

Judgment 20/2010

**Storm Residential & Commercial Management Ltd v Sarnia
Developments Ltd – Court of Appeal (Civil Appeal 416)
- 13 April 2010**

Stay of Evictions Laws, 1946 and 1954 – commercial premises – tenant’s appeal from order for eviction stayed for seven days – respective roles of the Bailiff and Jurats – circumstances in which the Bailiff may sit without Jurats to determine factual issues – recent evolution of Ordinary Court business – appeal allowed, and with the consent of the parties, new order for eviction substituted, stayed to 31 March 2010.

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil No. 416

The 13th day of April, 2010 before Dame Heather Steel, DBE, presiding, Sir de Vic Carey and Michael Cameron St John Birt, Bailiff of Jersey

STORM RESIDENTIAL & COMMERCIAL MANAGEMENT LTD

Appellant

v

SARNIA DEVELOPMENTS LTD

Respondent

In the matter of the applications by the Appellant, for leave to appeal against eviction and for a stay pending appeal, from the decision of the Royal Court on 26 February 2010 whereby an eviction order was made against the Appellant with a stay of execution of seven days;

Whereas, on 16 March 2010, THE COURT, having heard Mr Terence Le Maitre, director, on behalf of the Appellant, and Advocate Gordon Dawes for the Respondent, thereon: -

(1) ALLOWED the appeal, (2) SET ASIDE the said order made on 26 February 2010, (3) with the consent of both parties SUBSTITUTED an order for the eviction of the Appellant stayed until 31 March 2010, (4) RESERVED its reasons; and (5) MADE NO ORDER as to costs;

THE COURT this day ISSUED JUDGMENT in the terms attached hereto

K H TOUGH
Registrar of the Court of Appeal

**Approved Judgment
13 April 2010**

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CIVIL DIVISION

Between

**STORM RESIDENTIAL
&
COMMERCIAL MANAGEMENT LTD**

Appellants

V

SARNIA DEVELOPMENTS LTD

Respondent

**Before: Dame Heather Steel DBE
Sir de Vic Carey
Michael Cameron St John Birt, Esquire, Bailiff of Jersey**

JUDGES OF APPEAL

**Hearing date: 17th March 2010
Judgment handed down: 13th April 2010**

**For the Appellant: Mr T Le Maitre, Director
For the Respondent: Advocate G S K Dawes**

Cases, texts and statutes:

The Law Giving the Court Increased Power to Stay Execution in Actions for Eviction, 1946
The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950
The Law Reform (Tort) (Guernsey) Law, 1979
The Royal Court (Reform) (Guernsey) Law, 2008
The Eviction Actions Order, 1959
Camacho v Stan Brouard Limited, Royal Court 6th January 1995 18 GLJ 34
Champion v Paint (No. 2), Royal Court 25th September 1995 20 GLJ 49
Mann v St Pierre Park Hotel (No. 1), Royal Court 30th October 1998 26 GLJ 56
Fairhurst v Siteweld Limited, Royal Court 28th April 2000
Practice Direction 3 of 1995
Practice Direction 6 of 2002

CAREY JA

1. This is the judgment of the Court on an appeal by Storm Residential and Commercial Management Limited (“the appellant”), against a decision of Judge Finch, in the Royal Court on 26th February 2010, whereby he granted an eviction order against the appellant but stayed its execution seven days. The appeal raises an interesting issue as to whether the exercise of the

Court's discretion to stay an eviction order is properly a matter for the Bailiff (or a judge sitting in his place) or whether it can only be decided by the Jurats.

2. In view of the urgency of the situation, the appeal came on at very short notice and time for research was limited. We are grateful therefore to Advocate Dawes for his assistance, particularly bearing in mind that the appellant was represented by its director, Mr Le Maitre.

Factual Background

3. We can describe the facts very shortly. In October 2008, Sarnia Developments Ltd ("Sarnia") leased premises ("the premises") at Stanley Road, St Peter Port, comprising a garage, forecourt and land, to the appellant. That lease expired but a further lease dated the 11th November 2009 was entered into between the parties, whereby the appellant leased the premises for a further six months, commencing 1st October 2009 and ending on 31st March 2010. The rent for the six month period totalled £12,000 of which £6,000 was payable on the signing of the lease and the remaining £6,000 was payable in three instalments of £2,000 on the 14th days of November and December 2009 and January 2010.
4. The appellant paid the sum of £6,000 in advance on the signing of the lease, but failed to pay the balance on any of the due dates. On the 28th January 2010, the appellant sent a cheque and two post-dated cheques for the outstanding amounts, but these were returned marked "*refer to drawer*". The rent remains unpaid. The cheques were not drawn on the bank account of the appellant, but on a bank account of Delta Taxis (2004) Limited, a Guernsey company which operated from the premises at the material time.
5. Sarnia instituted proceedings for eviction and these came before the Judge of the Royal Court on 26th February 2010. Advocate Grainge appeared for Sarnia and relied simply on the non-payment of rent as grounds for making an eviction order. Mr Le Maitre appeared and complained of the fact that he had not received a signed copy of the lease from Sarnia. He also referred to the fact that during the course of the original lease, the premises had suffered damage to its electrical supply during a night of storms, which the appellant had paid for. There was apparently an ongoing dispute between the insurance companies as to whether it was the responsibility of Sarnia or the appellant but the fact was that the appellant had spent money on the repairs which far exceeded the outstanding rent. In effect therefore, he wished to claim a set-off.
6. Advocate Grainge responded that neither the failure to supply a copy of the lease nor the alleged failures of the landlord in fulfilling its maintenance obligations could provide a defence to non payment of rent. There was also mention of the fact that Delta Taxis who had issued the dishonoured cheques were subtenants, although there was a dispute as to whether the landlord had approved a subletting. Advocate Grainge renewed her application for immediate eviction. Mr Le Maitre on the other hand sought one month's adjournment.
7. Judge Finch decided to retire to consider the matter. Before he did so Advocate Dawes intervened. [We understand that he was in Court overseeing the work of Ms Grainge in accordance with the requirement of the Royal Court that new advocates such as Ms Grainge then was had to be accompanied by a senior practitioner from their firm]. Mr Dawes addressed the Judge thus:

"Sir, if I can just add by way of assistance to the Court, the alternative would be to put it over until the next Court sitting with Jurats on 16th March, if you feel there are factual matters that need to be looked into with Jurats, sir."

To which the Judge responded:

"Indeed, if there are factual matters to determine but from what I gather, from what I've heard, the matters for determination are really procedural matters rather than(sic) factual matters."

8. On his return the Judge asked some more questions of Ms Grainge about the supply of the lease and the subletting. After concluding that these matters did not impact on the case he said this:

“...it is the payment of the rent, that is the problem in this case, and it has not been done. The factual issues are not in dispute it is really a question of submissions of procedural matters.

What I am going to do in this case is I am going to grant the eviction but I am only going to stay it for seven days, having listened to everything that has been said.”

9. The appellant sought to appeal the decision. The matter came before the Bailiff as a single judge on an application to stay the eviction, pending appeal. The Bailiff raised the issue as to whether a judge sitting without Jurats, could determine the period of stay of an eviction. As we have recorded, this matter had been touched upon by Advocate Dawes, Advocate Dawes did not dissent from the assertion by the Judge that it was a procedural matter and indeed sought to defend that view before us. In any event we make no criticism of Advocate Dawes in letting the matter rest.

The Appeal

10. Mr Le Maitre sought to raise again before us some of the issues he had pursued before the Royal Court. However, we propose to confine our decision to the issue of whether Jurats are required for a decision on whether to stay an eviction. In what follows, we shall refer to the Bailiff, but of course the principles apply to whoever is presiding in place of the Bailiff.

11. We begin by raising one issue, only for the purpose of disposing of it immediately. Section 13 of The Royal Court (Reform) (Guernsey) Law 2008, provides that in certain circumstances, the Bailiff may sit without Jurats and may determine the facts. This may be done at the election of all the parties to the case, or upon direction of the Bailiff, although in the latter case, the direction does not have effect if all the parties elect that Jurats should nevertheless continue to sit. A decision under section 13 has to be taken formally and after due consideration. There should be an Act of the Court recording that a decision under section 13 has been taken. Advocate Dawes very properly accepted that the judge in this case clearly did not apply his mind to section 13 and did not purport to take a decision under that section. We can therefore ignore section 13 and return to consider the general position in the absence of that section.

12. The relevant part of section 6 of The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950 provides as follows:

“1) Subject to the provisions of this and the next succeeding section, the judicial functions, powers and duties of the Royal Court shall continue to be exercised as hitherto.

2) (a) The Bailiff shall be the sole judge of law and of questions of procedure in all causes and matters heard in a court over which he presides and shall award the costs, if any, and for the purposes of the determination of any question of which he is the sole judge, the Royal Court shall be properly constituted if it consists of the Bailiff sitting unaccompanied by the Jurats or any of them.

(b)

3) Subject to the provisions of sub section (5) of this Section, any matter which, under the provisions of this Law, is within the competence of the Jurats to decide, shall, if they be not of one opinion, be decided by a majority of the Jurats sitting.....

5) *In all causes and matters, the Bailiff shall have a casting vote whenever the Jurats are so divided in opinion that the giving of a casting vote is necessary for the finding of a majority opinion.*”

13. Advocate Dawes pointed out, correctly, that the 1950 Law does not specifically state what the role of the Jurats is. However, it cannot be doubted that their role has been clearly understood ever since the coming into force of that Law. They are the finders of fact, whereas the Bailiff’s role is limited to the three functions spelt out in Section 6, namely deciding issues of law, procedure and costs. His only involvement in matters of fact is where he exercises a casting vote pursuant to subsection (5) because the Jurats are equally divided.

14. In many cases it is obvious that a particular matter is an issue of fact e.g. which evidence is to be accepted? However, many cases turn on the exercise of discretion. In other words, there is no dispute as to the primary facts; the real issue is what decision should follow from those primary facts; what is the right and just answer? Advocate Dawes referred us to *The Oxford Companion to Law* which contains the following definition of “discretion”:

“The faculty of deciding or determining in accordance with the circumstances and what seems just, fair, right, equitable and reasonable in those circumstances……. A question of judicial discretion is accordingly a question not determined, like a question of fact, by evidence, nor one determined, like a question of law, by authorities and argument, but one determined by an exercise of moral judgment…….”

15. We are in no doubt that, save where an issue of discretion relates to a question of procedure or costs (which is a matter for the Bailiff pursuant to Section 6(2)(a) of the 1950 Law), an issue which falls to be decided as a matter of discretion is a decision for the Jurats. To refer back to the definition referred to above, issues of what is just, fair, right, equitable and reasonable, are just the sort of issues for which the Royal Court has always had Jurats. They are elected to decide such matters.

16. This is consistent with Practice Direction 3 of 1995 which endeavoured to separate the specific matters to be dealt with by the Bailiff and Jurats on the one hand and the Bailiff alone on the other. Under the heading of “Examples of Jurats Business” it states:-

“Generally anything requiring a finding of fact by the Court or the exercise of the Court’s discretion on other than a pure point of law or procedure.”

17. Although it is not perhaps as clear as it might have been, Practice Direction 6 of 2002 is also consistent with this. With reference to the business of the Ordinary Court, the Practice Direction said this:

“In all matters where there is a requirement for findings of fact or for the exercise of discretion to be made by a court composed of Jurats, the application should first be listed before the Bailiff’s Friday court when directions will be given concerning a hearing date.”

18. There are a large number of areas of the Ordinary Court’s business where issues of the exercise of the Court’s discretion arise. The Bailiff having identified the question to be decided, the Jurats traditionally reached their decision without any further intervention from him. We give as examples guardianship cases, wage arrests, liquor licensing applications, and in saisie proceedings the important issue as to whether there should be a stay in the making of an Interim Vesting Order.

19. Advocate Dawes pointed to some cases where perhaps the Bailiff sitting alone has decided matters where a question of discretion arises. For example, applications by trustees for directions were often heard by a single judge prior to the recent statutory provision enabling that to occur.

We accept that it is possible that matters may have been wrongly heard in the past. However, we must return to the 1950 Law. Ultimately Advocate Dawes accepted that if a matter was not one of law or procedure or costs, it was for decision by the Jurats. The Bailiff's powers were confined to those three matters. We think he was entirely correct to accept that and indeed it is what the statute necessarily implies.

20. Advocate Dawes' final point was that a decision as to whether to stay an order for eviction was a procedural matter and could therefore be dealt with by the Bailiff sitting alone. We do not agree. It is hard to think of something of more substance to a person than whether he should be able to remain living in the house which he rents for one month, three months or six months. These are matters which fall for decision by the Jurats, not by a judge of law or procedure sitting alone.
21. Advocate Dawes conceded that where such issues arose, they had traditionally been adjourned for decision by the Jurats. Indeed, one only needs to look at the provisions of the Law Giving the Court Increased Power to Stay Execution in Actions for Eviction 1946. Section 2 confers a power upon the court to suspend eviction for such time and upon such conditions as the court may consider reasonable, and then goes on in section 3 to list eight matters which the court may specifically take into account in deciding whether to suspend the eviction and say for how long. These are clearly matters which the Jurats should consider and decide, e.g.:

(h) whether the dwelling house is so overcrowded as to be dangerous or injurious to the health of the inmates.....

22. On the basis therefore that the decision as to how long to suspend an eviction order is a matter of discretion which does not relate to a matter of procedure, it follows that the Judge of the Royal Court had no jurisdiction to decide the period of suspension of the eviction order. We therefore allowed the appeal at the conclusion of the hearing on 16th March. The normal consequence would have been for us to remit the case to the Royal Court for decision by the Jurats. However, in view of the imminence of the expiry of the lease period, both parties agreed that we should make an order staying the eviction order until the 31st March 2010 and this is the order that we made.
23. That is sufficient to deal with the matter, but we feel we owe it to Judge Finch, whom we find has fallen into error, an error for which we make no criticism, to say that to some extent he may have been let down by the system. We understand that twenty years ago the Ordinary Court sat on a weekly basis composed of the Bailiff and Jurats of the quarter. The business of the Court was naturally much lighter in those days and much of what came before the court did not require any input from the Jurats, other than formal nodding of their agreement. As the demands placed on the Jurats increased, an attempt was made to rationalise the business of the court between that requiring the participation of the Jurats and that which could be left to the Bailiff alone. This took the form of dividing the weekly list of the Ordinary Court into business where the Jurats participated and business where the Bailiff sat alone. In order to accommodate other business, the number of days fixed for the transaction of business in the Ordinary Court before the Jurats was reduced.
24. The Order of the Royal Court entitled The Evictions Action Order 1959, which Advocate Dawes helpfully included in his bundle, directed that an Eviction application shall be dealt with summarily. Experience showed that not all actions for eviction could be disposed of conveniently in this way. Hence, the apparent differentiation in Practice Direction no. 6 of 2002 between simple evictions and those which presumably are less simple and which are directed to be listed before the Bailiff's Friday Court with regard to directions being given concerning a hearing date and any other matters that may be relevant. We have noted from what Mr Dawes says that the practice has apparently developed of first listing all eviction actions in the Friday court, which would not appear to have been what was intended in 2002.
25. This case shows that what may have been thought to be clear in the Practice Directions given by the Royal Court in 1995 and 2002, has led to some confusion in 2010 with Judge Finch, Advocate

Grainge and her overseer on the day, Advocate Dawes, not identifying that an eviction action where there was a contest as to the length of the stay had to be re-listed before the Jurats. Whilst the Bailiff can make an eviction order if the facts are agreed, the Friday Court can only dispose of the matter where the defendant fails to appear, or there is an agreement as to the period of stay, if any. Even where an eviction order is agreed any question as to stay, if disputed, has to be reserved to the Jurats

26. Mr Dawes' submissions highlighted all this and he also rightly drew attention to Judges having sat alone to decide trust applications, prior to the law having been recently changed to provide that these may be dealt with by the Bailiff alone. He also mentioned the way in which some applications under the provision of The Law Reform (Tort) (Guernsey) Law, 1979 relating to the extension of time limits have been dealt with where Judges have sat alone.
27. Since the hearing our attention has been drawn to the judgment of Day DB in *Fairhurst v Siteweld Limited*, 28th April 2000, when he commented on the presence of Jurats in such applications where issues of credibility of witnesses arose. He also commented, without wishing to make any criticism of his predecessor, on two cases, namely *Champion v Paint*, 25th September 1995 and *Mann v St Pierre Park Hotel* (No. 1), 30th October 1998. It may be that in those two latter cases and in another case that has been drawn to our attention, namely *Camacho v Stan Brouard Limited*, 6th January 1995 the Judge should have sat with Jurats. However, the issue of whether matters of prescription are matters of procedure and therefore fall to be decided by the Bailiff alone is not before us and has not been argued. We therefore express no view on the correctness of these decisions.
28. Applications of this kind can however involve the Court engaging in difficult balancing exercises weighing up conflicting interests and principles. Separating those out from factual findings in the days when the Bailiff did not retire with the Jurats may have led to a mild reluctance to involve the Jurats particularly where the facts were not really in issue. The then procedure could have given rise to difficulty in the presiding Judge having to give full directions on the issues which should weigh with the Jurats in the exercise of their discretion and the Jurats then returning announcing their decision when it was not their practice to give any reasons.
29. These problems are to a large extent overcome by the provisions of Sections 14 and 16 of the Royal Court Reform (Guernsey) Law 2008, which enable the Bailiff to now retire with the Jurats and assist in preparation of the court's judgment. This brings the procedure in Guernsey closer to that of the Samedi division of the Royal Court of Jersey where the Jurats routinely sit with the Bailiff on these kinds of application
30. As Day DB said in *Fairhurst* "Each case must depend on its own facts" and it will be a procedural matter for the Bailiff in each case, to decide whether issues of fact or exercise of discretion requiring the presence of Jurats arise. The test is nevertheless clear. If the exercise of discretion relates to a matter of procedure or costs (or law although it is difficult to imagine this), it is a matter for the Bailiff. If it relates to anything else, it is a matter for the Jurats. Hopefully following the reforms of 2008 there will in future be less hesitation in including the Jurats as members of the court hearing these applications unless of course the provisions of section 13 of the Law of 2008, to which we have already referred, have been invoked.