

Judgment 1/2011

**Jubilee Scheme 3 Limited Partnership v
Capita Symonds Limited – Court of Appeal
(Civil Appeal 425) – 4th January, 2011**

Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (s.7) – interlocutory act of court had been registered with leave in the Livre des Hypothèques at the Greffe – application for leave to appeal from decision of Royal Court refusing application to vary registration – legal effect of registration of an interlocutory act of court – review of Norman, French and Guernsey authorities – factors to be taken into account in the exercise of judicial discretion under s.7 – inadequate information provided by the applicant – leave to appeal granted and appeal dismissed. (See Judgment 33/2010)

IN THE COURT OF APPEAL OF GUERNSEY

The 4th January 2011 before Dame Heather Steel, DBE, presiding, Michael Cameron St John Birt, Esquire, and Sir Hugh Bennett

Jubilee Scheme 3 Limited Partnership

Applicant

v

Capita Symonds Limited

Respondent

On the Application of the Applicant for leave to appeal from the decision of the Royal Court on 16th September 2010;

Whereas, on 14 December 2010, Advocates Gordon Dawes and Ian Harris were heard on behalf of the respective parties;

And whereas, on 15 December 2010, THE COURT: -

- (i) GRANTED leave to appeal

- (ii) DISMISSED the appeal
- (iii) AWARDED costs on the standard recoverable basis in favour of the Respondent, to be taxed if not agreed; and
- (iv) RESERVED its reasons:

THE COURT this day ISSUED JUDGMENT in the terms attached hereto.

K H TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO 425

14th & 15th December 2010

Before: Dame Heather Steel, DBE

Michael Cameron St John Birt, Bailiff of Jersey

Sir Hugh Bennett

Between: Jubilee Scheme 3 Limited Partnership (Applicant)

v

Capita Symonds Limited (Respondent)

Advocate G Dawes appeared for the Applicant

Advocate I Harris for the Respondent

This is the Judgment of the Court

BIRT, JA

1. This is an application by Jubilee Scheme 3 Limited Partnership (“Jubilee 3”) for leave to appeal from the decision of Carey, Lieutenant Bailiff, given on 16th September 2010, whereby he refused to vary the terms of a registration in the *Livre des Hypothèques, Actes de Cour et Obligations* (“the *Livre des Hypothèques*”) obtained by Capita Symonds Limited (“the plaintiff”) in respect of a claim which it has instituted against Jubilee 3, so as to permit the sale of completed units in the development which Jubilee 3 is carrying out at the property known as Royal Terrace.
2. The application raises issues as to the effect of registration in the *Livre des Hypothèques* and the approach which should be adopted when applications are made under section 7(c) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 (“the 1987 Law”) to vary a registration in cases where there is a commercial development of property. The Court announced its decision on 15th December and we now give our reasons.

Factual background

3. The factual background was set out very clearly in the judgment of the Lieutenant Bailiff and we gratefully borrow substantially from his judgment.
4. The site of the former Royal Hotel in St Peter Port is in course of development by the Longport Group. Part of the site – known as Royal Terrace – was acquired by Jubilee 3. When completed, the development at Royal Terrace will comprise 46 local market apartments, 8 open market apartments and some commercial development. Another part of the site – to be known as Royal Chambers - was acquired by Jubilee Scheme 2 Limited Partnership (“Jubilee 2”) where a separate development is being carried out. Jubilee 2 and Jubilee 3 are special purpose vehicles established by the Longport Group and each of them has no assets other than the relevant real property described above.
5. The plaintiff is a substantial architectural practice in England which was engaged by both Jubilee entities as architects and building service engineers. The engagements were in accordance with standard contracts for the provision of architectural and engineering services and these provided for the payment of fees in the normal way. Accounts were rendered to Jubilee 3 in the sum of £1,657,821.81 and to Jubilee 2 in the sum of £1,534,097.53. When these sums were not paid the plaintiff started proceedings against Jubilee 3 as first defendant and Jubilee 2 as second defendant.
6. The cause was placed on the pleading list on 6th November 2009. On 4th December 2009, following an *ex parte* application by the plaintiff, the Bailiff granted leave to the plaintiff to register the claims in the *Livre des Hypothèques* against each defendant respectively in the sum claimed. Since then, a substantial counter claim has been entered on behalf of both defendants against the plaintiff, an associated company called Woolf Limited and PEP Civil and Structures Limited in the sum of approximately £70 million. As the Lieutenant Bailiff stated, no view can be formed at this stage as to merits of the plaintiff’s claim or the strength of the counter-claim, but it is clear that there have been considerable delays in completion of the various parts of the development.
7. The Lieutenant Bailiff described in some detail at paragraphs 7 to 16 of his judgment the correspondence which had taken place between the advocates for the plaintiff and the defendants since the registration was obtained. We do not think it necessary to rehearse this in detail. Suffice it to say that on 7th December 2009, when notifying Advocate Ferbrache, who represents the two Jubilee entities, of the registration, Advocate Swan, on behalf of the plaintiff, invited the defendants to consider offering an acceptable alternative form of security. There was no response to that but some three months later, on 10th March, Advocate Ferbrache wrote to Advocate Swan advising him that Jubilee 3 wished to sell some car parking spaces at Royal Terrace and asking the plaintiff to release that part of the property from its registration. There were various exchanges during the course of which Advocate Ferbrache referred to the Royal Chambers development as having an equity of £13 million on the basis of a valuation from Savills of £48 million and an outstanding loan from Lloyds TSB of £35 million. However, the valuation was described by Savills as only “an indicative desktop opinion of the current value” and there was a specific exclusion on the part of Savills of any liability to anyone who acted on the information. After various exchanges, Advocate Swan made it clear that he needed some further evidence of the value of Royal Chambers but he heard nothing further from Advocate Ferbrache until 23rd July.

8. On that date Advocate Ferbrache wrote saying that Jubilee 3 was in the process of selling units in Royal Terrace, with some sales being due for completion in July and August and thereafter every month until all the units were sold. He explained further that the initial sale proceeds would be used to finish the Royal Terrace development at an estimated cost of £15.3 million and that thereafter, sale proceeds would be used to reimburse the indebtedness to Lloyds TSB Offshore Limited (“Lloyds TSB”). Lloyds TSB holds a first charge over Royal Terrace in the aggregate sum of £47 million, which is the outstanding amount under the facility granted by the bank to Jubilee 3.
9. There was further correspondence between the advocates but it did not prove possible to come to terms. Accordingly, Jubilee 3 lodged an application requesting, *inter alia*, that the registration be varied pursuant to section 7(c) of the 1987 Law so as to permit the sale of units at Royal Terrace up to a value of £63,560,000 and direct that the plaintiff, by its advocates, complete and sign all documentation as may be necessary to give effect to the sale of units and clear title to the purchasers of the units.

Evidence before the Royal Court

10. Jubilee 3 filed a number of affidavits in support of its application and these were summarised in the Lieutenant Bailiff’s judgment. For our purposes the relevant evidence was as follows:-
 - (i) Mr Charles Billson is a director of the general partner of Jubilee 3. He confirmed that Jubilee 3 is indebted to Lloyds TSB in the sum of £47 million and that this sum is secured as a first charge against Royal Terrace. He explained the considerable delay and cost over-runs which had occurred and which formed the basis of the counter-claim against the plaintiff. He said that the sum of £15.3 million was required to complete the development. He said further that Jubilee 3 had internally valued Royal Terrace in the sum of £84 million and that it was common practice for initial sales to be utilised to fund any development costs still to be incurred. He confirmed that the initial sale proceeds would in this case be used to fund the finishing costs and that thereafter sale proceeds would be applied to paying off the first registered creditor i.e. Lloyds TSB. He emphasised that there was real prejudice to Jubilee 3 in that the existence of the plaintiff’s registration prevented Jubilee 3 from being able to sell units so as to fund the completion of the works and repayment of the amount owed to Lloyds TSB.
 - (ii) Mr Guy Austin is a partner in the firm of Ridge and Partners LLP (“Ridge”) who are the managers of the project on behalf of Jubilee 3. He supplied a breakdown of the costs of £15.3 million required to complete the development. He emphasised that practical completion of the Royal Terrace development could not take place unless these funds were expended. The sum of £15.3 million included a contingency of £1.5 million.
 - (iii) Mr Andrew Fraser-Dale is the group finance director of the Jubilee Group. He described in some detail the terms of the loan facility from Lloyds TSB; in particular that, pursuant to the loan agreement, there was a ‘sale proceeds

account’ which was under the sole control of Lloyds TSB and into which the proceeds of the sale of any units had to be paid. Lloyds TSB would apply any funds in the ‘sale proceeds account’ either to a reduction of the loan facility or, at the absolute discretion of Lloyds TSB, to fund ongoing expenditure in connection with the construction of Royal Terrace as approved by Davis Langdon LLP, the independent monitoring surveyors employed by the bank. That firm reported to the bank each month as to the validity of the approved expenditure.

- (iv) Mr Simon White, Senior Manager Corporate Banking of Lloyds TSB swore an affidavit confirming Mr Fraser-Dale’s affidavit. Thus he expressly confirmed that the bank was employing Davis Langdon LLP to monitor the construction expenditure on a monthly basis, that the sale proceeds of any units had to be applied either in reduction of the loan facility or, at the bank’s absolute discretion, to fund *bona fide* ongoing expenditure in connection with the construction of Royal Terrace as approved by Davis Langdon LLP; and thirdly that, under the terms of the loan agreement, the bank had to satisfy itself that the proposed sale of a unit was an arms length transaction to a third party before agreeing to disposal of that unit and therefore discharging its security in relation to that particular unit.
- (v) On behalf of the plaintiff, one of its directors, Mr Martin McClosky, swore an affidavit in which he set out the plaintiff’s position, namely that it was willing to accept suitable alternative security in return for vacating its charge, but that no such proposal had been made. In response to the assertion on behalf of Jubilee 3 that there was ample unencumbered equity in Royal Terrace to satisfy any judgment obtained by the plaintiff, he asserted that no reliable evidence had been produced to support the assertion of £84 million as the value of the property and, in any event, any equity could be diminished or destroyed by further borrowing from Lloyds TSB in excess of the sum of £47 million. He accepted that there would be substantial further costs in completing the development but did not necessarily accept the figure of £15.3 million put forward by Ridge.

11. Both parties made detailed submissions before the Lieutenant Bailiff which are summarised in his judgment. In briefest summary, Jubilee 3 asserted that it could not realise the development unless the application was granted and any refusal to do so would amount to an unreasonable fetter on its ability to carry out its commercial activities and realise the proceeds of its development. It asserted that the plaintiff would not be prejudiced. The plaintiff, on the other hand, asserted that it would be willing to release its charge to permit the sale of units provided that some alternative security was forthcoming. It submitted that there was no satisfactory evidence as to the value of Royal Terrace and whether there was any equity in the development.

The judgment of the Lieutenant Bailiff

12. Counsel for Jubilee 3 sought before the Lieutenant Bailiff to emphasise that he was only seeking a variation of the registration, not its revocation. However, the Lieutenant Bailiff did not accept this point. At paragraph 26 of his judgment, he said the following:-

“26. Mr Ferbrache started by trying to show a difference between ‘varying’ and ‘revoking’ registration, but in practice I cannot see that there is any real distinction. It is true that where permission to register is given and the real property to which it attaches comprises one parcel, then one will have the situation that one sees in Channel Island Cream Liqueurs v Woods and Brown v Vivien and De Carteret whereby there is one event, namely the sale of the property and the revocation of the registry and the substitution of security to meet the claim. The word ‘varies’ may appear more appropriate where authority is being sought to release parts of the property to which the registration attaches on terms that the Court approves. However, to make an order permitting the sale of every parcel of land owned by a person against whom a registration is made without any provision for part payment or provision of security in respect of the claim, the subject of the registration, seems to me to have the same effect as ordering the revocation of the registration without making any provision for securing the potential claim of the holder of the registration.”(emphasis added)

13. The Lieutenant Bailiff then dealt with the law and referred to a number of cases, some of which we shall deal with later. Turning to his conclusions, he pointed out that the facts of this case were very different from the previous cases, where there had only been one residential property, the whole of which was to be sold. In those circumstances it was easy to provide alternative security as a condition of releasing the registration to allow the sale. Striking the balance between the interests of the plaintiff in holding on to its security and Jubilee, in getting on with its development and realising the fruits of its labour, was not easy. In the end the Lieutenant Bailiff concluded (at paragraph 44) that Jubilee had not produced proposals with sufficient clarity and precision to justify the court directing the plaintiff to embark on a programme of release of up to £63 million in value of Jubilee’s realty without any clear provision for the plaintiff’s ongoing protection as second registered claimant against that realty. The essence of the Lieutenant Bailiff’s approach is perhaps conveniently to be found in the following paragraphs of his judgment:-

“40 Both Counsel quoted the observation of Clark JA (sic) in the Moed case that “the effect of the registration in my judgment is that the Plaintiff obtains in respect of his claim in the action what is in effect a charge over the defendant’s interest in Guernsey realty ranking in priority to all subsequent charges or actions even if registered”. In my judgment it follows that once having registered the Plaintiff cannot be required to erode the value of the registration and the priority he enjoys therefrom by being ordered to attend before the Conveyancing Court to release it without he and the Court being satisfied that in so doing he will be maintaining the value of the security that he has. It is that priority which in my judgment the claimant in possession of the appropriate Act of Court is after paying his fees for registration, entitled to have preserved as against any subsequent creditors of the First Defendant who choose to register their claims.

41. The holder of the first Charge will have priority and will be able to look to the First Defendant to pay to him the whole of the proceeds of any sale which he agrees may be released from his Bond. Putting aside for a moment the concession which Lloyds TSB is making that it will not require repayment of its indebtedness immediately, provided the Defendant uses the proceeds of sale for finishing its development project in accordance with arrangements that have been agreed with the Bank, the Bank cannot be required to accommodate the interest of the Plaintiff to the extent of surrendering any part of its entitlement to be paid to the Plaintiff. To do so would compromise the position of the Bank as first Bond holder. That however still does not mean that the Plaintiff must be required to give way to the Bank to the extent of vacating without any consideration or any provision for protection of its security as Second Chargee.” (emphasis added)

The legal background

14. There is no doubt that it has been the practice at least since the beginning of the 19th century for interlocutory acts of the Royal Court, such as placing matters on the pleading list, to be registered in the *Livre des Hypothèques*. In Chesney v Kitson 20th February 1978, that practice was challenged. Following a detailed review of Norman and Guernsey commentators, Frossard DB, a judge of enormous experience in the customary law, held that there was entitlement to register in this way. That decision was followed by Dorey DB in Birchwood Investments limited v Norman (6th June 1984). In that case the defendants wished to sell their property and offered full alternative security, in the form of cash, to meet a pecuniary claim against them. Dorey DB allowed the security to be substituted in this way. He rejected the argument of the plaintiff that it was not obliged to accept such alternative security, but instead was entitled to continue to enjoy a registration against the defendant’s realty, in the hope that full payment would be tendered without further argument in order to achieve a sale of the realty. He said in passing that the entitlement to register a mere claim was potentially open to abuse.
15. The States clearly took note of the concerns expressed by Dorey DB and shortly afterwards passed sections 6 and 7 of the 1987 Law. These provisions stipulated that there was no longer a right for a plaintiff to register a claim in the *Livre des Hypothèques*; he could only do so with the leave of the court. Furthermore the ability of the court to revoke or vary such

registration was clarified. The letter from the Procureur which gave rise to the legislation contained the following passage:-

“Registration of interlocutory matters. At present there is an absolute right for the plaintiff in any action before the court to register any Act of Court relating to the proceedings, whether before or after judgment is awarded, in the Livre des Obligations at the Greffe. This means that somebody who starts proceedings on a totally fallacious claim could register the Act of Court inscribing the case on the pleading list as a charge against the real property of the defendant. Such a step could result in real prejudice for the defendant if he is in the course of selling the property as he cannot make clear title. Although cases of abuse have been rare it is felt that the decision whether or not an Act of Court should be registered in the Livre des Obligations should in future rest with the Court and that the law be amended accordingly.”

16. The relevant provisions of the 1987 Law which were enacted in response to this concern are as follows:-

“6. An act or order of the Court made in any proceedings before the Court makes a final judgment in the proceedings or before the proceedings are otherwise concluded, including an order for an adjournment, shall not be registered in the Livre des Hypothèques, Actes de Cour et Obligations –

(a) without the leave of the Court; and

(b) unless the provisions of part IV of this Law have (where appropriate) been complied with.

7. The order of the Court by which leave to register is given under Section 6 of this Law:-

(a) may be made ex parte;

(b) may limit the pecuniary amount which may be registered to such amount as may be specified;

(c) maybe varied or revoked on the application of either party to the proceedings;

(d) may direct that the registration shall be removed:-

(i) after such time;

(ii) upon such contingency or event;

(iii) upon the deposit with the Court by the defendant to the proceedings of security of such amount, as in each case may be specified.”

17. The Court is aware of four decisions since the enactment of the 1987 Law. In Channel Island Cream Liqueurs v Woods (13th March 1992) and Brown v Vivien and De Carteret the one property covered in each case by the registration was going to be sold and there was sufficient cash left after the first secured creditor had been paid for the potential claim of the plaintiffs to be met. In each case the court ordered that registration be removed on condition that the relevant sum claimed was lodged with the Greffier pending the outcome of the plaintiff's action. In Magloire v Wright and others 2005 – 6 GLR 19 Hancox LB permitted registration of a counterclaim but the case is not relevant to the issues which we have to consider.

18. In Moed v Cockram and Ferbrache and Co 23rd July 1999 this Court (Clarke JA with whom Beloff and Nutting JJA agreed) held that the effect of registration of an Act placing a claim on the pleading list is that the plaintiff obtains in respect of his claim a charge over the defendant's interest in Guernsey realty ranking in priority to all subsequent charges or actions even if registered. As to the exercise by the Court of the discretion conferred by sections 6 and 7 of the 1987 Law, Clarke JA said specifically that the discretion was unfettered. However, no statutory discretion could be exercised without regard to the circumstances and context in which the discretion fell to be applied. He went on to say that it was not correct to say that principles applied by the English Courts in considering the grant or discharge of Mareva relief were exactly the same principles as applied to the exercise of jurisdiction under section 7 of the 1987 Law. This was because a Mareva injunction conferred no priority whereas a plaintiff seeking to register is exercising a customary right to obtain a charge on Guernsey realty. Clarke JA continued that it was not appropriate or desirable to attempt to identify all the factors that could be relevant to the exercise of a section 7 discretion but the principal considerations must include whether the claim in the action was sustainable and whether the plaintiff had been guilty of delay which should deprive him of the benefit of registration. Where the action was sustainable, the plaintiff was prima facie entitled to registration.

Grounds of appeal

19. The submissions of Advocate Dawes fall into two parts. First, he contends that, contrary to the generally accepted view, registration of an interlocutory act does not create any form of charge. Secondly, he argues that the Lieutenant Bailiff's decision not to vary the application was plainly wrong. We will consider each of these in turn.

- (i) **Effect of registration**
 - (a) **Submissions**

20. Advocate Dawes submits that various courts, beginning in Chesney and culminating in Moed, have been wrong to conclude that registration of an interlocutory act in proceedings creates a *hypothèque* over a defendant's realty. He argues that the true effect of registration is not to create a *hypothèque* or charge securing the amount claimed but is merely to give public notice of the claim itself in order to inform those contemplating entering into commercial obligations with the defendant. He says that this Court should take the opportunity of putting the law back on the correct path.

21. He began by taking us through all the commentaries relied upon by Frossard, DB in Chesney with a view to showing that they did not support the conclusion reached in that case as to the effect of registration. Although the actual decision in Chesney was simply that there was a right to register, he accepted that it was implicit in the decision that registration created a charge.
22. He began with Terrien and reminded us that Terrien carries particular authority in Guernsey because of the effect of *l'Approbation des Lois*, approved by Order in Council of 27th October 1583. The relevant extract is from Terrien *Commentaires de Droit Civil Observé au Pays et Duché de Normandie, Livre VII Chapitre IV* at page 232 of the 1654 edition:-

“Et ne sont lesdites escritures privées autorisées à faire, ni à porter aucune execution en Court laye; et ne prennent pié en date et ainsnesse pour emporter deniers au devant d’autres, que du jour qu’elles sont recognués, ou deurement verifiées en Court laye.”

The following paragraph reads as follows:-

“Que toutes parties qui seront adjournées en leurs personnes en cognoissance de cedules seront tenues icelles cognoistre ou nier en personne, ou par procureur specialement fondé, par devant le Juge seculier, en la jurisdiction duquel ils seront trouvez; sans pouvoir alleguer aucune incompetance; et ce avait que partir du lieu ou les dites parties seront trouvée. Autrement seront tenues lesdites cedules pour confessées par un seul default; et emporteront hypothèque du jour de la sentence, comme si elles avoyent esté confessées.

Si aucun adjourné en cognoissance de cedula, compare et conteste, deniant sa cedule et par après est prouvée par le creditur, l’hypothèque courra et aura lieu du jour de ladite denegation et contestation.”

23. Advocate Dawes points out that the text of the second passage refers only to ‘cedules’ i.e. promissory notes. It does not apply to ordinary debts. Furthermore, the second passage appears to be based upon an ordonnance of 1539 rather than upon Norman custom. However, Terrien does not appear to draw any distinction and asserts that, once a judgment is given, the relevant *hypothèque* dates back to the day upon which the claim was contested, albeit that this is only stated in relation to claims based upon a promissory note.
24. Advocate Dawes turned next to the *Coutume Reformée*. Article 595 is in the following terms:-

“Exécutoires de dépens en Normandie prennent hypothèque du jour de l’introduction du procès et non du jour de la condamnation pour les Jugemens donnés audit pays de Normandie.”

25. This article is commented on by Basnage both in his *Commentaires sur la Coutume de Normandie* (4th edition) 1778 (Vol 2 p544) and in his *Traité des Hypothèques*, Chapter VI at p16. The relevant extracts are to be found in full at pages 10 – 12 of the judgment in Chesney and we do not think it necessary to recite them again. Mr Dawes points out that it is a little unclear from Basnage whether the ‘*procès*’ referred to in Article 595 is simply an appeal process. However, he points out that, even if it is not, the Article only applies to ‘*dépens*’ i.e. costs. It does not apply to the principal of the claim.
26. To the contrary is the commentary on Article 595 in Berault, Godefroy and d’Aviron, *Commentaires sur la Coutume de Normandie* (1776). At p685 is said this:-

“Pour les jugemens donnez audit pays de Normandie, ce qui a lieu aussi bien pour le principal, donc l’hypothèque prend pied du jour de l’introduction du procez, comme pour les dépens.”

The authors then go on to draw a distinction with judgments given outside Normandy where the *hypothèque* only takes effect from the day of judgment. There is however a footnote in the following terms:-

“Berault dit que l’hypothèque du principal prend pied du jour de l’introduction du procez comme pour les dépens, cette opinionne paroît contraire aux maximes.”

The footnote goes on to refer back to Terrien and to point out that Article 595 speaks only of “*dépens*”.

27. Those were the only commentators on the law of Normandy to which we were referred or which were cited in Chesney. We were briefly referred to Pothier, *Coutume d’Orleans* (1825) *Titre XI* Chapter 1, Sections 13 - 14 page 253 and also to Planiol, *Traité Elementaire de Droit Civile*, Paris 1947 Tome 2 at paras 4157 onwards. As Advocate Dawes correctly pointed out, there is nothing in either of those two commentaries to suggest that a judicial *hypothèque* takes effect other than on the giving of a judgment. However, Pothier is commenting on the *Coutume d’Orleans* and Planiol is commenting on modern French law.
28. Turning to the Guernsey commentators and authorities, we were referred first to Le Marchant. *Remarques et Animadversions sur l’Approbation des Lois et Coustumier de Normandie usitées en la Jurisdiction de Guernesey*. At Remarque 6 Le Marchant says:-

“Ils paroît aussi par les 2 et 3 Articles de ce chapitre, qu’une dette demandée en Justice devant les Magistats ou Juges, vertu d’une cédule ou autre obligation de pareille nature, soit que le deffendeur fasse deffaut ou conteste la demande, et que par après le créditeur prouve la juste deu de sa demande, la dette prendra pied en datte et hypothèque sur l’obligé et ses biens du jour de la ditte demande judiciairement faite”.

Advocate Dawes accepts that this envisages a *hypothèque* taking effect at the time of the commencement of judicial proceedings but points out that it refers only to claims under a promissory note or an obligation of similar nature. It was therefore consistent with Terrien.

29. Next, we were invited to consider the 11th October 1631 and 13th April 1724 ordonnances made by the Royal Court of Guernsey. Advocate Dawes pointed out that the mischief at which the 1631 ordonnance was aimed is clearly described in the recital, namely that individuals could be severely prejudiced by contracting with others whose existing “*debtes et charges anterieures*” were not publicly known. What the ordonnance actually ordered was:-

“tous marchez, contracts, aliénations, eschanges, permutations, et hipotecques d’héritages de quelconque nature et qualité que ce soit, et semblablement toutes obligations, hipotecques et contracts mobiliaries seront, par la partie qui portera le contract, faits enregister au Greffe de la Cour dans deux mois après le passément d’iceux, à peine de perdre la preference qu’aultrement ils pouroent avoir eu sur les acquiseurs et creantiers posterieurs qui se seroent faits enregistre, lesquels sont dès à présent comme dès lors, déclarés preferable à ceux qui auront negligé l’enregistrement requis par la présente Ordonnance, sans que les contacts et obligations cy devant passées soent subjects au dit enregistrement; ...”

The relevant part of the 1724 ordonnance reads as follows:-

*“La Cour, pour la plus grande et meilleure sûreté des habitants de cette Isle dans leurs transactions mutuelles les uns avec les autres, a réformé le terme de deux mois, porté dans l’Ordonnance de 3 octobre 1681 pour l’enregistrement de faits héréditaires et mobiliaries, et a ordonné qu’à l’avenir toutes obligations et transactions ne prendront date de priorité que du jour qu’ils seront mis au Greffe.
.....”*

30. The final Guernsey commentator relied on by Frossard, DB in Chesney was Gallienne, *Traité de la Renonciation par Loi outré et de la Garantie* (1845). At page 8 Gallienne says the following:-

“La simple dette mobilière n’emportant hypothèque que par l’enregistrement sur le livre des contrats pour la date- qui prior est in tempore potior est in jure – c’est une précaution à prendre en commençant une procédure, de faire enregistrer le premier acte de cour que l’on obtient. (vide ordonnance du 13 avril 1724)”

31. Advocate Dawes submits that the various texts and commentaries to which we have referred do not establish that registration of an interlocutory act has the effect of creating a *hypothèque*. We wish to pay tribute to the eloquence and learning of Advocate Dawes’ submissions which we would summarise (very inadequately) as follows:-

- (i) There is no statutory provision to the effect that registration creates a charge. The procedure is merely an uncertain product of the customary law. The roots of the customary law of Guernsey in this area are similar to those of Jersey and France, but in neither of those jurisdictions does registration of a mere claim create any form of *hypothèque* or charge over a defendant’s real property. He adds, for good measure, that neither does the law of England and Wales have such a provision. It is inherently unlikely that mere registration of a procedural act made in the course of civil proceedings should give rise to a charge over real property.
- (ii) There is nothing in the commentaries cited by Frossard, DB in Chesney to suggest that the law of Normandy had developed so as to make registration of an act in a claim something which gave rise to a *hypothèque*. To the extent that some of the commentators suggested that, following judgment, a *hypothèque* related back to the beginning of the proceedings, this was confined to actions for ‘*dépens*’ and ‘*cedules*’.
- (iii) The ordonnances of 1631 and 1724 could not bear the weight placed on them by Gallienne and by the Court of Appeal in Moed. He points out that in neither of these ordonnances is it stated that registration of a claim creates any form of *hypothèque* or security. The Livre itself is a record not only of *hypothèques* but also of contracts and obligations more generally. Although there is a reference to a ‘preference’ being lost if there is a failure to register, there is no indication as to what ‘preference’ means in this context and no indication that it constitutes a charge over real property. In his submission, the reference to a preference in the ordonnances was simply to the order in which the claimant would be called in a *saisie*.
- (iv) The rule as it is thought to have developed is inappropriate and undesirable. It purports to give security equivalent to a bond in respect of untested claims of uncertain value with the effect of causing considerable inconvenience and disruption to a defendant. This is particularly so where, as here, the defendant is carrying on a commercial business.
- (v) Even those judges who have accepted that the law is as laid down in Moed have reservations about its desirability; see for example some of the observations of

Carey, Lieutenant Bailiff in the course of the present case as recorded on the transcript.

32. Finally, he argued that, if we found the law to be as laid down in Moed, this would amount to a breach of Article 1 of the First Protocol of the European Convention on Human Rights which reads as follows:-

“Right to Property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

He submitted that the threshold for obtaining and maintaining registration of a charge as set out in Moed, namely that the action was sustainable (in the sense that it cannot be struck out on any of the usual grounds) was too low and amounted to an interference with the enjoyment of property which was not sufficiently certain in law and was not proportionate. This Court should therefore depart from the law as established in Moed.

(b) Decision

33. We have carefully considered Advocate Dawes’ submissions but cannot accept them. In the first place it is clear that the law is well settled to the effect that registration creates a *hypothèque*. Thus:-
- (i) As Advocate Dawes concedes, although the actual decision in Chesney was that there was simply a right to register, it is implicit from the judgment of Frossard, DB that the consequence of registration was the creation of a *hypothèque*.
 - (ii) This was specifically confirmed in Birchwood when Dorey, DB referred on several occasions to the fact that registration of the interlocutory act in that case had achieved a ‘charge’ over the real property owned by the defendants.

- (iii) Similarly, the letter from the Procureur leading to the enactment of the 1987 Law referred to the fact that registration of the act inscribing a case on the pleading list operated as a charge against the real property of the defendant.
 - (iv) The 1987 Law was passed by the States in order to deal with the potential vice identified by the Procureur. It is hard to see that the 1987 Law would have been required had registration not created a charge. The enactment of the 1987 Law must therefore be taken as implicit confirmation by the legislature that, under the customary law of Guernsey, registration of an interlocutory act in proceedings creates a charge.
 - (v) This was specifically confirmed by a strong Court of Appeal in Moed, where the point specifically arose for decision.
34. We are here concerned with the law relating to real property, where certainty is of particular importance. We would therefore not be willing to depart from a decision reached comparatively recently by the Court of Appeal unless we were satisfied that it was clearly wrong.
35. Far from being of that opinion, we conclude that there was ample material upon which the courts of Guernsey could properly conclude that registration of an act placing a matter on the pleading list in the *Livre des Hypothèques* does create a charge as described in Moed. We would summarise our reasons as follows:-
- (i) It was common ground in the leading case of Chesney that interlocutory acts of Royal Court proceedings had been registered in the *Livre des Hypothèques* since at least the beginning of the nineteenth century. The Court dealt exhaustively with the Norman, French and Guernsey commentators. What is clear from the various extracts cited in Chesney is that what the various authors were discussing was whether a *hypothèque* took effect from the date of judgment or, where judgment was subsequently given, from the date of the initial claim. On this there was clearly some inconsistency but the point is that they were concerned with the date the *hypothèque* took effect, i.e. with the creation of security. They were not concerned with mere notification of a claim.
 - (ii) Frossard, DB accepted that the position under the law of Normandy was uncertain but he specifically approved of the observation of Gallienne to the effect that in Guernsey a simple debt acquires a *hypothèque* from the date of registration.
 - (iii) The views of Gallienne are not inconsistent with the general principle described by Le Marchant, another commentator on Guernsey law, when he states at Remarque 6 that, in the case of a claim under a promissory note or obligation of a similar nature, the debt carries a *hypothèque* from the beginning of the proceedings. These days, it would be illogical to distinguish between a claim under a promissory note and any other form of claim.

- (iv) In our judgment these observations are consistent with the terms of the 1631 and 1724 ordonnances. Whilst it is true that they do not state specifically that registration creates a form of charge, they do so by inference. The 1631 ordonnance makes it clear that a failure to register within two months will lead to a loss of the preference which the person concerned would otherwise have over subsequent creditors and the 1724 ordonnance abolished that two month period, presumably on the basis that its existence could well cause prejudice to those dealing with the debtor during that period whilst an encumbrance was unregistered.
- (v) Advocate Dawes argued that the reference to ‘preference’ was merely to the order in which persons are called in a *saisie*. He supported this point by arguing that it was impossible to know how a *saisie* would work in practice if registration of a mere claim created a *hypothèque* and a *saisie* were held before the claim had been adjudicated upon. But, as emerged during argument, this difficulty would be exactly the same even on his analysis. On his case, a bank with a conventional charge under a bond which was taken after registration of an interlocutory act in a civil claim would be called in a *saisie* before the claimant in the civil proceedings. The bank would therefore have to decide whether or not to take the property subject to the prior claim of the plaintiff in the civil proceedings. It would make no difference on this particular point whether the claim also attracted a *hypothèque*, thereby giving rise to a right to follow the property into the hands of a third party. Thus we do not accept Advocate Dawes’ argument that potential difficulties in a *saisie* support his analysis rather than that favoured in Chesney and Moed
- (vi) All in all, we find the terms of the ordonnances more consistent with the ruling of the Court of Appeal in Moed than with the proposition put forward by Advocate Dawes.
- (vii) It has been the custom and practice to register interlocutory acts for some 200 years. This is consistent with an understanding (confirmed by Gallienne) that security is thereby obtained over the real property of the defendant.
- (viii) Frossard, DB referred to De Farriere, *Dictionnaire de Droit et de Pratique* (1749 edition) and to the three requirements for custom and practice to become law. The second requirement was that the practice should not be unreasonable. Advocate Dawes submits that it is unreasonable for registration of a mere claim to create a charge. We do not accept this argument in the light of the discretion conferred upon the Court by Section 7 of the 1987 Law, which should ensure that registration does not have unreasonable consequences.
- (ix) We accept that the procedure is not to be found in other comparable jurisdictions, but customary law often develops differently in different jurisdictions. We also accept that the procedure has the potential to cause inconvenience, particularly in relation to commercial enterprises. However, the remedy lies with appropriate exercise by the Court of its discretion under section 7 of the 1987 Law rather than by abolition of or retrenchment from a rule of customary law which appears to us to be well established in this Bailiwick.

- (x) Finally we consider the argument under the ECHR. We accept that the procedure has the potential to interfere with the enjoyment of a defendant's real property. However, Section 7 confers an unfettered discretion upon the Court, as we shall describe shortly and, in our judgment, the ultimate effect of registration upon the enjoyment of a defendant's real property is not significantly different from that caused by a Mareva injunction or by the caveat procedure in Jersey. It is an interference which is proportionate, is sufficiently certain in law and serves a legitimate purpose in relation to the enforcement of civil claims. The protection against a breach of Article 1 of the First Protocol lies in a sensible application by the Court of the discretion conferred by section 7.

36. For these reasons we reject Advocate Dawes' first ground of appeal.

(ii) Exercise of discretion

37. This was a discretionary decision on the part of the Lieutenant Bailiff and there is no dispute as to the test to be applied on appeal in such cases. This court may only interfere if the decision was plainly wrong or if the court below has proceeded on some misunderstanding or misapplication of the law.
38. Advocate Dawes submits that the Lieutenant Bailiff misunderstood the position and applied the wrong legal test. He refers to the observations of the Lieutenant Bailiff in the concluding sentence of paragraph 41 of his judgment (see para 13 above) and contends that the Lieutenant Bailiff was wrongly stating that a person in the position of the plaintiff could not be required to vacate his charge without any consideration or without any provision for protection of his security as second chargee. This was inconsistent with the decision in Moed which made it clear that the discretion to revoke or vary such a registration is a matter for the unfettered discretion of the Court.
39. Secondly, he argues that the Lieutenant Bailiff had treated the application to vary as in effect being an application to revoke the registration. This emerged clearly, he said, from paragraph 26 of the Lieutenant Bailiff's judgment (quoted at para 12 above) and the error was repeated in the reference to 'vacating' in the passage in paragraph 41 of the Lieutenant Bailiff's judgment to which we have just referred.
40. We have some sympathy with Advocate Dawes' submissions in this respect. In the first place, it is clear that what is proposed is that the plaintiff should only release from its charge those units which are sold off. It will retain its charge over the units which remain in the ownership of Jubilee 3. Accordingly if, following repayment in full of Lloyds TSB, some units remain unsold, the plaintiff will still have its charge over those units. That does not seem to us to be the same as a revocation of the charge.
41. Secondly, it is clear from Moed that the section 7 discretion is unfettered, albeit that it must be exercised having regard to the statutory context. Although there is power under section 7(d)(iii) to order the provision of alternative security, an invariable practice that a second

charge obtained by registration is not to be varied unless there is some consideration or provision for alternative security is an unacceptable fetter on the discretion and may in many cases lead to injustice. Let us suppose that the proposal in this case was for all the sale proceeds of the units to be applied in the reduction of the bank loan from Lloyds TSB. There would then be no question, in our view, but that the Court should agree to vary the plaintiff's charge so as to require it to be party to sales of units to allow them to take place, so that the sale proceeds could be used to reduce the amount owing under the first charge. One would not in those circumstances order that some other form of security should be provided for the plaintiff, as this would be to rank the second charge ahead of the first charge. Furthermore, in such an example, it would not really be relevant what the overall value of the property was and whether there would be any equity after repayment of the bank loan. If the value were such that there was no equity, the second charge would not be worth anything in any event and therefore the plaintiff would not have been prejudiced by agreeing to the disposals with the sale proceeds being used in reduction of the first charge. Conversely, if there were any remaining equity after repayment of the bank loan in full, the plaintiff would still have its charge – and therefore its security – over that part of the property which was unsold and still owned by Jubilee 3. Thus we believe that the emphasised passages in paragraphs 40 and 41 of the Lieutenant Bailiff's judgment are unduly restrictive. If applied strictly, they would amount to an unacceptable fetter on bona fide commercial activities being undertaken by a person against whom there was merely a claim.

42. For these reasons, we proceed to consider the exercise of our own discretion, not of course on the hypothetical example referred to in the preceding paragraph but on the basis that what is planned in this case is that the first £15 million of the sale proceeds will not be repaid to the bank, but will instead be applied for the benefit of Jubilee 3.
43. Advocate Dawes argues that the present case is unlike any of the previous cases, which all concerned the sale of a single house, so that an appropriate portion of the sale proceeds could be placed in a separate secure bank account in order to protect the interest of the claimant holding the registration. Conversely, in the present case, Jubilee 3 is carrying out a commercial development and the registration of a mere claim should not be allowed to fetter or inhibit legitimate commercial activity. There would, he submitted, be considerable prejudice to Jubilee 3 in the event that it cannot realise units as they are completed and a restrictive application of the section 7 discretion would discourage commercial developments in Guernsey generally.
44. In any event, he argues, the claimant is fully protected. The evidence, particularly from Lloyds TSB, shows that the sale proceeds can only be applied towards completing the development (£15.3 million) or towards reducing the indebtedness to Lloyds TSB as holder of the first charge. The developer estimates the value of Royal Terrace as amounting to some £84 million pounds so that there is considerable equity in the development. The claimant will not therefore be prejudiced by sale proceeds being applied to complete the development.
45. Advocate Harris, on the other hand, relies upon the observations of Clarke, JA, in Moed summarised in paragraph 18 above. The plaintiff's claim was sustainable and it was therefore prima facie entitled to registration. The plaintiff should not be required to release its security over any part of the property unless alternative security was provided. Jubilee 3 had simply provided no satisfactory evidence as to the stage of the development, whether the expenditure of £15.3 million pounds would be beneficial and whether there would be any equity at the end of the day. The sole reference had been to an 'internal' valuation about which no details had been given. The plaintiff was not saying that it would in no circumstances agree to the release of its security so as to permit the sale of units but was simply asserting that Jubilee 3

had failed to provide adequate information or alternative proposals to protect the plaintiff's position.

46. We agree with the judgment in Moed that registration under section 6 of the 1987 Law is not the same as a Mareva injunction because registration results in a charge over the relevant reality whereas a Mareva injunction simply acts in personam to restrain the defendant from disposing of property. However, the observations of Clarke, JA must be read in the context of the particular case, which concerned individual residential properties. The court in that case was not concerned with the sort of commercial development which is taking place in this case. The discretion conferred upon the Court by section 7 is unfettered. Despite their different juridical bases, we consider that, when considering an application to vary or revoke registration of an interlocutory act, the Court will have to consider many of the same factors as are considered by a court hearing an application to vary or discharge a Mareva injunction. In particular, the Court must hold a fair balance between a plaintiff who seeks security for what is, at that stage, an unproven claim and a defendant who wishes to dispose of or otherwise deal with his real property. This is particularly important in the context of a defendant who is carrying on commercial activities in relation to his real property. In our judgment it is important that the court's discretion under section 7 to vary or revoke a registration is exercised in such a way as not to place an undue fetter upon legitimate commercial activity. It is important for the Island that bona fide commercial developments should be able to proceed to completion.
47. However, that is not to say that all a developer has to do is turn up in court and assert that it needs to realise its development. If a defendant wishes to seek a variation of the registration, it is incumbent upon it to provide full information to the person holding the registration and the court so that the right course of action can be considered and the court can understand the consequences of any order which it may make.
48. We have to say that the correspondence in the present case has appeared at times to be a conversation between the deaf. The advocates for Jubilee 3 have simply asserted that the registration must be varied so that the development can be completed and the plaintiff's advocates have simply asserted that alternative security must be provided.
49. As we have made clear at paragraph 41 above, if it were proposed that the sale proceeds should be applied entirely in reduction of the loan from Lloyds TSB secured by the first charge, any application to the court to vary the registration so as to direct the plaintiff to be party to the sale of those units to allow this to occur (assuming adequate undertakings from the vendor's advocates that they would so apply the sale proceeds), would be bound to succeed. However, that is not what is proposed. Jubilee 3 wishes to use the first £15.3 million of sale proceeds to complete the development. We have to say that remarkably little information has been given by Jubilee 3 as to the current status of the development, other than the brief details contained in the affidavit of Mr Austin. We have no indication as to how many units are already complete and ready for sale and how much they might be expected to raise; we have no information as to what exactly still has to be done with the £15 million, nor is there any evidence as to whether the investment of an additional £15 million will result in the recovery of more than £15 million in sale proceeds. In other words, will the investment of a further £15 million (which would otherwise go to reduce the first charge) be something beneficial which would therefore not prejudice the plaintiff?

50. Furthermore, is there any equity in this development? All that is provided is a straightforward assertion that Jubilee 3 has valued the development ‘internally’ at £84 million. On what is this based? Does it include the 14 units apparently already sold? In any event, a mere ‘internal’ valuation is unsatisfactory. We accept that it would probably not be reasonable to expect a full formal valuation as this would be unduly expensive. However, presumably Jubilee 3 has some estate agents in mind to market the various flats and we would find it surprising if such agents were not able to give general evidence about the nature of the flats, what price they expected to market them for and give an indication therefore of what they would hope for in terms of gross sale proceeds of all the units. They could also describe what would be the effect if the £15 million were not to be reinvested.
51. A court is entitled to be given sufficient information by a defendant applying to revoke or vary a registration to be able to assess the likely consequences of any course of action which it is invited to take. We are of the opinion that Jubilee 3 has failed to provide sufficient information to enable the Court properly to consider the effect of varying the registration as requested. The Lieutenant Bailiff was clearly of the same view and Jubilee 3 has only itself to blame for the fact that the Lieutenant Bailiff felt unable to accede to the application.
52. However, we wish to reiterate the importance, when considering an application under section 7 to vary a registration in relation to commercial development, of giving full weight to the desirability of allowing bona fide commercial activities to continue. Should Jubilee 3 on a future application provide satisfactory evidence that a further investment of £15.3 million will, in the long run, be likely to prove to be a profitable investment, thereby increasing the aggregate sale proceeds to be received from the development, we would expect an application to vary to succeed because the plaintiff will not be prejudiced in any way by the fact that the first £15 million is being used towards completing the development rather than in reducing the indebtedness to the bank. We reiterate that the plaintiff is not entitled to be put in a better position than it is at present.

Conclusion

53. We granted leave to appeal on the basis that the application raised issues of general importance upon which it may be useful to obtain the views of the Court of Appeal and because the Lieutenant Bailiff applied an over restrictive approach to the exercise of his discretion as we have described above. However, for the reasons given, we dismissed the appeal.