

Judgment 25/2004

**Healthspan Limited v Healthy Direct
Limited – Royal Court (Civil Action
File 827) – 15 June, 2004**

Passing off action between two Guernsey companies – an application to stay proceedings on grounds of forum non conveniens – principles to be applied – other available forum, availability of witnesses - lis alibi pendens – defendant seeking negative declaration before an English court – relevance of trademark dimension – application for stay refused – alternative dispute resolution should however be considered, rather than litigation.

IN THE ROYAL COURT OF GUERNSEY

The 15th day of June, 2004 before Sir de Vic Carey, Bailiff; sitting alone.

Between:-

HEALTHSPAN LIMITED

Plaintiff

v

HEALTHY DIRECT LIMITED

Defendant

In the matter of the Exception de Fonds in Les Defenses of the Defendant filed on the 2nd April, 2004, namely the application to stay proceedings on the grounds of forum non conveniens;

THE COURT having, on the 24th May, 2004 and the 3rd June, 2004 heard Advocates R.G. Shepherd and J.P. Greenfield, Counsel for the Plaintiff and Defendant respectively, RESERVED judgment;

THE COURT this day handed down judgment in the terms attached hereto and dismissed the Defendant's application, and reserved the issue of costs.

M. A. TOSTEVIN
Her Majesty's Deputy Greffier

Approved Text

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

HEALTHSPAN LIMITED

Plaintiff

v.

HEALTHY DIRECT LIMITED

Defendant

**JUDGMENT OF THE BAILIFF ON THE DEFENDANT'S APPLICATION TO STAY
PROCEEDINGS ON THE GROUNDS OF FORUM NON CONVENIENS**

Dates of Hearing: 21st May and 3rd June, 2004

Date judgment handed down: 15th June, 2004

Advocate for the Plaintiff: R. G. Shepherd

Advocate for the Defendant: J. P. Greenfield

Introduction

1. Some of those over 50 with creaking joints feel that their quality of life will be improved if they take vitamin and nutritional supplements. The two enterprising Guernsey companies that are engaged in this unfortunate litigation have for a number of years been meeting the demands of this market with considerable success. I am told that the value of the total market in the United Kingdom and Channel Islands is £71,000,000 per year. The Plaintiff's share of that market is worth about £26 million, or about four times the size of the Defendant's share. It is not suggested that there is a higher proportion of customers in Guernsey than in other parts of the British Islands and therefore we are faced with the possibility that for every 1,000 packets of pills sold only one reaches a Guernsey household.

2. Neither company presently manufactures its products in Guernsey, but the senior management of each company is apparently resident in Guernsey. Accordingly the mind and management of the companies is claimed to be here. Both companies appear to depend on direct sales to the public rather than sale through shops and other agents. Modern trading methods are used, that is to say by use of the Internet and telephone ordering services. The majority of telephone orders are placed through staff in England. It is also only fair to say that the reason why all these pills are brought over to Guernsey and then dispatched to addresses in the United Kingdom appears to be that H.M. Customs have accepted that in the case of small postal orders despatched from genuinely Guernsey based enterprises, VAT is not chargeable unless the order exceeds a certain value.

The current dispute

3. The Plaintiff started trading in earnest in about 1996. It was called Healthspan Direct Limited until the 16th December, 2001. The Defendant was incorporated on the 17th September, 1999, as C.I. Nutraceuticals Limited and then changed its name to Healthy Direct Limited on the 21st December, 2001. The Defendant was already trading under that name prior to that date. Problems of confusion are alleged to have arisen fairly early on and there was some correspondence between the lawyers acting for the parties as long ago as 2000. We reviewed this in some detail at the hearing. I do not however propose to go through it in detail in this judgment.
4. It appears that the Plaintiff company sought to limit the incursions that it felt were being unfairly made by the Defendant company into its market by drawing its customers' attention to the Defendant's activities and making some disparaging remarks about the quality of its products and service. Action was threatened by the Defendant and the Defendant's advocate sent a draft cause for a defamation action to the Plaintiff's advocate. The matter however never proceeded further. The differences continued but finally surfaced in litigation on the 5th March last when Mr. Shepherd on behalf of the Plaintiff commenced an action before this

Court in which substantial damages were sought against the Defendant and orders were asked for, giving injunctive relief against the Defendant company.

5. The basis of the Plaintiff's claim is to be found in clause 5 of the Cause, namely that the Defendant has in a systematic and deliberate attempt to profit from the goodwill and brand value attaching to the Plaintiff's business sought to pass its products off as those of the Plaintiff. This claim is particularised in clauses 6, 7 and 8 of the Cause. The Cause then goes on to particularise a number of instances where the Plaintiff claims that the Defendant's products have been confused with the Plaintiff's products in the eyes of members of the public who were acquiring the products of the Defendant in the belief that they were acquiring the products of the Plaintiff.

The Defendant's response

6. The Defendant has not substantively pleaded to any of these claims at this stage for the reason that it has chosen to challenge the jurisdiction of the Royal Court on the grounds that Guernsey is not the forum conveniens for this litigation. It has however filed (as directed by the Court) affidavits in response to the Plaintiff's demands for interlocutory relief. I have not considered any of this material at this stage. In addition the Defendant has gone further than merely filing this challenge to the jurisdiction of the Guernsey Court; it has on the 30th March last issued proceedings in England against the Plaintiff. It is quite clear that the issuance of these English proceedings were a direct result of the commencement of proceedings in Guernsey by the Plaintiff.

This Court's approach to the application

7. The Royal Court has on a number of occasions in recent years been faced with applications to stay proceedings on the grounds that Guernsey is not the suitable or appropriate jurisdiction for the trial of this dispute. I use the words "suitable and appropriate" in the light of the remarks of Lord Goff of Chieveley in Spiliada Maritime Corporation v. Cansulex Ltd 1987 AC 460 at page 474 beginning at letter E. The most helpful of the Guernsey decisions are

those of Newman, L.B. in Vardinoyannis v. Ansol Limited (24th May, 2002) and Day, L.B. in Technocom v. Roscomm Limited and Klabin (judgment 34/2003) in particular I note the following extract from Newman, L.B.'s judgment

“The authorities on forum non-conveniens in the context of an application for the grant of leave to serve proceedings out of the jurisdiction as well as the principles applicable to a stay, were reviewed by the House of Lords in Spiliada Maritime Corporation v. Cansulex [1987] App. C 460, and the leading judgment was given by Lord Goff of Chieveley. The fundamental principle applicable to both types of application is that the Court should choose the forum in which the case can be tried most suitably in the interests of all the parties and the ends of Justice. In an application for leave to serve out the burden is on the Plaintiff (the Claimant) to show that leave should be granted, and the Court considers that the residence, and the place of business of the Defendant, and the relevant ground which is invoked by the Plaintiff in deciding whether or not to exercise its discretion to grant leave.

The claimant must show not only that Guernsey is the appropriate forum for the trial of the action, but that it is clearly the appropriate forum, and in discharging that burden the Claimant is not confined to showing that justice cannot be obtained somewhere else or can only be obtained at excessive cost or delay or inconvenience but is also entitled to rely on the nature of the dispute, the legal and practical issues involved in such questions as local knowledge, availability of witnesses and their evidence, and expertise. The mere fact that the Guernsey system or wherever may have a different system of discovery or a different system for rules of damages or costs, does not necessarily govern the position but it is definitely a matter which ought to be taken into account.”.

Newman, L.B. is clearly conceding the point that whilst "the Guernsey system" as she calls it may be different, that does not govern the position as to whether the action should proceed here or not but is definitely a matter that ought to be taken into account.

8. I have already made mention of the fact that the market of these two companies, despite the fact that they operate out of Guernsey, is almost entirely within the United Kingdom and that will be a matter which I will address. However I felt it was important that I should endeavour to look at this application in the same way as a judge in the High Court in England would. Mr. Greenfield however clearly had some points about Guernsey judges and counsel being less experienced in specialist cases involving intellectual property and whilst at that stage I was not forming any view on those kinds of argument I felt that it was easier for me if I tried to look at this application ignoring entirely any perceived concerns that the Defendant may have about the Guernsey legal system. That issue the importance of which receded somewhat in argument I will leave to the end of this judgment.

The Law

9. I will continue with a review of the law which appears to be relevant. I have already made reference to the succinct summary of the position in the judgment of Newman, L.B. in Vardinoyannis. There is no more suitable place to start than looking in detail at the judgment of Lord Goff of Chieveley in Spiliada. I have already quoted from that part of the judgment where he is considering the fundamental principle namely that the Court has a jurisdiction to stay in such cases (page 474 of his speech). On pages 476 and following he summarises his opinion as to the then state of the law:-

" (a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and ends of justice.

(b) ... , in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay... It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

(c) The question being whether there is some other forum which is the appropriate forum of the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established...

Furthermore, there are cases where no particular forum can be described as the natural forum for the trial of the action. Such cases are particularly likely to occur in commercial disputes, where there can be pointers to a number of different jurisdictions. ... I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum. ... In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in *MacShannon's* case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the

anxiety expressed in your Lordships' House in the *Societe du Gaz* case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Credit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay;"

10. I propose to take separately the various issues raised by Mr. Greenfield in support of the Defendant's application and consider what Mr. Shepherd says in reply thereon and identifying the extent to which my conclusions on each point are going to be relevant in my overall balancing exercise.

Other available forum

11. There is no doubt that there is another available forum within which this dispute could be tried. That forum is England where virtually all the parties' products are sold. This is not a case where no particular forum can be described as a natural forum for the trial of the action. The natural forum is either Guernsey or England. Proceedings have been started in Guernsey by the Plaintiff as of right. Previous skirmishes between the parties for what they are worth appear to have been conducted in Guernsey and have involved correspondence between Guernsey advocates acting on both sides. The response of the Defendant in issuing proceedings in England has taken the Plaintiff by surprise to the extent that it was never suggested in earlier correspondence that Guernsey was not the natural forum for this litigation.
12. That of course cannot be an end of the matter but I have to note that the Plaintiff, as is its right, has chosen to start its action in Guernsey and appears to be ready to accept the jurisdiction of the Guernsey Court for what it is, and appears confident that it can obtain justice in this island, despite the fact that Guernsey is a very small jurisdiction. As Lord Goff says, the Defendant "has not just to show that Guernsey is not the natural or appropriate

forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the *Guernsey* forum".

13. I need therefore to go on to look to see what factors there are which point in the direction of England. When looking at all these issues I feel compelled to look at questions of convenience and transfer between jurisdictions with a sense of proportion. The vicissitudes of our peculiar Guernsey weather system excepted, questions of convenience for witnesses are not materially different from those which would exist where if the issue was whether a case should be tried in Southampton or Manchester. I reject Mr. Black's assertions about the problems of "international travel".

The availability of witnesses

14. The Defendant does make the point that this is a claim based on confusion in the minds of customers of the parties as to whether products are being supplied by the Plaintiff or the Defendant. Virtually all the evidence relating to confusion will emanate from persons resident in the United Kingdom. Indeed quite a lot of research has already been done and some twenty occasions upon which there has been confusion in the minds of the Plaintiff's customers have been chronicled. Whether at trial much or any of this evidence will have to be tested is not presently apparent.
15. I do not however consider that it should weigh heavily on the exercise of my discretion as to the appropriate place for this matter to proceed that persons may have to travel from England to Guernsey to give evidence. In any event it is going to be the Plaintiff's witnesses in the first instance who are going to have to travel. If this proves to be a practical difficulty for them, or any U.K. residents, whom the Defendant wishes to call, there is no reason why that evidence should not be collected on commission. I do not overlook the point that the writ of the Royal Court to compel witnesses to appear does not run to England.

Lis alibi pendens

16. In applications such as these, the Court should take account of the existence of proceedings in the other jurisdiction which is claimed to be the more suitable or appropriate. The

proceedings in England, although not in my view parasitic as claimed by Mr. Shepherd have clearly been issued following the commencement of these proceedings. Mr. Greenfield cannot therefore claim credit that the proceedings pending in the other jurisdiction should be a factor per se to which I should give weight. I cannot agree with the submission "that the very existence of those proceedings is a significant factor in showing that England is clearly the more appropriate forum". If anything the prior existence of the Guernsey proceedings would be one that should be considered in any forum challenge in England.

17. One of the less attractive features of the English proceedings is that the Defendant is applying for a negative declaration. However I am told that the English Courts have no difficulty with such applications and indeed it ought not to be impossible for a judge to do justice to a case simply because the parties are in the opposite positions to what conventionally one would expect them to be in. That said I do hesitate over whether the English Court taking into account its overriding obligation "to deal with cases justly" under the C.P.R. will be able to deal with this by way of negative declaration. Despite the acceptance by the Court of Appeal in Messier-Dowty Limited v. Sabena S.A. 2000 1 WLR at 2040 that the Court had a discretion to grant negative declarations I do take note of what Lord Woolf M.R. said on page 2051 in paragraph 42

"42. While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling "defendant". This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so."

18. Another unattractive feature of letting these proceedings be stayed in Guernsey and leaving it to the Defendant to pursue its remedy in England is that this whole action stems from a complaint that the Defendant is making unfair inroads into the business activity of the Plaintiff by passing off its products as those of the Plaintiff. The Plaintiff is the party alleging damage and will be presumably anxious to pursue this litigation so that it can get the relief

from the Court that it is seeking. The Defendant on the other hand is happily trading freely, advertising and marketing its products in the way that it considers most effective.

19. Although I accept that it will have some satisfaction if it is successful from learning that it may continue to trade as it currently wishes to, I do not think that there is anything like the same incentive for the Defendant to bring these proceedings to a rapid conclusion that there is on the Plaintiff. In saying this I accept that there is armour in the English Court system to prevent procrastination.

The advantage of suing in the place of the Defendant's incorporation

20. The Defendant is a Guernsey Company. A Guernsey judgment would Mr. Shepherd suggests be more effective and easier to enforce than an English one which would have to be enforced under the reciprocal enforcement legislation. Mr. Greenfield disputes this – reciprocal enforcement would not be difficult. This is not a big point, but again it adds weight against the argument that England is the more appropriate forum.
21. To sum up therefore from what I have heard so far in respect of the more conventional arguments relating to the application by the Defendant for a stay I am not convinced that the Defendant has shown that England is the more appropriate forum. However, as Mr. Shepherd says the Defendant has what it is really claiming a trump card and if it is right on this it may be able to sway me to the view that England is the jurisdiction for this litigation.

The trademark dimension

22. As has been seen the complaint of the Plaintiff against the Defendant in the Guernsey action is simple passing off. The proceedings do make reference to the fact that the Plaintiff is the registered holder of a trademark protecting the name "Healthspan" and the way that that name appears on its products. At no time in the correspondence or in the current proceedings is

there any suggestion that what the Defendant has done to date involves infringing the Plaintiff's trademark.

23. The argument that has been advanced from the beginning by the Defendant through its lawyer, Mr. Black, of S. J. Berwin is that the issue of infringement of the Plaintiff's trademark is bound to feature in the litigation between the parties notwithstanding the fact that it has not been raised by the Plaintiff. Mr. Black says and this cannot be disputed that the English Court has jurisdiction to deal with issues relating to the validity and infringement of the Plaintiff's trademarks which despite the fact that they appear to be capable of registration in Guernsey have not been so registered. The Defendant's argument therefore is that the only Court where both the trademark and passing off issues can be satisfactorily resolved is that of England.
24. There is in the exchange of affidavits a certain amount of extraneous material that has crept into Mr. Coates' affidavit where he is trespassing into the areas of argument and indeed issues of law which is not helpful. However that does not at the end of the day devalue the argument that this case is not a trademark infringement case. The trademark registration in the United Kingdom relates only to the word "Healthspan". In the passing off claim the Plaintiff is seeking wide relief including an order that the Defendant stops using the word "Health" in its title. Whether this is a trademark point remains to be seen. It seems to me to be as much one of passing off. It is clear that the English Court has jurisdiction in connection with the trademarks and I am not surprised that that Court has given leave for the passing off action, which of course is closely associated with trademark issues, to be pursued in that jurisdiction. However, I cannot see that if there were trademark issues to be investigated and complaints of infringement being brought by the Plaintiff these could not be necessarily explored by the Royal Court despite the fact that the trademarks are not registered here.
25. Mr. Black has asserted that the English Court has sole jurisdiction in connection with trademark matters. Mr. Black's affidavit evidence is that the English Court is the only Court that has jurisdiction over the trademark claims. He calls in aid what Mr. Pendell has said on behalf of the Plaintiff but I am satisfied that Mr. Pendell was not conceding this point and I

accept the evidence of Miss Kilshaw who is another solicitor with C.M.S. Cameron McKenna who act for Healthspan Limited in London.

26. There is a clear difference of view between Mr. Greenfield and Mr. Shepherd as to whether this Court would be able to make any findings with regard to the trademark. The whole issue is not made any easier by the fact that we have no pleadings at this stage in the Guernsey proceedings and there is no suggestion on the part of the Plaintiff that the trademark is being infringed. There is certainly no dispute about the validity of the trademark which I accept would be an issue for the Court in the country where the trademark is registered. Interestingly no claim as to invalidity is made in the English proceedings. The only indication of the nature of the trademark dispute can be gleaned from the Defendant's application in England which merely asks for a negative declaration to the effect that the company is not infringing the trademark.

27. I have taken on board the point made by Aldous, J. in Plastus Kreativ A.B. v. Minnesota Mining Co. [1995] R.P.C. 438, 447 at page 447 quoted by Laddie, J. in Coin Controls Ltd. v. Suzo International (U.K.) Ltd. [1999] Ch. 33 at page 43. I see the point that any decision on infringement will lead to the implication that as between the parties the trademark is valid. In Coin Controls on the same page Laddie, J. has the following to say about litigating foreign intellectual property rights in England

"The principles which applied to land in the *Moçambique* case apply equally well to attempts to litigate foreign intellectual property rights in English courts. Those rights give rise to monopolies or quasi-monopolies, which are strictly territorial in nature. In the case of patents, historically their purpose was to encourage and protect local industry. So courts following the common law tradition have declined to entertain actions concerned with the enforcement of foreign intellectual property rights."

and at letter G

"The *Moçambique* rule has nothing to do with double actionability. It is a principle of public policy based on the undesirability of our courts adjudicating on issues which are essentially foreign and local."

28. That said, the position in England and in Guernsey differs to the extent that the E.C. Directives do not apply here, but I do not think that that materially alters the position. The

real point is that any difference between the parties concerns only infringement of the trademark and not its validity. At no point in the English proceedings issued on behalf of the Defendant is there any suggestion that the Healthspan trademarks are not valid. The material difference between the parties is whether the Guernsey Court, could or could not, if asked by the Defendant company to adjudicate on whether or not the Healthspan trademark was being infringed, deal with the matter.

29. In Guernsey we have a trademarks registry under an old law which regulates a procedure for registering copies of English trademarks and none other. For reasons that have not been explained Healthspan Limited has chosen not to register its trademark in Guernsey, but presumably it could do this and, in the absence of any serious suggestion that the trademark is in some way invalid, I cannot see that an application could be opposed. However, I have not heard argument on these points and I will not speculate on what or would not happen if application for these trademarks to be registered, in accordance with our local law, were to be made. However, if, as part of a Guernsey passing off action, the Defendants make a counter-claim for a declaration that, not only were they not passing off the Plaintiff's business, but also they were not infringing its trademarks registered in England, I do not see any authority which can give me definitive guidance as to whether this can or cannot be heard here. No doubt with the best intentions Mr. Shepherd threw in at the last minute the judgment of Peter Prescott, Q.C. sitting as a Deputy High Court Judge in Griggs v. Ross Evans and Others [2004] EWHC 1088.
30. As always when a judge at first instance does his job conscientiously, a great deal of wise guidance can be identified. However, at the end of the day the decision of the Court inevitably is limited to the narrow issues before it. I do not find a great deal of assistance from Griggs because as Mr. Greenfield points out in his skeleton the case turned on a contractual situation rather than a tortious one.

31. That said I am not convinced that the issues relating to the trademark and the need to have those determined by a foreign court are sufficient to defeat the wish of the Plaintiff to have this matter determined in the Court of the jurisdiction in which both the Plaintiff and Defendant are established. Lord Goff's principles in Spiliada are clear and applying those principles, I am still not persuaded that the Defendant has discharged the burden on it to show that the Plaintiff's choice of forum should be displaced in favour of England.

32. On a more general point this is a dispute between two companies established in a very small jurisdiction. Both are highly successful at gathering business within the United Kingdom. They have somewhat similar names, but part of the confusion that has been alleged to arise between them, could be as much due to the fact that they both operate from within this jurisdiction. Therefore it could be argued that customers get confused as to which of the two companies operating herein are indeed the suppliers with whom they wish to treat. That is of course of no moment. The real issue is whether the Defendant in the way that it has structured its marketing campaign has indeed solicited confusion between itself and the Plaintiff in order to score some commercial advantage.

The Guernsey dimension

33. At the beginning of this case the Defendant company was saying that this Court should recognise its own shortcomings and decline jurisdiction in favour of the English court. This has not been substantially pursued. I would, however, record my acceptance of the fact that the judiciary and the advocates of the Royal Court are not as experienced in the issues of intellectual property that have been thrown up by these proceedings as their colleagues in the larger jurisdiction to the north. However, this Court must be robust. The issues thrown up by these proceedings are not without the comprehension of the Bailiff or his Deputy or one of his Lieutenants and the Jurats of the Royal Court.

Conclusion

34. In my judgment this case can and should proceed in the Royal Court of Guernsey where it has been instituted. I reject the defence arguments that this is not the most convenient forum. I would however add two further points which I would urge the parties to consider:-

Making the Guernsey process work

35. Guernsey is a jurisdiction where the roles of judge of law and fact are separated. In a complex matter relating to intellectual property and passing off it is essential that the legal issues are distilled and divorced from the factual issues. This will mean that any trial of this matter must be carefully prepared. Although I will listen to argument there is, as I see it, no requirement to fast track the proceedings unduly because, these two parties have been operating in the same area since 2000 and the Plaintiff has desisted from bringing the matter to Court, as has the Defendant, with regard to its allegations that the response to its purported trespass into the area of the Plaintiff's marketing, has been unfair.

36. These are difficult issues and the Court is entitled to expect that the parties' advocates will work together to ensure that justice is done. The Court will look to the advocates for the parties to work in a professional way to assist the Court in this regard. Work will then have to be done to ensure that the presiding judge is properly equipped to assist the jurors with the factual issues which they must determine. The Plaintiff has chosen to bring these proceedings in a small jurisdiction which I am the first to admit, may not enjoy the sophisticated judicial machinery that England has. That however is said, without any lack of confidence in the ability of the Guernsey Court to deliver justice to these two local companies.

Alternative disputes resolution

37. Healthspan has been very successful since it started in 1996. Healthy Direct has also built up a substantial market. As I indicated when I first looked at the papers in this case, it does seem to me that Healthy Direct has on occasion advertised its products in a very similar way to

Healthspan. Perhaps, it is because these two companies both operate in Guernsey that there is a need for them to row on separate sides of the river when it comes to their advertising and marketing. Healthspan is suggesting that Healthy Direct should take 'Health' out of their trading title. I certainly do not wish to express any view on this, but it does seem to me that, whatever the outcome, Healthy Direct is an established player, albeit in a smaller way than Healthspan. I cannot see how it can be ordered out of business simply because there is confusion resulting from the fact these two companies market their products from Guernsey.

38. I think there are real difficulties for any Court trying to deal with these matters on the basis of a passing off or trademark infringement. They seem to me to be very much practical issues between two competitors who choose to market themselves out of the same small island and as a result confusion seems to arise between them. They are both relatively young businesses in what appears to be a developing market. I respectfully suggest that litigation of the kind that each of them has started in Guernsey and England respectively is not the best way of establishing the appropriate space that should be placed between them. This in my view is a classic case for invoking the assistance of mediators experienced in issues of intellectual property and fair competition.