Judgment 34/2010

Capita Symonds Ltd v Jubilee Scheme 3 Limited Partnership et al.
- Royal Court (Civil Action File 1443)
- 16th September 2010 & 1st November 2010

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i. **Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 – interlocutory act of court had been registered in the Livre des Hypothèques at the Greffe, pursuant to s.7 of the 1987 Law – application to vary the registration – judicial discretion – applicant's proposals held to be insufficiently clear and precise – application refused.**

ii. **Application for leave to appeal to the Court of Appeal – test to be applied – application refused.**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 16th day of September, 2010 before Sir de Vic Carey, Lieutenant Bailiff; sitting alone.

Between:-

CAPITA SYMONDS LIMITED

Plaintiff

and

JUBILEE SCHEME 3 LIMITED PARTNERSHIP

First Defendant

JUBILEE SCHEME 2 LIMITED PARTNERSHIP

Second Defendant

and

WOOLF LIMITED

First Third Party

and

PEP CIVIL & STRUCTURES LIMITED

Second Third Party

ON THE AMENDED APPLICATION of the First Defendant, dated the 9th September 2010, for the variation of a Caution, in the terms attached hereto;

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WHEREAS, on the 6th and 7th days of September 2010, THE COURT, having heard Advocates P.T.R. Ferbrache and I.C. Swan, Counsel for the Plaintiff and First Defendant respectively, THE COURT RESERVED Judgment;

THE COURT, this day handed down Judgment in the terms attached hereto and MADE NO ORDER on paragraph (a) and DISMISSED the remainder of the application;

AND THE COURT, with the consent of the parties, ORDERED that the First Defendant pay the Plaintiff's costs of and relating to the application on a standard recoverable basis, such costs to be assessed if not agreed.

M A TOSTEVIN
Her Majesty's Deputy Greffier

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IN THE COURT OF APPEAL OF GUERNSEY

1st day of November 2010 before Sir de Vic Carey, Lieutenant Bailiff sitting alone

Between **CAPITA SYMONDS LIMITED** **Plaintiff**

And

JUBILEE SCHEME 3 LIMITED PARTNERSHIP **First Defendant**
JUBILEE SCHEME 2 LIMITED PARTNERSHIP **Second Defendant**

And

WOOLF LIMITED **First Third Party**

And

PEP CIVIL & STRUCTURES LIMITED **Second Third Party**

Whereas on 26th October the Lieutenant Bailiff considered an application by the first Defendant for leave to appeal his judgment of 16th September 2010 regarding an application by the First Defendant to vary registration of an Act of Court in The Livre des Hypothèques, Actes de Cour et Obligations and whereas the Lieutenant Bailiff heard thereon Advocates R I C E Harris and P T R Ferbrache, counsel for the Plaintiff and First Defendant respectively the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and REFUSED leave.

S M D ROSS
H M Deputy Greffier

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IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **CAPITA SYMONDS LIMITED** **Plaintiff**

And

JUBILEE SCHEME 3 LIMITED PARTNERSHIP **First Defendant**
JUBILEE SCHEME 2 LIMITED PARTNERSHIP **Second Defendant**

And

WOOLF LIMITED **First Third Party**

And

PEP CIVIL & STRUCTURES LIMITED **Second Third Party**

Judgment of Lieutenant Bailiff Carey
In the matter of an Application by the First Defendant dated the 3rd August 2010 to vary registration of an Act of Court in The Livre des Hypotheques, Actes de Cour et Obligations ("the Livre des Hypotheques")

Advocate for the Plaintiff: **I C Swan**
Advocate for the First Defendant: **P T R Ferbrache**

Dates of hearing: **6th & 7th September 2010**
Judgment handed down: **16th September 2010**

Introduction

1. The main action in this matter involves a claim by the Plaintiff Architects against two special purpose vehicles, set up by the developers of the former Royal Hotel site to develop two buildings thereon. This action was defended and in due course the Plaintiff obtained leave to register what it then described as the proceedings in the Livre Des Hypotheques at the Greffe. At the outset I should record that there is at the present time, no issue relating to the proceedings against the Second Defendant where the registration is in place and not subject to any application to vary. This judgment concerns solely an application to vary the initial Order permitting registration in respect of the First Defendant.

2. The First Defendant's development when completed will comprise 46 local market apartments and 8 open market apartments as well as areas for commercial and retail development. The First Defendant is being financed throughout by Lloyds TSB Bank and some £47 million has been drawn down.

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Preliminary Issues

3. Mr Peter Ferbrache helpfully furnished the Court with two composite lever arch files, containing all the papers filed on behalf of the Plaintiff and the First Defendant, running to some 1200 pages. On a preliminary read of the most important documents, it occurred to me that there were substantial differences of opinion between the Plaintiff and the First Defendant as to the value of the real property to which the Plaintiff's registration was attached and that if these evidential differences were to be resolved satisfactorily, it would perhaps be more appropriate for me to sit with Jurats. I also, in accordance with the practice that this Court has developed since the decision of McGonnel in the ECHR, drew attention of the parties to the fact that I had been the Procureur at the time that the legislative changes of 1987 were promoted, although I personally saw no difficulty in my sitting.

4. Mr Swan and Mr Ferbrache confirmed they had no objection on this latter count and they also agreed that there should be an Order under Section 13(1) (a) of the Royal Court (Reform) (Guernsey) Law 2008, that this particular application should be resolved by the judge sitting alone and I so ordered. Following the commencement of my preparation of this judgment, I discovered that there was some confusion over the way in which the two Defendants to the main action were identified in the Defendants counterclaim and in the application itself and I was also uncertain as to whether what Mr Swan had purported to register in the Livre Des Hypotheques was an Act of Court. I therefore recalled Counsel to draw their attention to these problems which are of a technical nature and had not been spotted by me in my preliminary reading. Both matters have been sorted out with an amended application from Mr Febrache and an application from Mr Swan for rectification of the Bailiff's order of 4th December, which was not opposed, and which I have granted and to which I will refer later.

The Background in more detail

5. The Plaintiff is a substantial architectural practice in England which was engaged by both Defendants to these proceedings as Architects and Building Services Engineers. The engagement was in accordance with standard contracts for the provision of architectural and engineering services and these provided for the payment of scale fees in the normal way. Accounts were rendered in the case of the First Defendant in the sum of £1,657,821.81 and when these were not paid, the Plaintiff started proceedings and no doubt because a similar situation had arisen with the Second Defendant, the claims were joined in one cause of action.

6. The initial cause was placed on the pleading list on the 6th November 2009. Some technical amendments were made on the 20th November by consent and the amended order of the Bailiff provided that these Acts of Court formed the subject of the registration in the Livre Des Hypotheques. Subsequent to the commencement of the proceedings by the Plaintiffs, a massive counter claim has been entered on behalf of the Defendant against both the Plaintiff, a company called Woolf Limited and PEP Civil and Structures Limited in the sum of approximately £70,000,000. I can form no view on the merits of the Plaintiff's claim or the strength of the counter claim. All I do conclude is that this particular building project has run into serious difficulties resulting in considerable delay in completion of the various parts of the development. I know not whether this gives rise to anxiety as to the financial health of the First Defendant, whose only asset as I have said, is the building comprising the development known as Royal Terrace.

Events following the Registration

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7. Mr Williams of Ozannes, who has been assisting Mr Ferbrache, has sworn an affidavit to which he has appended all the correspondence that was exchanged between the parties after the registration. This starts with the email of 7th December 2009 wherein the registration was formally notified to Advocate Ferbrache by Advocate Swan. Mr Swan finished the letter with these words "*we write to you at the suggestion of the Bailiff (who was sitting in court on Friday) to invite your clients to consider offering an acceptable alternative form of security"*. That letter went unanswered.

8. The next communication was some three months later when on 10th March this year, Advocate Ferbrache wrote to Mr Swan advising him that his clients (Jubilee 3 Partnership) were selling some car parking spaces at Royal Terrace and that the purchaser's Advocates had highlighted the registry that the Plaintiff had obtained. Mr Swan was informed that the monies from these sales were to be applied in partial discharge of the indebtedness to the company's banker who had a prior Charge. The letter asked for the Plaintiff to release that part of the property from its registration at the appropriate Conveyancing Court. Mr Swan is told that failing a satisfactory response by the end of this week (i.e. within two days), application will be made to the Court and full costs will be sought against his client.

9. Mr Swan did in fact reply by return on the 10th March. He reminded Mr Ferbrache that his client was perfectly prepared to consider releasing parts of the property from its Charge upon his clients offering suitable alternative security as had been alluded to in the letter of 7th December. He finishes: "*It is perhaps unfortunate that your clients have left matters until some 7 – 10 days before a transaction is envisaged. We can only suggest that your clients make haste to discuss the terms of suitable alternative security through our respective firms"*.

10. On 25th March Mr Ferbrache replied in the following terms:

> *"We refer to your letter dated 10th March 2010. Enclosed is a valuation prepared by Savill's which values Royal Chambers in the sum of £48,000,000. The development is encumbered by way of security granted to Lloyds TSB securing a development loan, the outstanding balance of which is £35,000,000. A copy of the current loan balance is attached. Accordingly there is £13,000,000 equity in the development which is more than sufficient to satisfy your client's claim inclusive of costs in the event that it is successful at trial.*
>
> *In the circumstances our client should not continue to be prejudiced by the Charge registered by your client over Royal Terrace"*.

11. The sale of the car parking spaces in Royal Terrace was still said to be imminent and due for completion. The letter finishes with the following:-

> *"Please confirm by 5.00 pm on Friday 26th March that your client will release its Charge over Royal Terrace. To be clear, if your client does not release its Charge then application will be made to the Court and full costs will be sought against your client. Our client also reserves all of its right in respect of any loss it may suffer in the event of the continued registration of the Charge".*

12. On the following page is what Mr Ferbrache describes as "*the valuation"*. It emanates from Savills the well known international firm of chartered surveyors. At no stage in the text is any suggestion made that what is being produced is a valuation. It is described as "*an indicative desktop opinion of the current value"* and there is a specific exclusion on the part of Savills of any liability to anybody who acts on the information contained therein. The letter of 25th March was responded to immediately later that day with the caveat that an answer might not be possible within 24 hours as requested by Ozannes, particularly as they had taken a fortnight to reply to the letter of 10th March. An answer was however given by Mr Swan on the 26th March, in which he took the point about the inadequacy of the Savills' opinion. Again Mr Swan reiterated that his clients are ready to consider releasing the Charge over Royal Terrace on the provision of adequate alternative security.

13. Mr Ferbrache replied on the 30th March. He pointed out, which is obvious, that the registration is not akin to a judgment and that the proceedings will be contested and a substantial counter claim lodged. Mr Ferbrache went on to make the point that there was sufficient security in the Royal Chambers site owned by the Second Defendant. That was answered by Mr Swan the following day. He asked for clarification of the proposal whereby the Second Defendant as owner Royal Chambers, would offer security in respect of the claim against the First Defendant.

14. This was replied to by Mr Ferbrache on the following day advising that his client was not prepared to offer a Bond over the Royal Chambers development as security for the claim against the First Defendant. The reasons for the client to refuse to do this are not entirely clear. Firstly it would apparently involve extensive and costly negotiations with Lloyds, which is the first registered creditor and the formalisation of a Deed of Priority, whatever that would contain. Then he said that the Bond would give the Plaintiff better security than it had at present by virtue of the registration which is something I do not understand. He then went on to offer an undertaking on the part of the Second Defendant to satisfy any judgment against the First Defendant, and that it would not further encumber Royal Chambers without the consent of the Plaintiff, such consent not to be unreasonably withheld. He further suggested that if indeed Royal Chambers was sold, then money would be put into escrow putting settlement or final judgment in respect of the registered claim. He then reiterated the point that there was £13,000,000 equity in Royal Chambers.

15. This letter was answered on the 7th April. Not surprisingly, Mr Swan pointed out that the offer contained in the letter of 1st April is only of value if there is available equity in the property of the Second Defendant and he reverted to the problems over the Savills opinion. Mr Swan then went on to offer to accept something short of a full valuation with its serious cost implications and he wrote this:

> *"Are you in a position to produce any better evidence of the present value of Royal Chambers for example an opinion from a reputable valuer based on a worst case valuation of the property in its present condition? If, as you implicitly suggest the available equity is undoubtedly in excess of the security to which our client is entitled then one would think that such an opinion would be available. If not then the alternative security which is being offered is inadequate".*

16. Again, Mourant Ozannes, as by then they had become, became silent for a further three months until there is a revival of activity on the 23rd July when the matter was reopened in correspondence by Mr Ferbrache. The basic proposition which he puts forward is that his client's bankers who hold the First Charge are to be paid off in full before any security can be claimed by the Plaintiffs. The matter goes somewhat further than merely discharging indebtedness because an arrangement has been made with Lloyds TSB whereby the cost of finishing the building which had been estimated at £15.3 million, is to come out of the proceeds

of the first sales. Again, Mr Swan replied and repeated the difficulties in any such offer because there is no independent evidence in support of the figure that is suggested as to the value of the finished building. There is further no suggestion that the First Defendant will not continue to borrow within the limits of the Bonds in favour of Lloyds. The correspondence between the parties continues without resolving the matter. This application is therefore filed and a timetable for lodging evidence etc agreed.

The Terms of the Application

17. The First Defendant's application lodged by Mr Ferbrache refers to what was registered on the 4th December on behalf of the Plaintiff as a "caution". The word "caution" has no meaning in the context of that part the 1987 Law. [There was mention of "cautions" in Part IV but those sections relating to conveyancing procedures have never been brought into force]. The confusion may, in part have been as a result of the defect in the way that the Plaintiffs originally purported to register their claim. Mr Swan sought an Order of the Court registering proceedings and then filed the amended cause. As I indicated after the hearing when I examined the exact wording of what had been registered, with the Bailiff's leave, the documentation was defective and by consent on 9th September I gave leave for the Plaintiff to rectify the registration of 4th December last, to the effect that there should be registered in the Livre Des Hypotheques the original Act of Court of 6th November 2009 inscribing the Plaintiff's cause on the rôle des causes à plaider.

18. Be that as it may, Mr Ferbrache's application is in two parts. It was perhaps as a result of the uncertainty stemming from the way in which Mr Swan had originally registered his proceedings, that Mr Ferbrache deemed it necessary to make paragraph (a) of his application. Perhaps the inspiration for this is to be found in the dicta of Hancox LB in paragraph 39 of the judgment in Magloire v Wright and two others 18th January 2006. I, for myself, could not see that it was other than declaratory of the position that stemmed from a proper registration of the Act of Court referred to in the last paragraph, (which properly included in the usual way an unliquidated claim for costs) and so I propose to make no Order thereon, a course to which Mr Ferbrache did not demur.

19. The more important part is paragraph (b) of the application which seeks variation of the Order of the Court granting leave to register, so as to permit the sale of the various items of realty comprising Royal Terrace therein described and defined as "*units"* up to a value of £63,560,000. Paragraph (c) asks for the incidental direction to the Plaintiff's Advocates to enable release of the registration to be put in hand, to the end that clear title will be given to the individual purchasers of the units. It was clear from the application and what Mr Ferbrache said about it that until sales up to this amount had been effected there was to be no provision for providing any security in respect of the Plaintiff's claim.

The Evidence

The First Defendant initially filed three affidavits in support of its application. I have dealt with the first, that of Mr Williams that appended the correspondence that was exchanged and to which I have referred quite fully above. The second affidavit was from Mr Guy Philip Austin who is a Director of Ridge and Partners LLP who are the client representatives responsible for costing the project, supervising the performance of service providers and certifying the completion of the various stages of the work and monies payable there under. He is the person who has explained the calculations behind the additional £15.3 million required to complete construction and in his affidavit, he divides up into various heads these costs. The difficulty I see in his figures, which are not at this stage substantially contested by the Plaintiff, is that he is including in the contingency allowance,

prolongation and disruption claims due to the continuing delay in the completion of Royal Terrace and remedial works, which may be contentious.

20. The main deponent on behalf of the First Defendant is Mr Charles Billson who describes himself as a Director of Jubilee General 3 Limited, which is the general partner of the First Defendant. The affidavit describes the nature of the development at Royal Terrace and the amounts of the Bonds in favour of Lloyds Bank and some details of the dispute between the Plaintiff and the First Defendant. He then gives some information on the counter claim which has been filed against the Plaintiff and others involved in providing contractual services to the First Defendant.

21. Mr Billson, in paragraph 22 of his affidavit deals with the request of the Plaintiff to seek comfort that there is sufficient equity in Royal Terrace to meet any judgment in its favour in these proceedings. He then talked of the cost of an independent valuation and how that in his view was disproportionate and unnecessary. He states "*Jubilee 3 has internally valued Royal Terrace in the sum of £84 million"*. Interestingly he does not proffer this as his own view of the value of the property. Neither does he explain what the £47 million drawn down on the Lloyds loan has been spent on. The cost of the land was £3 million; building costs certified so far are a figure slightly in excess of £28 million. He explains how the initial sale proceeds will be used to fund the finishing costs. Thereafter sale proceeds will be applied to paying off the first registered creditor i.e. Lloyds TSB.

22. As a result perhaps of discussion on the first day of the hearing, the following day Mr Ferbrache produced an affidavit from Mr Andrew Fraser Dale, who described himself as the Group Finance Director of the Jubilee Group, whatever that is. I have however noted that in the desktop valuation from Savills, the same gentleman is addressed as the Group Finance Director of Longport Group which of course does have a public profile as the identified developer of the whole Royal Hotel site development. The purpose of Mr Fraser Dale's affidavit is to provide comfort to the Court and to the Plaintiff that Lloyds TSB as lender, have put in place for their own benefit, a control system which will ensure that whenever any unit is sold, such sale is at arm's length until full value and also that where money that is generated from such sales is applied on additional building works, that the validity of the sums being paid out is independently checked by the Bank's own surveyors.

23. Mr Fraser Dale's affidavit is supported by a further affidavit from Mr Simon White who is the Senior Manager Corporate Banking of Lloyds TSB Offshore Limited, confirming the truth and correctness of Mr Fraser Dale's affidavit concerning the loan facility with Lloyds TSB.

24. On behalf of the Plaintiffs there is one affidavit from one of its directors, Mr Martin McCloskey in which he sets out the Plaintiff's position, which is that it is willing to accept suitable alternative security in return for vacating its charge. In response to the First Defendant's assertion that there is ample unencumbered equity in Royal Terrace to satisfy any judgment obtained by Capita, he claims that no reliable evidence has been produced to support that assertion of value. He also points out that there could be further borrowing from Lloyds TSB under the Bonds which attach to both the present and future indebtedness of the First Defendant. He accepts that there will be a necessary cost incurred in completing the project, although he does not accept the accuracy of Mr Austin's calculations.

Counsels' Submissions

25. Mr Ferbrache started by trying to show a difference between "varying" and "revoking" registration, but in practice I cannot see that there is any real distinction. It is true that where permission to register is given and the real property to which it attaches comprises one parcel, then one will have the situation that one sees in Channel Island Cream Liqueurs v Woods and

Brown v Vivien & De Carteret whereby there is one event, namely the sale of the property and the revocation of the registry and the substitution of security to meet the claim. The word 'varies' may appear more appropriate where authority is being sought to release parts of the property to which the registration attaches on terms that the Court approves. However, to make an Order permitting the sale of every parcel of land owned by a person against whom a registration is made without any provision for part payment or provision of security in respect of the claim, the subject of the registration, seems to me to have the same effect as ordering the revocation of the registration without making any provision for securing the potential claim of the holder of the registration.

26. The proposal put forward by Mr Ferbrache is that sales should be permitted up to £63 million and he submits that on the strength of what Mr Billson says, there is clearly sufficient equity left in the overall project to meet any successful claim on the part of the Plaintiff. He argues that until such time as all the extra building works have been completed, paid for and the 47 million. due to Lloyds has been settled, the Plaintiff is entitled no further security in respect of its registration.

27. Mr Ferbrache made a point that if there is only sufficient money to meet the first registered Creditor, the registration which the Plaintiffs hold will be of no value and there can be no dispute as to that. Mr Ferbrache's client maintains that we are not in that situation and that there are going to be funds available once the property is fully developed, the units sold and the Bank paid back.

28. In response, Mr Swan was commendably brief, reiterating yet again, his client's point that they were perfectly happy to release their registration, provided that satisfactory alternative security was lodged. Alternatively he was prepared to agree to his client's releasing its security to enable the project to be completed and the holder of the first charge to be repaid provided that satisfactory evidence was produced to show that once these debts had been discharged there was sufficient equity to left to meet the Plaintiff's claim if it were to succeed.

The Law

29. The law of this island clearly gives claimants against owners of real property the right to register Interlocutory Acts in order to secure any potential judgment against such realty. This was recognised in the masterly judgment of Frossard B in Chesney v Kitson 20th February 1978 where the matter was fully argued and the local and French authorities fully examined. This was followed by Birchwood Investments Limited v Norman and Others which came before Dorey DB on 6th June 1984 and varied by the Court of Appeal on 18th July 1984. What happened in this case was that the Respondents offered full alternative security in the form of cash to meet a pecuniary claim against them. Dorey DB allowed the security to be substituted in this way. He rejected the arguments of the Plaintiff that they were not obliged to accept such alternative security, but instead to be able to continue to enjoy a registration against the Defendant's reality, in the hope, one has to presume, that full payment would be tendered without further argument in order to achieve a sale of that realty. Dorey DB made some useful observations on the procedure for registration, which had been established by the judgment in Chesney v Kitson and identified misgivings both on his part and on the part of his predecessor who sat on Chesney v Kitson, as to the way the procedure could be miss-used. He went on to foresee the need for legislation on the lines of the 1987 provision.

30. It seems from what is said in Chesney v Kitson, that the *coutume* of different regions of France developed in different ways. Some decreed that protection was afforded to Plaintiff by way of hypothecation of a defendants land only ran from judgment, whereas others provided it ran from the institution of process. In Guernsey the *coutume* developed in its own way from at least the beginning of the nineteenth century in that protection and priority ran from the date of registration of the *acte* in the Livre des hypotheques, as opposed to the date of tabling the cause.

As Frossard B observed this was hardly surprising as Guernsey had introduced a system or practice of registration of documents of this kind by HM Greffier.

31. As has been observed by Counsel, there is not a great deal of authority which has developed since the enactment of the 1987 Law.

32. The first two decisions happen to be mine namely Channel Island Cream Liqueurs v Woods 13th March 1992 and Brown v Vivien and De Carteret. In each case the one property covered by the registration that had been effected was going to be sold and there was sufficient cash left after the first creditor had been paid for the potential claim of the Plaintiffs who had registered claims to be met if it was successful. Interestingly in Brown v Vivien and De Carteret, (of which I have not been able to obtain a copy of my judgment), I appear to have given further protection to the registered creditors by ordering security for their costs to be put up as well as the amount of the claim. Neither decision dealt with the position where there was no surplus immediately available to provide security, or where there was going to be a long and complex disposal programme as is contemplated here.

33. Both Counsel quoted from the learned judgement of Clark JA in two appeals which were heard together under the heading of Moed v Cockram and Ferbrache and Co and Cockram v Mrs Moed, 23 July 1999. The observations of Clark JA coming as he did afresh to identifying the relevant factors for the Court when it was considering applications under sections 6 and 7 of the Law of 1987 are most valuable. I intend, no discourtesy by not quoting at this stage at length from pages 9, 10, 12 and 13 of that judgment. Despite the help it gives me, that decision does not deal with the point in issue in this case. The two appeals centred on firstly the issue of whether the then Bailiff was right in revoking the registration of an Act of Court placing a matter on the pleading list, where the Plaintiff had been guilty of undue delay and in the second, issues of *locus standi* of a husband where the wife had granted a bond to an alleged creditor but was now seeking to resile from it on grounds of undue influence and where the property had in any event been re-vested in the wife in the Matrimonial Causes Division.

34. The final judgment is that of Hancox LB in Magloire v Wright. There, it appears that the Defendants to an action were bringing a counter claim and sought to register the counter claim against the Plaintiff's real property. There seems to be some doubt as to whether the counter claim showed a liquidated amount as being due and there was argument as to whether it should registered at all. Hancox LB, after making reference to the three previous authorities I have dealt with, decided that he had discretion to permit registration of the counter claim and (it appears) also to delineate the amount to be covered by the registration in the livre des hypotheques. This he did in the sum of £8,250 and he further directed registration and subsequent vacation on lodging of a similar amount in monies worth in the joint account of the parties' advocate. This decision is clear further authority for the proposition that claimants against those who hold interests in realty are entitled to maintain their security in exchange for release of the registration.

Conclusions

35. The facts of this case are very different from any previous case which has been before the Court. The Plaintiff architects gave credit to the First Defendant knowing (assuming it made appropriate enquiry) that the First Defendant's sole asset was the Royal Terrace site and that it was or would be heavily encumbered in favour of its bankers. Indeed most building projects are financed on borrowings which are drawn down against properly rendered accounts from the contractors and professionals charged with the design and oversight of the project.

36. The Longport Group has chosen to establish special purpose limited partnerships to develop parcels of the Royal Development, no doubt so as to limit the liability of the group as a whole if a particular project goes wrong. There is nothing wrong or unusual in this and I can see the

argument that it would be contrary to the principles of limited liability to expect the parent group to stand by its subsidiary to the extent of introducing further funds from its own resources to guarantee in effect the Plaintiff's claim.

37. This protection given to claimants against defendants possessed of land may at first sight seem a little harsh and the cause of unease referred to by Dorey DB in Birchwood. However it must be remembered that probably until the middle of the nineteenth century the main source of wealth in this island was land, (the merchant classes perhaps excepted), and it was only against land that indebtedness could be secured. The need for some oversight on the part of the Court as to how this right to early protection was exercised was recognised in 1987, but the legislature has not questioned its continued existence.

38. As Clark JA said in Moed *"If an action is sustainable… [the plaintiff] is prima facie entitled to registration".* Clark JA continues in the next paragraph the discretion under section 7 must be exercised not only reasonably *"it must also be exercised with a recognition of the existence of the customary right to which it is appurtenant"*.

39. Both Counsel quoted the observation of Clark JA in the Moed case that "*the effect of the registration in my judgment is that the Plaintiff obtains in respect of his claim in the action what is in effect a charge over the defendants interest in Guernsey realty ranking in priority to all subsequent charges or actions even if registered*". In my judgment it follows that once having registered the Plaintiff cannot be required to erode the value of the registration and the priority he enjoys therefrom by being ordered to attend before the Conveyancing Court to release it without he and the Court being satisfied that in so doing he will be maintaining the value of the security that he has. It is that priority which in my judgment the claimant in possession of the appropriate Act of Court is after paying his fees for registration, entitled to have preserved as against any subsequent creditors of the First Defendant who choose to register their claims.

40. The holder of the first Charge will have priority and will be able to look to the First Defendant to pay to him the whole of the proceeds of any sale which he agrees may be released from his Bond. Putting aside for a moment the concession which Lloyds TSB is making that it will not require repayment of its indebtedness immediately, provided the Defendant uses the proceeds of sale for finishing its development project in accordance with arrangements that have been agreed with the Bank, the Bank cannot be required to accommodate the interest of the Plaintiff to the extent of surrendering any part of its entitlement to be paid to the Plaintiff. To do so would compromise the position of the Bank as first Bond holder. That however still does not mean that the Plaintiff must be required to give way to the Bank to the extent of vacating without any consideration or any provision for protection of its security as Second Chargee.

41. The discretion of the Court under section 7 must accordingly be exercised having regard to that principle. I accept that when dealing with a development of this complexity it will not be easy to ensure that the Plaintiff's position is protected as the realty begins to be sold off. I adopt the caution expressed by Clark JA in Moed when he said *"It is not in my judgment, appropriate or desirable to attempt to identify all the factors that could be relevant to the exercise of a section 7 discretion"* I do not therefore think it appropriate to be drawn further into speculation as to what would be a satisfactory Order for the Court to be making.

42. Where one has an insolvency it may be necessary to recognise that despite the registration there is no prospect that the Plaintiff will be entitled to receive anything if its claim is successful and there the Court may have to order release in order to ensure that the interests of the first registered creditor are safeguarded. However from what Mr Ferbrache says on behalf of his clients this is not the present situation, so I will say no more about it.

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43. It follows from what I have said that the First Defendant has not produced proposals of sufficient clarity and precision to justify this Court to direct without more the Plaintiff to embark on a programme of release of up to £63m in value of the First Defendant's realty without any clear provision for its ongoing protection as second registered claimant against that realty.

44. The First Defendant appears not to have taken the position of the Plaintiff seriously and this is illustrated by the somewhat spasmodic way in which it endeavoured to pursue negotiations with the Plaintiff. I am also concerned at the failure of the First Defendant to explain on what the monies, which were outstanding to Lloyds, have been expended and as I have said, the lack of any detail in the explanation as to what the outturn of the development is likely to be.

45. I have also noted that somebody must have financed the substantial professional fees that must have been incurred in the preparation of the counter claim and I find it hard to accept that it could have been resourced by the First Defendant in the light of the size of the counter claim that is being generated and the losses it claims to be suffering.

46. Mr Swan showed little enthusiasm for the Plaintiff having to police the progress of the development in order to ensure that its priority was not being compromised, but if it wants to protect its position I see no alternative in the event that the First Defendant offers no better solution

47. Striking the right balance between the interests of the Plaintiff in holding on to what it has and the First Defendant in getting on with its development and realising the fruits of its labours is not easy. What the First Defendant has proposed to date is not an adequate proposal for the reasons I have outlined and I therefore have to reject the application.

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IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **CAPITA SYMONDS LIMITED** **Plaintiff**

And

JUBILEE SCHEME 3 LIMITED PARTNERSHIP **First Defendant**
JUBILEE SCHEME 2 LIMITED PARTNERSHIP **Second Defendant**

And

WOOLF LIMITED **First Third Party**

And

PEP CIVIL & STRUCTURES LIMITED **Second Third Party**

Decision of Lieutenant Bailiff Carey
In the matter of an Application by the First Defendant
For leave to Appeal his judgment of 16th September 2010

Advocate for the Plaintiff: **R I C E Harris**
Advocate for the First Defendant: **P T R Ferbrache**

Dates of hearing: **26th October 2010**
Decision handed down: **28th October 2010**

1. Mr Peter Ferbrache has with unfailing courtesy throughout, both in written and oral argument before me, rehearsed a number of complaints against my judgment in this matter. He relies on the recent decision of HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited 2009-10 GLR 239 as setting out the test which I am to apply to this application in the following terms:

a) that leave to appeal would be granted where the legal grounds of the appeal are "*clearly arguable and any appeal would have a reasonable chance of success"*;

b) that in circumstances where an issue or application was coming before the Guernsey Courts for the first time *"It was desirable that a higher court have the opportunity to consider the issues raised and to scrutinize the decisions of the lower courts"*.

2. With regard to a), it is conceded that Mr Ferbrache will need to show that I made errors in my interpretation of the law in the matter, or that where a discretion has been entrusted to me, he must show that my decision is wrong. He is clearly on stronger grounds if he shows that in coming to my decision I have erred in law. I have studied the points he makes in attempting to

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show that I have misdirected myself as to what the law is in this particular area and I have carefully considered these.

3. Mr Harris, who appeared in the absence of Mr Swan, so enabling the application to be dealt with this week not surprisingly took a less jaundiced view of my conclusions and urged me to reject the application.

4. I have re-read my judgment in the light of Mr Ferbrache's submissions and I accept, as one always does on re-reading a judgment which is a subject of an application for leave to appeal, that there are some things that have been included which perhaps need not have been and other matters have not been amplified to the extent that they could have been.

5. The application, although on its facts it was novel, was presented in very clear terms by Mr Ferbrache. He was submitting that on the evidence before me and without further enquiry, I should be giving a direction to the Plaintiff that it was, over a period of what was to be some months, to attend before the Conveyancing Court to release the whole of its security, covered by the registration, which it had obtained against the First Defendant on 4th December 2009, without any clear assurance that should it succeed in that claim, the priority which it had obtained over other possible claimants, would remain in any tangible form. Put another way the First Defendant was to be allowed to sell the whole of its real property and apply the proceeds in accordance with the very careful drafted loan agreement that it had with its first bondholder Lloyds TSB, leaving hopefully a surplus after Lloyds had been satisfied that would be in cash and available to all the creditors of the First Defendant. By that stage as all the First Defendant's realty had been conveyed the effect of the registry and the priority it gave over later claimants (whether they had themselves registered or not) would have been lost.

6. I do not see that in rejecting such a stark proposition, I can be shown to have been misapplying the law, such as it has developed in this particular area. On re-reading paragraph 42 of my judgment, I could perhaps have been more forthcoming and proffered the view that in the light of the evidence that had been tendered as to the arrangements with the bank that an orderly sale of at least the first half of the First Defendant's portfolio, in accordance with those arrangements could have been agreed. This could have been done without making any further provision for securing the position of the Plaintiff on the understanding that the issues raised by the application could be revisited at a later stage, when substantial inroads would have been made into reducing the indebtedness to the Bank and it would be possible to have a clearer view of the likely outturn from this development.

7. Mr Ferbrache did say that his application was for such other order as the Court might feel appropriate. I fear however that if I had let myself be drawn into trying to broker a compromise on these lines, I would have needed further evidence and could easily be drawn into the proverbial argument concerning the length of a piece of string.

8. However unattractive it may be to the First Defendant, particularly as it is locked in heavy and costly litigation with the Plaintiff and its associates, to concede anything at this stage, the door is still open to Mr Ferbrache to bring a reformed application on these lines. So if I refuse leave to appeal I am not closing the door to the First Defendant. In making such an observation I wish to make it clear that it is not a consideration which should weigh on my decision whether or not to grant leave to appeal.

9. Looking back to my judgment, I cannot see that I was doing anything other than exercising an unfettered discretion under the law that I understood that I had to apply and that the conclusion I reached was wrong.

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10. I have considered ground (b) of the Gresh test enunciated above. Whilst I accept that this application raised issues that had not been directly covered before, I do not feel that the limited evidence upon which I made my decision assists in making it desirable that this decision be used as the spring board for a reconsideration by the Court of Appeal of the way in which our custom has developed in this area. Inevitably this would involve a re-appraisal of the decision in Chesney v Kitson.

11. Leave to appeal is therefore refused.

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