Judgment 2/2006 **Magloire (trading as First Call Recruitment) v Wright, Goguelin and Leapfrog Limited – Royal Court (Civil Action File 846) – 18th January, 2006**

Livre des Hypothèques – defendants' application for leave to register counter claim – Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 - discretion of the Court is unfettered, but must be exercised judicially – leave to register granted

IN THE ROYAL COURT OF GUERNSEY

The 18th day of January, 2006 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone

In the matter of:

TINA MAGLOIRE T/A First Call Recruitment

(Plaintiff)

v.

FIONA WRIGHT
LAURA GOGUELIN
LEAPFROG LIMITED

(Defendants)

And in the matter of:

FIONA WRIGHT
LAURA GOGUELIN

(Applicants)

v.

TINA MAGLOIRE T/A First Call Recruitment

(Respondent)

Whereas on 10th January, 2006, the Lieutenant Bailiff considered an application by the Defendant for leave to register the Counter Claim on the Livres des Hypotheques and heard thereon Advocates P. Richardson and C. H. Edwards, Counsel for the Plaintiff and Defendants respectively,

the Lieutenant Bailiff this day gave judgment in the terms attached hereto and ORDERED: -

1. that there shall be given leave to the First and Second Defendants to register the Act of Court in the Livres Hypotheques, Actes de Cour et Obligations in the sum of £8,250;
2. that under Sub-section (d) (iii) of Section 7 of the Law Reform (miscellaneous Provisions) Law,2987, such registration be vacated upon the deposit by the Plaintiff of £8,250 with HM Greffier or, alternatively, upon written undertaking by Advocate P. Richardson to place this sum into a joint account of his firm and that of Advocate Edwards, such retention to subsist until further Order of the Court.

S.M.D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION.

Between:

TINA MAGLOIRE T/A First Call Recruitment ……...Plaintiff

and

FIONA WRIGHT }
LAURA GOGUELIN }……Defendants
LEAPFROG LIMITED }

And Between:

FIONA WRIGHT }……..……..Applicants
LAURA GOGUELIN }

And

TINA MAGLOIRE T/A First Call Recruitment……..Respondent

Judgment.

1. Since the inception of this case in October, 2003, it has been the subject of three sets of interlocutory proceedings. The first, relating to an objection by Advocate Le Cras, then representing the three Defendants, that the contracts of employment of the first two Defendants referred to in paragraphs 2.1 and 2.2 of the Cause were not relevant to the then current Application to strike out parts of the Cause, and should not be seen by the Court. That objection was dismissed by a Ruling handed down on 31st August, 2004.

2. Next, on 1st and 2nd September of that year, I heard the substantive application to strike out paragraphs 11 and 12 of the Cause. Had it succeeded then the rest of the Cause might well have fallen away. But it did not succeed, for on 1st October, 2004, I declined to strike out those two paragraphs, but instead ordered the Plaintiff to furnish certain further and better particulars of the Cause, which had been requested in the *Exceptions de Forme* contained in that which is often termed a 'holding' Defence filed on 12th December, 2003. Those particulars were duly furnished by the Plaintiff.

3. On the 21st January, 2005, the Defendants filed a substantive Defence denying the operative parts of the Cause, to which was added a Counterclaim by the first two Defendants, which, in essence, claimed that they were entitled to and did resign from the Plaintiff's employment because of conduct by her which amounted to repudiatory breaches of their contracts of service.

4. In her turn the Plaintiff filed *Exceptions de Forme* on 15th April last year seeking extensive particulars of the implied terms alleged in the

Counterclaim, and of the alleged breaches thereof by the Plaintiff as summarised in paragraphs 8 and 9 of the Ruling handed down on 22nd July, 2005, in which certain of the particulars sought were ordered to be provided. These were supplied in the Amended Further Responses filed by Ozannes on 13th October, 2005. A Replique together with a substantive Defence to the Counterclaim was lodged in the Ordinary Court on 2nd December, 2005.

5. On the 28th January, 2005, the the Deputy Bailiff, as he then was, ordered that the Counterclaim be placed on the Pleading List. That is reflected in an Act of Court of the same date. It is that Order which the First and Second Defendants now seek leave in their current Application to be registered in the *Livres des Hypotheques, Actes de Cour et Obligations* in accordance with Section 6 of the Law Reform (Miscellaneous Provisions) Law 1987.

6. Both Advocate Richardson and Advocate Edwards, appearing for the Plaintiff and the Defendants herein respectively, are *ad idem* that the right to register an Act of Court existed well before the 1987 Law, as is shown by the extensive historical review of various learned authors in Normandy and this Island by Sir Charles Frossard D.B, as he then was, in Chesney v. Kitson [1978] 20th February, at Divider 2 of the Defendants' Bundle.

7. Frossard D.B, at page 19 of the Judgment stated the question before him for decision quite simply:

> **"Can a Plaintiff register in the Register of Hypothèques an Act of the Court which orders an action to be placed on the Pleading List?"**

At the conclusion of his Judgment the then Deputy Bailiff found as follows:

> **"I am satisfied that under the Law of Guernsey the Defendant has the right to register the Act of Court of the 4th August, 1977, on the Register of Hypothèques and I accept the Exception pleaded by the Defendant."**

It is manifest that a Defendant who has obtained a similar Act of Court is in the same position as that of a Plaintiff, for he or she is effectually the plaintiff in the cross-action, which under Rule 27 of the 1989 Rules will, unless the Court orders that it be tried separately, be heard at the same time as the Cause.

8. The action in which the issue arose for decision in Chesney v. Kitson was brought by the Chesneys, as the plaintiffs, for the cancellation of an entry in the Register of Hypothèques. However the entry sought to be vacated was an Act of Court which Mr. Kitson (originally the plaintiff, but by then the defendant in the Chesney action) had registered in the *Livres* in respect of an earlier action by him for the return of a deposit he (Mr. Kitson) had paid for the purchase of certain property in St Saviours' parish, on the grounds that the Chesney's had, in breach of the Conditions of Sale, purported to consent to the conveyance to Kitson on 28th August, 1977, and had thus rendered impossible the delivery of immediate vacant possession on 28th July, 1977, as had been agreed.

9. It will be readily apparent that Part II of the 1987 Law does not extend or enlarge the right to register an Act of Court, but rather curtails it. Whereas prior to 1987, the party concerned had an immediate right to register,

since then, with the exception of an Act of Court reflecting a final judgment, leave to do so has to be obtained. The provision is put negatively, in contrast to the power to grant an interim injunction in Part I of the Law, as it says that the act or order of the Court shall not be registered without such leave. This was doubtless done so as to meet the danger expressed by Dorey D.B at paragraph 3 of his Judgment in Norman v. Birchwood Estate [1984] 6th June at Divider 3 of Ozanne's Bundle, of a mischievous registration.

10. That this was indeed one of the reasons which led to the enactment of Part II of the Law is shown in the judgment of Carey D.B., as he then was, in the next case cited, Channel Island Cream Liquers Ltd v. Woods [1992] [13 G.L.J.para. 56]. At page 7 he recited from the Policy letter submitted to the States Advisory and Finance Committee by H.M. Procureur in 1987, as follows:

> **"At present there is an absolute right for the plaintiff in any action before the Court to register any Act of Court relating to the proceedings whether before or after judgment is awarded in the Livre des Obligations at the Greffe. This means that somebody who starts proceedings on a totally fallacious claim can register the Act of Court inscribing the case on the Pleading List as a charge on the real property of the defendant. Such a step could result in real prejudice for the defendant if he is in the course of selling the property as he cannot make a clear title.**

11. In the Channel Island Liquers case the plaintiff company sued its former managing director for £60,075.89 allegedly due in respect of a loan and unauthorised expenses drawn from the company's funds. On 27th February, 1992, the action was inscribed on the pleading list and, on a further *ex parte* application made the same day and supported by affidavit, the Royal Court permitted the Act of Court to be entered in the *Livres des Hypotheques.* Shortly after the defendant applied to remove the entry, to which Carey D.B acceded, subject to lodging a sum equal to the claim (£60,075.89) with H.M.Greffier or a suitable third party.

12. That decision is relevant in the instant case in two respects:

(a) That the Court's discretion to lift a registration is not limited to cases where the claim is shown to be fallacious.

(b) That the property concerned was jointly owned by the defendant—the other party being his wife, who was given leave to intervene in the suit.

13. The first of these supports Mr. Edwards' contention that the Court's discretion, whether to give leave to make the entry in the first place or to vacate the registration, is unfettered. Proposition (a) also received the endorsement of the Court of Appeal in Moed v. Cockram [1999] Civil Appeals Nos. 267 and 272, where one of the issues was whether the registration of an Act of Court by Mr. Cockram in a previous action, in which he had issued proceedings for damages of £64,207 for alleged misrepresentation, should have been revoked. Clarke J.A, delivering the leading judgment said at page 12:

> **"It is plain that this letter' [he was referring to the Policy letter which was quoted *in extenso* in the Liquers case]'that the mischief to which the Law was directed was that property might be encumbered on the basis of spurious claims to the prejudice of the**

defendant who wished to sell his property. It does not, however, follow from the fact that that was the mischief identified that the bringing or maintenance of a frivolous claim is the only circumstance in which the powers conferred by Sections 6 and 7 of the Law can appropriately be used. In terms the discretion is unfettered."

14. I do not think Mr. Richardson seriously resisted this proposition, for he cited the case of Brown v. De Carteret and Vivyan [1992], in which Mr. Brown had building work done on his property in Les Merriennes for which he failed to pay. The builders each filed suit and registered the Acts of Court placing their actions on the pleading list in the *Livres des Hypothèques,* pursuant to the leave of the Court which they respectively obtained under Section 6.

15. The Browns applied to the Royal Court to lift the registrations and resisted the imposition of conditions that any monies should be paid into Court under subsection (d)(iii) of Section 7. One reason advanced was that this would prejudice the rights of the first registered creditor, Barclays Bank PLC, in whose favour the Browns had executed a bond for £328,000. Nonetheless Carey D.B. allowed the application but on the condition that their Advocate undertook to place in the joint account of his firm and that of the builder's advocate a sum equal to the total of the two claims and £500 security for costs in each case. In the course of his judgment Carey D.B said:

"Although it is not spelt out in the Law Reform (miscellaneous Provisions) Guernsey Law 1987, in my judgment the Court is given a wide discretionary power in matters such as these."

16. It is thus clear beyond all peradventure on the authorities that the Court, taking into account all the circumstances, may make such order as appears to it to meet the ends of justice in a particular case, and that this is so whether the application is for registration in the *Livres des Hypotheques, Actes de Cour et Obligations,* or for the revocation thereof. Manifestly, however wide, the discretion thus conferred must be exercised judicially. As Clarke J.A. said in Moed v. Cockrem:

"But no statutory discretion can be exercised without regard to the circumstances and context in which the discretion falls to be applied."

17. The main thrust of Mr. Richardson's submissions in response to the Application is that it does not sound in money save for the issue of costs. A claim for costs cannot in itself found a cause of action. Prior to 1987 the procedure was that the plaintiff, at the time when his action was called on in the Ordinary Court, enunciated the words '*en registré'*. As Sir Charles Frossard had said in Chesney v. Kitson *(supra)* this gave the plaintiff the right to register the Act of Court expressing the Court's assent to the action being placed on the pleading list. The consequent entry in the *Livres* was for an amount certain, because this enabled H.M.Greffier to assess the document duty payable.

18. Mr. Richardson also referred to the passage from Gallienne cited at page 29 of the Report in Chesney v. Kitson to the effect that it is the debt *itself* which acquired Hypothèque. He submitted that the fact that the Court's leave is now statutorily necessary before registration can take place had not altered the fundamental character of the encumbrance.

19. Mr. Richardson continued that in the substantive Defence now filed there was no real dispute as to the essential facts, namely that the first two Defendants had each had a contract of service with the Plaintiff for several months and that each then went to work for Leapfrog, a competitor and rival. As far as the Counterclaim is concerned it contained no prayer for damages, whether liquidated or otherwise, nor for any monetary relief. He submitted that as the only cause of action which these Defendants could show, however well it is disguised, is in essence for costs, the claim was manifestly unsustainable.

20. Mr. Richardson further said that, irrespective of the issue of costs, the case itself, as advanced by these Defendants, was unsustainable. Mr. Edwards had referred to the Affidavit of Miss Wright, sworn on behalf of herself and Miss Goguelin, in support of his argument, yet Mr. Richardson maintained that it is remarkable, not for its contents, but for that which it did not contain. For instance there is no statement that the Defendants had retained Ozannes, neither does the Affidavit give any indication as to whether they have so far had to pay any costs, nor is there any factual basis for the statement in paragraph 15 that between them the three Defendants have incurred legal fees of over £35,000.

21. The next head of Mr. Richardson's submissions related to the subject-matter of the registration sought by the Defendants. According to paragraphs 13 and 14 of Miss Wright's Affidavit searches have revealed that the Plaintiff is the joint owner of two properties known as 'Les Vents Deux' and No. 35, Les Canichers. But, Mr. Richardson said—joint owner with whom? The danger, he suggested, is that if the Application succeeds, it could result in an order to the prejudice of an as yet unnamed third party who is not before the Court and who has consequently not been heard.

22. Mr. Richardson said that the Liquers case was distinguishable from the present inasmuch as Mrs. Woods was a known party and clearly had an interest, which was capable of being defined, in 3, Le Clos Galliotte in St. Martin's Parish. At the time the Act of Court was registered in the *Livre* Mr. and Mrs. Woods had agreed to sell their property, and it was accepted at the hearing that it was in all the parties' interests for the sale to proceed, in particular to enable them to sort out the family's finances and to pay off Mr. Woods' debts. While Carey D.B held that Mrs. Woods was not a third party in the true sense of the word he also took the view that it was in her interest that her husband's indebtedness was resolved. It may be that this was why he declined to order severance of the proceeds of sale so as to reflect their respective interests.

23. There was a further reason why, Mr. Richardson submitted, the Court should decline leave to register the Act of Court, namely that two properties are involved, and it is impossible to say at this stage against which the *Hypothèque* should be registered, especially as no evidence had been adduced as to their respective values. The consequence would be that if each is worth, say £½ million, then an order of registration would have the effect of clogging up a large portion of the Plaintiff's assets. As appears from the quotation in paragraph 13 of the Plaintiff's Skeleton argument, this could result in real prejudice to her as she could not show a clear title to either property, and is the very situation envisaged by the Procureur in the Policy letter cited in the Liquers case.

If this aspect of a registration needs emphasis, it is to be found in Clarke J.A's judgment at page 13 where he is contrasting this type of relief with *Mareva* relief (see paragraph [27] *infra),* as follows:

> **"A registration may not have the same incommoding effect as a Mareva injunction …….but it is an impediment to the disposition of realty which may have a significant prejudicial effect."**

24. If registration of an Act of Court amounted to a caution against the title of specific property, in the sense ordinarily understood by lawyers, then the foregoing arguments might well have some validity. But the nature of hypothecation in Guernsey is that the charge obtained by the registrant, as Clarke J.A. said in Moed v. Cockrem at page 8—

> **"..…….is in respect of his claim in the action' [here, of course, the Counterclaim] 'what is in effect a charge over the Defendant's *interest in* Guernsey realty ranking in priority to all subsequent charges even if registered."**

Therein lies the distinction. The entry in the *Livres* does not constitute a charge *on* specific property, but on the Respondent's interest in any property—wheresoever in Guernsey that property is situated.

25. As regards the issue as to whether the instant Application is a thinly (and not very well) disguised attempt to obtain an order for security for costs: as Mr. Richardson put it in paragraph 10 of his Skeleton Argument:

> **"It is submitted that this is such a case of abuse' [which the 1987 Law was designed to prevent] 'as the reality of the situation is that the 1st and 2nd Defendants are seeking security for costs. Instead of applying for security in the usual way under RCCR r 48 (1)(b), they are attempting to gain a tactical advantage by in effect registering a charge against the Plaintiff's property, thereby preventing her from selling it and causing her real prejudice. This application is a façade for obtaining security for costs"**

26. In my judgment the answer to the contention that the Counterclaim is in essence a claim for costs only, dressed up as a substantive cross action, is to be found in the following passage from Commercial Injunctions by Steven Gee Q.C., 5th Edition, 2004, at page 328:

> **"Although the claimant has no 'cause of action' for interest and costs, these form part of the final relief sought in the action, and, provided the action can be brought, there is no difficulty in principle in granting *Mareva* relief based on section 37(1) by reference to the final relief sought."**

27. Of course I recognise that there is an essential difference between an application under the 1987 Law and one for a *Mareva* injunction. The difference cannot be expressed more clearly (I say with the greatest respect) than by Clarke J.A. in Moed v. Cockrem (*supra)* in the following passage at pages 12 and 13:

> **"But it is not correct to say that the principles applied by the English courts in considering the grant or discharge of Mareva relief are exactly the same principles as apply to the exercise of jurisdiction under Section 7 of the Law. This is because Mareva relief and the registration of a Act of Court are quite different things. Mareva relief is not based on any customary right. It operates in personam. It confers no**

> **priority. An applicant for such relief must, on principles now well recognised show, amongst other things, a good arguable case (which need not be a case with a 50% or greater chance of success) and a risk of dissipation of assets. By contrast, a plaintiff who seeks to register an Act of Court invokes a customary right, to which he was hitherto absolutely entitled, to register the entry of his action on the Pleading List."**

28. The point, however, of the above quotation from Steven Gee's work is that it supports the view, which I adopt, that the prayer for costs in the Counterclaim here is clearly ancillary to the substantive claim, which is for final relief by way of the declarations set out in the preceding five sub-paragraphs. True, costs are also claimed in sub-paragraph (6), but only as an adjunct to the declarations sought.

29. It is well settled that, provided a proper factual basis is laid in the pleading which contains the prayers therefor, a claim for a declaration is a valid form of substantive relief which can be claimed by a plaintiff, or, as here, a counterclaiming party, notwithstanding that no other relief is sought—see the former Order 15 Rule 16 of the Rules of the Supreme Court at page 267 of Volume 1 of the 1999 White Book. This is so whether or not there is a claim for any consequential relief, and in this sense I would include costs in the term 'consequential relief'.

30. The next question to be addressed is: Is the Counterclaim *itself* sustainable? Counsel were sharply divided on this issue, as might be expected, Mr. Edwards confidently maintaining the affirmative and Mr. Richardson the opposite. The test is clearly spelt out, again by Clarke J.A. at pages 12 and 13 of the judgment in Moed v. Cockrem that a would-be registrant:

> **"….may, no doubt, be refused leave if his action is frivolous or vexatious or obviously unsustainable or otherwise such as should be struck out on any of the recognised grounds. Similarly, his leave may be revoked if it should later transpire that his action falls to be struck out on that basis."**

Then, at page 13, he said:

> **"If ' [the] 'action is sustainable in the sense that it cannot be struck out on any of the usual grounds he is, in my view, prima facie, entitled to registration."**

31. I do not accept Mr. Richardson's contention that the Counterclaim is unsustainable. It may or may not succeed at the trial. It contains allegations of fact, some of which have been particularised, which the Defendants say entitled them to leave the Plaintiff's employment because those alleged acts collectively constituted repudiatory breaches of terms implied in their respective contracts of service. Consequently they were discharged from performance either of the contracts or of the restrictive covenants alleged in paragraph 3.4 of the Cause

32. The Plaintiff, in her Defence to the Counterclaim of 2nd December, joins issue on those allegations of fact and denies that these Defendants are entitled to the declaratory relief they seek. She may succeed in repelling those allegations, but that is very different from saying that the Counterclaim is not sustainable on any of the grounds enumerated by Clarke J.A. In my judgment, recognising as I do that the burden, which is of course not an evidential burden at this stage, rests on the parties counterclaiming to establish their right to

registration, I hold, in consequence, that they have a *prima facie* right to do so within the passage I have just set out from the judgment of Clarke J.A.

33. However, this is far from being an end of the matter because Mr. Richardson's submissions as to the unsustainability of the Counterclaim led him on to the Bill of Costs annexed to the Application, which he subjected to close scrutiny. Here, in my view, he is on firm ground. Manifestly, as the first five items are not referable to the Counterclaim, but to that which went before it came into existence in October 2005, they ought not to be included in the sum for which the Court may give leave for registration under the 1987 Law.

34. By the same token, I consider the next six items, 6 to 11 inclusive, are legitimately referable to the Counterclaim. As to the remainder, items 12 to 15, it is true that some of them, or possibly a proportion of each item, may rightly be said to belong to the Counterclaim rather than to the Cause and its ensuing pleadings and *Exceptions.* But there has been no attempt to apportion these, or to separate them into actual and potential costs. I do not see that it is possible for the Court to do so without the necessary documentary material. In these circumstances I have no hesitation in rejecting items 12 to 15 for inclusion in the sum to be registered.

35. Reverting to items 6 to 11, which total £16,500, this is a relatively small proportion of the total of the Draft Bill of Costs. I would not characterise them as 'staggering' in the words of Browne Wilkinson V—C (as he then was) in Porzelack A.G v. Porzelack (UK) Ltd [1987] 1 AER 1074, at page 1076 *f* (which was a case relating to security for costs) but, nevertheless, they seem to me to err on the side of generosity (to the Defendants, not to the Plaintiff).

36. Moreover, I have not lost sight of the point emphasised by Mr. Richardson that in the body of Miss Wright's Affidavit there occurs the following statement:

> **"15. The Second Defendant and I have incurred considerable expense thus far *both* in defending the claim brought by the Plaintiff *and* progressing our Counter-claim. *Together with the Third Defendant, we have incurred legal fees in excess of £35,000.*"**

37. The words in italics in the above passage are mine, and I have done so because there has been no effort to separate the Defence from the Counterclaim as regards the fees said to have been incurred. Leapfrog is not involved in the Counterclaim. The claim against it is in tort, not contract, and the averments in the Counterclaim relate solely to the contracts between the Plaintiff and the two Defendants, Miss Wright and Miss Goguelin respectively.

38. It might be argued that it is possible to discern which of the Items 6 to 11 relate exclusively to the Counterclaim, and those which do not, but the impression I receive from the wording of paragraph 15 of the Affidavit is that a blanket amount has been plucked from the air and, quite probably, includes amounts referable to defending the Cause. Similar considerations apply to the form of paragraphs 16 and 17 of the Affidavit, save, of course, to note that the Defence to the Counterclaim has now been lodged.

39. In these circumstances, and taking the view, as I do, that the unfettered nature of the discretion I am about to exercise (nonetheless judicially) relates not only to the giving of leave under the Statute, but also as to the *quantum* of the figure which should form part of the entry, I consider it right to order that the amount which should be entered in the *Livres* should be £8,250. The Order I therefore make is that there shall be Leave to the First and Second Defendants to register the Act of Court in the *Livres des Hypotheques, Actes de Cour et Obligations* in the sum of £8,250.

40. I further order, under sub-Section (d)(iii) of Section 7 of the Law that such registration may be vacated upon the deposit by the Plaintiff of £8,250 with H.M. Greffier or, alternatively, upon a written undertaking by Mr. Richardson to place this sum into a joint account of his firm and that of Mr. Edwards, such retention to subsist until further order of the Court. I am prepared to hear Counsel on the costs of the instant Application if they so wish.

A.R.W.Hancox
Lieutenant Bailiff
18th January 2006.

