

Judgment 10/2008

**Wrench v Albany Hotel Ltd – Royal Court (Civil
Action File 926) – 17 March 2008**

Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 (ss.6 and 7) – leave had been granted to register Act of Court against Albany – dispute had been referred to arbitration – amount claimed had been increased with leave of the arbitrator – held that there was no power to treat an order of an arbitrator as if it were an Act or Order of the Court – no power to amend the cause because the proceedings before the Court were stayed – held that the amount secured could only be increased if another, later Act or Order of the Court were registrable (See Judgment 14/2007)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 926

The 17th day of March 2008 before Richard John Collas Esquire, Deputy Bailiff alone

PAUL WRENCH

Plaintiff

v

ALBANY HOTEL LIMITED

Defendant

Whereas on the 16th December 2004 the then Deputy Bailiff gave leave to register this action in the Livre des Hypotheques, Actes de Cour et Obligations and whereas on 18th January 2005 the Plaintiff registered judgment and whereas on the 25th February the Deputy Bailiff considered three applications in the following terms:-

1. The Defendant's application dated 14th January 2008 to vacate the said registration upon payment into Court of £325,000.
2. The Plaintiff's application for leave to increase the charge registered from £325,000 to £535,000.
3. The Plaintiff's application dated 1 February 2008, pursuant to Rule 35 of the Royal Court Civil rules 1989, for leave to amend his cause

and having heard thereon Advocates J Le Tissier and M G Ferbrache counsel for the Plaintiff and Defendant the Deputy Bailiff this day gave judgment in the terms attached hereto and:-

1. GRANTED the Defendant's application that the existing charge in the sum of £325,000 be vacated upon payment into court of the amount of the order.
2. DISMISSED the applications of the Plaintiff to increase the amount of the charge registered and for leave to amend the cause.

S M D ROSS

Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between

Paul WRENCH

Plaintiff

- and -

ALBANY HOTEL LIMITED

Defendant

Date of hearing: 25th February 2008

Judgment handed down: 17th March 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Plaintiff: J T Le Tissier
Advocates for Defendant: M G Ferbrache

Cases & statute referred to:

1. Moed v Cockram and Ferbrache and Co 23 July 1999 Guernsey Court of Appeal.
2. Birchwood Investments Ltd v Norman 18 July 1984 Guernsey Court of Appeal.
3. Magloire v Wright, Goguelin & Leapfrog 18 January 2006, Guernsey Royal Court.
4. Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1AC 334

1. This is the third interlocutory Judgment I have delivered in this matter and the facts are set out in the earlier decisions. The Royal Court proceedings remain stayed, pursuant to the Order of 7 September 2005, as arbitration is continuing.
2. The Royal Court proceedings issued on 16 December 2004 claim damages of £325,000, interest and costs. On 31 December 2004, the then Deputy Bailiff gave leave pursuant to Section 6 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987 ("the 1987 Law") to register the action in the Livre des Hypotheques, Actes de Cour et Obligations. The Order of the Court granting leave to register did not limit the pecuniary amount which may

be registered and on 18 January 2005 the Plaintiff registered the judgment, having paid document duty in the sum of £1,625. So, the amount secured is £325,000.

3. There are three applications now before me:
 - 1) The Defendant's application dated 14 January 2008 to vacate the registration upon payment into Court of £325,000.
 - 2) The Plaintiff's application pursuant to sections 6 and 7 of the 1987 Law for leave to increase the charge registered from £325,000 to £535,000.
 - 3) The Plaintiff's application dated 1 February 2008, pursuant to Rule 35 of the Royal Court Civil Rules 1989, for leave to amend his Cause. The amendment would increase the claim for damages to £440,440.
4. The Plaintiff's application to increase the amount of the registered charge is the main issue in contention.

The Law

5. In addition to sections 6 and 7 of the 1987 Law, I have been referred to a number of Court decisions including the leading case of *Moed v Cockram and Ferbrache and Co*, Guernsey Court of Appeal, 23 July 1999; *Birchwood Investments Ltd v Norman*, Guernsey Court of Appeal, 18 July 1984 and the Royal Court judgment in the same matter dated 6 June 1984; and the more recent case of *Magloire v Wright, Goguelin & Leapfrog*, Royal Court, 18 January 2006.
6. Although the substantive Royal Court proceedings are stayed, there can be no doubt that the Royal Court continues to have jurisdiction to deal with any matters arising under Sections 6 and 7 of the 1987 Law in respect of which the arbitrator has no jurisdiction.
7. It is abundantly clear that sections 6 and 7 of the 1987 Law curtail the previously unfettered right to register an interlocutory act or order of the Royal Court against the real property of the defendant. The policy letter which gave rise to the States Resolution to amend the Law, makes it clear that "*the mischief to which the law was directed was that property might be encumbered on the basis of spurious claims to the prejudice of the defendant who wished to sell his property*". (Clarke JA at page 12 of *Moed*). He went on to say, at page 13, that the Court's discretion under sections 6 and 7 must be exercised reasonably and "*with a recognition of the existence of the customary right to which it is appurtenant*".

Jurisdiction/Procedural Difficulty

8. On 25 January 2008, I directed Counsel to a number of issues on which I invited them to address me. The first issue is one that I described in terms of jurisdiction, although I note that in Channel Tunnel Group Ltd v Balfour Beatty Ltd [1993] 1AC 334, Lord Mustill described a similar issue as a problem of procedural mechanics (at page 365 D). The issue is whether the Court can vary the amount of the Plaintiff's registry in an action which is no longer before the Court.
9. In Channel Tunnel, the House of Lords held that there is power to grant a Mareva injunction in connection with a dispute which has been referred to arbitration and where Court proceedings have been stayed. Lord Mustill said (at page 366B):

“But neither the Arbitration agreement nor the [New York] Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] can contemplate that by transferring to the arbitrators the substance of the dispute, the court also divests itself of the right to use the sanctions of municipal law, which are not available to the arbitrators, in order to ensure that the arbitration is carried forward to the best advantage.”

10. Advocate Le Tissier submitted Lord Mustill identified a principle that applies to any form of ancillary relief which may assist in ensuring that any award by an arbitrator can be fruitfully enforced against a defendant. Advocate Ferbrache submitted that, on a true understanding of the *ratio* of the decision, the principle was limited to the granting of Mareva relief.
11. In my view, it does not matter which argument is correct because even the wider interpretation is not sufficient to assist the Plaintiff in the way he contends. It is clear, from Moed and from section 6 of the 1987 Law, that the ancillary relief claimed in this case is a customary right to register an act or order of the Court. There is no customary right to register an act or order of an arbitrator, nor is there any statutory right to do so in the Arbitration Law, the 1987 Law, or any other statute.
12. I am told that the amount claimed in the Arbitration has been increased, with leave of the arbitrator, to an amount in excess of £325,000. There is no power to register that decision of the arbitrator.
13. Advocate Le Tissier submitted that, if the Court does not have the power to grant the application, there would be a significant, and possibly overwhelming, disincentive to parties considering alternative forms of dispute resolution. I understand his concern, although I believe he may have exaggerated its significance. However, I do not consider there is any power, either under the customary law or the 1987 Law, to treat an order of an arbitrator as if it was an act or order of the Court. If it was thought desirable to do so, the necessary power could only be introduced by amending the legislation.

Application to Amend the Cause

14. If I had power to amend the Cause, and if I were to give leave for it to be amended, the Plaintiff would be able to apply under Section 6 of the 1987 Law to register the act of Court granting such leave in order to secure the additional amount claimed. The principles that govern the exercise of the Court's discretion in deciding whether to grant leave to amend a Cause are well established. In my view, they are not engaged in this case because the Royal Court proceedings are stayed. So, as the Plaintiff has not applied to lift the stay, I do not have the power to entertain the application to amend the Cause. I do not propose to consider whether it would be an appropriate exercise of discretion to grant leave to amend if the action was not stayed.

Variation of the Existing Registration

15. Sub-section 7(b) of the 1987 Law enables the Court to limit the pecuniary amount which may be registered to a specified amount and sub-section 7(c) enables the Court to vary the Order granting leave to register.
16. The Order dated 31 December 2004, which granted leave to register these proceedings, did not limit the amount. When registration was effected on 18th January 2005, it was in respect of the full amount of damages claimed, £325,000.
17. The Court's discretion under Section 7 "*must be exercised reasonably, it must be exercised with a recognition of the existence of the customary right to which it is appurtenant*". (*Moed* page 13).
18. The customary right was an unfettered right to register an interlocutory act or order of the Court as security for the amount claimed in the action. A plaintiff could always register for less than the amount claimed by paying document duty in respect of a lesser amount only. The customary right did not permit a plaintiff to register in an amount greater than the claim.
19. I do not consider that the 1987 Law has enlarged the customary right so as to enable the Court to order that an action may be registered for more than the amount claimed. I say that because there is nothing in the 1987 Law to suggest the right has been enlarged in that way and, in any event, the purpose of the Law was, as I have said, to curtail the customary right by giving the Court such powers as it needs to prevent the right being abused.
20. So, I have no power to increase the amount registered in respect of the Court's order of 31st December 2004. The amount secured can only be increased if another, later, act or order of the Court is registerable.

Recoverable Costs Orders

21. During the course of argument, I was informed that part of the increased amount claimed by the Plaintiff is in respect of costs recoverable from the Defendant in connection with two earlier interlocutory applications. (In

relation to one of which I handed down a written judgment in which I indicated that I was minded to order costs in favour of the Plaintiff, unless a different order was sought. No other order has been requested and the parties have proceeded on the basis that the Defendant is to pay the Plaintiff's recoverable costs. I also will proceed as if an order had been made and ask that the Deputy Greffier shall produce a Court order in those terms if so requested).

22. Any order of the Court awarding costs to the Plaintiff is registerable against the realty of the Defendant. In my view, the orders made in this case cannot be registered as a right, but only with leave of the Court, pursuant to sections 6 and 7 of the 1987 Law. I say that because there has not been "*a final judgment in the proceedings*". "*Final judgment*" is not defined in the 1987 Law, but I take it to mean a final substantive judgment in the proceedings. It does not include an interlocutory order or a costs order consequent upon an interlocutory decision of the Court.
23. As interlocutory costs orders can not be registered as of right, leave to register would be required under sections 6 and 7. Any such order could be registered even though the quantum of costs the Plaintiff seeks to recover is disputed by the Defendant and is still subject to taxation. An application for leave to register would have to be supported by an affidavit exhibiting the bill of costs and, if leave is given, the order may limit the amount to be registered to the amount of the bill, or a lesser amount. Section 7 enables that amount to be varied by the Court subsequently. I would expect it to be reduced if, for example as a result of taxation, the costs claimed by the Plaintiff are reduced. The Plaintiff is on notice that Advocate Ferbrache has argued leave should not be granted, because the Plaintiff has been slow to enforce the costs order. I do not need to consider the reasons for, and the length of, any delay in this judgment but delay is a factor the Court would take into account when deciding whether to grant leave to register either or both of the costs orders (if there is an application to do so).

Costs of the Arbitration

24. The legal, and non legal, costs incurred by the Plaintiff in the arbitration proceedings form part of the increased amount now sought to be registered. This is in hope and anticipation that the arbitrator may make an award in the Plaintiff's favour because no such award has yet been made. I consider that the Court has no power to grant leave to register an anticipated award of the costs of the arbitration in advance of the making of such an award. It would be otherwise if, and when, the arbitrator makes an award of costs because section 26 of the Arbitration (Guernsey) Law 1982 provides that:

"An award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect; and, where leave is so given, the Act of Court should specify the manner of enforcement".

25. So, until the arbitrator makes an award, there is no ability for the Plaintiff to obtain security over the Defendant's realty in respect of the costs of the arbitration.

Conclusion

26. The Plaintiff does not oppose the Defendant's application that the existing charge in the sum of £325,000 be vacated upon payment into court of the amount of the order. In my view, there can be no grounds on which that could be opposed and Advocate Le Tissier has correctly not done so. There will therefore be an order in those terms.

27. The two applications by the Plaintiff (to increase the charge and to amend the cause) are both dismissed.