

Judgment 24/2006 Ogier v Grand Havre Holdings Limited – Royal Court (Civil Action File 205) – 30th May 2006

Royal Court Civil Rules, 1989, Rule 36 (2) – péremption d’instance – defendant’s application that action be declared périmée or struck out for want of prosecution – held that the action became périmée not later than 4th October, 2002 – delay would cause serious prejudice to the defendant – action struck out

IN THE ROYAL COURT OF GUERNSEY

The 30th day of May, 2006, before Alan Robin Winston Hancox, Esquire,
E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

Between: MAUREEN SYLVIA OGIER
Plaintiff

and

GRAND HAVRE HOLDINGS LIMITED
Defendant

Whereas on 2nd February, 2006 and 7th February 2006 the Lieutenant Bailiff considered an application for an order that the Plaintiff’s claim became perimé on or shortly after 1st March, 2002 and in the alternative that in any event the Plaintiff’s claim should be struck out for want of prosecution and heard thereon Advocates A.M. Merrien and M.G.D.A. Dunster counsel for the Plaintiff and Defendant respectively The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and

- 1) DISMISSED the case under Rule 36(2) of the Royal Court Civil Rules 1989;
- 2) RESERVED the question of costs for future hearing.

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

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION.

Between:

MAUREEN SYLVIA OGIER.....Plaintiff

And

GRAND HAVRE HOLDINGS LIMITED.....Defendant

Judgment

1. The latest Application, dated 4th March, 2005, with which I am now concerned in this long-running case is by the Defendant Company, is that by reason of the inaction and delay that has taken place by the Plaintiff, or on her behalf, the action became perimé on or shortly after 1st March, 2002. However in his opening address Mr. Dunster submitted that the latest possible date, putting the Defendant's case at its lowest on this issue, was 4th October, 2002, that is to say a year and a day after the last scheduled Court appearance, which was on 3rd October, 2001. In his skeleton argument (paragraph 7) he suggested a third date, namely that the action became perimé on 2nd March, 2003, which Advocate Merrien, for Mrs. Ogier, described as a 'longstop' date.

2. There are four other prayers in the Application, namely that which is in effect an alternative claim that the action should be struck out for want of prosecution under Rule 36(2) of the Royal Court Civil Rules 1989, and three which overlap with, and to some extent reiterate, those contained in the Defendant's applications of 20th August, 2001. They were:

1. (a) That the Plaintiff should pay £1,380 recoverable costs of the Application to amend the Cause—dismissed on 4th May, 1999—which were ordered by me on 6th August, in my Ruling giving leave to appeal.
(b) That the Plaintiff should pay £738/50 costs of the unsuccessful appeal ordered by Sumption J.A on 27th September, 2000.
2. Under Rule 48 of the Rules, that the Plaintiff should give Security for actual & estimated costs in the sum of £36,871.20 (now £43,982/40) in the current action.
3. That the Plaintiff should lodge her Trial Bundle.
4. That the Defendant should have leave to amend its Defence as in the Draft annexed.

3. As a result of a telephone conversation between the Deputy Greffier and Mrs Ogier of 20th June, 2001, the case was listed for a pre-trial review on Monday, 3rd September, 2001, by which time Advocate Dunster had replaced Advocate Le Marquand as representing the Defendant. On the morning of that day I summarised the applications that had then recently been filed, and Mrs. Ogier sought an adjournment in order to complete the preparation of her Trial Bundle and to apply for legal aid. I then directed that the case be stood over to that afternoon and, as regards 3

above, that the red and blue Bundles which Mrs Ogier had produced should collectively be treated as her Trial Bundle.

4. At the afternoon Session the Court specifically directed itself to the issue of a level playing field and thus the possibility of Legal Aid for Mrs Ogier. After an exchange as to when it would be convenient for Mrs. Ogier next to travel from Ireland to Guernsey the following dialogue ensued:

LEUTENANT BAILIFF:The only thing is, I think the decision, whatever it is, will be before then. I think perhaps- I'm anxious not to lose sight of this case for too long because one of the reasons why Mr. Dunster is supporting this application' [meaning the proposed application for legal aid] 'is in the interests of getting it on quickly, getting matters resolved quickly.

ADVOCATE DUNSTER: I know now is not the time but I have grave concerns about this case, it's 10 years after the event, more than 10 years after the event, in which Mrs. Ogier's case, by enlarge, as far as I see, rests entirely on oral evidence. It's a case which, in other circumstances, may have already been applied to be struck out. I am mindful, as the Court says, this matter must be pressed forward.

LIEUTENANT BAILIFF. I don't think we could expect a decision on this matter before about the end of this month?

H.M. DEPUTY GREFFIER: I think that's right sir, it will take a month.

LIEUTENANT BAILIFF:I would suggest about 3rd or 4th October. If you can make a day trip over so much the better, if not-

MRS. OGIER:Yes, preferably on the Wednesday.

LIEUTENANT BAILIFF: Well, I'll tentatively fix it for 3rd October. What time? You have to get over here, you have to make a day trip so, is there a flight- is it Belfast or Dublin?

MRS. OGIER: No, I'm just staying in England at the moment to make things a little bit easier so the first trip from Gatwick is about 9 a.m. I could get here, as I have this time, at 10.30, but then if things are delayed I would rather it was either later on in the morning or first thing in the afternoon.

LIEUTENANT BAILIFF: Well, let's say midday, then if I've got anything else then it will probably be over by midday, let's say midday on Wednesday 3rd October. That's merely for mention and communication of any decision regarding legal aid and, of course, anything else Mr. Dunster wants to bring to our attention.

MRS. OGIER: But if nothing has been decided by then concerning legal aid-

LIEUTENANT BAILIFF: We'll undertake to inform you in advance if no decision has been reached to avoid your coming over unnecessarily, is that alright?

MRS. OGIER:Thank you very much.

LIEUTENANT BAILIFF: But unless you hear from us that will be-

MRS. OGIER: The next Court date, yes.

5. However the case did not come on on 3rd October because, as a result of an approach by H.M.Procureur, the then Legal Aid Administrator contacted Mr.Ross, H.M. Deputy Greffier and indicated that it would be necessary for the merits of the intended legal aid application to be assessed. Mr. Ross noted:

“.....neither M.G.A.D or Mrs. Ogier are keen to attend’ [on 3/10/01] ‘at the moment”

At the outset of his submission Mr. Dunster said he was prepared to accept that he had acquiesced in the date (meaning 3rd October) being vacated.

6. The next event, so far as the Court is concerned, was that after a long gap of some four years the case came up on 28th January, 2005, as a result of Mrs. Ogier’s Application for directions of the 20th of that month. However she had presaged this step in her letter to the Greffe of 28th October, 2004, which enclosed a request for directions as to how to proceed with her case.

7. In the meantime efforts were made to secure legal aid for Mrs. Ogier under the Legal Aid Scheme which was about to be introduced for civil matters. Special arrangements were made for her to receive legal aid, notwithstanding that the civil aspect of legal aid was still in the embryo stage. The action then ‘went to sleep’ and the next two years were occupied by correspondence between Advocate Merrien, who agreed to act for Mrs Ogier, Mrs. Ogier herself, and Mr. Le Poidevin, the first Administrator of the Scheme. The terms under which the Certificate was granted are summarised in Mr. Le Poidevin’s letter of 18th December, 2002, to Advocate Merrien.

8. Eventually there was an unfortunate dispute between Mr. Merrien and Mrs Ogier, but their differences have been, as it were, patched up and Mr. Merrien has put forward very comprehensive submissions (a) as to why the action is not perimé (b) if, contrary to his submissions, the Court should so hold, then the Court should order that the action be restored under Rule 50(b) of the 1989 Rules and (c) that there has been no inordinate delay on the part of the Plaintiff, but even if there has been, it has not operated to the prejudice of the Defendant.

9. On 28th January, 2005, Advocate Greenfield, temporarily representing the Defendant, indicated that he would expect his client to instruct his colleague to take the point regarding perimé. The matter was fixed for further directions on 11th March, 2005, in order that Mrs. Ogier’s position regarding legal representation could be clarified, by which time the Application of 4th March, 2005, *inter alia*, that the case should be declared perimé, had been lodged. Both Mrs Ogier and Advocate White, appearing for the Defendant, are on record on 11th March as saying they had no objection to the hearing of the perimé point first and as a separate issue. The hearing was then set for 5th to 8th April.

10. That hearing did not take place, possibly because further time was taken up as a result the new Legal Aid Administrator’s letter of 24th March to the Greffe stating that further legal aid would not be available unless the Court certified that this was in the interests of justice. The Court then so certified. On 5th April Advocate Dunster by letter submitted that the Defendant’s three Applications of August 2001, namely (i) to amend its Defence of May, 1998 (ii) for the lodgment of Security for Costs in the sum of £43,982/40 (iii) to pay £2,118.50 in respect of the two further bills of costs referred to in 1(a) & (b) of paragraph 2 above, and for the action to be stayed and/or dismissed pending compliance with (ii) and (iii), should be combined with the perimé application so as to avoid a multiplicity of hearings and, consequently, of possible appeals.

11. At that time I expressed the firm view that the perimé issue is of a wholly different nature from the Defendant's other extant applications, and that it would be inappropriate for them to be heard at the same sitting. I did not have any objection to the strike-out prayer being heard together with the perimé application—as has occurred. With the foregoing summary of the background in mind I proceed to address the perimé issue first.

12. The origin of the peremption doctrine, from which perimé stems appears to have been in about 1843. The principle is expressed at page 312 of Traité de la Renonciation par Loi Outrée by James Gallienne as follows:

“La péremption d’instance qui a été introduite pour metre un terme à la durée des des process,— *ne lites fiant penè immortales*,—est l’extinction ou l’anéantissement d’une poursuite, par la discontinuation des procedures pendant un certain terme determine par loi.”

The translation being:

“The peremption d’instance which was introduced to limit the duration of actions (so that litigation should not be immortal)—means that an action is extinguished or annihilated by the discontinuance of procedures after a certain term determined by the law”

13. This was followed in 1848 by The Ordonnance au sujet de la Péremption et du Rôle des Causes à Plaider, section 4 of which declared:

“Tout Acte d’Inscription sur les Rôle des Causes à plaider sera périmé par le laps d’an et jour.”

meaning—

“Every act ordering Inscrite shall be prerempt after a year and a day.”

Section 5 of the same Ordinance then provides:

“Toute Cause maintenant inscrite sur le Rôle des Causes à plaider sera censée perimée après le laps d’an et jour, à compter de la passation de la présente Ordonnance.”

meaning—

“Every Cause now Inscribed in the Roll shall be deemed perempt after the lapse of a year and a day after the passing of this Ordinance.”

14. How, then, is the doctrine of peremption to be applied in the instant case? Most of the authorities contained in the Defendant's Bundle, to which Mr. Merrien also extensively referred, deal with the issue of restoration under Rule 50, so that the basis for the Courts' decisions in those cases was that the perimé doctrine was already in operation. One of the difficulties in those cases was that there was frequently uncertainty as to when the period of a year and a day should begin. For instance in Silver Falcon Enterprises Ltd et al v. International Hellenic Operations Ltd et al [1998] 25 GLJ page 38 it was held that where the last Court Order required action by both parties it was not possible to determine from what point the period would run, and the action was not therefore perempt.

15. I think Counsel are agreed that if *périmé* applies, then the remedy is barred, although the action survives—in contrast, for instance, to the plea of prescription, which, if successful, operates to extinguish the cause of action absolutely. As far as I can discern, both sides were also agreed that when a case is adjourned, a further mention in Court, even if it is just to adjourn the case to another date, stops the period running. The authority for this is Nigerian Television Authority v. Transcom International Ltd [1985] 1 GLJ page 14.

16. In the above connexion I am content to adopt Mr. Greenfield's remarks in Court on 28th January, 2005, when he said:

“What has to happen is that that’ [meaning the fresh application for an adjournment] ‘can’t be done informally. Very often on a Friday morning Court , the Ordinary Court sitting, if a year and a day has gone by, and nothing happened, like a case that I was involved in, then you have to actually formally mention it. Something has to happen by way of a mention in Court formally. As I say, Sir, invariably on the Friday morning Court which will stop the period running, then the year period starts all over again.”

What is clear in this case is that, so far as the Court was concerned, there was no appearance and no formal step was taken from 3rd September, 2001 and 28th January, 2005, a period of four years and nearly five months.

17. Counsel were not agreed, however, that the effect of *périmé* differed according to whether the adjournment of a case is to a date certain or if it is adjourned *sine die*. The meaning of the phrase is stated in Wharton's Law Lexicon as:

“.....The consideration of a matter is said to be adjourned *sine die* when it is adjourned without a day being fixed for its resumption”(i.e with no appointed date).

18. In Mr. Merrien's written submission at paragraph 19 he refers to the personal injury case of Haines v. Annandale Tile Company Ltd [1997] 23 GLJ page 24, at first instance Carey D.B (as he then was) said at page 8 of the judgment:

“.....I would just record that I hope this will turn out to be the high water mark in applications for indulgence when case have been allowed by Advocates to become *périmée*. If it is not, it may be that the Court will have to introduce some further Rule of Court on the lines that where a case has been adjourned *sine die* (that having been the belief of both counsel, though incorrect, in that case) it will be struck out if nothing is done for a certain period of time.”

Mr. Merrien's argument runs thus: if it were not the case that the *périmé* rule did not apply where the action was adjourned *sine die*, then there would have been no reason for the former Deputy Bailiff to say that further rules might be necessary so as to keep advocates up to the mark in not letting their cases go to sleep for more than a year and a day.

19. While dealing with the topic of the application or otherwise of the *périmé* rule to the instant case I propose to refer briefly to the two other authorities mentioned by Mr. Merrien, namely Le Moigne v. Hargetion [1996] 20 GLJ page 24 and Stoneman v. Cummings & others [1999] 27 GLJ page 30 [TAB 10 of the Defendant's Bundle]. In both cases there was no dispute that the action had become *perempt* (in the first for over five years before the application to restore under Rule 50(b) was made and in the other a matter of weeks) so the only issue was whether the Court should exercise its discretion restore the case to the Roll.

20. **Le Moigne v. Hargetion** was a personal injury case and the Deputy Bailiff held that the delay had mainly been caused by the unstable medical condition of the plaintiff. He pointed out that in such cases delays are inevitable and ordered the case to be restored to the Roll. In **Stoneman's** case Day D.B held that the Plaintiff's delays had been 'disgracefully lengthy and without any valid excuse or justification'. Accordingly he dismissed the application to restore.

21. As a matter of law I agree with Mr. Merrien that if the order of the Court is that the case be adjourned *sine die*, that is a strong argument for saying that the order, if made by consent, and even if acquiesced in, by the parties or their Advocates, amounts to an acceptance by both parties that the action is kept alive—that it is still in the world of the living. Whereas if the matter is adjourned to a fixed date, and neither party turns up, and no positive step is taken for a year and a day, then it can reasonably be said that the parties are not sufficiently interested in keeping the case alive. This is in keeping with Carey D.B's observation in **Saromaje Ltd v. Janet Holdings Ltd [1993] 15 GLJ 53** that:

"It is in the public interest that litigation should proceed expeditiously."

And in **Le Moigne v. Hargetion** at page 2:

"The reasons for introducing' [peremption] 'are clear. Parties must get on with actions and in days where litigation was simpler a year and a day was by no means an unreasonable time within which to expect a Plaintiff to advance on to another stage of the proceedings."

And, further, with Day D.B's statement in **Stoneman** (*supra*) that:

"Our peremption rules are, and could only have been, designed to ensure reasonable expedition on the part of the plaintiff to pursue his case."

22. Mr. Dunster only peripherally addressed the issue as to whether the case was or was not adjourned *sine die* on 3rd September, 2001. But it matters not, for whatever happened subsequently, the fact of the matter is that on 3rd September the case was not adjourned without an appointed day for its resumption. In Mr. Merrien's phrase there was a cut-off date. The case was expressly adjourned to the 3rd October at midday. Both the transcript and my note are in agreement on this point.

23. It is clear from the Record that the reason for the adjournment was two-fold: (A) to allow time to canvass the possibility of public funding for Mrs. Ogier and (B) to review the case—in particular with regard to the Defendant's applications regarding costs. I do not therefore see how a subsequent event, namely the informal intimation by each party to the Deputy Greffier that they were 'not keen' to go on on 3rd October, can possibly be said to convert an adjournment to a date certain to one *sine die*. I therefore reject the concluding paragraph of Mr. Merrien's submission, and Mrs. Ogier's assertion in the Chronology exhibited to her Affidavit of the 31st October, 2005, to that effect.

24. Nevertheless the Chronology shows that there was indeed considerable activity taking place outside the ambit of the Court. This is amplified in the 'Chronology Correspondence' sent in by the Plaintiff on 4th May, 2006 (well after the close of the hearing but I nevertheless propose to consider it as the information contained in it is not prejudicial to either side) which details the correspondence

passing between the Legal Aid Administration, Mr. Merrien, Mrs. Ogier and, occasionally, the Greffe, between 7th January, 2002, and 31st March, 2005.

25. At the outset of that period there was a fifteen month delay between the September, 2001, adjournment and the provisional approval of Legal Aid by Mr. Le Poidevin 18th December, 2002, and the actual grant of the Certificate on 7th January, 2002. Mrs. Ogier has suggested that during the interregnum Mr. Merrien was at pains to keep the matter alive, year by year, so as to avoid perimé, but there is no record whatsoever, and no shred of evidence, of any formal application to, or proceedings in, the Court until January, 2005.

26. The question I now have to address is: ‘Does that to which I may refer as extraneous material, that is the correspondence and other activity which took place between the persons involved, affect or interrupt the perimé period?’ For assistance I turn to the recent decision of Talbot L.B. in Henniger v. Robinson [2005] 14th October, as yet unreported. In that case the testator, Dr. Pilkington had bequeathed, a sum of money and, at a peppercorn rent, a lease of his house for her life to his housekeeper (the Defendant). The plaintiff commenced proceedings to set the lease aside on the grounds of lack of testamentary capacity and undue influence by the housekeeper.

27. The proceedings were tabled on 21st September, 2001, eighteen months after the doctor’s death and the defences followed swiftly. Thereafter, in a more desultory way, there were lodged further and better particulars of the Cause on 17th October, 2002, and discovery in stages until 10th June, 2003. No other Court action occurred until the defendant applied to have the case declared perimé on 15th July, 2005. One of the main issues in that case was that the defendant had either expressly or tacitly renounced her right to claim peremption on the lines set out by Dorey B. in William Place Investments Ltd v. The States of Guernsey [1995] 20 GLJ page 24.

28. Renunciation, as it is expressed by Mr. Merrien in his paragraph 21, is only incidentally an issue in the instant case. He suggests that the claim by Mrs. Ogier that she had contacted the Greffe in order to obtain guidance as to a directions hearing in July, 2004, was a matter of which Careys ‘were presumably aware’ when they instituted the present Application. Consequently they had evinced an intention to renounce their client’s right to claim Perimé. I cannot accept this argument, which I do not think was advanced very confidently, for it is contradicted by the express terms of the first prayer.

29. Nevertheless Henniger v. Robinson is particularly valuable here because in his judgment Talbot L.B. differentiates between interchanges and correspondence passing between the Advocates and their clients on the one hand, and the more formal, procedural, steps taken in Court on the other—the former being contained (as in the instant case) in a separate bundle. Mr. Merrien asked rhetorically: ‘What constitutes a procedural step?’ The answer to my mind is in the following passage in which Talbot L.B distinguished between the effect of interchanges between the Advocates, and thus between the parties, and formal steps in Court. He said at paragraph 26:

“It seems clear to me, and I so find, that no active procedural step was taken by Mrs Henniger between 10th June 2003 and no earlier than 24th November 2004. I prefer the view that no active step was taken, by which I mean no active inter partes step, the parties being Mrs Henniger and the First Defendant, and perhaps the Royal Court itself, between about 10th June 2003 and 1st July 2005, when an application was made to have the case listed for trial. It is equally clear to me that the proceedings had become preempt by the end of June 2004, or perhaps a few days earlier.

That was when the date expired after the delivery of the documents referred to in the third list of documents, to which the letter of 10th June 2003, referred.”

30. I have no hesitation in adopting this passage and in applying it to the instant case. As I observed earlier, there is no record of any formal or active *inter partes* step being taken by or on behalf of the Plaintiff at any time after the 3rd September, 2001, until, at the earliest, 24th July, 2004. The Court records do not show that anything of the kind took place between those dates. I am therefore unable to reach any conclusion other than that the case became perimé, putting the Defendant’s case at its lowest on this point, as Mr. Dunster invited me to do, no later than 4th October, 2002. I so find.

31. I therefore now have to address the issue of whether restoration should be granted as submitted by Mr. Merrien at paragraphs 22 to 27 of his written submission. If, as I have found, the case became preempt on 4th October, 2002, there is then a delay until, in my judgment at the earliest, 28th October, 2004, just over two years more. In one other case which were cited, the delay after perimé was much greater—in Le Moigne v. Hargetion it was ten years since the accident giving the cause of action and over five since the case became perimé. In Haines v. Annandale Tile Company it was just under five years since the accident and ten months since the case became preempt.

32. In considering the application to restore I have to be guided by the principles laid down by Southwell J.A in In Haines v. Annandale Tile Company. At page 6 of the Judgment he said:

“In my judgment this’ [meaning the guidelines he had just set out] ‘is the correct approach to applications under Rule 50 to be adopted by the Royal Court and the Court of Appeal, and it would be an incorrect approach simply to adopt the principles applied in English cases in relation to the automatic striking out of County Court actions. The statutory provisions are entirely different.”

At page 5 he had said:

“Naturally the Court will take into account as part of the relevant circumstances:

- (1) the position of the plaintiff, and the effect on the plaintiff and the plaintiff’s case if the action is not restored;**
- (2) the history of the action, and the activity or inactivity of the plaintiff, and of the plaintiff’s legal representatives, which have led to the action becoming perimé;**
- (3) the position of the defendant, and the effect on the defendant and the defendant’s case if the action is restored;**
- (4) any other special circumstances relating to the action and its conduct by the parties, including such matters as settlement discussions or any express or implied agreement not to take further steps in the action for the time being;**
- (5) the general circumstances in Guernsey relating to the relevant class of litigation including, for example, any difficulties in securing legal representation for impecunious plaintiffs suing for personal injuries.”**

33. Although at that time the absence of a civil legal aid system in Guernsey was a factor which led Southwell J.A to dismiss the appeal, the fact that we now have such a system remains, in my view, a relevant factor. In the nature of things several matters have to be considered when dealing with a Legal Aid Application—which are not confined to the legal merits or demerits of the party’s case—for instance the full means and circumstances of the applicant.

34. In the instant case, the *perimé* period from 3rd October, 2001, to 4th October, 2002, plus a further two to three months was taken up by the delay (not, I hasten to say a reprehensible delay on the part of the Legal Aid Authority) before the certificate was issued. Then there was a further period when legal aid had again to be considered, see Mr. Le Poidevin’s letter of 19th February, 2004, to the Greffe, followed by the grant of the Amended Legal Aid Certificate on 6th June, 2005, which was after a further enquiry by the Administrator as to whether it was in the public interest to give further assistance to Mrs. Ogier.

35. Having directed myself according to the guidelines laid down by Southwell J.A, and were it not for my conclusion as regards paragraph 2 of the current Application I consider this would be a proper case for the exercise of judicial discretion in restoring the action. I must therefore now direct my mind to the paragraph which seeks the strike out of the action for want of prosecution.

36. In my judgment the starting point in considering an application to strike out under Rule 36(2) is the passage in Rath v. Lawrence [1991] 1 WLR 399 which I cited in Willow Property Developments Ltd & Balmoral Homes Ltd v. John Nikolas Van Leuven & Others [1998] 26 GLJ page 18, [TAB 12 of the Bundle]. It appears in the judgment of Slade L.J in at page 410:

“Under the principle in Birkett v. James [1978] AC 297 the ultimate question for the Court is whether the inordinate and inexcusable delay on the part of the plaintiffs or their lawyers gives rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause or have caused serious prejudice to the respective defendants. For this purpose a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.”

37. It is generally accepted that the most likely, and the most frequent, cause of the inability to have a fair trial is the effect of the lapse of a long period of time on the recollection of witnesses. In Birkett v. James [1978] AC at page 327, Lord Salmon said:

“When cases (as they often do) depend predominantly on the recollection of witnesses delay can often be most prejudicial to defendants and to plaintiffs also. Witnesses’ recollections grow dim with the passage of time and the evidence of honest men differs sharply on the relevant facts. In some cases it is sometimes impossible for justice to be done because of the extreme difficulty in deciding which version of the facts is to be preferred.”

38. Mr. Merrien submitted, rightly, that what constitutes inordinate delay will depend on the facts of each particular case—see per Salmon L.J. (as he then was) in Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1AER 543 at page 561:

“What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case., but it should not be too difficult to recognise inordinate delay when it occurs. (ii) [The] ‘inordinate delay’ [must be] ‘inexcusable. As a rule, until a credible excuse is made out, the natural inference is that it is inexcusable.”

Salmon L.J. continued:

“As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.”

39. In developing his argument Mr. Merrien closely analysed the chain of events since the order of June, 1991, and traced the history of the appeals against that Order. He pointed out that the instant proceedings were not tabled until 15th April, 1997. The then Deputy Bailiff ordered that the amended Defences should be filed by 8th May, 1988, and that the action be placed on the Witness List. Four months later the Plaintiff sought to amend her Cause, *inter alia*, so as to implead the Guernsey Brewery as a second defendant. That application came on before Dorey, B. on 23rd October, 1988, who ordered the Defendant to file a skeleton argument by 20th November, and the hearing date of the Application to amend was set for 7th December.

40. On the 7th December, Dorey B. recused himself on the ground of a possible conflict of interest, and I was detailed to hear the application, which I did on 8th and 9th April, 1999. The amendment was refused after a reasoned judgment on 4th May, 1999, but I gave the Plaintiff leave to appeal against that decision on 6th August, 1999. That appeal was dismissed by the Court of Appeal on 27th September, 2000, and a related application for leave to appeal out of time against the eviction order of 14th June, 1991, (which had earlier been granted by the Court on 30th March, 1992) was dismissed on 8th January, 2001.

41. The second application for leave was allegedly on the ground that Mrs. Ogier had discovered fresh evidence material to her case in or about 1998. Sumption J.A, who delivered the Judgment of the Court dealt with that matter in these terms:

“Thirdly, it is far from clear to us that there has in fact been a re-designation, or re-grading of these premises’ [meaning the Hotel] ‘from Part B to Part D of the Housing Register. There appears to be considerable doubt about that, and we do not think that Mrs. Ogier is in a position positively to assert that the registration has been changed. Be that as it may, it is perfectly clear from documents which Mrs. Ogier herself put before us on the occasion when she appeared in this Court in September of 2000, that if there has been a change in the registered status of this hotel, it has arisen because the Housing Authority was only willing to allow the hotel to remain on Part B of the Register on condition that the letting to Grande Havre was not renewed beyond the initial year. If therefore, which appears to be a matter of some doubt, there has been a change in the registration status of the hotel it appears to us to have arisen entirely from the fact that Mrs. Ogier has not complied with the condition imposed by the Housing Authority on the continuance of the registered Part B status of the hotel.”

42. I would comment here that in the Housing Authority’s letter of 27th February, 1989, the permission to grant an occupation licence to Mr. Becker (the then replacement manager of the Hotel) it was expressly stated that :

“The Authority resolved that, if Hotel Houmet du Nord were to be leased by Novotel UK Ltd. the inscription of the Hotel would remain on Part B of the Housing Register, provided that:-

1. The lease does not exceed one year.
2. The Hotel is not occupied by the staff of Novotel for more than one year, and
3. The Hotel remains in possession of a Valid Boarding Permit.

It is therefore obvious that, as the lease was renewed for a further year and no evidence has been forthcoming of any accompanying permission or licence from the Authority, the Plaintiff was in breach of a condition permitting the continued presence of the Hotel in Part B of the Register.

43. I will now briefly recapitulate the case pleaded against the existing Defendant. In early 1982 the Plaintiff and her husband became the sub-tenants and licensees of the Houmet Hotel, and the tenants of an annexe to the Hotel which comprised nine rooms. The annexe was owned by the Guernsey Brewery. In 1988 Mrs. Ogier and her husband separated and she thenceforth became the sole sub-tenant and licensee of Houmet, to which the Tavern was added the same year.

44. The Defendant owned the nearby Penninsular Hotel, and in 1989 agreed with Mrs. Ogier to rent nineteen rooms in Houmet and its annexe for its staff for one year. The agreement was renewed for another year, after which she complained that extensive damage had been caused by the Defendant's servants. She claimed that the cost of dilapidations amounted to £19,485 and were such that the relevant Authority downgraded the premises. For both reasons she was unable to let any rooms thereafter to visitors. A further consequence was that she was financially unable to meet the condition as to clearance of the outstanding accounts which were attached to the stay of eviction ordered in the proceedings brought by the Brewery on 14th June, 1991.

45. All these allegations are at issue on the pleadings, and Mr. Dunster submitted that in the instant case a great deal will depend at the trial on the state of the Hotel, at that time known as Novotel, in the Route de Picquerel at the conclusion of the lettings. Consequently, Mr. Dunster said, the evidence of the manager and other hotel staff who were there at the time would be crucial to important factual issues in the case. In his address to the Court Mr. Dunster said that there are twelve potential witnesses, of which three would each give particularly relevant evidence, namely Mr Becker, who had now retired, Mr Chapman, the expert surveyor, and Mr. Le Cheminant, the expert valuer.

46. It was self-evident, Mr. Dunster continued, that most of the witnesses, including the manager, had by now moved on. He said that such of the material witnesses that would still be available would not have a clear recollection of events and therefore how, he asked, would he be able to cross-examine the Plaintiff when she gives her evidence before the Jurats at the trial? Moreover how could he take instructions as to the authenticity of the documents which had been challenged in the Trial Bundles at this distance of time?

47. Mr. Dunster set out the prejudice which his client will suffer in this respect at paragraph 34 (a)(b) and (c) of his Skeleton Argument. Mr. Langlois, a director of the Defendant Company has specifically sworn in his Affidavit of 25th February, 2005, that he had read the contents of the Bundle submitted, including the Skeleton Argument, and that the matters that are within his personal knowledge are true, and the rest are true to the best of his knowledge information and belief.

48. Mr. Merrien accepted that oral evidence would be necessary, but maintained that the case was also document driven. It cannot be gainsaid that there was a great deal of correspondence between Mr. Dadd, who then acted for Mrs. Ogier, and the other Advocates and parties involved during and after the period of the lettings. Mrs. Ogier has also produced a sheaf of correspondence under cover of her letter to Mr. Merrien of '5th November, 2006' (clearly a misprint) which passed

between herself, some London solicitors, the Home Office and Buckingham Palace, which have little relevance to these proceedings.

49. There was also an occasion in 1998, when Advocate Laws briefly came to the assistance of Mrs. Ogier, but declined to take any responsibility for the drafting of the proposed amended Cause. As he said in his letter to Mrs Ogier of 9th September 1998, the window of opportunity which he had set aside in order to assist her had by then disappeared.

50. I mention the foregoing because Mr. Merrien said it was apparent that Mrs. Ogier had had several legal advisers (as well as Mr. Miller, the McKenzie friend) over the years, which, in itself is productive of delay, and he further submitted that it would be proper to treat the case as ‘on hold’ during the time taken up over the issue of legal aid. Moreover, while it is evident from the passage cited at paragraph 41 that Sumption J.A regarded the second application for leave to appeal out of time as misconceived, I agree with Mr. Merrien that it would be unfair to regard the Plaintiff as responsible for the delay which occurred while the two Court of Appeal matters which I have mentioned above were in train.

51. It is possible to interpret the English authorities cited by Mr. Day in Scanfield v.Carr [2002] 16th August [TAB 11 in the Bundle] is authority that the modern judicial tendency (and it is common ground that in Guernsey we habitually look to the English authorities for guidance even when the respective Rules are not identical) has veered away from the strict apportionment of blame for successive delays in want of prosecution cases: for instance in Kincardine Fisheries Ltd. v. Sunderland Marine Medical Insurance [1997] 21st January (unreported) Colman J. commented on the ‘lengthy and deplorably cumbersome analytical exercise which the Courts have to undertake to ascertain if the delay is inordinate and/or inexcusable, and if so, whether there is likely prejudice’.

52. Nevertheless, if justice is to be done, I consider, for the reasons given by Day D.B. in Scanfield, and to a lesser extent by myself in Willow (*supra*), that some inquiry into the causes for a long delay in bringing a case to the stage of hearing is essential. Many of the case on the subject, which are catalogued by Day D.B, support this view. I cannot do better than quote this passage from his judgment:

“It appears that the power to dismiss for want of prosecution was sparingly used in England and Wales until 1968, when it acquired a new and vigorous life, following the decision of the Court of Appeal in three cases which were heard together and are generally referred to by the name of the first, i.e. Allen (1)’ [Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 1AER 543].It is important, I believe, to note that in the 1990’s, prior to the C.P.R, courts in England and Wales were increasingly urged to take ‘*a less mechanistic approach*’ and parties to avoid taking “*points and indulge in refinements which would do credit to a medieval schoolman*” (in the words of Lord Bingham M.R in Sparrow (7)’ [Sparrow v. Sovereign Chicken Ltd [1994] June. C.A. (unreported)]).

Provided our courts adopt that more flexible approach - always, I stress, within the proper parameters of established authority - I endorse Carey D.B’s view, expressed in Dunne (2)’ [Dunne v. Rowe [1998] 26 GLJ page 17] ‘that the area for judicial discretion within the English principles is sufficient.

53. Day D.B then continued:

“I turn to the White Book and to the principles and cases referred to therein. The main principle is stated, at paragraph 25/L/2 as follows:-

“Main principle – there are two distinct, though related circumstances in which an action may be dismissed for want of prosecution, namely, (a) when a party has been guilty of intentional and contumelious default, and (b) where there has been inordinate and inexcusable delay in the prosecution of the action (*Allen v. McAlpine*, above, approved in *Birkett v. James*).”

Only the second of those circumstances is applicable in this case.

With regard to these circumstances, the requirements are (paragraph 25/L/4):-

- (a) “that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and
- (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party”.

54. In the instant case, in my opinion, the Defendant and its advisers have not been wholly innocent as regards the long period that had elapsed since the cause of action arose, and, indeed, since the Cause was tabled in April, 1997. In his paragraph 32, for example, Mr. Merrien instances the delay between the directions hearing before the Court of Appeal in April, 2000, when the Defendant was ordered to file submissions by the 14th of that month. They were not filed until 30th June, 2000, with the result that the appeal was not dealt with until the September. This said Mr. Merrien, was glossed over in the Chronology at TAB 3 of the Defendant’s Bundle.

55. Mr. Merrien says that there were, in addition, several occasions when the Plaintiff was in hospital (though these are unsupported by medical evidence). To add to this there was the period in the first three months of 2005 when Mr. Dunster, who by then had control of the case, did not appear and Mr. Greenfield and M/s White respectively held his brief. However it is fair to say that Mr. Dunster, both in 2001 and in 2005, has pressed hard for progress in this case, and that it was for that reason that he supported the view which the Court had taken that Mrs. Ogier should have the benefit of legal representation.

56. Nonetheless despite Mrs. Ogier’s undoubted difficulties in not having had the benefit of settled legal advice there are unfortunately, I have to say, areas of delay for which she, and no one else, was responsible. I quote again from Sumption J.A at page 2 of the second Court of Appeal Judgment:

“Now the short answer to the present application is that even if it is assumed that Mrs. Ogier has serious grounds for an appeal, the fact is that the matters, which she now advances in support of her application, are those which she knew or suspected in 1997. If she is in a position to make the application now’ [pausing her, the application was made in the latter part of 2000] ‘she was just as much in a position to make it in 1997. *The passage of three years* in circumstances where there are tight limits to the time available for appealing against orders of the Royal Court is entirely unacceptable.” [My emphasis].

57. The next aspect of this part of the case which I have to address is how far that which in England was termed the ‘pre-writ’ delay and the ‘post-writ’ delay are relevant to one another and to the overall period which had elapsed from the cause of action to the date of the strike-out application. In *Birkett v. James* Lord Diplock said at page 320:

“.....time elapsed before the issue of the writ which does not extend beyond the

limitation period cannot be treated as inordinate delay: the statute itself permits it.”

At first sight Day D.B. appeared to agree with this view, for he said at page 9 of his Judgment in Scanfield:

“The periods of culpable delay (a description I use to encompass both the necessary elements) must have occurred after proceedings have been instigated, however late in the prescription period’.

However he moderates this view in the concluding sentence of this passage:

“But the later the plaintiff starts his action, the higher his duty to prosecute it with diligence.”

58. In my opinion English judicial thinking has moved on since 1978, and it is clear that in Birkett v. James Lord Diplock was considering the situation where a plaintiff, having had his action already dismissed for want of prosecution, but before the expiry of the relevant limitation period, may yet issue a fresh writ for the same cause of action. As I interpret the decision in Rath v. Lawrence (*supra*) the Court of Appeal held that although the pre-writ delay cannot of itself lead to a successful strike-out (provided the action is begun within the limitation period) it can be linked with the post-writ period in order to ascertain if the totality amounts to inordinate delay.

59. Biss v. Lambeth Southwark & Lewisham Health Authority [1978] 2 AER 125, was, in that sense, a similar case. The Master had granted the strike out application, but this was reversed by the Judge, who held that while there was delay, which was both inordinate and inexcusable, the prejudice suffered by the defendants related to the pre-writ delay and not to that which occurred after the writ was issued. The Court of Appeal rejected the submission that the Court could not take into account delay occurring before the issue of the writ and the prejudice resulting from that portion of the delay. Lord Denning M.R. said at page 130:

"It is very rare that there is any additional prejudice since the issue of the writ, or, at any rate, the prejudice is no more than minimal. It is often during the first three or four years that witnesses die or disappear or forget what happened and that records and notes are lost or destroyed, especially when there is no letter before action."

At page 132 he said that the totality of the delay, comprising both the pre and post-writ delay, fell to be assessed in relation to the prejudice suffered by the defendants.

60. Roebuck v. Mungovin [1994] 1 AER 568 is to the same effect. At page 574 Lord Browne-Wilkinson stated that in the ordinary case the prejudice suffered is the dimming of witnesses' memories. He continued:

" Where there are two periods of delay, how can it be shown that a witness has forgotten during the later, rather than the earlier, period?.....I have no doubt that a judge can infer that any substantial delay at whatever period leads to a further loss of recollection. But even so the attempt to allocate prejudice to one rather than another period of delay is artificial and unsatisfactory."

61. I have carefully considered the authorities listed by Day D.B in Scanfield v. Carr. He placed considerable reliance on Shtun v. Zalejska [1996] 3 AER 411. I respectfully agree with him and I would adopt the principles enunciated by Neill L.J. at page 429 of the Report. They are:

“How, then, should this second precondition’ [meaning the prejudicial effect of delay on the

defendant] ‘be approached? Each case will depend on its own facts and it is not helpful to lay down hard or fast rules. One can, however, indicate the factors to be taken into account in evaluating the defendant’s case. These will include:

- (1) The issues in the case
- (2) The evidence which is or is likely to be available and how far this will be oral or documentary.
- (3) The time which has elapsed since the relevant events.
- (4) The degree of prejudice which was or is likely to have been suffered in the pre-writ period
- (5) The degree of prejudice which has been or is likely to have been caused by the inordinate and inexcusable delay.

62. To the foregoing I would add this extract from the passage set out at paragraph 36 above from Rath v. Lawrence, namely:

“Is there a substantial risk that it is not possible to have a fair trial of the issues in the action.”

In answering this I accept that the final sentence of the quotation contains a dependent question, namely:

“For this purpose a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.”

63. I further accept this proposition stated by Day D.B at page 9 of his Judgment:

“The burden of establishing inordinate delay to the satisfaction of the court rests on a defendant. However, if that is so established, then the burden will generally be on the plaintiff to establish a reasonable excuse for the delay, because once inordinate delay has been established then in the majority of cases that will of itself establish that the delay was inexcusable”.

64. The reverse side of this particular coin is, however, that once inordinate delay has been established, and the plaintiff has not demonstrated a reasonable excuse for the delay, the burden of establishing prejudice, and, by the same token, that a fair trial is impossible, shifts to the defendant. This is clear from the judgment of Waite L.J. in Rowe v. Glenister [1995] Times 7th August, who said that the onus of proving additional prejudice in the post-writ period lies on the defendant.

65. Further support is to be found in Department of Transport v. Chris Smaller Ltd 1989 AC 1197, in which, at page 1208, Lord Griffiths said:

“I regard this’ [the submission that the burden is on the Plaintiff to negative prejudice] ‘as a wholly impractical suggestion. It would put an unrealistic burden on the plaintiff. The plaintiff will not know the defendant’s difficulties in meeting the case, such as the availability of witnesses and documents, nor will the plaintiff know of other collateral matters which will have prejudiced the defendant, such as the effect of delay on the defendant’s business activities.”

66. In my judgment these *dicta* must apply to the pre as well as to the post-writ period, in view of the statement by Lord Browne-Wilkinson in Roebuck v. Mungovin (supra) and, indeed, the earlier remarks of Lord Denning in Biss v. Lambeth Southwark & Lewisham Health Authority (supra), and this is consistent with the fifth guideline as to the principles to be observed in these cases stated, again by Neill L.J., in Trill v. Sacher [1993] 1 AER 961. This is as follows:

"Where a plaintiff delays issuing proceedings until towards the end of the period of

limitation he is then under an obligation to proceed with the case" [I interpolate here 'To progress the case'] "with reasonable diligence. (see Birkett v. James). Accordingly a court is likely to look strictly at any subsequent delay which is in excess of the period allowed by the rules of court for taking the relevant step, and may regard (it) as inordinate even though a similar lapse of time might have been treated less strictly had the action been started earlier."

67. Accordingly, it is, in my opinion clear, on all the authorities, that delay after the issue of the writ, or of the tabling of the Cause in Guernsey, can be added to the pre-writ delay and if it appears to the Court on a strike out application that the aggregate of those delays is inordinate and inexcusable, and no reasonable excuse has been shown, it will then look to see if the defendant has established that substantial prejudice has been occasioned to him. Moreover, in Electricity Supply Nominees Ltd. v. Longstaff & Shaw Ltd [1986] Constitutional Law Journal page 183, shows that the Court will pay close attention to each separate period of delay that has occurred.

68. I now turn to address the five questions stated by Neill L.J. in Shtun v. Zalejska:

(1) The issues are clear on the pleadings. (i) Was the state of the Hotel, as left by the Defendant's servants, in the state alleged by the Plaintiff? (ii) If so did that have the consequence which she alleges in paragraphs 12 to 21 of the Cause, as it now stands?

(2) I have referred earlier, in paragraph 45, to the witnesses Mr. Dunster says will be called, if they are still available. There will undoubtedly be some documentary evidence, but I am satisfied, on the available material, that a very material part of the case will depend on parol evidence.

69. As regards (2), in her Affidavit of 31st October, 2005, Mrs. Ogier said that she made it 'in response' to Mr. Langlois' March Affidavit. She did not however, challenge or refute anything that Mr. Langlois had said. I am therefore entitled to accept, which I do, Mr. Langlois' statement on oath (remembering that he is an Advocate of this Court) and I am satisfied that those advising the Defendant entertain a genuine apprehension that the respective memories of the material witnesses will have been impaired by the time they are called upon to testify—should a trial take place.

(3) The events complained of took place in the years 1990 and 1991, at the latest in mid-1991. It is now virtually mid-2006. It is all but fifteen years since those events occurred. While I recognise the force of Mr. Merrien's submission that every case will depend on its own facts, I find myself in agreement with Mr. Dunster that that is a very long time and it is inevitable that the witnesses' memories will be substantially impaired.

(4) and (5). Applying Roebuck v. Mungovin and Biss v. v. Lambeth Southwark & Lewisham Health Authority (*supra*) I take the totality of the 'pre-writ' and 'post-writ' periods. I accept that the whole of the delay since April, 1997, was not directly attributable to the fault of the Plaintiff. But clearly, and I so find, a large part of it was. As regards the pre-writ delay, I find that that, taken in context with the totality of the delay was also inordinate. The Plaintiff has not attempted to offer any excuse for an almost six year delay in tabling her Cause after the eviction on 24th June, 1991—the latest date stated in the Cause. Added to that is the three year post-writ delay which Sumption J.A. stated was unacceptable—see paragraph 56 above.

69. As Lord Pearce observed in Davies v. Elsby Brothers Ltd [1961] 1 WLR 170 at page 175 (which I cited at page 3 of my Judgment of 4th May, 1999):

" I arrive at that conclusion reluctantly, because it is based on a technicality. But so far as the merits are concerned the Plaintiff has brought the matter on himself. He waited for three years. There was no correspondence or bargaining to justify the delay. Moreover, the writ, when issued just within the statutory period of three years, was not served until the three hundred and sixty fourth day of the following year - that is to say, one day before it would finally expire. When Plaintiffs delay in that way it becomes very difficult for actions to be properly tried. And if, having left the matter so late, they get into technical difficulties (as this Plaintiff did) they are liable to find that they have no opportunity to set the matter right."

70. Consequently, upon my answers to the issues posed and set out at paragraph 68, and applying the words of Day D.B. as regards the appropriate burden of proof, and, under Rowe v. Glenister and Department of Transport v. Chris Smaller (supra), that it shifts to the Defendant to establish prejudice, I am left in no doubt:

(A) That there has been inordinate, and to the extent that the Plaintiff was responsible for it, inexcusable delay, with no reasonable excuse shown.

(B) That the Defendant has shown that, to apply the test propounded by Slade L.J at paragraph 36 above, namely that there is a substantial risk that it is not possible to have a fair trial of the issues in the action. Consequently I believe that the totality of the delay, not only is likely to, but will inevitably, cause serious prejudice to the Defendant. In my judgment it will be quite impossible, at this distance of time, to conduct a fair trial of the issues. I so find.

(C) Thirdly, I am satisfied that the causal link has been proved between the inordinate delay and the prejudice to the Defendant, resulting in an inability to have a fair trial.

71. For these reasons I uphold the prayer in the second paragraph of the Defendant's Application, and I dismiss the case under Rule 36 (2) of the 1989 Rules. .

72. Because of the Legal Aid and other aspects of this case I propose to set it for hearing as regards the issue of costs.

**A.R.W.Hancox
Lieutenant Bailiff
30th May 2006**