

**Judgment 14/2010**

**McNamara v Gauson – Royal Court (Civil Action File 781) -  
9 February 2010, 22 March 2010 & 28 April 2010**

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1. **Action in damages – péremption – Plaintiff’s application to restore action to the Rôle des Causes à Plaider – Royal Court Civil Rules, 1989 (Rule 50(b)) still applicable – principles to be taken into account in exercise of the Court’s discretion – principles applicable to application to restore and application to strike out compared – Plaintiff’s failure to comply with Practice Direction No. 2 of 2008, providing for uniform case management – loss of prescription defences if the action were to be restored – application to restore refused.**
2. **Application for leave to appeal – interlocutory decision – Plaintiff not out of time – criteria to be considered on an application for leave to appeal – permission will be given unless an appeal would have no real prospect of success – grounds of appeal each considered – held that there was no real prospect of success and that no point of general principle was involved – leave to appeal refused.**
3. **Decision by Single Judge adjourning to Plenary Court Application for Leave to Appeal against the decision of the Deputy Bailiff to refuse leave for the Applicant to restore action against the Respondent to the Rôle des Causes á Plaider, it having become perempt.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 9th day of February 2010 before Richard John Collas Esquire, Deputy Bailiff, alone

Between

FRANK McNAMARA

Plaintiff

-v-

FRANCIS McCABE GAUSON

Defendant

Whereas on the 14th and 15th September the Deputy Bailiff considered the Plaintiff’s application to restore this action to the Rôle des Causes à Plaider and heard thereon Advocates A M Ozanne and R I C E Harris counsel for the Plaintiff and Defendant respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and DISMISSED the said application.

S M D ROSS  
HM Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY  
ORDINARY DIVISION

Between

FRANK McNAMARA

Plaintiff

-v-

FRANCIS McCABE GAUSON

Defendant

Judgment handed down: 9<sup>th</sup> February 2010  
Before: Richard John Collas Esq., Deputy-Bailiff

Advocate for Plaintiff: A M Ozanne  
Advocate for Defendant: R I C E Harris

**Cases, texts & legislation referred to:**

Guernsey Annandale Tile Company (1980) Limited v Haines (Guernsey Court of Appeal, 6 Nov. 1997), 24 GLJ 48 and 82  
Ogier v Grand Havre Holdings Ltd (Guernsey Court of Appeal, 25 Sept. 2007)  
Saromaje Limited v Janet Holdings Limited (Royal Court, 17 March 1993)  
Stoneman v Cummings and Others (Royal Court, 1999)  
The Trusts (Guernsey) Law 1989, Section 70  
The Trusts (Guernsey) Law 2007, Section 83  
The Royal Court Civil Rules 1989, Rule 50  
Practice Direction No 2 of 2008

**Introduction**

1. This is my judgment on the Plaintiff's application to restore to the *Rôle des Causes à Plaider* an action that has become *périmé* due to the Plaintiff's failure to progress it in a timely manner.

**The Proceedings**

2. In the action, the Plaintiff, a resident of the Republic of Ireland, is claiming the sum of £552,761.53 from the Defendant plus interest and costs. The sum is alleged to represent the balance of US\$1 million which the Plaintiff claims he was induced to invest in a bank known as Bank Crozier International Limited with premises in Grenada. The inducement is alleged to have been made by a number of servants or agents of a company called McCabe & McRae Associates Limited ("McCabe & McRae"). He claims that the Defendant was a director of that company. The Defendant's nephew, Bryan Gauson, is alleged to be the principal person who made the representations upon which the Plaintiff relied when making the investment.

3. It is claimed that Bryan Gauson told the Plaintiff his uncle was a major investor on behalf of others and was regulated in Guernsey, the money would be invested in Bank Crozier, the money would be absolutely safe, it would earn a high rate of interest, and it “*would be used to “purchase” a bank guarantee of US\$10 million of which \$9 million would be invested so as (i) to preserve [the Plaintiff’s] \$1 million and (ii) generate the promised return*” (paragraph 7(e) of the Amended Cause). During the first seven months of 2000, the Plaintiff received a return of US\$290,000 and has received nothing since August 2000.
4. It is alleged that further representations were made after August 2000 in order to induce the Plaintiff to continue or renew his investment and not to take action to recover his money. It is alleged that some of those further representations were made by the Defendant who, it is claimed, was the directing mind of, and the controller of, McCabe & McRae or alternatively an officer or agent of McCabe & McRae.
5. The claim is based on three causes of action, unlawful means conspiracy, fraudulent misrepresentation, and/or breach of trust.
6. In his defences, the Defendant does not admit he was a director of McCabe & McRae. He denies liability and denies most of the allegations save where he says he had no knowledge, or in some cases no recollection, of the allegations. He admits signing some letters to the Plaintiff but they were, he says, prepared by his nephew who told him to sign and despatch them.
7. I have taken account of the nature of the allegations and I have taken note of what I have been told will be given in evidence if the action is restored. However, I have not formed any view as to the merits of either party’s case as I am in no position to do so at this time.

### Procedural History

8. The action commenced with the issue of a summons on 30 September 2003 naming the Defendant as the first defendant and McCabe & McRae as the second defendant. The Defendant is now the only defendant because subsequently McCabe & McRae, which was a Guernsey registered company, has been struck off the register of companies for failing to file an annual return. The action was placed *inscrite* on the *Rôle des Causes à Plaider* on 10<sup>th</sup> October 2003. One week later leave was granted for the claim to be registered in the *Livre des Hypotheques*.
9. The Defendant requested further and better particulars of the Cause dated 26 November 2003 and lodged defences on 5 December 2003. There were a number of interlocutory hearings during 2004 and 2005 including several in connection with one or more applications for security for costs.
10. With regard to the pleadings, the Plaintiff answered the Defendant’s request for further and better particulars on 12 August 2004. In a Consent Order dated 13 November 2005 but signed by Lieutenant-Bailiff Hancox on 13 January 2006, the Plaintiff was granted leave to file an amended Cause. The Defendant sent amended defences to the Plaintiff on 3 February 2006. The Plaintiff further amended the Cause, by consent, on 7 April 2006. The Defendant filed amended defences, again by consent, on 11 August 2006 containing *Niances* and *Prentions* but no *Exceptions*. On 11 September 2006, the Plaintiff filed a *Réplique* which referred to amended defences dated 22 May 2006 but which I assume should have referred to the 11 August defences. The *Réplique* contained an *Exception de Forme* to which the Defendant responded on 12 September 2007, following an application by the Plaintiff for directions that was heard in Court on 10<sup>th</sup> August and 31st August 2007.
11. No further steps were taken and the action became *périmé* on 13 September 2008 or on 1<sup>st</sup> September 2008 if the last appearance in Court is the date from which time is to be counted. Notwithstanding that the action is *périmé*, I refer to it in this judgment as the “present action” and as “the action”.

12. On 21 October 2008 AO Hall, Advocates for the Plaintiff, wrote to the Defendant's Advocate enclosing an application for directions proposing a timetable for disclosure and inspection of documents, exchange of witness statements and a pre-trial review.
13. By application dated 7 January 2009, the Plaintiff applied to the Court "*Pursuant to Rule 50(b) of the Royal Court Civil Rules 1989 or alternatively Rule 86(b) of the Royal Court Civil Rules 2007 for an order that the proceedings be restored to the Rôle*".
14. The parties are agreed that the action is still governed by the 1989 Rules so it is Rule 50(b) that applies:

*"Where an action becomes périmé – ...  
(b) any party to the action may apply to the Court for an order that the action be restored."*

### **The Plaintiff's grounds for seeking restoration**

15. The Plaintiff relies upon a number of factors in support of his application. In summary:
  - a) The Plaintiff is impecunious as a result of the matters complained of in the action and the Defendant's approach to the conduct of the litigation which has involved numerous interlocutory applications;
  - b) For two years, the Plaintiff did not progress the action because of his impecuniosity and the fact that the Police were conducting a criminal investigation;
  - c) And, if fresh proceedings have to be commenced, two out of the three causes of action will be prescribed;
  - d) The time delay between the action becoming *périmé* and the Plaintiff's Advocates writing to the Defendant's Advocates was only 37 days.
16. The only direct evidence as to the means of the Plaintiff was filed in response to an application for security for costs. In an affidavit sworn on 13 September 2004 and in a letter from his accountant dated ten days later, the evidence is that he had no funds other than an overdraft. His capital assets were his house and a workshop. He also had two investment properties that were fully mortgaged. His only other investments were tied up in McCabe & McRae. That information was not updated for the purpose of the present application although Mr Hayter said at paragraph 14 of his affidavit sworn on 7 January 2009 that:

*"[The Plaintiff] has informed me that he now has sufficient funds to finance the litigation and that he expects to be in an increasingly healthy financial position into 2009."*
17. The Police investigation in Guernsey appears to have started in April 2005. The Plaintiff wrote to the Guernsey Police with a complaint that the Defendant and his nephew had "*misappropriated substantial funds which they promised to invest on my behalf*". A copy of the letter is at page 218 of exhibit DH1 to Mr Hayter's affidavit.
18. An email from a Police officer sent on 16 September 2005 indicated the matter had been referred to the Crown Officers who were "*keen to tackle the case on two fronts, ie. the criminal offences and the regulatory breaches*".
19. In an email dated 20 February 2006, a Detective Constable told the Plaintiff's Advocates that he had authority to travel to Ireland to interview the Plaintiff and he had asked the Plaintiff to contact him with suitable dates.
20. On 7 December 2006, Mr Hayter spoke with the Detective Constable who told him that the ring leader of Bank Crozier had been arrested and was facing fraud charges in Sweden. He

said he had taken various witness statements and his next step would be to interview the Defendant but before doing so he was awaiting some information from the German Police who were also making some investigations. The earliest date for an interview would be early in 2007. He said that the Law Officers would advise whether information could be shared with the Plaintiff for use in civil proceedings as they would not want to release witness statements if that would jeopardise the criminal investigation.

21. On 13 April 2007, the Detective Constable emailed Mr Hayter to say he was still awaiting information from the Swedish and German Police and had not yet interviewed the Plaintiff. In a telephone conversation later that day, he told Mr Hayter that he expected to interview the Defendant “*by early August at the latest*”.
22. The next communication from the Police advised that nothing had been heard from the other jurisdictions and so the matter could not be progressed. That was by email sent on 15 October 2008, after the action had become *périmé*.
23. On 16 December 2008, the Police released three witness statements to the Plaintiff. Later the same day, the Police advised that the Swedish criminal investigation had been completed and various suspects were awaiting trial.
24. The Plaintiff submitted that if the present action is not restored to the *Rôle*, any fresh proceedings could only be brought in respect of one of the three causes of action currently pleaded as the first two are now prescribed by the lapse of time. On the other hand, if it is allowed to proceed, the present pleadings are now closed and the parties could proceed to the disclosure of documents. If the present proceedings are not pursued, there will be cost consequences. In view of the Plaintiff’s impecuniosity, it is said that he would be unable to commence fresh proceedings.
25. The delay on the part of the Plaintiff was 37 days between the action becoming *périmé* and his Advocates writing to the other side with a proposed timetable to progress the matter.
26. Advocate Ozanne, on behalf of the Plaintiff, submitted that given the importance of Guernsey’s reputation as a financial centre, the Court should be slow to strike out claims of this nature unless there are compelling reasons.
27. She argued that the Defendant’s ability to adduce evidence at the hearing would not be prejudiced as the case will principally concern documentary evidence.
28. In summary, she argued that the balance of fairness demanded that I exercise my discretion in favour of restoring the action and that to do otherwise would be disproportionate.

### **The Defendant’s grounds for resisting restoration**

29. The Defendant does not admit that the Plaintiff was impecunious and says that despite his alleged impecuniosity, he had an Advocate acting for him at all times. Furthermore, he could have applied for civil legal aid in Guernsey. The Defendant also denies that the manner in which he has defended the action has aggravated his situation. Advocate Harris said he only pursued one interlocutory application, the application for security for costs dated 27 August 2004 which was successful.
30. The Police investigation is no reason to allow the action to become *périmé*. No complaint was made to the Police until April 2005, eighteen months after these proceedings started. The Swedish investigation appears to concern persons other than the Defendant. The Defendant has not been approached by the Guernsey Police, or any other Police force to assist with any enquiries or to give any witness statement.
31. The Defendant submitted, on several grounds, that he would now be severely prejudiced if the matter was restored and came to trial. If the proceedings are not restored, two of the present causes of action could not be reinstated because they are prescribed. In relation to the third

cause of action, the Plaintiff alleges the Defendant is liable under section 70 of the Trusts (Guernsey) Law 1989 as a guarantor of McCabe & McRae. However under section 83 of the Trusts (Guernsey) Law 2007, he would now only be so liable in respect of proceedings instituted prior to the commencement of that law in March 2008. Advocate Harris added that, as the present action became *périmé* in September 2008, there are presently no proceedings pending against the Defendant and consequently he would be prejudiced if the action is restored.

32. He would be further prejudiced because many of the matters subject of the complaint are more than ten years old, a lot of the defence evidence will involve oral evidence and memories have inevitably become impaired, especially as the Defendant is now 70 years old.
33. Although the Defendant says he suffers impairment of memory, my understanding is that he does not claim that his memory is any worse than would normally be expected of someone of his age. He did not adduce any medical evidence to show that he is suffering from any medical condition.
34. Further prejudice, he said, will result from the fact that his nephew, who would have been a key witness, is now no longer willing to travel back to Guernsey from Singapore where he is living and the Defendant does not have the funds required to enable his evidence to be taken in Singapore.
35. Advocate Harris drew attention to several periods of delay on the part of the Plaintiff in the conduct of the action which together add up to almost three years:
  - i) Between 26 November 2003 and 12 August 2004 before providing further and better particulars of the claim;
  - ii) Between 12 September 2006 when the *Réplique* was lodged and 10 August 2007;
  - iii) Between 12 September 2007 and 13 September 2008 when the action became *périmé*; and
  - iv) Between 14 September 2008 and 7 January 2009 when application was made to restore the action.
36. Advocate Ozanne accused the Defendant and his Advocates of causing delays but in my view, the delays attributable to the Plaintiff are the more significant.

### **The law concerning *péremption***

37. I was referred to a number of decisions of the Guernsey Courts. They included two decisions of the Court of Appeal, the first of which was *Guernsey Annandale Tile Company* (1980) *Limited v Haines* (1997). It concerned an appeal from a decision of the then Deputy-Bailiff ordering, pursuant to Rule 50 of the 1989 Rules, that the case be restored to the *Rôle*. Southwell J A said that, in such applications, the onus is on the plaintiff to satisfy the Royal Court that in all the circumstances it is just to exercise its discretion in the plaintiff's favour. He deliberately emphasised the words "in all the circumstances", adding that the court's discretion is not to be fettered by judge-made criteria that the legislature has chosen not to impose.
38. Southwell J A set out relevant circumstances that the court would naturally take into account.
  - (1) *"the position of the plaintiff, and the effect on the plaintiff and the plaintiff's case if the action is not restored;*
  - (2) *the history of the action, and the activity or inactivity of the plaintiff, and of the plaintiff's legal representatives, which have led to the action becoming périmé;*

- (3) *the position of the defendant, and the effect on the defendant and the defendant's case if the action is restored;*
- (4) *any other special circumstances relating to the action and its conduct by the parties, including such matters as settlement discussions or any express or implied agreement not to take further steps in the action for the time being;*
- (5) *the general circumstances in Guernsey relating to the relevant class of litigation, including, for example, any difficulties in securing legal representation for impecunious plaintiffs, or in securing medical reports for plaintiffs suing for personal injuries."*
39. He said it would be wrong simply to adopt the statutory provisions that apply to the striking out of County Court actions in England and Wales as they are entirely different. He also said the general circumstances in England and Wales were different, for the reason that civil legal aid was then available in England and Wales but not in Guernsey.
40. The Court held that little helpful analogy could be drawn from the House of Lords decisions in cases that were sought to be struck out for want of prosecution because: *"In those cases the burden is on the defendant to show want of prosecution and prejudice: in the present case the burden was on [the] plaintiff to show a sufficient basis for restoration."*
41. The fact that a prescription defence will be lost if an action is restored is a factor to be taken into account. He said *"that is one reason why Rule 50 was made, in order to enable the Court to restore an action even when the prescription period has expired"*.
42. The other Court of Appeal decision to which I was referred was *Ogier v Grand Havre Holdings Ltd* ( 25 September 2007) where a differently constituted Court, with Sumption J A presiding, considered the difference between a plaintiff's application under Rule 50 and a defendant's application to strike out for want of prosecution. In the decision that was the subject of the appeal, Hancox LB had said that in principle he would have granted a Rule 50 application restoring the action but he did not in fact do so because he considered it should be struck out for want of prosecution.
43. At paragraph 13 of the Court of Appeal's judgment, Sumption JA said:
- "13. Both parties submitted that there was an inherent illogicality about the Bailiff's decision to strike out the action for want of prosecution in circumstances where he would have restored it to the roll under Rule 50. The criteria to be applied for restoration to the roll were considered by this Court in Guernsey Annandale Tile Co. v. Haines, 16 Oct.1997, 24 GLJ 48, 42. Although the two jurisdictions are distinct, the criteria are very similar to those which guide the courts in deciding whether to strike out for want of prosecution. In particular the question whether the delay was excusable and prejudicial arise in both jurisdictions. It is not impossible but must be very rare for a court to strike out for want of prosecution a case which it would have been prepared to restore to the roll. We do not know how the Lieutenant Bailiff squared this particular circle in the present case because he does not give his reasons for concluding that the action might properly be restored to the roll."*
44. The several Royal Court decisions to which I was referred are, in my opinion, no more than illustrations as to how the Court has exercised its discretion in the particular circumstances of each of those cases. They do not establish any new legal principles but merely show how the Court has applied the general principles identified by Southwell J A in *Guernsey Anandale*. In some of the cases, the judge has had to consider the extent to which the principles established in the strike out for want of prosecution cases are to be applied to Rule 50 applications.
45. In *Saromaje Limited v Janet Holdings Limited* (17 March 1993) the then Deputy Bailiff said:

*“I am reluctant to see the Rules as to péremption being eroded to the stage that restoration will be allowed in all cases other than that would have reached the stage of being struck out for want of prosecution”.*

46. Advocate Harris drew attention to the decision of Day DB in Stoneman v Cummings and Others (1999) in which he said that in the absence of special Guernsey factors (such as the position of an impecunious plaintiff at a time when no civil legal aid was available) the plaintiff will have a proportionately greater task in persuading the Court to show indulgence to restore an action that has become *périmé*.
47. In my view the decisions of the Royal Court that preceded the Court of Appeal decision in Ogier in 2007 must be read with some care. My understanding is that prior to 2007, the decision in Guernsey Annandale v Haines indicates that the courts regarded *péremption* as a uniquely Guernsey concept with no parallel in England. The purpose of it was clear; it was to ensure that plaintiffs would progress their cases without delay. Where an action had become *périmé* the onus was on the plaintiff to persuade the Court to grant him an indulgence by restoring the matter to the *Rôle*. In deciding how to exercise such discretion, the Court could derive little or no assistance from the principles established by the House of Lords when considering applications by defendants to have actions struck out for want of prosecution. The two types of application were different and were governed by different principles.
48. In Ogier the Court of Appeal was aware of the earlier decision in Guernsey Annandale v Haines but appears to have adopted a different interpretation as to how the Court should approach the two different types of application. In my view, that is apparent from the passage I have cited from paragraph 13 of Sumption J A’s judgment.
49. *Péremption* is a long-established feature of Guernsey law and procedure dating from a time when our civil procedures were different from those of the English courts. In more recent times, we have adopted procedural rules that are modelled on those of the English courts (developments that some traditionalists might regret). Where the two procedures are inconsistent, we have to consider whether and how they must be interpreted so that what remains of our ancient procedures can be applied in a way that is consistent with the modern, written, Rules of Court.
50. To what extent should the Court’s approach to Rule 50 applications differ from its approach to strike out applications? The objective that underpins them both is the same, namely the need to ensure that a plaintiff who has commenced proceedings progresses the action with due diligence and without delay. It is therefore logical that the criteria to be considered by the Court should be similar in both applications.
51. There remains, however, a fundamental difference between the two in that the plaintiff has the onus, in a Rule 50 application, to persuade the court to grant an indulgence whereas, in an application for strike out for want of prosecution, it is the Defendant who must persuade the Court to exercise its discretion in his favour.

## Decision

52. After reminding myself that the burden is on the Plaintiff, I considered the reasons why the action became *périmé*. First, what account should I take of the Plaintiff’s impecuniosity? I will accept that, although he had some capital assets, he had no realisable investments and no access, or only limited access, to cash. I will also accept for this purpose that his impecuniosity might have been caused by the actions of the Defendant that are the subject of the present action.
53. However, the Plaintiff’s circumstances are distinguishable from those of plaintiffs in personal injury actions where the Courts have accepted that special Guernsey factors have to be considered in Rule 50 applications. The Plaintiff has had an Advocate acting for him at all relevant times, he was not dependent upon having to find an Advocate prepared to pursue the case to its conclusion *pro bono* in the absence of civil legal aid. Unlike some personal injury

claimants, he was not in the position of being unable to investigate, or pursue, his action by reason of needing an expert report as to liability or quantum and not having the funds available to obtain an expert's services.

54. There is no evidence that the Plaintiff was so impoverished that he, or his Advocate on his behalf, could not have taken whatever step was necessary to keep the action 'alive'. What he could, or should, have done was to bring the action before a Friday Interlocutory Court for directions.
55. In fact, he should have done so before the end of April 2008. The action was inscribed on the *Rôle des Causes à Plaider*, the pleadings had not closed and it was not on the *Rôle des Causes en Preuve* as at 4 February 2008, the date when the Royal Court Civil Rules, 2007 came into force.
56. Practice Direction No 2 of 2008 applied, paragraph 4 of which stated:

***“4. Actions where a defence has been filed and the action remains on the Rôle des Causes à Plaider on 4 February 2008***

*The court will expect to case manage all such cases in accordance with the 2007 Rules. The Advocate for the Plaintiff in each such case is directed to list the matter for directions to be given in an Interlocutory Court before the end of April. The Court will then decide whether to place the action on the Rôle des Causes en Preuve, in which event the 2007 rules will thereafter apply to that action.”*

57. The reason the Court issued that Practice Direction is that the 2007 Rules introduced new case management procedures conferring certain express powers on the Court and imposing certain obligations and responsibilities on the parties that had not previously been expressed in the Rules. It was important that, wherever possible, all outstanding litigation was to be governed by the same rules. The Greffe (and the Court) did not know how many cases that had started under the old Rules were still active because many cases had been settled or abandoned without being withdrawn in Court and without otherwise informing the Greffe (or the Court).
58. The Practice Direction therefore put the onus on plaintiffs' Advocates to identify all outstanding cases and to apply for directions in respect of each case so that, wherever possible, they would all be governed by the new case management procedures. One of the advantages of the new Rules is that, in every case, the parties should always know the next step in the procedure and the date by which such step has to be taken. If the new rules are followed correctly, a situation should never arise where an action becomes *périmé*.
59. If the Plaintiff, or his Advocate, had sought directions in the present case as directed by the Practice Direction, this action would not have become *périmé*. I accept that the Plaintiff might not have known about the existence of the Practice Direction, but his Advocate knew, the Advocate was acting for him, the Advocate should have told him he had to list the matter for directions and should have discussed with the Plaintiff the nature of the directions he could seek.
60. The failure to act in accordance with the Practice Direction is, in my view, a significant factor and one of the circumstances that must be taken into account in the present application.
61. Even if the Practice Direction had not been issued, the least the Plaintiff should have done was to apply to the Court for directions as to the future conduct of the action before it became *périmé*.
62. If the Plaintiff wanted the action to be stayed pending the completion of Police investigations, he could have sought a formal order to that effect. Advocate Ozanne suggested that might have prejudiced the Police enquiries by alerting the Defendant to the investigation but there is no evidence to show that the Police held that view, or that they were asked for their opinion. It is unlikely to have been a secret that the Swedish Police had carried out an investigation, that they had brought charges, and that the accused were awaiting trial in that country. Even if

the Defendant was told that he might be the subject of a complaint, there is no evidence that he could have done anything to frustrate the investigation. In conclusion, I am not persuaded that matters were so confidential that an application for a stay would have been prejudicial to any criminal investigation.

63. I do not know whether the Plaintiff could have applied for civil legal aid in Guernsey, I have assumed he would not have been eligible. That issue does not affect my conclusion because I have assumed that the cost of applying for directions or for a stay of the action was not prohibitive. Or, to be more precise, the Plaintiff has not discharged the burden of persuading me that the cost was so great that no application could be brought.
64. I accept counsels' conclusion that two of the three causes of action currently pleaded are now prescribed and could not be pursued if fresh proceedings had to be issued. Counsel disagree as to the situation regarding the third cause of action.
65. Advocate Harris said that the material facts pleaded do not allege fraud, they do not allege that the Plaintiff was a personal trustee, and there is no pleading of a fraudulent breach of trust. He said that the third cause of action amounted to no more than an allegation that pursuant to section 70 of the Trusts (Guernsey) Law 1989 the Defendant would be liable as a guarantor of McCabe & McRae in respect of any damages that might be awarded against McCabe & McRae for any breach of trust committed by it. If the proceedings had to be recommenced, the Defendant would lose the protection offered by section 83(3) of the Trusts (Guernsey) Law 2007:

*“For the avoidance of doubt, a director or former director of a corporate trustee shall not, after the date of commencement of this Law, be under any duty, obligation or liability as guarantor by virtue of section 70 of the Trusts (Guernsey) Law, 1989 except by virtue of any proceedings instituted prior to that date against the trustee in respect of a breach of trust committed by the trustee.”*

66. On the other hand, Advocate Ozanne submitted that the cause of action was not prescribed but accepted that if the proceedings were not restored to the *Rôle*, the Plaintiff would not be able to pursue a claim under section 70 of the 1989 Law.
67. In my view, the effect of section 83(3) of the 2007 Law is clear. There will be prejudice to the Plaintiff if he has to reissue the proceedings because the Defendant will be able to claim the protection offered by that sub-section in respect of any claim against him as guarantor of the liabilities of the corporate trustee.
68. I am unable to reach a conclusion as to whether the Plaintiff would have a cause of action against the Defendant for fraud. I accept Advocate Harris' submission that none of the representations pleaded at paragraphs 1 to 8 of the Cause are alleged to have been uttered by the Defendant. However, many of the elements of fraud are alleged. It is alleged that the Defendant was part of an unlawful means conspiracy that made certain representations falsely and fraudulently. If the evidence exists to prove all of those allegations, it may be that there would be sufficient evidence to plead a case in fraud, even if Advocate Harris is correct in saying that the present pleadings do not do so.
69. In the Plaintiff's Skeleton Argument submitted in response to the Defendant's Skeleton Argument, Advocate Ozanne said that *“In Annandale v Haines, Southwell JA explicitly refused to take [the fact that the defendant would lose its prescription defences] into account.”* She added in relation to the application before me that:

*“4.3 The Court's discretion to restore the Acton is unfettered by prescription periods. In deciding whether to exercise its discretion the Court should not take into account the Defendant's loss of prescription defences.”*

70. I do not agree with that analysis of the Court of Appeal's decision in *Guernsey Annandale*. The Court emphasised that all the circumstances must be considered and refused to impose

any fetters on the exercise of discretion that have not been included in Rule 50 itself. The Court also said that the five factors to be taken into account include the effect on the plaintiff's case if the action is not restored and the effect on the defendant's case if the action is restored. In addressing issues raised by Advocate Haskins, Southwell JA said that if the case was restored the defendant would have lost a prescription defence. He added that the defendants would have little hope of recovering costs and that memories would have faded, all of which factors were prejudicial to the defence. Then Mr Southwell said "*These were factors fully taken into account by the Deputy Bailiff*".

71. My understanding is that the Court of Appeal was saying that the loss of a prescription defence is a factor to be considered when looking at the balance of prejudice to the two parties in the exercise of discretion. However it is not a conclusive factor. In an appropriate case, a claim can be restored even though it would deprive the defendant of a defence of prescription.
72. I turn next to look at the other reasons the Defendant has put forward to explain why he says a fair trial will now not be possible. I accept that memories will inevitably have faded. However I do not consider that to be as prejudicial in this case as it might be in other circumstances. Much of the evidence will be documentary and there is no suggestion that any documents have gone missing as a result of the delays.
73. The Defendant has been legally represented in these proceedings and I assume that his Advocates will already have taken a proof of evidence that will assist him in recalling events. Advocate Harris complains that many of the allegations are not clearly pleaded. If that is correct, it would hamper the finalisation of a witness statement but nevertheless significant progress could have been made in drafting the statement. That is especially so because the defences plead that the Defendant was not involved in most of the meetings that took place and was not involved in making many of the alleged representations. It is therefore unlikely that he would have much evidence to give on those issues and hence the impact of his loss of memory is of less significance than it might otherwise have been.
74. The Defendant says that he will also be prejudiced because his nephew is now unwilling to attend to give evidence and he cannot afford to take his evidence in Singapore. The reason he gave was that the nephew would be at risk of being arrested. I accept that the nephew would have relevant evidence that he could give and that might be significant. I cannot assess how much his evidence might assist the Defendant without seeing a proof of evidence. I will assume for the moment that the nephew's evidence would indeed be helpful to the Defendant.
75. The fact that the nephew is concerned that he would be arrested is indicative of a fear that he may have committed a criminal offence. If he was totally innocent, there would be nothing to fear and he might even want to assist the Police with their enquiries in order to clear his name. I therefore assume that the nephew's evidence, if he was to give it, would include matters that might incriminate him. If so, I have to ask myself whether he would have been a willing witness even if there had not been delay and it seems to me unlikely that he would have been. Consequently, I am not persuaded that the nephew is less likely to give evidence as a result of the delays that have occurred. I have no evidence as to the cost of taking his evidence in Singapore and I am not persuaded that the cost is so high that it would prohibit the Defendant obtaining his evidence in Singapore.
76. My conclusion as to the effect on the Defendant if the action is restored is that the main prejudice will arise from the loss of the prescription defences that would be available to him if fresh proceedings were issued. If fresh proceedings were issued, he would also have the benefit of the legal protection afforded by section 83(3) of the 2007 Trusts Law that would not be available to him if the present action was restored.
77. In paragraph 16 of the Defendant's Affidavit sworn on 23 February 2009, he said that "*it is now simply not possible to have a fair trial*". In his submissions, Advocate Harris referred to the prejudice the Defendant would suffer, describing it as "huge prejudice" but I believe he stopped short of saying that a fair trial would no longer be possible. I do not know whether

that is because the legal test I must apply is not expressed as being whether a fair trial would still be possible. However, I have applied my mind to the question of whether a fair trial is still possible. In my opinion, a fair trial is still as possible as it would have been if the delays have not occurred.

78. I have dismissed from my considerations any possibility of the Plaintiff making a claim against his Advocate if the action is not restored. In her Skeleton Argument, paragraph 3.6, Advocate Ozanne said

*“For the last two years or so, having regard to his impecuniosity and the fact that a criminal investigation was proceeding into the Defendant’s affairs, the Plaintiff’s instructions have been not to progress the civil claim substantively.”*

79. She has thus painted the picture that inaction on the Plaintiff’s part was as a result of express instructions given by him. Whether he could pursue a claim against his Advocate would depend upon the detail of his precise instructions and the nature of any advice given to him as to the consequences of not taking active steps to pursue the action. I do not have the evidence to enable me to form a view on those matters and therefore I have assumed that he would have no claim against his Advocate.
80. Advocate Ozanne submitted that the action contains allegations of fraudulent conduct against a Guernsey resident and his company who, it is alleged, were conducting unlicensed investment business and that given the importance of the Island’s reputation as a financial centre, the Court should be slow to strike out claims of this nature. I have carefully considered that submission and reject it because the Police and the Law Officers of the Crown are aware of the matter. They can be relied upon to bring a criminal prosecution if there is sufficient evidence and to recommend that any relevant regulatory authorities take appropriate steps to deal with the matter, regardless of what happens to the civil action.
81. There was some debate as to the date on which the action became *périmé*. It was either on about 13 September 2008 being one year after the last action taken by the Plaintiff namely the lodging of a *Réplique* or, about 1st September 2008 being one year after the last time the matter was mentioned in Court. In my view, the difference of 12 days is not material to my decision.

## Conclusion

82. I have found this to be a difficult decision in which the arguments are finely balanced. In fact, they are so finely balanced that my decision turns on the burden of proof. My conclusion is that the Plaintiff has failed to discharge the onus of persuading me that it is appropriate to restore the action to the *Rôle*.
83. In reaching that conclusion I have had regard to the reason why the action was allowed to become perempt. It was that the Plaintiff had given express instructions that it was not to be pursued in the light of his impecuniosity and in the light of the pending Police investigation.
84. Those instructions were not made known to the Defendant and the Court was not asked to give its blessing. The Plaintiff did not obey the directions in Practice Direction No 2 of 2008 to list the matter for the court to give directions before the end of April 2008.
85. I have had regard to the fact that the Practice Direction did not spell out the consequences of a failure to comply. In the absence of any such statement, it would be wrong to say that non-compliance will automatically lead to an action being struck out and it would be wrong to assume that it leads automatically to the conclusion that the Plaintiff is deemed to have abandoned the proceedings.
86. In my view, the fact of non-compliance is a circumstance or factor that I must consider in this application. It defeated the purpose of the Practice Direction which was to enable the Court

to identify the cases that were still ongoing and would require to be managed under the new procedures.

87. Furthermore, it ran contrary to one of the express objectives of the new Rules; to deal with cases “expeditiously and fairly”. If the Plaintiff had wanted to apply for a stay of the proceedings so that the action could be dealt with fairly, he could have applied for a stay. Before the enactment of the 2007 Rules, there was of course an obligation on every plaintiff to pursue his case expeditiously but the obligation to do so was given fresh emphasis in the new Rules and any plaintiff who unilaterally chooses to ignore the requirements of the Rules must face the consequences.
88. If the Plaintiff had sought directions as to the future progress of the action after the end of April 2008 but before the action became *périmé* I am sure that the Court would have permitted the action to continue or it would have granted a stay if that was appropriate. It is a different matter to come along after the action has become *périmé* and to seek leave of the Court to restore the action when the Plaintiff has chosen to ignore a direction of the Court.
89. In my view that is an important factor in the present case and none of the other factors I am required to take into account outweigh it. I therefore conclude that the Plaintiff has not discharged the burden of persuading me it is appropriate to restore the action to the *Rôle*.
90. I apologise for the delay in producing this judgment. The parties were ready for a hearing in the early part of the summer, 2009. However, there were delays in finding a date that was convenient to counsel and the Court. The application was eventually heard shortly before I started a lengthy civil trial with Jurats. Regrettably, I was unable to give this judgment the attention it deserved until after the conclusion of that matter. I have approached the application as if it had been heard, and the judgment produced, in a timely manner. On my instructions, the Greffe have kept counsel advised of the delay but I am sorry I was unable to reach a decision sooner.
91. Any consequential applications arising from this judgment are to be tabled in an Interlocutory Court.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

Civil 781

The 22nd day of March 2010 before Richard John Collas Esquire, Deputy Bailiff, alone

Between

**FRANK McNAMARA**

**Plaintiff**

-v-

**FRANCIS McCABE GAUSON**

**Defendant**

Whereas on the 15th March the Deputy Bailiff considered an application by the Plaintiff for leave to appeal the decision of 9th February dismissing an application to restore this action to the Rôle des Causes à Plaidier and heard thereon Advocates A M Ozanne and R I C E Harris counsel for the Plaintiff and Defendant respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and REFUSED leave.

**S M D ROSS**  
HM Deputy Greffier

Approved Judgment  
22 March 2010

IN THE ROYAL COURT OF GUERNSEY  
ORDINARY DIVISION

Between

FRANK McNAMARA

Plaintiff

-v-

FRANCIS McCABE GAUSON

Defendant

APPLICATION FOR LEAVE TO APPEAL

Hearing Date: 15<sup>th</sup> March 2010  
Judgment handed down: 22<sup>nd</sup> March 2010  
Before: Richard John Collas Esq., Deputy-Bailiff

Advocate for Plaintiff: A M Ozanne  
Advocate for Defendant: R I C E Harris

**Cases, texts & legislation referred to:**

*Salaman v Warner* [1891 1 Q.B. 734

*Ogier v Grand Havre Holdings Ltd* (Royal Court, 27<sup>th</sup> April 2007)

*Ogier v Grand Havre Holdings Limited* Civil Appeal 374, 25<sup>th</sup> September 2007

*Nash v States of Guernsey* (Royal Court 1<sup>st</sup> September 1997)

*Planning and Environment Committee v Lesquende Limited and Others* [2003 JLR 15]

*White v Brunton* [1984] 2 All ER 606, CA

*Ogier v Grand Havre Holdings Limited*

Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027

*Chetsov v BNP Paribas Jersey Trust Corporation Limited* (Royal Court of Jersey 22<sup>nd</sup> July 2009) and (Jersey Court of Appeal 11<sup>th</sup> August 2009)

*Glazebrook v Housing Committee of the States of Jersey* (13<sup>th</sup> November 2002)

*Smith v Cosworth Casting Processes Ltd* Practice Note [1997] 1 W.L.R 1538

*Guernsey Annandale Tile Company (1980) Limited v Haines* (Guernsey Court of Appeal 6 November 1997) 24 GLJ 48 and 82

*Birkett v James* [1977] 3 W.L.R. 38

1. This is my decision on the Plaintiff's application for leave to appeal the judgment I handed down on 9<sup>th</sup> February 2010 in which I dismissed the Plaintiff's application to restore his action against the Defendant that had become *perimée*. In this decision, I refer to the application for leave to appeal as "the Application" and to the draft notice of appeal as "the Notice of Appeal".
2. Before dealing with the merits of the Application, there are three preliminary issues that have been raised by counsel:

- a) To confirm that the judgment of 9<sup>th</sup> February is an interlocutory decision in respect of which leave to appeal is required:
- b) To consider whether, as the judge of the court at first instance, I have jurisdiction to grant leave more than one month after the judgment was handed down when the Application and Notice of Appeal were lodged with H M Greffier and served on the Defendant within the one month period; and
- c) To establish the criteria that are to be applied in Guernsey to applications of this nature. In summary, whether I should follow the English Courts or the Jersey Courts.

### What is an Interlocutory Decision?

3. Leave to appeal is required in respect of interlocutory decisions by reason of Part II (Appeals in Civil Matters) of The Court of Appeal (Guernsey) Law, 1961 (“the Appeals Law”), section 15(e) of which provides that:

*“15. An appeal shall not lie to the Court of Appeal under this Part of this Law-*

*(e) without the leave of the presiding judge of the court whose decision is sought to be appealed from or of the Court of Appeal, from any interlocutory order or interlocutory judgment, except in the following cases:- [none of which are relevant to the present application].*

4. Section 13(e) of the Court of Appeal (Jersey) Law 1961 contains the same limitation in respect of that island.
5. Neither the Appeals Law nor the rules made thereunder contain a definition of what is an interlocutory order or interlocutory judgment.
6. On 3<sup>rd</sup> March 2010 Advocate Ozanne, acting on behalf of the Plaintiff lodged with HM Greffier the Application and the Notice of Appeal. She did so under cover of a letter saying that she was unsure whether leave was required. By the time the matter came before me, Advocate Ozanne had agreed with Advocate Harris, on behalf of the Defendant, that leave was required as the decision was interlocutory.
7. I respectfully agree with counsel. My understanding, both as an Advocate in private practice and as a Deputy-Bailiff, has been that in this Island we follow the test laid down by Lord Esher, M.R. in *Salaman v Warner* [1891] 1 Q.B. 734, at page 735:

*“The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purpose of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.”*

8. That test was followed by Hancox L.B. in *Ogier v Grand Havre Holdings Ltd* (Royal Court, 27<sup>th</sup> April 2007) but I have not been referred to any other written decision of the Royal Court or of the Guernsey Court of Appeal that expressly quotes that test.
9. Whilst preparing this judgment, I consulted the Index to the volumes 1 to 29 of the Guernsey Law Journal and noted that there is only one reference under the heading “Court of Appeal – Civil Division – leave to appeal to Court of Appeal”. It is a report at 24.GLJ.2 of the decision of the then Deputy-Bailiff in *Nash v States of Guernsey* (Royal Court 1<sup>st</sup> September 1997). That decision is in a short judgment which I quote in full:

*“Advocate Merrien has sought leave to appeal against my decision of the 30<sup>th</sup> December last in which I upheld an exception de fonds raised by the States of Guernsey in the action brought by a former air traffic controller Mr. G. F. Nash. Mr. Roberts on behalf of the States takes no point on the fact that Mr. Merrien is out of time and the only issue for me is whether under section 15(e) of the Court of Appeal (Guernsey) Law, 1961 my leave is required on the basis that my judgment was an interlocutory judgment. This same point arose in the case of Fruit Export Company Limited v. The Guernsey Gas Company. On the face of it the upholding of an exception de fonds in such cases means that the action is dismissed and I cannot see that there is anything “interlocutory” about such a judgment. I therefore am of the view that my leave is not required, but if I am wrong in this I am quite satisfied that despite the fact that Mr. Nash’s grounds for appeal do not fully convince me that he has a good arguable case at this stage, it would be wrong for him to be denied the right to have my decision reviewed by the Court of Appeal in view of the finality of the present decision.”*

10. It appears that the Deputy-Bailiff did not have the benefit of any authority to guide him as to whether the decision was interlocutory or as to the criteria to apply in deciding whether to grant leave and I do not believe that his judgment represents the current practice of the courts in this Bailiwick. If it did, the outcome of the present Application would be that leave is not required or would be granted because my judgment of 9<sup>th</sup> February produced finality by refusing leave to restore the proceedings to the Rôle.

11. In the Jersey case of Planning and Environment Committee v Lesquende Limited and Others [2003 JLR 15], the learned Deputy-Bailiff of Jersey said, at paragraph 8(b):

*“Although there is no decided case in Jersey it has certainly been my impression, both as an advocate and as a judge, that the Salaman approach has, in general, been followed.”*

12. In my view, exactly the same can be said about the practice in Guernsey. Therefore, I agree with counsel that we apply the *Salaman* test in this Island and, consequently, the order I made in my judgment of 9<sup>th</sup> February was an interlocutory order.

### **Is the Plaintiff Out Of Time?**

13. The chronology is:

9 February 2010: I handed down the judgment.

3 March 2010: The Plaintiff’s Advocate lodged the Notice of Appeal and the Application (for leave to appeal) with H M Greffier as Registrar of the Court of Appeal and served the same on the Defendant’s Advocate.

9 March 2010: The Plaintiff’s Advocate applied to H M Greffier to set down the Appeal in accordance with Rule 4(1) of The Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (“the Rules”).

12 March 2010: The Application came before me in the ‘Interlocutory Court’ and at the request of Advocate Harris I adjourned the matter to the following Monday, 15 March to enable him to lodge further authorities.

15 March 2010: I heard submissions from Advocates Ozanne and Harris on the Application.

14. Advocate Ozanne submitted that she had done all she could within the period of one month that is allowed under Rule 3 for serving a notice of appeal.

15. On the other hand, Advocate Harris argued that an appellant cannot properly have served a notice of appeal if subsequently he has to ask for leave to validate such service. Furthermore, he said that Advocate Ozanne omitted to ask for an extension of time for serving the Notice of Appeal before the expiry of the one month appeal period. Had she done so I, as the first instance judge, could have granted an extension of time under Rule 17(3). He argued that I cannot now do so because my jurisdiction is only exercisable “*upon application being made before the expiration of that period*”.
16. I note that an extension of time can be agreed in writing by the parties but on this occasion Advocate Ozanne did not ask Advocate Harris for any extension.
17. In support of his contention that a valid notice cannot be served until leave has been given, Advocate Harris relied upon paragraphs 59/1/139 and 59/14/17 of the Supreme Court Practice 1999 and to one of the decisions cited in the former of those two paragraphs, *White v Brunton* [1984] 2 All ER 606, CA, and specifically to the judgment of Sir John Donaldson, MR at page 108F.
18. In my view, time is deemed to have stopped running when the Application was lodged with HM Greffier and served on the Defendant. It might be said that Advocate Ozanne could have included an application for an extension of time which I could have considered either before or after the expiration of the appeal period, under Rule 17(3). However, she did not do so and it would seem wholly unjust in the circumstances to penalise her client for that omission when the underlying purpose of the Rules has been achieved, namely to ensure that notice of the Application is served on the Defendant in a timely manner and without delay.
19. Advocate Harris argued there could have been an unreasonable delay between the filing of the Application and its determination but, as Advocate Ozanne said, once an application has been filed, the parties are in the hands of the Court.
20. One of the purposes of requiring a prospective appellant to seek leave of the presiding judge in the court of first instance is to assist in identifying and filtering out unmeritorious appeals. The first instance judge has an understanding of the issues involved in the case and if he, after applying the appropriate criteria, concludes that leave should be granted, the Court of Appeal will respect that decision. On the other hand, if he refuses leave, the appellant can renew his application before the Court of Appeal, initially to a single judge thereof. The Court of Appeal may find that it is of assistance to know the reasons why the first instance judge refused leave. In any event, the prospective appellant would have the opportunity of a hearing of his application in front of a single judge, or a plenary sitting, of the Court of Appeal.
21. I am therefore satisfied that there is nothing in the Rules, nor in the spirit of the Rules, that would prevent the judge of the court of first instance exercising his jurisdiction to consider an application for leave to appeal after the expiry of the period allowed for serving a notice of appeal and to grant leave, if he so decides.

### **What Criteria are to be Considered on an Application for Leave to Appeal?**

22. In *Ogier v Grand Havre Holdings Limited*, Hancox LB mentioned several decisions of the English courts which he said formed the foundations of a practice note issued under the authority of the Master of the Rolls, Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027. I refer to the Practice Direction as the “PD of 1999”. It lays down, at paragraph 2.8, a general test for permission to appeal:

*“The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case*

*raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for reconsideration.”*

23. Mr Hancox adopted that as the relevant test to apply in this jurisdiction and he refused leave to appeal. Mrs Ogier pursued the application, as she was entitled to do, before a plenary sitting of the Court of Appeal whose judgment was delivered by Sumption JA in Ogier v Grand Havre Holdings Limited, Civil Appeal 374, 25<sup>th</sup> September 2007.

24. Although it was an application for leave to appeal, the Court considered the merits of the proposed appeal before concluding, at paragraph 18 that

*“In our judgment there are no substantial grounds for challenging the Lieutenant'-Bailiff's conclusions in this case. We therefore refuse leave to appeal.”*

25. The Court of Appeal did not expressly approve the test adopted by Mr Hancox because it did not set out the terms of test to be applied. On the other hand, the Court did not criticise the approach taken by Mr Hancox. Therefore, it can be said that, by implication, the Court of Appeal agreed that the PD of 1999 is to be followed in Guernsey.

26. Advocate Harris drew attention to decisions of the Jersey Royal Court and Court of Appeal which show that in our sister island a different test is applied even though the relevant provisions of the two Appeals Laws are the same and the same panel of judges are appointed to the Courts of Appeal in both islands.

27. Two of the judgments were in the matter of Chetsov v BNP Paribas Jersey Trust Corporation Limited. The first, dated 22<sup>nd</sup> July 2009, was a decision of the Bailiff of Jersey, the judge at first instance. The second, dated 11<sup>th</sup> August 2009, was a decision of Vos JA sitting as a single judge of the Court of Appeal. Both judgments refused the plaintiff leave to appeal the Bailiff's judgment (issued when he was Deputy-Bailiff) dismissing the plaintiff's order of justice as disclosing no cause of action. Both courts applied a test that had been adopted by the Jersey Court of Appeal in Glazebrook v Housing Committee of the States of Jersey (13<sup>th</sup> November 2002). The test is explained by the Bailiff at paragraph 7 of his decision:

*“There are the usual three headings: - i) is there a clear case of something having gone wrong, ii) is there a question of general principle to be decided for the first time and iii) is there an important question of law upon which further argument or a decision of the Court of Appeal would be to the public advantage?”*

28. The wording of the first limb of the test laid down in the P D of 1999, “a real prospect of success”, is different from the test applied in Jersey, “a clear case of something having gone wrong”, but the two are similar and it is likely that in very many cases both tests will produce the same result.

29. It is apparent from paragraph 19 of the Jersey Court of Appeal's decision in Glazebrook that the test they adopted was based upon the principles relating to the grant of leave to appeal that used to be applied by the English Court of Appeal as set out in the Supreme Court Practice 1988. They pre-date the P D of 1999 which was not mentioned by the Jersey Court of Appeal and probably was not drawn to its attention.

30. Advocate Harris argued that the P D of 1999 post-dates the Woolf reforms in England and, for that reason, it should not have been adopted in Guernsey by Hancox LB. I am not persuaded that the P D of 1999 is part of the reforms introduced by the Civil Procedure Rules, or influenced by those reforms. It followed a Practice Note issued by the Court of Appeal in 1997: Smith v Cosworth Casting Processes Ltd Practice Note [1997] 1 W.L.R 1538 where Lord Woolf said the Court was laying down some guidance which he described as “largely a matter of common sense”. The guidance began:

*“1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different*

*from that which is sometimes used, which is that the applicant has no arguable case. Why however the court has decided to adopt the former phrase is because the use of the word “realistic” makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.”*

31. In my view, that passage shows that the phrase adopted in the P D of 1999 was not a novel innovation but merely an evolution of terminology that had been used previously.
32. Advocate Harris also argued that as the Jersey and Guernsey Appeals Laws are similar and as we have the same panel of judges, the same test should be applied in both islands. Furthermore, as the *Glazebrook* test had been adopted by a single judge of the Jersey Court of Appeal, it was more persuasive than the P D of 1999 that had only been followed by a Lieutenant-Bailiff in Guernsey and not expressly approved by our Court of Appeal.
33. I do not accept his argument. A common approach in both islands may be desirable but it is not essential; the two Courts are free to adopt different practices if they so wish. It is more significant, in my opinion, that the P D of 1999 was not drawn to the attention of the Jersey Court of Appeal in either of the decisions Mr Harris relies upon.
34. Therefore, I prefer to follow Hancox LB’s decision in *Ogier* where he adopted the test set out in the P D of 1999, especially as his decision to do so was not criticised by the Court of Appeal when it considered, and dismissed, the application for leave to appeal in the same matter.

### **The Grounds of Appeal**

35. The Plaintiff’s draft Notice of Appeal in the present matter includes the following grounds, at paragraph 16:

“16. *The Deputy Bailiff has erred in his findings in Law as follows:*

- 16.1 *In breach of the guidelines set down in Guernsey Annandale Tile Company (1980) Limited v Haines by the Court of Appeal no or no adequate account is taken in assessing prejudice to the Plaintiff of the special “Guernsey Factor” of loss of the only security the Plaintiff has for his claim which will follow if the matter is not restored namely the registration in the Livre des Hypotheques.*
- 16.2 *In the case of Guernsey Annandale Tile Company (1980) Limited v Haines the Court of Appeal expressly states that one of the reasons why rule 50 was made was to enable the Court to restore an action even when the prescription has expired and accordingly the loss of prescription defence should not be taken into account when assessing the potential prejudice that could be suffered by the Defendant by restoring the matter.*
- 16.3 *The Judge has not adequately (or at all) taken account of the effect of the Ogier v Grand Havre Holdings Ltd criteria as set out in the leading English case of strike out for want of prosecution Birkett v James [1977] 3 W.L.R. 38. This held that for a strike out the power of the Court should only be exercised where the Plaintiff’s delay has been “intentional and contumelious” or alternatively whether there has been an “inordinate and an inexcusable delay giving rise to a substantial risk that a fair trial would not be possible or to seriously prejudice the Defendant (emphasis supplied).*
- 16.4 *Despite finding the Ogier v Grand Havre Holdings Ltd criteria apply no finding is made as to whether or not the delay in this matter is*

*“excusable” and the test as to whether or not prejudice (which for the purposes of this application must be “substantial”) is misapplied. Indeed as there is a finding of fact that “a fair trial is still as possible as it would have been if the delays had not occurred” the Judge has misapplied the criteria.*

- 16.5 *Further that where the underlying claim is not prescribed (as the fraud claim here is not) then apart from the case of contumelious conduct on the part of the Plaintiff the discretion should not normally be exercised when to do so would only aggravate the prejudice to the Defendant from delay and to add to costs (Birkett v James [1977] 3 W.L.R. 38). The same criteria applied on strike out applications should be applied in an application to restore.*
- 16.6 *The only direct prejudice found that will be suffered by the Defendant if the matter is restored is the loss of prescription defence (which is in any event found to be “not a conclusive factor”.) accordingly refusing to restore on that ground is in error.*
- 16.7 *The failure to comply with the Practice Direction is not (for the purposes of the criteria of an application to restore) a “significant factor” and has been given undue weight particularly where such failure has not directly caused the Defendant relevant prejudice.*
- 16.8 *The failure to comply with the Practice Direction is not a contumelious act and following Weir Valves & Controls (UK) Ltd v Mrs J B Armitage EAT [2003] “the guiding consideration is always the overriding objective” and “the Court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice”*
- 16.9 *In finding that the failure to comply with the Practice Direction “is an important factor in the present case and none of the other factors I am required to take into account outweigh it” when it was either (a) inappropriate in law to take account of it in this way at all or (b) to give it such weight was in error and it does not “outweigh” all other factors. Inter alia no or inadequate weight or consideration is given to the costs consequences and the Plaintiff’s impecuniosity.*
- 16.10 *The Plaintiff has not acted contumeliously and even had the Judge found “inordinate and inexcusable delay” he has found as a fact that “a fair trial is still as possible as it would have been if the delays had not occurred” and accordingly should have restored the matter to the Rôle.*
- 16.11 *The Judge has failed or failed adequately to apply the over-riding objective of dealing with matters “justly” and “fairly” in dismissing the Plaintiff’s application.”*

36. Advocate Ozanne expanded upon these grounds in her oral submissions. I will deal with each one in turn.

### **Paragraph 16.1**

37. The Plaintiff has registered its action against the real property of the Defendant and, Advocate Ozanne said, that is the only security he has for the claim. I agree with her that the ability to register claims in the *Livre des Hypotheques* is a special feature of Guernsey law but it is not, in my view, one of the special factors that Southwell JA had in mind in Guernsey Annandale

Tile Company (1980) Limited v Haines (Guernsey Court of Appeal 6 November 1997) 24 GLJ 48 and 82. The examples cited by Mr Southwell were difficulties in securing legal representation or in obtaining medical reports in personal injury actions in the absence of legal aid. In my opinion, the special factors he had in mind are matters which will delay or hinder a complainant or plaintiff in instigating or pursuing legal proceedings. The ability to register a claim is not such a factor. Indeed the fact that a claim has been registered should be a reason for pursuing the action expeditiously so that the inconvenience caused to the defendant by registering a claim that may ultimately fail, or not be successful in the full amount claimed, is minimised. The existence of such a registration cannot be used to justify an application to restore an action that is *perimée*.

## Paragraph 16.2

38. In her oral submissions, Advocate Ozanne said that the loss of a prescription defence is not a factor that should be taken into account on the issue of prejudice. Her reason was, as I understand it, that the purpose of giving the Royal Court the power to restore an action that has become *perimée* is to enable the Court to keep alive an action that could not be recommenced by issuing fresh proceedings. She was replying to Advocate Harris who, she said, had misconstrued her submission by saying that she was claiming that in every case where prescription has expired the action should be restored.
39. I do not agree with either of their arguments and I am not persuaded that I was wrong in law when I said at paragraph 70 of my judgment of 9<sup>th</sup> February that all the circumstances must be considered; the Court of Appeal has refused to impose any fetters on the exercise of discretion by the Royal Court. Therefore, in my view, where the defendant may lose a prescription defence if proceedings are restored to the Rôle, that is a factor which must be considered.

## Paragraphs 16.3, 16.4 and 16.5

40. In the grounds of appeal, it is claimed that I failed adequately (or at all) to take account of the criteria set out in Birkett v James [1977] 3 W.L.R. 38 relating to applications to strike out for want of prosecution. (By way of an aside, I observe that the case was not cited by Advocate Ozanne in her submissions on the application for leave to restore the action although I am, of course, well aware of it.) It is said to be relevant to the Appeal because of the passage I quoted from paragraph 13 of the Court of Appeal's decision in Ogier v Grand Havre Holdings Limited and my statement at paragraph 48 of my judgment that I thought the Court of Appeal in Ogier differed from the earlier judgment of a differently constituted Court of Appeal in Guernsey Annandale Tile Company (1980) Limited v Haines.
41. In Guernsey Annandale, the Court of Appeal said that little helpful analogy can be drawn from English cases. In the later case of Ogier, the Court of Appeal said that the criteria to be applied on an application to restore an action are very similar to the criteria applied by the English when on an application to strike out a claim for want of prosecution. It said: "*In particular the question whether the delay was excusable and prejudicial arise in both jurisdictions*".
42. In my opinion, we have come closer to the English practice because we have expressly adopted rules of court modelled on the English rules. However, *péremption* is a unique feature of Guernsey law. There is no reason why we should borrow criteria from the English strike out cases when deciding whether to restore an action which is *perimée*. My understanding of the judgment in Ogier is that the Court of Appeal said the criteria are very similar, they did not say they are the same and they did not say that we must apply the Birkett v James test.
43. Consequently, I do not accept that I erred in law in not doing so.

## Paragraphs 16.6 to 16.11

44. These grounds appear to be directed largely to the way that I exercised my discretion. The circumstances in which a court should give leave to appeal an exercise of discretion are considered in the P D of 1999 at paragraph 2.11:

*“2.11.1 The Court of Appeal does not interfere with the exercise of discretion by a judge unless satisfied the judge was wrong. The burden on an appellant is a heavy one (many family cases do not qualify for permission for this reason). It will be rare, therefore, for a trial judge to give permission on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required.”*

45. Advocate Ozanne submitted that an issue of general principle is involved; that there are an increasing number of applications to restore actions that are *perimée*; that the criteria are unclear following the Court of Appeal’s decision in *Ogier*; and that the consequences of a failure to comply with Royal Court Practice Direction No 2 of 2008 (“the 2008 Practice Direction”) are unknown.
46. (The 2008 Practice Direction was issued to coincide with the coming into force of The Royal Court Civil Rules, 2007 and gave directions to parties to list before the Court all existing proceedings so that the Court’s new case management powers could, wherever possible, be applied to all cases whether commenced before or after the new Rules took effect.)
47. I have carefully considered Advocate Ozanne’s submissions. I am not convinced that applications to restore actions are increasing in number but if they are, it should only be a temporary phenomenon as the case management powers introduced by the 2007 Rules will reduce, or eliminate completely, the number of cases that will become *perimée* in the future.
48. I do not believe the criteria are unclear, they are explained both in *Guernsey Annandale* and in *Ogier*. I have already said that I formed the view that in *Ogier* the Court of Appeal indicated a different approach to the interpretation of those criteria. It may be that I am wrong in that view but, if so, it does not assist the Plaintiff because the *Guernsey Annandale* approach was, if anything, more stringent and less likely to assist the Plaintiff. Any appeal would therefore have no real prospect of success on that ground.
49. The consequences of a failure to comply with the 2008 Practice Direction cannot, in my view, be spelled out clearly. It cannot be said that all such cases will automatically be struck out as that would be unfair in some instances and equally it cannot be said that no case will ever be struck out. Every case must be considered on its own facts. The consequences of a failure to comply with the 2008 Practice Direction are, in principle, no different than a failure to comply with any other direction or order of the court. Every such failure will incur the court’s disapproval but the precise consequences will vary according to the circumstances.

## Conclusion

50. For the reasons I have given, I do not believe there is a point of general principle involved in the Appeal and therefore the second limb of the test in the P D of 1998 is not satisfied.
51. As for the first limb, does the appeal have a real prospect of success? I believe that in my judgment of 9<sup>th</sup> February I considered the factors or criteria that I was required to take into consideration. It involved an exercise of discretion and I said it was a difficult decision. Another judge might have reached a different conclusion but I do not believe there is a real prospect that the Court of Appeal will interfere with my exercise of discretion.
52. I therefore refuse leave to appeal.

**IN THE COURT OF APPEAL OF GUERNSEY**

The 28<sup>th</sup> day of April, 2010 before Sir de Vic Carey, sitting as a Single Judge of Appeal

**FRANK McNAMARA**

**(Applicant)**

**-v-**

**FRANCIS McCABE GAUSON**

**(Respondent)**

In the matter of the application by the Appellant, for leave to appeal from the decision of the Royal Court handed down on 9<sup>th</sup> February 2010;

THE SINGLE JUDGE, having on 22<sup>nd</sup> April 2010 heard Advocates A M Ozanne and R I C E Harris for the respective parties thereon, this day HANDED DOWN JUDGMENT in the terms attached hereto and DIRECTED that the application be listed for determination by the next scheduled sitting of the plenary Court of Appeal, on 12<sup>th</sup> July 2010.

**K H TOUGH**  
Registrar of the Court of Appeal



Judges and she made it very clear that she would. I can well understand her reasons for this and I felt that it would be difficult for me to restrict my review of the issues that were raised to enable the matter to be dealt without a full hearing on the merits. In this regard, I note that the hearing before the Deputy Bailiff lasted less than half a day, when he rejected leave to appeal, although his judgment must have taken some time to prepare as it is extremely careful and comprehensive, but the position of the trial judge is inevitably different from that of the Court of Appeal whether composed of one or three judges.

4. There are clearly advantages in having some applications for leave to appeal considered by a Single Judge and the system works well in the Criminal Division where applications for leave to appeal against sentence are considered by a Single Judge on the papers and a number of applicants who are refused, decide, after reading the reasons for refusal, not to renew the application to the Plenary Court. Here however, I found myself faced with having to hear from Miss Ozanne in support of her application and Advocate Harris in opposition (provided of course I concluded it was necessary to hear him) and this could have lasted some hours. This would involve the parties in not inconsiderable costs and whilst on the papers I had not identified any clear pointers from what Miss Ozanne was saying in the direction of giving leave, I felt that having regard to all the circumstances of the case, the proper course was to list this matter before the next Plenary Court which sits in July and I so direct.
5. This would inevitably involve the three Judges who are sitting in July reading in to the case and because of the way in which our Court of Appeal is constituted with three different members of the panel, sitting on each occasion, it is probable that Judges presiding will wish Counsel to be prepared to argue, not only on the merits of the grant of leave, but more generally on the merits of the Appeal. Mr Harris makes the point that this can involve parties in extra costs of preparation, but the duplication that will result from deferring a case to a new bench three months later will generally outweigh this perceived disadvantage.
6. It is perhaps appropriate that I flag up at this stage a discrete issue that is disclosed in the Respondent's notice, served by Mr Harris on Miss Ozanne on the 16<sup>th</sup> March. This is the contention that the Royal Court, as a rule making body acting under powers given to it by the Reform Law, could not when it promulgated the Civil Procedure Rules in 1989 change the substantive law relating to prescription. The present state of the law is that the Royal Court is bound by the decision of the Court of Appeal to deliver by Southwell JA in Haines v Guernsey Annandale where an action was restored, notwithstanding with the expiry of the prescription period and therefore it would be for the Court of Appeal to decide whether that decision could stand. The argument which was first developed before Day DB in Stoneman v Pannell Kerr Forster would involve a point of general interest, but that would only arise if Miss Ozanne persuaded the Court that leave was appropriate. Further, if Mr Harris were to succeed on the point, he would still be left with part of the action still being able to proceed.
7. Finally, I have referred to the volume of paper produced on what Mr Harris felt could have been a short application to the Court, albeit that I was not entirely persuaded of its potential brevity. Can I make a plea for Counsel when they produce voluminous files for Judges to include therein where appropriate an essential reading list.