out either under the inherent jurisdiction of the Court or as being frivolous, vexatious or an abuse of the process of the Court and accordingly, I am dismissing the application to strike out."*

The test which I had to apply in this case was identical to that applied in the Mauger v. Batty case. Again I had to ask myself the question as to whether the Appellant's case as currently pleaded is so based on speculation and a case which the Appellant clearly cannot prove and which is without any solid basis so as to permit it to be struck out under the inherent jurisdiction and as being frivolous, vexatious or an abuse of the process of the Court. In this case, I found that the Appellant's case as currently pleaded was and that it should, accordingly, be struck out both under the inherent jurisdiction and as being frivolous, vexatious or an abuse of the process of the Court.

In so finding, I was influenced by the following major factors:-

(a) Firstly, the fact that with a period of almost eight months having expired between the date upon which the Respondent first showed concern in relation to the works and the date of the Notice and with a further three months being allowed for the work to be completed, and with a further five months having expired since the date of the expiration of the period of the Notice, it was not in any way arguable that the Appellant had not had sufficient time in which to comply with the terms of the Notice.

(b) The fact that the conditions attached to the various consents and the terms of Mr. Beaty's letter to Advocate Clyde-Smith dated 13th July, 1974 showed clearly that the IDC of the day was not willing to allow any new opening to be made on to La Rue des Buttes. In the light of those documents and correspondence it was most unlikely that anything would have been agreed by Mr. Beaty.

(c) The fact that the Bower family had no direct knowledge of any conversations between the said Mr. Lyons and Mr. Beaty. The Appellant is therefore relying upon hearsay evidence which will not be admissible at any future trial.

(d) The fact that, in any event, Mr. Beaty could not, in any way, bind the Committee of the day or any future IDC. There is, I believe, clear case law on this point although it was not quoted to me at the hearing.

(e) The fact that the Appellant does not have any evidence to support his contention nor any reasonable prospect of obtaining any such evidence.

(f) The fact that no application was made to the Committee of the day for any formal consent.

(g) The fact that in the case of the increase in height of the wall the work was not commenced until at least 15 years after the alleged agreement.

Accordingly, I struck out the allegations contained in the Notice of Appeal and the Affidavit in support thereof and in the Reply to the Respondent's Statement. I decided that without those allegations the existing pleadings of the Appellant could not continue to exist and, accordingly, struck them out in full. However, I gave the Appellant leave to file an amended Notice of Appeal relating to certain issues which he raised at the hearing which were not contained in his pleadings and leave to apply for leave to file an amended Appellant's Case. In so doing, I did not in any way judge the merits of the further lines of argument which had been raised by the Appellant but left it up to the Respondent either to seek to oppose these on the application for leave to file an amended Appellant's Case or to seek thereafter to strike out any amended Appellant's Case, as the Respondent thought fit.

As the Appellant had effectively lost the argument in relation to striking out, I also ordered that the Appellant pay the costs of and incidental to the striking out Summons, in any event.

Finally, although the Appellant has lodged a Notice of Appeal against my decision, that Notice, somewhat curiously, does not seek to set aside the Order striking out the Notice of Appeal and the Reply document but seeks to overturn my decision to grant the Appellant leave to file an amended Notice of Appeal with the grounds therein being confined to a narrow area. Having had the opportunity to briefly discuss the procedure in relation to such an appeal with the Appellant, I had expected that he was going to lodge an appeal against the decision to strike out and it may well be that that was his intention and, accordingly, I have given full reasons in relation thereto.

## Authorities

Le Cocq -v- Gillespie (12th March, 1991) Jersey Unreported; (1991) JLR N.5.

Mauger -v- Batty (9th October, 1995) Jersey Unreported.

Bastion Offshore Trust Company, Ltd -v- Finance & Economics Committee. (1991) JLR N1.

Cooper -v- Resch (1987-1988) JLR 428.

Lazard Brothers and Company (Jersey) Limited -v- Bois and Bois, Perrier and Labesse (1987-1988) JLR 639.

Rahman Showlag -v- Mansour and First Union Corporation S.A. (1991) JLR 367.

Kenneth Skinner -v- The States of Jersey Island Development Committee (25th March, 1993) Jersey Unreported.

Minories Finance Ltd. -v- Ayra Holdings Ltd. (28th April, 1994) Jersey Unreported CofA.