Judgment 17/2007 **Ferbrache and Richardson (Applicants) v Kirk, Bound, Cheong, Ogier and Green (Respondents) – Royal Court (Civil Action File 1073) – 27th February 2007**

Arbitration (Guernsey) Law, 1982 - partnership dispute – Respondents had applied for legal proceedings to be stayed pending arbitration (s.4) – Applicants alleged 'equitable fraud' and applied for an order that the arbitration agreement shall cease to have effect (s. 24(2)) – held that 'fraud' in this context meant fraud strictly so called – Applicants did not intend to allege deceit or impropriety – Applicants' s.24(2) application therefore failed – Respondents' s.4 application granted

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil 1073

The 27th day of February 2007 before Catherine Newman QC, Lieutenant Bailiff

(1) MARK GERARD FERBRACHE
(2) PAUL RICHARDSON

Applicant

and

(1) IAN MICHAEL KIRK
(2) CHRISTOPHER JOHN BOUND
(3) SIEW SEAN CHEONG
(4) RICHARD PETER OGIER
(5) JASON BRIAN GREEN

Respondents

Whereas on 22nd January the Lieutenant Bailiff considered an application by the Respondents to stay the proceedings and application by the Applicants to restrain the First and Second Respondents from acting in the management of the firm of Collas Day and heard thereon Advocates M G Ferbrache and P Richardson acting for themselves and Advocate P T R Ferbrache on behalf of the Respondents and whereas the Lieutenant Bailiff also considered

written submissions from the parties the Lieutenant Bailiff this day gave judgment in the terms attached hereto and GRANTED the Respondents the relief sought and stayed the proceedings.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

B E T W E E N:

(1) MARK GERARD FERBRACHE
(2) PAUL RICHARDSON

Applicants

- and -

(1) IAN MICHAEL KIRK
(2) CHRISTOPHER JOHN BOUND
(3) SIEW-SEAN CHEONG
(4) JASON BRIAN GREEN

Respondents

1. These proceedings appear to have begun with an application by the Applicants, Mark Gerard Ferbrache and Paul Richardson, dated 29th December 2006.

2. The Respondents countered with an application dated 9th January 2007 to stay all the proceedings in that action or matter.

3. On 12th January 2007 the Applicants issued a further application to stay a reference to arbitration commenced by the Respondents by notice dated 11th January 2007.

4. The Applicants issued an application dated 15th January 2007 for dissolution of Collas Day.

5. At the hearing before me on 22nd January 2007 the parties told me that they had agreed that Collas Day should be dissolved with effect from 31st March 2007 and compromised paragraph 1 of the application dated 29th December 2006. Nothing more need be said about that paragraph.

6. Paragraph 2 of the application dated 29th December 2006 seeks a declaration. This paragraph was not argued before me at the oral hearing. The court rarely grants declarations at interlocutory hearings. If the action proceeds it will doubtless have to be tried and determined.

7. Paragraph 3 of the application seeks an order that for a period of 3 months the first and second Defendants Ian Kirk and Christopher Bound should be restrained from acting in the management of the firm of Collas Day.

8. At the oral hearing the sequence in which the applications were made was as follows:

   (1) The Respondents' application dated 9th January 2007 to stay the proceedings in this Court was argued first.

   (2) Paragraph 3 of the Applicants' application dated 29th December 2006 was then argued.

   (3) There was insufficient time to complete all the arguments and I gave the parties liberty to complete their argument in writing.

Should the arbitration go ahead in full or part or not?

9. The Respondents have applied to the Court, by Notice dated 9th January 2007, for an order pursuant to Section 4 of the Arbitration (Guernsey) Law 1982 (as amended) ("the Arbitration Law") that all proceedings in the action be stayed (save for applications for interim relief in aid of the intended arbitration) Section 4 gives the Court power to stay legal proceedings commenced by a party to an arbitration agreement. It gives the court a discretion to stay if the Court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration and that the applicant was, at the time when proceedings were commenced, and still remains, ready and willing to do all the things necessary to the proper conduct of the arbitration.

10. It has now been agreed that the partnership of Collas Day will be dissolved with effect from 31st March 2007. The application dated 22nd January 2007 has therefore been disposed of. It is clear that many questions will remain to be resolved in the course of that process.

11. Section 24(2) of the Arbitration Law is also relevant. It provides that where partners have agreed to refer their disputes to arbitration and where a dispute which has arisen involves a question of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall

cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

12. In this case the Applicants allege what they describe as victimisation and equitable fraud. These allegations are contested.

13. In the skeleton arguments originally submitted to the Court the parties did not address the question of whether 'fraud' in Section 24(2) of the Arbitration Law meant fraud strictly so called (that is to say, deceit) or whether the term included equitable fraud (which may mean no more than deliberate breach of duty). I directed that supplementary skeleton arguments be provided on this point. The Court has been much assisted by the supplementary skeleton arguments provided by both parties.

14. The question does not appear to have been decided in Guernsey. Were the matter entirely free from persuasive as well as binding authority I would have been inclined to say that 'fraud' means fraud strictly so called. There is authority in England that the words 'fraud' in Section 24(2) of the Arbitration Act 1950 (now repealed), which was in similar terms, meant deceit and that dishonesty was an essential ingredient: see Watson v. Prager [1991] 3 All ER 487 at 510 per Scott J (as he then was). Fraud, of course, must be alleged (and pleaded) in the clearest of terms. There must be a prima facie case shown: Russell v. Russell (1880) 14 Ch D 471.

15. The Respondents have been accused of victimisation and equitable fraud. The Court was told that the Applicants are not intending to allege deceit or impropriety and that must therefore be an end of any suggestion that a stay of the court proceedings should be ordered under s. 24(2). Moreover, as recently as October 2006, it is common ground that they too wished for arbitration.

16. Accordingly, the parties have reached a position where

    (1) it has been agreed that the firm will be dissolved with effect from 31st March 2007;

    (2) although there are hotly congested disputes between the parties about why relations between the partners have broken down to the extent which they plainly have, these disputes or their resolution are unlikely to have a material,

if any, effect upon the rights and obligations of the partners to one another in the period leading up to the dissolution or in the actual winding up of the affairs of the firm;

(3) the Applicants have stated in open court that they will not be alleging that the Respondents are guilty of deceit or impropriety. The extent to which they will hereafter think it of any utility to seek to argue for the relief sought at paragraph 2 of their application dated 29th December 2006 is unclear;

(4) Both parties acknowledge the prima facie validity of the arbitration agreement between them and neither party argued that it was inadequate to deal with ordinary issues arising in the winding up of the firm (although there is a dispute between the parties about whether or not an arbitrator can make orders akin to interlocutory injunctions).

17. I am satisfied that there is no other reason why any questions arising in the winding up of the partnership of Collas Day should not be referred to arbitration in accordance with the agreement between the partners. I am also satisfied, having been given an assurance to this effect by Advocate Peter Ferbrache on behalf of the Respondents, that his clients are ready and willing to do all things necessary to the proper conduct of the arbitration.

18. The Court therefore grants the Respondents the relief sought in their application dated 9th January 2007 and stays these proceedings. It must follow from the foregoing that the Applicants' application dated 10th January 2007 fails.

19. The Court having stayed these proceedings, it is no longer open to me to make any order in terms of paragraph 3 of the Applicants' application of 29th December 2006. But perhaps I should nevertheless say whether or not I would have granted that relief had I not stayed these proceedings.

20. A number of issues have assumed great significance in the events which have led to the very unfortunate breakdown in the working relationship between the parties. These are principally and in detail set out in Advocate Mark Ferbrache's first affidavit. The Applicants are plainly very dissatisfied at the way in which other partners, especially Mr Kirk and Mr Bound, have dealt with a number of issues,

including the issues surrounding the admission of John Lewis to the partnership, material expenditure, marketing and the rumours which they believe have been put about the Island about the circumstances surrounding the breakdown of the relationship between the Applicants on the one hand and the Respondents on the other. The issues have been most helpfully explained and discussed in the Applicant' skeleton arguments and were developed in oral argument. I have carefully considered all of the points raised and argued. I am satisfied that even if I had not stayed the Royal Court proceedings I would not have granted the relief sought at paragraph 3 of the 29th December 2006 application. It is a strong thing to interfere with the internal management of any firm, a fortiori at an interlocutory stage. I am by no means convinced that the allegations made against Mr Kirk and Mr Bound would justify such interference and, given that they continue to enjoy the support of the majority of the partners for their continuing management role, I doubt whether the Court has jurisdiction technical or practical, to suspend them from their role. Moreover, the fact that the partnership is in any event to be dissolved on 31st March 2007 means that Mr Kirk and Mr Bound are necessarily confined to relatively short term decision making, which should alleviate the Applicants' concerns.

21. I should not conclude without some mention of the fact that the Applicants' suggested that this was a case where the Court, if seised of the winding up of the firm, might consider making a Syers v. Syers order, that is to say, an order permitting a majority of the partnership to buy out a minority's share in the partnership. Such orders are not commonly made, and are not likely to be made where the minority share is as large as the 29.2% owned in aggregate by the Applicants. I do not consider that the technical availability of such an order constitutes any good reason why the arbitration should not proceed. There is, of course, nothing to prevent either camp from making a suitable offer to buy out the other, and a mediation may usefully be considered by both sets of parties with a view to seeing whether a solution can be reached which would avoid the need for a dissolution of the firm (notwithstanding the fact that the parties are agreed that this should happen).

22. I should make clear that I have also read the materials sent to me by the Greffe following the oral hearing.

23. The Respondents' letter to the Applicants dated 6th February 2007 has been sent to me by the Greffe. It contains a number of assertions about my powers to rule on various points. I consider that my powers to issue rulings are limited to the issues raised in applications before me.

24. The evidence and skeletons also refer to arguments which it was at one point intended to be advanced by the Applicants to the effect that the Respondents had not acted promptly in relation to the reference to arbitration. This point was not pursued at the oral hearing before me and I shall therefore say nothing more about it.

Catherine Newman QC

Lieutenant Bailiff

27th February 2007.

