

Judgment 15 / 2004

**Courtney, Bax, Boonrawdpranich & Yodwanlop v
Alderney Building Company (1992) Ltd – Royal Court –
20 May, 2004**

Court of Alderney (Appeals) Law, 1969 – civil appeals from findings of fact by the Alderney Jurats – jurisdiction of the Ordinary Court – circumstances in which Ordinary Court properly composed by a judge sitting alone – contractual dispute – whether the original contract had been replaced by a compromise agreement – whether there was credible evidence upon which the Jurats could have reached their factual conclusions – both appeals dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 20th day of May, 2004 before Andrew Christopher King Day, Esquire, C.B.E., Lieutenant Bailiff; sitting alone.

In the appeals of PHILIP COURTNEY and JENNIFER BAX and RAJAKIT BOONRAWDPRANICH and SUNATA YODWANLOP (“the Appellants”) against the decisions of the Court of Alderney of the 9th September, 2003 and the 23rd November, 2003;

WHEREAS THE COURT on the 6th and 7th of May, 2004 having heard Advocate P. Richardson, Counsel for the Appellant, and Advocate M.G.A. Dunster Counsel for ALDERNEY BUILDING COMPANY (1992) LTD (“the Respondent”), reserved judgment;

THE COURT this day handed down judgment in the terms attached hereto and DISMISSED the appeal, and will consider any application as to costs.

M.A. TOSTEVIN
Her Majesty’s Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ON APPEAL FROM THE COURT OF ALDERNEY**

Between:	PHILIP COURTNEY	First Appellant
	and	
	JENNIFER BAX	Second Appellant
	and	
	RAJAKIT BOONRAWDPRANICH	Third Appellant
	and	
	SUNATA YODWANLOP	Fourth Appellant
		(Collectively
	and	The Appellant)
	ALDERNEY BUILDING COMPANY (1992) LTD	Respondent

Judgment of Day L.B. on the Appellant's two appeals from the Court of Alderney.

Advocate P. Richardson appeared for the Appellant.

Advocate M.G.A. Dunster appeared for the Respondent

Hearing dates: 6th and 7th May, 2004
Judgment handed down: 20th May, 2004

Legislation referred to:

The Court of Alderney (Appeals) Law, 1969
The Court of Alderney (Civil Appeals) Rules, 1969
The Court of Appeal (Guernsey) Law, 1961

Cases referred to:-

Hawkins v. Greenwood R. Ct on appeal from Alderney (20/5/1985)
Guille v. Mackay C of Appeal 14.6.1967 (Appeal No. 2)
Martel and others v. Wilkinson C of Appeal 4.4.1991 (Appeal No. 140)
Mersey Docks and Harbour Board v. Proctor (1923) AC 253
Coghlan v. Cumberland (1898) Ch 704
L O C v Diment; Whales 1993 GLJ 16, 86 and 87 – Guernsey C of A
L O C v. Blondel (No. 2) 11.5 1999 – R. Ct.

1. This Judgment relates to two appeals by this Appellant against two separate decisions of the Court of Alderney in the same litigation, of the 9th September and the 24th November, 2003, respectively. Whilst errors of law form part of the basis for the Appellant’s appeals, the essence of both decisions of the Court below, and the complaints about them, was findings of fact by the Alderney Jurats. The first issue, therefore, which I am going to address relates to the composition of the Ordinary Court on such appeals from Alderney. To put the matter simply; should such appeals be heard by a judge alone or by a judge sitting with the Jurats of the Royal Court of Guernsey? Although this was not a matter of serious dispute between Counsel, whose approach was commendably relaxed, it is nevertheless right that I should determine this point, as it must, as always, be for the Court itself to determine whether it is acting lawfully. Moreover, I understand a determination on this matter might be of assistance to practitioners in the Bailiwick generally.

A. The jurisdiction of the Ordinary Court

2. The Court of Alderney (Appeals) Law, 1969, provides (in Part II):-

“Appeal in civil matters

2. (1) *Subject to the provisions of subsection (2) of this section, there shall be a right of appeal to the Ordinary Court from any decision of the Court made on or after the appointed day in relation to any civil matter.*
- (2) *An appeal shall not lie to the Ordinary Court under this Part of this Law-*
 - (a) *from any decision which it is provided, under any enactment, is to be final;*
 - (b) *without the leave of the Court, from any order made with the consent of the parties or as to costs;*
 - (c) *without the leave of the Court or of the Ordinary Court, where the value of the matter in dispute does not exceed the sum of twenty-five pounds unless there was in contest a question of law.*
3. *The Royal Court may from time to time make rules of court-*
 - (a) *for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Ordinary Court in all appeals under this Part of this Law and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provisions) the manner in which, and the time within which, any appeal under this Part of this Law may be made;*

(b) for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given in any proceedings or on any application in connection with or at any stage of any proceedings; and

(c) for regulating or making provision with respect to any other matters which may require to be regulated or with respect to which provision may require to be made under this Part of this Law.”.

3. The Court of Alderney (Civil Appeals) Rules, 1969 make provision for notice of appeal, transcripts, documents, security for costs, date of hearing, abandonment of appeal, service of trial transcripts, “enlargement” of time, and transitional and interpretive matters. Rule 6 specifically provides:-

“6 (1) The Royal Court may by order confirm, reverse, or vary the determination of the Court or make such other order in the matter as it thinks fit.

(2) Upon the determination of an appeal the costs of and incidental to the proceedings, both on appeal and in first instance, shall, within the scale for the time being laid down according to law, be in the discretion the Royal Court.”.

4. For completeness, I would add that the Court of Appeal (Guernsey) Law, 1961, in relation to appeals from the Ordinary Division of the Royal Court, provides (at section 13(1)):-

“...there shall be vested in the Court of Appeal the appellate jurisdiction in civil matters which immediately before (the appointed) day was vested in the Royal Court, sitting as a Cour des Jugements et Records.”.

5. And section 14 provides:-

“For all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have the power, authority and jurisdiction which vested in the Royal Court sitting as a ‘Cour des Jugements et Records’ and shall have power, if it appears to the Court of Appeal that a new trial ought to be had, to order, if it thinks fit, that the verdict and judgment should be set aside and that a new trial be had.”.

6. I think it would be accurate to say, prior to the enactment of the 1961 Law, the *Cour des Jugements et Records* had the power to confirm, reverse or vary the decision of the Ordinary Court at first instance. The powers conferred upon the Ordinary Court by the relevant legislation on appeals from Alderney are, at the least, similar. Whether the Ordinary Court

in such appellate capacity is also empowered to order a new trial, as is the Court of Appeal specifically under the 1961 Law, could be a matter for argument.

7. What is unarguable is that if the issues raised by an appeal from the Court of Alderney to the Ordinary Court clearly and solely involve matters of law or procedure, then they fall for determination by a judge alone. It is also undeniably a fact that, in times past, when the issue raised on appeal from Alderney was the factual determination of the Alderney Jurats, then the judge sat with Jurats in the Ordinary Court (see for example Hawkins in 1985). In that case, Sir Charles Frossard B sat with three Jurats. His directions to the Jurats, at the very commencement of his summing up to them, were as follows:-

“Gentlemen, in sitting as a Court of Appeal you must be guided as the Court of Appeal, Guernsey Court of Appeal itself is guided when it held that it is proper for the Court of Appeal to approach the Jurats’ findings - this is the Jurats of the Court of Alderney - on the question of fact in the same way as the Court of Appeal in England would approach the findings of a jury in an appeal in a civil case which has been tried by a Judge and Jury. The Court would not interfere with the findings of fact made by the Jurats unless it was satisfied that there was no evidence before them on which they could reasonably have arrived at those findings, or that for any other reasons the finding of fact of the Jurats were perverse. Well of course it is quite obvious why because a finding of fact when you hear witnesses and you see the place, as they did in this case, you are perhaps in the best position to decide why it was the right answer than reading it just in the transcript.”

8. That description by Sir Charles Frossard of the approach to be taken by the Appellate Court to factual findings of Jurats in the lower Court, reflected, and clearly adopted, that which Le Quesne JA (as he then was) had stated in Guille (at p. 5):-

“Now it seems to me that when this court is dealing with an appeal from a trial conducted by the Bailiff and Jurats in this way, it is proper for the court to approach the Jurats’ findings on question of fact in the same way as the Court of Appeal in England would approach the findings of a Jury in and appeal of a civil case which had been tried by a Judge and a Jury, that is to say, it seems to me that our approach should be that we will not interfere with the findings of fact made by the Jurats unless we are satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings. I should perhaps add, in order to cover any exceptional case which may arise, that it will also be proper for the court to interfere if we are satisfied that for any reason the findings of the Jurats were perverse.”

9. That test was reiterated by the Court of Appeal in Martel (1991). In that case, Kentridge JA (as he then was) referred to the headnote in Guille, which I believe accurately summarises

the passage I have cited from the judgment of Le Quesne JA, and to Mersey Docks, a case in which Viscount Cave LC (at pp. 258-259) identified in England and Wales the proper approach to be taken in an appeal in a civil case from a judge sitting alone, following the test laid down in Coghlan (a case helpfully brought to my attention by Mr. Richardson), as opposed to an appeal from a jury. Kentridge JA went on to say (at p. 112 F):-

“What we have to ask ourselves is whether it can be said that there was no evidence on which reasonable Jurats could find otherwise than that the Appellants were the effective cause. Put another way, can it be said that the finding of the Jurats was so at odds with the evidence as to be perverse. I do not think that this can be said.”

10. And again (at p.114 A - C):-

“I do not say that other triers of fact might not have come to a different conclusion. Other triers of fact may have been persuaded by the very cogent arguments which were put up to this Court by Mr. Collas and which were no doubt put up by him in the Court below. But, as I have said, the question that is before us is the question stated by this Court in its judgment in Guille v. Mackay.

Can we say that there was no evidence on which the Jurats could reasonably have arrived at their findings or that the findings of the Jurats were perverse? For the reasons I have given and although it was perhaps a nicely balanced case, I think it is impossible to say that on the evidence before them the Jurats were not entitled to make the finding which they did, namely a finding for the Defendants.”

11. All those authorities consistently identify the test to be applied, in civil matters, by the Court of Appeal to factual findings of Jurats in the Ordinary Court as that of perversity. There can be no justification for applying a different test to appeals from the Court of Alderney to the Ordinary Court; indeed the relevant statutory provisions are in effect the same. Therefore I respectfully concur with the statement of Sir Charles Frossard B in Hawkins, that the test of perversity is that to be applied by the Ordinary Court on appeals from factual findings of the Court of Alderney.

12. Perversity is a question of law and not of fact (see for example Beloff JA in Walters at p. 9 E to F). That being so, the ordinary Court is correctly composed of a judge alone in such appeals, notwithstanding that on some previous occasions, at least, Jurats have sat with the judge.

13. For completeness, I would add that until 1993, it had been the invariable practice of the Royal Court, sitting as a full Court on appeals against conviction in the Magistrate’s Court,

for the Jurats to be part of that appellate process. That practice came to an end with the cases of Diment and Whales, when the perversity test came to be clearly identified. As Harman LB subsequently stated (in Blondel (No. 2 at p. 2H):-

“For the Appellant to succeed on an issue of fact it is necessary to show that the verdict of the Magistrate was one at which he could not properly have arrived.”.

14. I accept, however, the force of Mr. Richardson’s submission that it may be easier for an appellate court to analyse the evidence in the lower court of a documentary nature, and thus perhaps identify perversity, then it is when the evidence is wholly oral and credibility is in issue.
16. Having dealt with that preliminary matter, and bearing those tests in mind, I now turn to the specific circumstances of these appeals.

B Background and decisions appealed from

17. This litigation relates to the renovation and reconstruction of certain premises in Alderney by the Respondent, a locally registered building company, and their conversion into a new Thai restaurant for the four Appellants, resident in England. The first Appellant, Mr. Courtney, was clearly the main contact between the developers/employers and the builders, for whom a Mr. Christopher Reeves was in charge. It appears that preliminary discussions, negotiations, and planning took place from the autumn of 1999, and that the Respondent started building works in early April, 2000, though it was not until a meeting in July, 2000, between representatives of the parties and the employers’ architect, a Mr. Beney, that the terms of the building contract between the parties were recorded. There is no argument that there was such a building contract (“the building contract”). The terms of it for present purposes I do not need to explore, save to emphasise that the parties to it were the Respondent, on the one hand, (the builder), and the four Appellants, as individuals describing themselves as the Mai Thai Partnership, as employer/developer. In due course the Appellants incorporated an Alderney limited liability company called Mai Thai Company Ltd. (MTCL), in January, 2001.
18. Work proceeded with the new restaurant, though at a pace which may have been slower than originally anticipated (some 5 months or so perhaps having been contemplated). In the spring of 2001, the employer Appellant apparently dismissed their architect (Mr. Beney), from a supervisory role, but retained him for valuation purposes, so that he proceeded to

issue, at least, two further certificates in respect of the works under the building contract, which by the autumn of 2001 had been largely completed. Payments, however, were not made, so that arrears mounted. As a result, in mid-November, 2001, there was a meeting between the parties at which Mr. Courtney made proposals for payment of the outstanding monies. These proposals he put into writing on the 19th November, 2001, a communication which he signed on behalf of MTCL.

19. Those proposals involved the immediate payment of about £23,000 which was the balance outstanding under the Architect's Certificate No. 9. The remainder of the monies due, being in total sum about £54,000 comprising, roughly, £46,000 under certificate No. 10 and about £7,000 being retention monies, would be paid by standing order at the rate of £4,000 per month until full payment was achieved. There was also reference to the payment of a further nominal sum outstanding, and, more importantly perhaps, to the builder providing a full and comprehensive breakdown of all aspects of Certificate No. 10, as well as reference to certain outstanding matters, involving further electrical and underpinning works. On the 28th November, 2001, Mr. Reeves replied to Mr. Courtney in person. Whilst the monies still due under Certificate 9 were demanded to be settled forthwith, the remaining balance of just under £54,000 was to be settled at the rate of £1,000 per week or £4,333.33 per month until total clearance and was to carry interest at 2% over "bank base". Mr. Reeves emphasised that *"this agreement is a credit extension of our contract and has been taken at my discretion"*. He also made reference to the nominal monies still owed to his building company, to the questions of the electrics and the underpinning of the adjacent cottage, and to the breakdown of Certificate No. 10. On the 3rd December, 2001, Mr. Courtney, again on the face of it on behalf of MTCL, effectively agreed the terms for those repayments of the outstanding monies. The payment of some £23,000 under Certificate 9 was received by the Respondent soon thereafter, and the first three monthly payments of £4,333.33 were received at the beginning of the first three months of 2002 respectively. All four payments were made from MTCL's account. No further payments were made.
20. The agreement reached as a result of these has throughout the ensuing litigation, and before me, been referred to as the Compromise Agreement and I propose to use the same description.
21. Proceedings were instituted before the Court of Alderney by the Respondent in early 2003 – when the instalment payments should just have been completed. I will be returning to the details of the Cause, but essentially it was a claim for the balance of the monies, including interest thereon, allegedly due under the Compromise Agreement, which, it was further alleged, had been performed in part by the MT Partnership by the payments to which I have already referred. Defences were filed. In due course the Court of Alderney, having heard

argument, determined that two preliminary points should be decided by it. Those preliminary points can be best identified by reference to the relevant Act of Court of the 9th September, 2003.

“To determine the following preliminary points:

a. whether the parties’ entitlement under the building work contract were compromised by the agreement pleaded at Paragraph 6 of the Cause;

and

b. if the answer to point (a) is in the affirmative, was the compromise reached between;

a. the Plaintiff and the Defendants; or

b. alternatively the Plaintiff and Mai Thai & Company Ltd.”.

22. The trial of these issues took place on the 8th and 9th September, 2003, and the Court found in the Respondent’s favour.

23. The Court deferred the substantive hearing as to the amount claimed and/or the payment of interest, which came before the Court of Alderney on the 24th November. The second hearing/appeal relates to the terms of the Compromise Agreement, and whether they were fulfilled to the extent necessary for the Respondent to have been awarded judgment in the sum claimed, the Appellant alleging that certain information relating to Certificate No. 10 had to be provided, and certain works carried out, before any payment became due. In the event, the Court found in the Respondent’s favour in the full amount claimed, namely £40,695.42, together with interest quantified at £3,492. The Court also awarded the Plaintiff costs on a “*half-full indemnity basis*”.

24. That, then, is the brief background to this litigation and these appeals, which I must now examine in more depth.

C. The first appeal

25. For ease of reference, the Respondent’s Cause is appended as Appendix 1. The salient features are the allegation that the four Defendants traded at the material times as the MT Partnership, that in or about November, 1999, the MT Partnership engaged the Plaintiff to undertake building works to the property, which works commenced in early April, 2000, and were completed in August, 2001. The terms of the contract were identified by the minutes of the meeting of the 27th July, 2000, which is not mentioned in the Cause but about the accuracy of which, namely as to the terms of the building contract, there is no argument, as I

have already stated. It is further alleged that in November, 2001, the MT Partnership acknowledged, by Mr. Courtney, that the sum of £77,117.39 was then due and owing by the MT Partnership to the Respondent for the works. As they are the crux of this claim, I cite paragraphs 6 and 7 of the Cause in full:-

“6. *By exchange of correspondence dated 28 November 2001 and 3 December 2001, between the Plaintiff and the First Defendant, on behalf of the Mai Thai Partnership, a compromise was reached between the Plaintiff and the Mai Thai Partnership that the sum of £77,117.39 would be paid by the Mai Thai Partnership as follows:*

- a) *The sum of £23,419.97 to be paid forthwith;*
- b) *The balance of £53,697.42 to be paid by standing order, at a £1,000 per week or £4,334.00 per month, until the debt was cleared.*
- c) *The whole to be paid, according to this timetable, by 1 October 2002.*

(“the Agreement”)

7. *The Agreement was performed, in part, by the Mai Thai Partnership, by payment of:*

- a) *The sum of £23,419.97 on 4th December 2001;*
- b) *A payment of £4,334.00 on or about 8 January 2002;*
- c) *A payment of £4,334.00 on or about 4 February 2002;*
- d) *A payment of £4,334.00 on or about 6 March 2002.*

26. As I have said, these paragraphs state the crux of the Respondent’s case, namely that it is suing on the Compromise Agreement (rather than upon the building contract itself), which in turn was allegedly part performed by the MT Partnership. The Cause concludes that the Partnership thereafter made no further payments and that the balance was due by the Partnership, namely £40,695.42, with interest from the 3rd December, 2001.

27. The Appellant’s case, relevant to the first appeal, was and is (as stated in *Exceptions de Fonds*) that the Agreement pleaded at paragraph 6 of the Cause (the Compromise Agreement) was made between the Respondent and MTCL. The Defendants in person thereby had been discharged and released from any liability to the Respondent. Additionally, the payments which were in fact made in late 2001 and early 2002 were not made by the MT Partnership, as averred, but by MTCL, thus providing further evidence of the new contractual arrangements. It should be noted, again, that there is no argument but that the cheques in payment were drawn on the company’s bank account; that does not, of course, necessarily provide conclusive evidence that that they were debts due by the Company as opposed to the Partnership. For completeness, I should also add that in the Defences originally filed, the Defendants also alleged that the Respondent was in breach of the original building contract,

for reasons of delay, and failure to use due professional skill and care in carrying out the works; in other words, what might be described as a standard building dispute. However, as previously indicated, after hearing argument, the Court of Alderney determined that the case should proceed, as it did, on the basis of the validity or otherwise of, and the parties to, the Compromise Agreement, upon which the claim was specifically based.

28. I turn now to the relevant facts with regard to the Compromise Agreement and the issues involved therein, which facts have been helpfully and carefully reviewed for me by Mr. Richardson. I should immediately state that, whilst the Court had formally to rule on the point, Counsel were not in dispute as to the existence of the Compromise Agreement. What was in real dispute was between whom it was made. I should also make it clear that I concur with Mr. Richardson's submission that it was for the Respondent to have persuaded the Court of Alderney that the Compromise Agreement was indeed between the Respondent and the Partnership, as that was how the former pleaded its case, and that the burden did not lie upon the partners to prove that this Agreement was with MTCL.
29. The majority, if not all, of the earlier part of the evidence to which Mr. Richardson referred me, was to rebut any suggestion that it was only in early 2002, when payments under the Compromise Agreement dried up, that the Appellants first raised the question of their company being involved. Thus, at a very early meeting in which the restaurant project was discussed, in September, 1999, at which Mr. Reeves was present as well as the architect, an indication was given that a company would in due course be formed by the Appellant (I repeat that MTCL was not in fact formed until January, 2001). A minute of a further meeting held on the 17th /18th March, 2000, at which Mr. Reeves was not present but the architect was, the person who wrote the minutes described the client at that stage as being MT Alderney Ltd. There was also a written memorandum of the 3rd May, 2001, from Mr. Courtney to Mr. Reeves, which the former signed on behalf of the company, and was written on company note paper (this communication referred to the resignation of Mr. Beney as architect and that thereafter Mr. Reeves would have full "on-site" responsibility). Further, at the end of June, 2001, Mr. Reeves agreed to be put forward as the proposed designated official for the provisional liquor licence for the premises, which licence was itself to be held by MTCL (and that licence was subsequently confirmed in January, 2002, with Mr. Reeves as designated official).
30. Thus, Mr. Richardson argued, and there can be no disagreement, that prior to November, 2001, MTCL existed and was known by Mr. Reeves to exist. Furthermore, at the meeting held on the 16th November, 2001, in which Mr. Courtney put forward various proposals for settling the outstanding monies due, he introduced to Mr. Reeves a Mr. Cresswell, whom he described as a director of MTCL, being a person who would be putting funds into the

enterprise. There was, in fact, argument at the trial as to whether Mr. Cresswell was so introduced as a director of the company or as a partner. It does not seem to me to be necessarily of any great importance.

31. With regard to what I have described as the negotiations of the second part of November, 2001, and early December, 2001, and the exchange of correspondence, Mr. Richardson again emphasised the position of the company's involvement, the note paper being used by Mr. Courtney being that of MTCL and his letters being signed on the company's behalf. Additionally, the letter of 3rd December, 2001, stated that the first payment of £23,419.97 was to be issued from "*our Alderney account*", meaning of course that of the company.
32. After the Compromise Agreement was concluded the evidence continued to show that MTCL was the party who had concluded it with the Respondent. This was illustrated by the undisputed fact (as I have already stated) that the cheques issued in respect of the four payments which were in fact made were all on the company's account. Additionally, the correspondence, in form, continued to the like effect. Thus, on the 3rd January, 2002, the third Appellant wrote to Mr. Reeves on company note paper and signed on the company's behalf; as also was the letter of the 10th May, 2002, by Mr. Courtney to Mr. Reeves. Moreover, Mr. Reeves himself, on the 28th May, 2002, wrote to Mr. Courtney at the company's address in Alderney. Mr. Reeves, and this again is not in dispute, was a knowledgeable business man who well understood the legal distinction between an individual and a corporate entity. The overwhelming inference, so Mr. Richardson submitted, to be drawn from all of this evidence was that the Compromise Agreement was between the Respondent and MTCL.
33. Mr. Richardson also took me to the transcript of the oral evidence. All the documentation to which I have referred was put to Mr. Reeves. The position, as I think can be accurately summarised, and Mr. Richardson did not seek to put it any differently, was, as far as Mr. Reeves was concerned, and whatever may have been various pieces of note paper, and who signed them in what capacity, his position was quite clear. The partnership had been given extra time to pay. It did not matter who actually paid the bills as long as the monies were received. At no time did he agree to release the partners from their obligations and instead to accept the liability of MTCL to pay the outstanding monies. Perhaps, Mr. Richardson suggested, Mr. Reeves, naturally, was solely concerned with being paid, which may have diverted his attention from the fact as to whom he was now in contract with.
34. Mr. Courtney also gave evidence in respect of the documentation; and as one would expect his position was the complete reverse of that maintained by Mr. Reeves. As at the autumn of 2001 the partnership no longer existed (which, if I may say so, is a peculiar proposition and

unexplained). It was, Mr. Courtney continued, the company which had undertaken to pay the monies which had been previously outstanding and owed by the partners. All the evidence, and Mr. Courtney's position, was clear in that regard. Mr. Reeves, he said, never challenged that the new arrangement, the Compromise Agreement, was with the company, nor did he maintain that it was with the partnership. Neither of the principal protagonists, it can be neutrally and accurately stated I believe, were shaken in their position under cross-examination.

35. The position advanced by Mr. Richardson was that Mr. Reeves' oral testimony was wholly insufficient to outweigh the documentary evidence from which, as I have already observed, he submitted it had to be overwhelmingly inferred that the new Agreement in the autumn of 2001 was with MTCL. The Jurats gave insufficient weight to that correspondence and the proper inferences to be drawn therefrom. Moreover, if there were any ambiguities in that correspondence, then they should have been resolved against the person on whom the burden of proof lay, namely the Respondent, to establish that the Compromise Agreement was between itself and the Partnership.

36. The decision of the Court of Alderney, as evidenced in the Act of Court of the 9th September, which accurately stated what the transcript reveals as being the judgment of the Chairman of the Court, Jurat Partridge, is as follows:-

“There has been NO EVIDENCE to show that the original CONTRACT based on the minutes of 26th July 2000, between the Plaintiff and the Defendants was revoked by virtue of any subsequent agreements.

As to the question of whether the parties entitlements under that contract were compromised by the agreement reached through exchange of correspondence in November/December 2001, the JURATS are unanimous in finding that this did constitute a COMPROMISE. On that basis the JURATS are also unanimous in finding that a compromise can only be reached between the SIGNATORIES to the ORIGINAL CONTRACT, in the absence of a formal AGREEMENT between the parties to that contract to a substitution of a COMPANY for a PARTNERSHIP in this instance, and the fact that the property remains in the ownership of the DEFENDANTS. The COURT concludes that the COMPROMISE was reached between the PLAINTIFF and the DEFENDANTS.

And the Plaintiff is awarded the Costs of today's application following the event.”.

37. I turn to Mr. Richardson's criticisms of this judgment.

38. The first paragraph revealed a fundamental error in the Jurats' thinking. It was indeed a recurring theme of his submissions, that with the coming into being of the Compromise Agreement (regardless of whom it might have been between) the building contract ceased in its entirety. All the rights and obligations of the parties to it disappeared. The sole agreement with which the Court, and the parties, were concerned was the Compromise Agreement, and the rights and obligations created thereunder. To make any reference to the original or earlier building contract was not only unnecessary, it was wrong. Moreover, for the Court then immediately to proceed to state that the parties' entitlements under the original contract were compromised by the Agreement, reached through the correspondence in the autumn of 2001, was fundamentally inconsistent and unsustainable as a matter of law. It showed the confusion on the part of the Court as to how the compromise was to operate, namely as a wholly self-contained agreement.
39. There are two further criticisms. The first is that the Alderney Court were wrong in law in their analysis as to how a contract between A (the Respondent) and B (the Appellant) could be changed, and could only be changed, so that C (MTCL) assumed B's obligations to A (in discharge of B's obligations). If A and C agreed that C would so assume those obligations, then B did not need to be a party to that agreement or new assumption of responsibility. The second criticism was that the ownership of the property was a wholly irrelevant consideration in assessing between whom the Compromise Agreement had been reached, and as such was a further indication of perversity on the part of the Alderney Jurats.
40. Perversity was also, and firmly, the criticism of the Court's final conclusion, namely that *"the compromise was reached between the Plaintiff and the Defendants"*.
41. In summary, therefore, Mr. Richardson's submissions with regard to the inadequacy and error of the Court's judgment were: they stated that the original Agreement had not been revoked yet found that there had been a compromise to it; that that compromise was as a matter of law wrongly analysed, and that the ownership of the property was an irrelevant consideration to take into account.
42. All these arguments were rehearsed in the Notice of Appeal and Mr. Richardson's skeleton argument. Essentially, however, the crux of the first appeal was that the factual finding of the Alderney Jurats that the Compromise Agreement was between the Respondent and the Appellants, was perverse.
43. With regard to the facts of the case, Mr. Dunster submitted that, at the very heart of it, was the fact that a building contract came into existence in 2000 under which, in due course, Certificates 9 and 10 came to be issued (on the 6th July and 23rd September, 2001, respectively). Come the end of November, 2001, monies were still outstanding under those

certificates. The Compromise Agreement could not be looked at in isolation; its roots were the monies outstanding under those two certificates. The purpose and intended effect of the Compromise Agreement was to defer payment of the monies due under Certificate 10, together with interest thereon. Mr. Reeves never agreed that the identity of the employer should be changed from the partners to MTCL. There was abundant oral evidence before the Court to that effect. Additionally, most importantly, there was documentary evidence. There was no document in which a new employer was specifically identified. None of the inferences from the limited correspondence, which Mr. Richardson was asking the Court to make, were sustainable, either in terms, or with the assistance of oral evidence. He referred me *inter alia* to the following exchange between him and Mr. Courtney (at pp. 156-157 of the transcript):-

Q. There is no document which you have placed before the Court in which Mr. Reeves has used words to the effect of: 'I agree that my employer is now the company rather than the prtnership.'

A. That is correct.

Q. You did not go back and amend the July, 2000 contract to substitute the company name for the partnership, did you?

A. No, we did not.

Q. You did not give any statement during your evidence in chief that Mr. Reeves had said the words to the effect of: 'I agree that my employer should now be the company.'

A. No, that is correct."

44. Again there is the exchange (at pp. 111-2 referred to me by Mr. Richardson in fact):-

Q. Did the contents of this letter (this is the letter of the 10th May, 2002, from Mr. Courtney to Mr. Reeves on MTCL note paper and signed on its behalf) – there is clearly talk about the company cutting its overheads and what have you – lead you in anyway to alter who you thought your employer was?

i. No."

45. He is then referred to the letter of the 28th May, 2002, which he wrote addressed to Mr. Courtney at the company address in Alderney:-

“Q. Why did you choose to address it to Mai Thai (inaudible) as part of the address – Mai Thai Company Limited – if you thought your employer was the partnership?”

A. Because I was getting trouble getting hold of Philip Courtney by now. I had used his fax in England, which is the surgery fax, and he wrote back to say that he did not want me to use that fax, so the way to get mail to him was to write to 7-8 Olivia Court.

.....

(this letter) ... it is to Phil and as far as I am concerned wherever I can find him it was written to Mr. Courtney.

Q. Again, no change of who you thought your employer was?

A. No.”.

46. Again, his very last answer in examination in chief, Mr. Reeves said this (at p. 113 D):-

“A. All I would say, my dealings were with Mr. Courtney with regard to any matters to do with money. I originally engaged in the project thinking I was working for the individuals so they could set up their Thai restaurant. Nothing changed, in my mind, throughout the whole of my dealings with them.”.

47. Those passages are cited merely as, I believe, an accurate indication of the consistency which Mr. Reeves showed throughout his oral evidence (at least as identified by the transcript), as to what he would have considered the position to be.

48. Mr. Dunster succinctly summarised the Respondent’s position in this way: there might be something to be said by way of evidence in support of the positions of both parties (although that really was only a concession for the purposes of this particular submission), but for that very reason the decision of the Alderney Jurats was incapable of being upset by this Court on the grounds of perversity.

49. With regard to the Court’s judgment itself, he fully supported what had been stated. The statement that there had been no evidence to show that the original contract had been revoked but that it had been compromised in November/December 2001, compromised in the sense of merely giving time to pay, was an accurate statement of the facts. With regard to Mr. Richardson’s allegation that the Alderney Court had wrongly analysed what was required by way of novation, Mr. Dunster argued that in the circumstances of this case, as opposed to abstract legal analysis, what was required was that both the original contracting parties had to agree to any change (as he had himself stated in his opening to the Court – see

p. 90 of the transcript). The Court of Alderney could not be faulted in this regard. Finally, the ownership of the property could not be blindly dismissed as an irrelevant factor. The Respondent was working on the very bricks and mortar which belonged to the partners. It was a legitimate line for the Jurats to take, as he put it, if they so wished, although he accepted its significance was peripheral.

50. I accept Mr. Dunster's submissions and reject those of Mr. Richardson. Far from there being no evidence upon which the Alderney Jurats could have come to the conclusion that the Compromise Agreement was reached between the Respondent and the Appellants, it seems to me that there was an abundance of evidence to lead them to that conclusion. Mr. Dunster's analysis of the facts is in my view correct. There was an original building contract under which monies had become immediately due and payable (indeed overdue) at the end of November, 2001. All that the agreement then reached sought to achieve, and in terms expressly did achieve (the letters of 28th November and 3rd December, 2001), was to allow the partners time to pay the sum of £54,000 or thereabouts (being specifically the monies outstanding under Certificate 10 and the retention monies) by specified instalments, in return for which interest would be charged thereon. It was Mr. Courtney who initiated the proposals which came to be put into effect contractually. The fact that Mr. Courtney signed the "acceptance" letter to Mr. Reeves, of 3rd December, on MTCL note paper, is wholly inadequate to found an argument that the Respondent had agreed to release the partners from all their outstanding liabilities, and that the Respondent had accepted a company as its new debtor. Self-evidently, that was not the case – *"This agreement is a credit extension of our contract"*. The fact that further correspondence on the face of it emanated from MTCL, as did the cheques, is neither here nor there. And there was oral evidence to substantiate the contractual position, if it was needed in any event and if it was believed.

51. The Respondent, having chosen to sue on the Compromise Agreement alone, had to satisfy the Alderney Court that the parties to that Compromise Agreement were the Respondent and the four partners. In my view the Alderney Court were justified in their conclusion that the Respondent had so satisfied them. Nor can there be any justifiable criticism of the substance of the Jurats' reasoning in reaching that conclusion. It provided a sustainable analysis of the issues and the evidence; in my view, it was also correct.

D. The second appeal

52. The case proceeded, on the 24th November, 2003, to a further hearing, to determine the amount due, if any, by the partners to the Respondent. The amount claimed was £40,695.42, together with interest from the 3rd December, 2001. That sum was the outstanding balance of the £53,697.42 which was to be paid by monthly instalments starting in January, 2002, only three of which had been made.

53. The central issue to be determined by the Court of Alderney can be identified by reference to the position of the partners as stated in their Defences (at para. 5):-

“5. Insofar as paragraph 6 of the Cause is concerned, the Defendants aver that a new contract and/or novation of the existing agreement was entered into between Mai Thai & Company Limited and the Plaintiff to the effect that Mai Thai & Company Limited would make certain payments to the Plaintiff on condition that the Plaintiff:

5.1 provided a full breakdown of Certificate No. 10 (upon which the payments were to be based);

5.2 the Plaintiff completed outstanding works.

...

6. In the events which have happened the Plaintiff at the time of the commencement of the action herein has acted in breach of the agreement pleaded in paragraph 5 in that the Plaintiff has:

6.1 failed to provide a breakdown of Certificate No. 10;

6.2 failed to complete outstanding works.

7. ...

8. In the premises it is denied that the first Defendant (and other defendants) and/or each of them and/or any of them are liable to the Plaintiff whether as alleged in or by way of the Cause and/or at all.”

54. (The Appellant also lodged a counter-claim – based upon the alleged losses arising from delay in completing the works, and various costs of rectification, arising from the building contract – which was not pursued, as the Court had ruled that the hearings would be limited to the question of the Compromise Agreement and the terms and fulfilment thereof).

55. Much of the documentation relevant to the second appeal I have already referred to in relation to the first appeal, but in the context primarily of ascertaining who the parties were to the Compromise Agreement. I must now return to the specific correspondence which comprises the Compromise Agreement, so as to identify its terms.

56. Firstly, I turn to the letter of the 19th November, 2001, which followed the meeting, three days previously, convened to enable Mr. Courtney to make certain proposals with regard to the payment of monies outstanding under Certificates 9 and 10. In his written proposals,

after referring to the outstanding sums due and how it was proposed to repay them Mr. Courtney continued:-

“You are also going to provide us with a full and comprehensive breakdown of all aspects of Certificate No. 10.

The outstanding works that require completing are as follows:

- 1. Final fixing of all electrical work. Hopefully you can arrange this as soon as possible, as our financial situation will be aided by having Raj and Pip into the top flat quickly. We agree to pay Dick Oakman immediately, on completion and presentation of his invoice, by cheque a sum not exceeding £500.*
- 2. The underpinning adjacent to Mr. Newton’s cottage. We will liaise with yourself and Alderney Electric a mutually convenient time. We also agree to pay you immediately upon completion and presentation of your invoice, by cheque a sum not exceeding £1,000.*

I hope that this meets with your approval and if so please would you confirm your acceptance of these arrangements. We appreciate your helpful assistance in the resolving of this situation.”.

57. In his reply of the 28th November, 2001, Mr. Reeves after referring to Mr. Courtney’s proposals as to the payment of the outstanding monies, and acknowledging that they were acceptable subject to the payment of interest and that the agreement was a credit extension of the contract and had been taken at his discretion, replied as follows:-

“With regard to the second fix of the flat electrics. I have spoken to Derek Oakman who is willing to undertake work on a second fix however he requires a payment of £500 before he will do the work. I am afraid I cannot argue with his reasoning.

The final underpinning adjacent to Mr. Newton’s cottage is expected to cost about £1,000. This figure cannot be fixed due to the nature of underpinning work, but as always, careful time and material content sheets will be kept. This work is also dependent upon input and co-operation from both Alderney Electricity and the Public Works Department.

I have carefully read through all Mr. Beney’s letter of the 9th October 2001 in which he gives an accurate breakdown of Certificate No. 10. If you wish to see specific invoices relating to major items then I suggest we meet the next time you are in Alderney. (I repeat that though Mr. Beney was no longer involved as architect he still retained responsibilities for valuations and certification).

58. In his reply of the 3rd December, 2001, Mr. Courtney stated:-

“Thank you for your letter of 28 November 2001 previously faxed. We do appreciate that the Agreement is at your discretion and also that interest is payable on the outstanding amount. I have now arranged for the money to be transferred to our Alderney account and will instruct Pip to issue a cheque for £23,419.97 payable to ABC. This will be ready for collection from this afternoon.

With regard to Dick Oakman, while we also appreciate his reasoning, there is no way my partners will accept paying him in advance as he has previously shown himself to be unreliable in terms of attendance on site. Please could you supply us with copies of the electrical plans in order for us to arrange an alternative contractor.

I have yet to discuss with my partners how detailed a breakdown they require as to costs, but I hope to have this information by the time we return to Alderney and will keep you informed.”.

59. That, then, is what I might call the contractual correspondence. I turn to the subsequent correspondence which was referred to me, on this occasion for its substance rather than form. The letter of 3rd January, 2002, from the Third Appellant to the Respondent related to the second electrical fixing at the flat at the premises and the employment or otherwise of Mr. Derek Oakman. Mr. Reeves was informed that the electrical works had now been carried out by a third party, the cost of which indicated how, in the writer’s view, the charges of Mr. Oakman were so excessively exorbitant. Which led the writer to query whether there should not be a complete review of Mr. Oakman’s charges for the total contract.

60. The next letter is that of the 10th May, 2002, from Mr. Courtney to Mr. Reeves. It is in the following terms:-

“Further to our recent telephone conversation, may I first apologise that you were not kept informed as to our financial situation. This was entirely due to a breakdown in communication between our company directors. Currently the restaurant is not performing as well as was forecast and this has led to a problem with our cash flow, despite numerous directors’ loans. We are currently looking at ways to aid the company by cutting down its overheads. This may include re-mortgaging the building over a longer period.

Unfortunately at this moment in time we are only just breaking even and we are therefore unable currently to meet our agreed payments to your company. I would hope the situation will be rectified as soon as it is possible, especially as the season is about to get under way

and our turnover should therefore increase. In the meantime I can only ask that you be patient and bear with us, as we do intend to settle all of our debts.

If you require any further information please do not hesitate to contact me.”.

61. On the 28th May, 2002, Mr. Reeves again wrote to Mr. Courtney (this was the letter addressed to the MTCL to which I previously referred) in which he stated:-

“Thank you of your letter of the 10th May 2002. Further to this, I can confirm that you are now in breach of the extended terms of your credit contract as you have made no payments for April or May 2002.

Please submit the sum of £13,002 to reflect the total payments for April May and June 2002 by the 7th June 2002 or I shall have no alternative other than to put the matter in the hands of the Court.”.

62. Mr. Courtney’s reply to Mr. Reeves was dated the 7th June, 2002. It is too long to cite conveniently save for the first paragraphs:-

“I have your threatening fax of Friday. We have reached a stage where some things need to be made clear:-

- 1. You have not complied with the agreement reached in November last year, an essential component of which was that you would provide a full and comprehensive breakdown of Certificate No. 10. You have instead made excuses and suggestions about that which have not been helpful in the least and which do nothing to discharge your obligations in that respect. Such agreement as there was is now therefore at an end.*
- 2. From May 2001 Messrs Brittain Hadley were no longer employed by us and we have never accepted that Paul Beney’s Certificate No. 10 was a true and accurate representation of the value of the work done over the period it purports to cover. That is why we have insisted and still insist on the breakdown referred to above.*
- 3. Whilst we do not accept the figure reached by Beney and for which you now press, we do accept that we probably owe something. Until that something has been established we will make no further payments to you. For the avoidance of doubt, nothing said previously is to be taken as any sort of admission that the debt if there is one is for a sum certain.”.*

63. Mr. Courtney then proceeded to indicate that if proceedings were taken against him then the whole conduct of the contract would be opened up, that the company would go into liquidation, and secured creditors would have preference over any claim of the Respondent,

and suggested that the way forward was for Mr. Reeves to make full disclosure relating to certificate No. 10 to a forensic architect acting for Mr. Courtney, after which the extent of the debt could be discussed.

64. I think it is accurate to say that this letter of the 7th June, 2002, was the first time, certainly the first time which has been brought to my attention, that these complaints and claims are made in respect of the breakdown of Certificate No. 10; and that Mr. Reeves' invitation expressed in his letter of the 28th November, 2001, in respect of meeting to inspect the specific invoices, was not acted upon. For completeness, I should add that those invoices were in due course produced for discovery purposes after the institution of proceedings; and that Mr. Courtney in evidence emphasised the importance of the invoices and that they should have been provided when requested, and not require, at vast expense, a forensic architect to visit Alderney to inspect them. It should also be noted that the letter of the 7th June, 2002, makes no reference to the electrical and underpinning works.

65. Although there is no transcript for much of the proceedings on the 24th November, 2003, (though the Chairman's notes are commendably clear) and what transcript there is of the remainder of the evidence is not altogether satisfactory, it would be fair to say, I believe, that the respective stances of the parties did not change or were shaken in evidence. So that as far as Mr. Reeves was concerned, no conditions were attached in the Compromise Agreement to the making of the stage payments during 2002, whilst Mr. Courtney maintained that there were. Thus, his statement in the letter of the 7th June that as those conditions had not been fulfilled, monies were in fact not due at all.

66. Jurat Partridge expressed the unanimous views of the Jurats in this way:-

“The JURATS looked closely at the correspondence referred to and in particular the letters between the parties relating to the compromise agreement, and the terms of that agreement in respect of monies due and payment to be made.

The JURATS believed that the PLAINTIFF'S interpretation of the meeting held between the parties as recorded in the letter of the 28th November 2001 and as confirmed in the evidence given by Mr. Reeves, namely that the compromise agreement was a credit extension of the contract taken at his discretion was accepted by the Defendants in their subsequent reply.

That acceptance was further evidenced by the DEFENDANTS' payment in full of Certificate 9 and three subsequent stage payments against Certificate 10.

The JURATS placed considerable weight on the DEFENDANTS' willingness to settle these Certificates following the valuations made by their Architect whose continued role was

further evidenced in the PLAINTIFF’S letter of the 28th November 2001 referring to the Mr. Beney’s letter of the previous month giving an accurate breakdown of Certificate 10.

With regard to the DEFENDANT’S request for a detail breakdown the JURATS were satisfied that the PLAINTIFF had given (Counsel agreed that this or a similar word had to be inserted into the Court record to give it meaning, no transcript of what Jurat Partridge said being available) sufficient information to enable their Architect to certify payment. Furthermore the Defendants had never advised the PLAINTIFF on what basis they required such a breakdown to be set out since their letter of 3rd December 2001.

With regard to the additional works which the DEFENDANTS’ allege form part of the COMPROMISE AGREEMENT, the JURATS believed that two terms referred to, namely the electrical and underpinning work, cannot have formed part of the works valued under Certificate 10 and that the PLAINTIFF should not (again, an essential insertion) be denied full payment of that Certificate.”.

67. The consistent thrust of Mr. Richardson’s criticism of the Judgement, whether paragraph by paragraph or taken as a whole, was that the Jurats still were in error in their analysis of the legal contractual situation; they were still treating the original building contract as extant rather than concentrating solely on the only agreement in existence, the Compromise Agreement. Thus to describe the latter as a “credit extension of the contract” was misconceived, and inconsistent with their first decision. Their statement that the Appellant’s alleged acceptance of the Compromise Agreement by the payment in full of Certificate 9 and part payment of Certificate 10 placed undue reliance on those Certificates. Further, the Jurats’ conclusion that the additional electrical and underpinning works could not have formed part of the works valued under Certificate 10, indicated that they were still concentrating upon that Certificate rather than confining their analysis to the Compromise Agreement. They therefore ignored the works and provision of information required of the Respondent under that Agreement; in the result their conclusions were perverse.
68. Mr. Dunster for his part criticised what he described as the overly legalistic approach taken by the Appellant to the contracts; rather, the Jurats had accurately identified the truth of the contractual relations e.g. that the Compromise Agreement was indeed a credit extension of the original building contract which the Respondent had not been obliged to enter into, but of its own volition had agreed to do so. The deferred payments could only, and did, relate back to the acknowledged debt under Certificate No. 10. Taken overall, there was plenty of evidence to found the Jurats’ analysis of the contractual relations and on which the Jurats could come to the conclusion as to its terms which they in fact arrived at, for example with regard to the breakdown of Certificate 10.

69. Again, I concur with the submissions of Mr. Dunster in respect of the second appeal. There was credible evidence upon which the Jurats were entitled to come to the factual conclusions which they did if they believed that evidence: namely, that the Appellant, at the latest by the letter of the 19th November, 2001, as confirmed on the 3rd December, 2001, unconditionally accepted both the amounts due under the certificates, most particularly under Certificate 10, and the terms as to payment. The documents were in themselves conclusively determinative of the case. Moreover, there was credible evidence upon which the Jurats were entitled to base their further conclusions, that four payments actually received were evidence of the contract, that the Appellant never took up Mr. Reeves’ invitation to inspect the specific invoices relating to the major items under Certificate 10, which their architect had previously explained, and that the electrical and underpinning works never formed part of the works valued under Certificate 10, being works additional to the building contract. Moreover, one might merely add that whilst in his letter of the 7th June, 2002, bearing in mind the context in which it was written, Mr. Courtney might have been seeking to maintain that the provision of a full breakdown for Certificate 10 was to be provided before any further monies were to be paid, there was no such reference to these two items of work whatsoever.
70. With regard to the order of the Alderney Court that the Respondent be awarded its costs on a “*half-full indemnity basis*” I bear in mind the principle that an appellate court should be slow to interfere with an award of costs in the Court below. The Court of Alderney identified the reasons why it made the order as to costs which it did. It was clearly not particularly impressed by the attitude adopted by the Appellants throughout in respect of paying their debts.
71. Both appeals are dismissed.
72. I will hear any application as to costs.