Judgment 31/2006 Wrench v Albany Hotel Limited – Royal Court (Civil Action File 926) – 15th June, 2006

Arbitration (Guernsey) Law, 1982 – defendant company's application for the arbitration agreement to cease to have effect – and/or for the arbitrator to be removed – review of the arbitration proceedings – application dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 15th day of June, 2006 before Richard John Collas, Esquire, Deputy Bailiff; sitting alone

Civil File 926

In the matter of:-

PAUL WRENCH

Plaintiff

v

ALBANY HOTEL LIMITED

Defendant

WHEREAS on the 7th day of June, 2006

the Deputy Bailiff considered an application by the Defendant:-

1. That the arbitration agreement entered into by the parties shall cease to have effect; and/or
2. A declaration that the arbitration agreement is no longer binding and that the Plaintiff be restrained from further conduct of the reference;

   and/or

3. That the arbitrator be removed in that he has misconducted the proceedings; and or

4. A declaration that the agreement to refer the dispute to arbitration between the parties and the arbitrator has come to an end;

and heard thereon Advocates M.G. Ferbrache and J.M. Wessels, Counsel for the Defendant and Plaintiff respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and

1. DISMISSED the application

2. DIRECTED that this decision be forwarded to Mr A.L. Ozanne, the arbitrator, for his consideration

3. AWARDED costs on a recoverable basis to the Defendant, subject to any further applications by the parties.

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

Final Judgment
15 June 2006

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between	**Paul WRENCH**	**Plaintiff**
	v	
	ALBANY HOTEL LIMITED	**Defendant**

Judgment handed down: 15 June 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Appellant: Advocate M G Ferbrache
Advocate for Respondent/Plaintiff: Advocate J M Wessels

Cases, texts & statute referred to:

1 Arbitration (Guernsey) Law 1982
2 Law and Practice of Commercial Arbitration in England, Second Edition by Mustill and Boyd

Introduction

1. Albany Hotel Limited ("Albany") is applying, in an application dated 12 May 2006, for orders that the arbitration agreement entered into between the parties shall cease to have effect; and/or that it is no longer binding and Mr Wrench ("Mr Wrench") be restrained from further conduct of the reference; and/or that the arbitrator be removed as he has misconducted the proceedings; and/or a declaration that the agreement to refer the dispute to arbitration has come to an end. I was informed that the arbitrator was aware of the hearing of this application, but he was neither present nor represented.

Background

2. Advocate Mark Ferbrache appears for Albany, the Defendant in the arbitration, and Advocate Wessels appears for the Plaintiff in the arbitration proceedings, Mr Wrench and I am grateful to both Advocates for their written and oral submissions.

3. Albany is a building contractor and the developer of premises now known as Camblez Apartments, Queens Road, St Peter Port. By a Conveyance registered on 26 February 2004 Mr Wrench purchased Apartment 3, Camblez

Apartments from Albany as agreed in conditions of sale dated 25 February 2004. Albany retained the ownership of Apartment 4, situated above Apartment 3.

4. Mr Wrench's claim against Albany is for damages in the sum of £379,967.18 for works required to remedy two substantial defects. First, he alleges that during the redevelopment Albany lowered the floor level to Apartment 3 and thereby undermined one of the structural walls supporting Apartments 3 and 4 which had to be underpinned. Secondly, there is dry rot on the premises which Albany allegedly failed to remove or treat properly. Mr Wrench pleads breaches of express and implied terms of the conditions of sale.

5. The action started in the Royal Court but the parties agreed to refer the dispute to arbitration, appointing A L Ozanne of Lovell Ozanne Ltd, Chartered Architects, as the arbitrator. His notepaper shows his qualifications to be BA(Hons) Dip Arch (Oxford) RIBA MCI Arb. The appointment was acknowledged by Mr Ozanne in a letter dated 6 September 2005, addressed to the parties' respective Advocates, to which is appended a schedule setting out his jurisdiction and powers.

6. At the outset of the hearing of this application, Advocate Mark Ferbrache was keen to stress that although he is alleging misconduct on the part of the Arbitrator, "misconduct" is a term of art. He declared that Mr Ozanne is a man of the highest integrity who has at all times sought to assist the parties in the progress of this arbitration but unfortunately he has fallen into error induced, Mr Ferbrache argued, in a large part by the manner in which Mr Wrench and his advisors have conducted the arbitration proceedings.

7. In an amendment to the claim made in December 2005 Mr Wrench also pleaded misrepresentation. The misrepresentations relied upon were made to Mr Andrew Dunnell of Dunnell Robertson Partnership Limited, a chartered surveyor. He carried out two surveys of the property. The first was commissioned by Albany in December 2002 and the second was in April 2003 on behalf of Mr Wrench. A Mr Moralee or Morley, acting on behalf of Albany, allegedly made the false and untrue representations to Mr Dunnell in December 2002 when he was preparing the first survey report for Albany. The representations broadly confirmed to Mr Dunnell that certain defects identified by an earlier prospective purchaser (but not seen by Mr Dunnell) had been addressed and appropriately remedied. Mr Wrench alleges the representations were relied upon by Mr Dunnell in preparing his report for Albany in December 2002 and taken into account by him when later preparing the survey report for Mr Wrench. That report induced him to purchase the apartment. (Mr Wrench's case is clarified in a letter from Advocate Wessels to Advocate Mark Ferbrache dated 23 February 2006).

8. By letter dated 9 January 2006, Advocate Mark Ferbrache served a defence in reply to the amended claim and gave notice that Albany might issue third party proceedings against Mr Dunnell in the light of the new allegations. The third party action has been drafted but not issued apparently because Albany does not wish to be faced with pursuing the third party action in the Royal Court

while the original action proceeds by way of arbitration. Advocate Wessels stated that Mr Wrench would have no objection to the third party claim being added to the arbitration proceedings but that would require consent of all three parties which has not yet been forthcoming.

Albany's Arguments

9. Albany's case on this application is summarised in paragraph 38 of its Skeleton Argument:-

> "*38.1 The arbitrator proceeded by way of enquéte/inquiry rather than adversarial;*
>
> *38.2 He has held meetings with the parties' experts and apparently heard evidence from them;*
>
> *38.3 He did so before the pleadings were closed and the issues thus properly framed;*
>
> *38.4 He has misdirected himself as to the burden of proof;*
>
> *38.5 As a result of the amended Cause and proposed further amendments, Mr Dunnell's role has now changed from independent expert, to key witness of fact for the Plaintiff and now a potential party. It is a key maxim that not only must justice be done, it must be seen to be done".*

The Arbitration Proceedings

10. I need to review what has happened in the arbitration proceedings.

11. Having accepted his appointment by letter dated 6 September 2005, the Arbitrator held an initial meeting the following day at the offices of Ozannes Advocates. Present with the Arbitrator were Advocate Mark Ferbrache and Mr Brewin (an expert retained by Albany) and Ms Parr of Ozannes on behalf of Mr Wrench. Mr Dunnell attended by telephone in his capacity as Mr Wrench's expert witness. In a letter to advocate Ferbrache dated 23 November 2005 the Arbitrator said what he understood had been agreed at that meeting. Neither Advocate Ferbrache nor Advocate Wessels disagree with this statement:

> *"You will recall from our meeting of the 7th September 2005 that it was agreed that Peter Brewin, Chartered Surveyor, would represent your Client, and Andrew Dunnell, Chartered Surveyor, would represent Mr Paul Wrench.*
>
> *It was agreed that the first hearing of the Arbitration would identify the extent of works to which the dispute relates. Part of the objective in identifying the extent of works was in order for a schedule to be prepared*

> *between Mr Dunnell and Mr Brewin, to which costs could be apportioned in relation to specific elements of work.*
>
> *The second objective at that time, was for me to seek an understanding of the sequence of those works and associated matters.*
>
> *I am mindful that at our initial meeting of the 7th September 2005 you stated that you wished to deal with the issues of liability".*

12. Details of further meetings are contained in notes made by Mr Brewin which are exhibited in an affidavit sworn by him on 12 May 2006 in connection with this application. He records four meetings attended by Mr Ozanne, Mr Brewin, Mr Dunnell and Mr Gladstone (a quantity surveyor retained by Albany) at which no lawyers were present. The four meetings took place on 14 September, 23 September, 11 October and 27 October 2005. His notes record that at each meeting, issues of liability were discussed (this is relevant to one of Advocate Ferbrache's complaints with which I will deal later). At the first meeting, described as a preliminary meeting, Mr Ozanne instructed the other three:-

> "……*to meet to examine the Scott Schedule to attempt to identify items of work which are agreed between both parties and where there is still disagreement and to identify items of work and costs".*

13. Mr Ferbrache, quite rightly, raises no objection to this direction which is entirely in accordance with what had been agreed at the meeting held seven days previously.

14. At the second meeting, the note records that Mr Brewin reported on the further enquiries he had made to attempt to establish the nature of the building works implemented on behalf of Albany prior to Mr Wrench's purchase of the property. The only direction from Mr Ozanne was to Mr Dunnell to submit to himself and Mr Brewin a copy of the survey report prepared by his firm for Mr Wrench in respect of Apartment 3. As Advocate Wessels points out, that was probably at the request of Mr Brewin (on behalf of Albany). Certainly, Mr Dunnell would not have requested it on behalf of Mr Wrench.

15. Advocate Ferbrache submits that it was at this second meeting that the arbitration started to go wrong although he says it may have been possible at that time to get matters back on track.

16. Mr Brewin's note of the third meeting records that they discussed the attempts being made between himself and Mr Dunnell, with the aid of Mr Gladstone, to assess and agree quantum. He said no agreement had been reached. Mr Ozanne issued a direction that a structural report on the property produced by Campbell and Bloese Limited be forwarded to Mr Brewin. Again, as Advocate Wessels points out, this was presumably at the request of Mr Brewin on behalf of Albany. I conclude, as neither party has suggested otherwise, that both this report and the survey mentioned at the second meeting were discoverable documents which would have been produced in due course.

17. At the 11 October meeting, Mr Ozanne also issued an Order of Direction, recorded in a letter dated 12 October addressed to both Advocates, directing the Advocates to meet to discuss the issue of liability, following which he proposed:-

> "…….*to hear a submission from Advocate Mark Ferbrache on the issue of liability in the presence of Advocate Wessels who will be invited to respond".*

18. Following receipt of this Order, Advocate Ferbrache wrote to Mr Ozanne on 25 October 2005 expressing concern that he appeared to be focusing almost exclusively on quantum as opposed to liability. Advocate Ferbrache proposed a directions hearing to determine how to resolve the issue of liability and in particular whether terms can be implied into the conditions of sale. Advocate Ferbrache also questioned whether Mr Dunnell could give independent expert evidence as he said he might be the subject of litigation in relation to his professional advice and he reserved his position in both respects.

19. On 27 October, Mr Ozanne held his fourth meeting with the other three professionals. He requested Mr Brewin to obtain copies of invoices from Ronez Limited of materials delivered to builders working at Camblez House on behalf of Albany. Copies of photographs Mr Brewin had taken when meeting at the property with Mr Dunnell were shown on a projector screen and the nature and extent of works implemented on behalf of Albany was debated. Mr Ozanne retained a copy of the CD Rom containing the digital photographs.

20. Advocate Ferbrache wrote again to Mr Ozanne on 7 November, in reply to a letter he had received on 3 November. He expressed concern that Mr Ozanne was adopting an "inquisitorial" rather than an "adversarial" approach and said he would attend all future hearings on behalf of his client.

21. A further meeting took place on 30 November chaired by the Arbitrator and attended by Ms Parr of Ozannes and Advocate Mark Ferbrache in addition to the three professionals. Mr Brewin records:-

> *"During this meeting issues of liability were again discussed along with the building works undertaken on behalf of Albany Hotels Limited prior to the purchase of the property by Mr Wrench. Again, photographs taken by Mr Brewin were viewed at this meeting.*
>
> *During this meeting it was agreed that the Plaintiff would file an amended Cause and a timetable for this was agreed and issued as a direction notice by Andrew Ozanne."*

22. The direction notice was based upon a draft order produced by Advocate Mark Ferbrache. It set out a timetable for filing an amended cause, defences, a request for further and better particulars, disclosure and a case management conference. Advocate Wessels informed me that he had agreed with Advocate

Ferbrache the sequence of events and said the only discussion concerned the time period to be allowed at each stage.

23. Earlier, on 23 November 2005, Mr Ozanne had sent Advocate Ferbrache the letter I referred to above. In that letter he also indicated he wished to visit the site in the company of Mr Brewin and Mr Dunnell. I am told that following objections from Advocate Ferbrache that visit has not taken place.

24. Following these directions, the claim was amended in December 2005, defences were filed in January and discovery has also taken place.

25. Another significant development is that by letter dated 11 May 2006 Advocate Ferbrache informed Advocate Wessels that liability for the underpinning is no longer contested and made an open offer to pay compensation of £141,511.10 being the amount that a quantity surveyor had advised to be the cost of remedial works. I understand the offer has not been accepted so quantum of this part of the claim remains an issue and the part of the claim relating to dry rot also continues.

26. The latest development is that during the hearing before me Advocate Wessels announced that his client will no longer be employing Mr Dunnell as an expert witness and will be instructing a replacement. Mr Dunnell will remain a witness of fact.

The law

27. Both Advocates are agreed that by reason of Section 1 of the Arbitration (Guernsey) Law 1982, the arbitration agreement can only be revoked with leave of the court. As to the circumstances in which leave would be granted, Advocate Ferbrache relied first on Section 5 of the 1982 Law which gives the court power to stay court proceedings where an arbitration agreement is proved. In particular, he relied upon the provision of Section 5(1) stating that court proceedings would not be stayed if an arbitration agreement is "incapable of being performed". I am of the opinion that Section 5 is not applicable at this stage of the proceedings where the arbitration is already underway. Even if it was applicable, I am not satisfied that this arbitration agreement is incapable of being performed.

28. Advocate Ferbrache principally relied on Section 23 (1) of the 1982 Law :

> *"Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him".*

29. Advocate Ferbrache alleges the Arbitrator has misconducted these proceedings and thereby misconducted himself. His arguments are summarised in paragraph 38 of his written submissions which I have quoted above.

38.1 The Arbitrator Has Proceeded By Way Of Enquiry

30. Albany's first complaint is that the Arbitrator has misdirected himself by proceeding by way of an enquiry rather than by conducting adversarial proceedings. Advocate Ferbrache relied upon the "Law and Practice of Commercial Arbitration in England", Second Edition by Mustill and Boyd. At page 16 they say the essence of the distinction between adversarial and inquisitorial systems is that in the latter:

> "….*the tribunal takes the initiative, in an endeavour to find the truth. Under the adversarial procedure, the arbitrator plays a less active role. Naturally, he wishes to ascertain the truth, but instead of searching for it, he allows it to evolve from a kind of dialectic between the parties, the assumption being that if it is left to the parties to present the alternative versions of the true position, they will between them furnish the arbitrator with sufficient material upon which to base an informed decision".*

31. They identify three main characteristics of the English adversarial system (at page 17):

> *"The first is that the procedural initiative lies mainly with the parties. If one of the parties desires that a step should be taken to move the arbitration forward, then he takes it himself; if he wishes his opponent to do something, he applies to the arbitrator for an order to that effect. Unless invited to decree what is to happen next, the arbitrator need not do anything at all. The responsibility for maintaining the momentum of the reference rests with the parties".*
>
> *..."The second characteristic of the adversarial system is that in principle the whole of the evidence and argument are presented at a single hearing. There may be preliminary hearings, at which the Arbitrator is called upon to give rulings as to the future conduct of the reference, but these are purely procedural, and are not the occasion for evidence or argument".*
>
> *...Third, the adversarial system as practised in England is predominantly oral in character. Most evidence is given by witnesses who attend in person, although in certain circumstances it is permissible to use written statements in substitution".*

32. They also state that the arbitration procedure should be on broadly the same lines as those followed in a High Court action.

33. I have no doubt that what the learned authors wrote was correct in 1989. Since then, civil procedure in England has been revolutionised through the introduction of the Civil Procedure Rules requiring the active participation of the judiciary in case management. Guernsey has not yet modified its written rules to introduce express provision for case management but in recent years the Royal Court has been managing cases more actively than it was doing in

1989 (which was also the year when the Royal Court Civil Rules were enacted). If it is accepted that the procedure in arbitrations should be on broadly the same lines as those followed in the courts, it must follow that a modern arbitrator must play an active part in managing the proceedings. I also agree with the principle that the arbitration proceedings should be adversarial rather than inquisitorial.

34. When judging Mr Ozanne's conduct of this arbitration against a modern standard, I am not persuaded that he has in any way misconducted proceedings and certainly not to such an extent that he should be removed. During the period from the date of his appointment on 6 September to the end of November, he attended a total of six meetings concerned with case management. His approach was not dissimilar to the regular review of Royal Court proceedings which may take place in the Friday Interlocutory Court where the judge is ensuring that the parties are progressing the preparation of their respective cases.

35. Advocate Ferbrache accepts that any arbitrator is entitled to adopt whatever procedure he thinks fit. In the schedule of jurisdiction and powers of Mr Ozanne attached to his letter of 6 September 2005, it was agreed he would have jurisdiction to:

> *"……direct the procedure of the arbitration including the amendment of time limits and other procedural requirements"*

and that he had the power to…….

> *"conduct such enquiries as may appear to the Arbitrator to be desirable".*

36. Furthermore, a number of matters were agreed on 7 September (when the parties were legally represented). It was agreed that he would first identify the extent of works to which the dispute relates and that Mr Brewin and Mr Dunnell would represent each of the parties in preparing an appropriate schedule. Secondly, it was agreed at that meeting that Mr Ozanne would seek an understanding of the sequence of works and associated matters. I infer he was to do that prior to the oral hearing of the arbitration. My understanding of Mr Brewin's brief notes of the subsequent meetings is that Mr Ozanne was endeavouring to do what had been agreed.

37. At those meetings Mr Ozanne requested the production of two survey reports to be given to Mr Brewin. It was appropriate for him to do so. Or it is not for Albany to object as the reports were for the benefit of their expert. As for the copies of invoices that were to be requested from Ronez Limited, I agree with Advocate Ferbrache that it is very likely that in 1989 an arbitrator would not have made such an order without receiving a specific application to that effect from one of the parties. In 2006, the Court should not criticise him for doing so, especially when the parties have agreed that he is to identify the extent of the works to which the dispute relates and to seek an understanding of the sequence of those works.

38. In my view it is significant that both parties were represented by their respective Surveyors or Advocates at each of the meeting convened by the Arbitrator. In an inquisitorial procedure, the arbitrator would make enquiries of his own initiative and not in the presence of the parties. That is not what Mr Brewin's affidavit and the correspondence suggest was happening in this case.

39. In a letter to the Arbitrator dated 25 October Advocate Ferbrache said he was focussing almost exclusively on quantum, not liability. The evidence before me, in Mr Brewin's affidavit, does not support that remark. His notes record that at each of their four meetings liability was discussed.

38.2 He Held Meetings With The Parties' Experts And Apparently Heard Evidence From Them

40. As I have said, the meetings Mr Ozanne held were in the presence of both parties' representatives. I agree it would be objectionable if he had met with one expert in the absence of the other, but there was no suggestion whatsoever that he has done so in this case.

41. I asked Advocate Ferbrache what evidence Mr Ozanne had heard. He explained that the allegation relates to the meeting of 27 October when he was shown photographs taken by Mr Brewin. However, the note records that Mr Brewin took the photographs when he met at the property with Mr Dunnell and they were shown to demonstrate to Mr Ozanne the nature and extent of the works implemented. In my view that relates to the matter that had been agreed at the 6 September meeting as the first aspect for Mr Ozanne to consider.

42. It is not alleged that either Mr Brewin or Mr Dunnell gave evidence on oath. The note records that it was Mr Brewin who produced the photographs; Albany cannot reasonably object, as he was their expert. The note does not record whether Mr Dunnell said anything about the photographs. Even if he did, it is not alleged that Mr Ozanne reached any findings of fact. Nor is there any suggestion that he has pre-judged the evidence to be given at the oral hearing.

38.3 He Did So Before The Pleadings Were Closed And The Issues Thus Properly Framed

43. On the evidence I have seen, I am satisfied that Mr Ozanne has only done what the parties asked him to do. Mr Ferbrache's main complaint under this heading relates to the fifth point which I deal with later.

38.4 He Has Misdirected Himself As To The Burden Of Proof

44. This complaint arises from Mr Ozanne's letter of 12 October. It is not clear to me whether in that letter he is referring to the substantive argument on the issue of liability, or to the procedure to be followed in order to establish liability.

45. In any event, no harm has flowed from Mr Ozanne's remark as both Advocates have corrected any misunderstanding he may have had.

38.5 Mr Dunnell's Role Has Changed

46. There was no satisfactory explanation from Advocate Wessels as to why it was only in December 2005 that Mr Wrench amended his pleadings to insert the misrepresentation claim. As Advocate Ferbrache points out, the amendment did not result from any facts, documents or material disclosed by Albany during the course of the proceedings; did Mr Wrench know from the outset that he would plead misrepresentation?

47. The case is now very different from the claim which Albany agreed to refer to arbitration. I infer that if Mr Wrench had originally pleaded his claim in its present form, then Albany would not have agreed to it being referred to arbitration, or at the very least that it may have sought to appoint a different arbitrator. However, as Advocate Wessels emphasised, the parties have both agreed to arbitration by Mr Ozanne. Mr Wrench is entitled to hold Albany to its agreement and the court should not lightly set aside an arbitration agreement. Indeed, the court encourages parties to seek to resolve their disputes through arbitration or mediation and it would be entirely wrong for me to set aside this arbitration unless I am satisfied it is proper to do so.

48. Advocate Ferbrache asserts that because Mr Dunnell is now threatened with a claim which will either be joined to the present arbitration, or will progress separately thereafter, Advocate Dunnell has, or may have, a financial interest in the outcome of the arbitration proceedings. He cannot continue to act as an expert witness as he is not an independent, disinterested party. His role has changed fundamentally.

49. The parties must always have contemplated that Mr Dunnell was likely to be a witness of fact in order to give evidence of the two surveys he carried out, in 2002 and 2003.

50. In the letter dated 25 October 2005, written before the claim was amended, Advocate Ferbrache contemplated the possibility that Mr Dunnell might be sued for his professional advice. Nothing had happened since the start of the arbitration to implicate Mr Dunnell in any way. So, Albany must have been aware, or should have been aware, prior to the commencement of the arbitration that Mr Dunnell might be subject to litigation. Albany could have objected from the outset to Mr Dunnell as an expert witness. Certainly, Albany need not have agreed, at the meeting on 6 September, that Mr Dunnell would represent Mr Wrench at meetings with the Arbitrator.

51. Advocate Wessels said that in attending meetings with the Arbitrator, the two experts were acting as *quasi counsel*. I do not find that to be a helpful expression. The job of counsel is to argue his client's case and to seek to persuade the tribunal to favour his client over his opponent. The role of the two surveyors in meeting with Mr Ozanne was to identify the extent of the

dispute. In other words, to agree what could be agreed and to identify what was in dispute. If Albany now considers that Mr Dunnell has abused his position in order to seek to obtain agreement to matters which should not have been agreed then, as Mr Brewin was a party to any agreements, Albany must be able to identify what it should not have agreed. Advocate Ferbrache did not tell me that there was any agreed fact which Albany now wishes to dispute. The Arbitrator has not made any findings of fact.

52. Advocate Ferbrache relies upon authorities concerned with judicial impartiality to seek to show that there is now a perception that the Arbitrator will be biased as a result of having heard from Mr Dunnell in his meetings with Mr Brewin. I do not accept that there is any evidence before me on which I could conclude that there is any real risk of a perception of bias.

53. One of the differences between these arbitration proceedings and court proceedings is that a judge would not meet with the two expert witnesses, in the absence of counsel or the parties, in order to seek to identify the areas of dispute. I do not criticise Mr Ozanne for holding such meetings. One of the reasons why parties to building disputes choose arbitration is so that they can have the benefit of an Arbitrator's expertise and knowledge of building and other technical practices. If he can meet with the parties' respective experts they can discuss matters between them as professionals thereby saving time and expense in the conduct of the arbitration to the benefit of both parties. It is of course essential that such meetings should always take place in the presence of both parties' experts and that no findings of disputed fact should be made by the Arbitrator at such meetings. It may happen that the Arbitrator will hear, from one side or the other, matters of evidence on disputed issues which will later be the subject of formal evidence during the oral hearing. There is nothing before me to show that that has happened in this case, but even if it had, Advocate Ferbrache accepts that Mr Ozanne is a man of the highest integrity. As such, I am satisfied that he will be able to dismiss from his consideration what he has heard and will base his findings of fact only upon the oral evidence to be given on oath in due course (as well as the agreed facts and the documents). That is no different from a judge or Arbitrator who, before a hearing, might read a proof of evidence or a document or report from a witness which is later contradicted on oath.

Conclusion

54. During the course of argument, Advocate Ferbrache was keen to persuade me that Albany had not in any way delayed in drawing this issue to the attention of the arbitration tribunal, the opposing party or in bringing the application to the Royal Court. For the avoidance of any doubt, I wish to state that I accept that to be so.

55. For the reasons I have given, I dismiss Albany's application and direct that this decision be forwarded to Mr Ozanne for his consideration. He is now faced with a claim substantially different from that which he agreed to accept for arbitration. Mr Wrench will have to notify him of his new expert witness. Mr Ozanne will have to establish whether it is proposed to apply to add Mr

Dunnell's action to the arbitration and, if so, to determine that application. The arbitration has not proceeded in accordance with the timetable agreed on 30 November 2005. Further directions will be required in order to progress it properly. I am sure that both advocates will give the greatest possible assistance to Mr Ozanne in deciding the proper procedure to be followed.

56. If either Advocate wishes me to give further directions or to apply for costs, they are to submit an application in the normal way. Regarding costs, without having heard from counsel my present view would be to order the costs of this application to be paid by Albany on a recoverable basis.

