Judgment 37/2005 **Westbury Property Fund Limited (ex parte) – Royal Court (Civil Action File 925) – 4 July, 2005**

Companies (Guernsey) Law, 1994 s.73(2) – application for declaration that special resolution be deemed to have been delivered to HM Greffier within the statutory period.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 4th day of July, 2005 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of an application by THE WESTBURY PROPERTY FUND LIMITED (Applicant)

WHEREAS on 28th day of June and 1st day of July 2005 the Lieutenant Bailiff considered an application by the Applicant dated 20th day of June 2005 seeking declaratory relief and heard thereon Advocates J.P. Greenfield and K.M. Le Cras, Counsel for the Applicant, and H.M. Procureur as Amicus Curiae the Lieutenant Bailiff this day gave judgment in the terms attached hereto and GRANTED the Application and ORDERED that a declaration be made in the following terms:-

"That the Special Resolution dated 17 December 2004 is deemed to have been received by H.M. Greffier in accordance with the requirements of section 73(2) of the Companies (Guernsey) Law 1994, as amended".

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

APPROVED TEXT

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF AN APPLICATION BY WESTBURY PROPERTY FUND LTD.

Westbury Property Fund Limited

Applicant

Judgment

1. On the 17th December, 2004, at an Extraordinary General Meeting of the Westbury Property Fund Ltd ('the Company') held at Admiral Park, Guernsey the following Special Resolutions, in summary, were passed:

(i) To convert and re-designate its authorised but unissued 10p. Income Shares into Ordinary 10p. shares

(ii) To convert and re-designate all authorised but unissued 10p. Capital Shares as 10p. Ordinary shares

(iii) To convert all issued 10p. income and 10p. Capital Shares into redeemable preference shares.

(iv) To increase the Authorised share Capital from £15 million to £22,500,001 as stated in Special Resolution 2 (f).

(v) To adopt revised Articles of Association in substitution for the existing ones

There was also a provision authorising the Directors of the Company to do all necessary acts for giving effect to Resolutions (i) to (iii).

2. Section 73(2)(b) of the Companies Law 1994 provides that a copy of every special resolution of a company (other than under paragraph (a)) shall be del- ivered to H.M.Greffier within fifteen days, with the sanctions for not doing so specified in subsection (3). The Company has now applied to this Court for a declaration that the Special Resolutions concerned shall be deemed to have been received by H.M.Greffier in accordance with the relevant statutory provisions.

3. According to the Affidavit of Serena Tremlett, the Business Manager of Mourant (Guernsey) Ltd, which acts as secretary to the Company and manages its business affairs, certified minutes of the meeting of 17th December, containing particulars of the Special Resolutions and the revised Articles, were transmitted to H.M.Greffier under cover of her letter of 20th December, 2004, by the normal method employed by Mourant, namely placing a sealed envelope with the postage rate marked thereon in the tray for outgoing post. It is then franked by Mourant's messenger and physically delivered to the Guernsey Post Office.

4. An Affidavit from Simone Simon, the Company's messenger confirms that she collected the post, franked it and delivered it to the Guernsey Post Office in the normal course of her duties on the 20th December, 2004. She does not, understandably, depone that she recalls that the letter in question, with its accompanying contents, was specifically delivered by her to the Post Office.

5. In most systems of law, and Guernsey is no exception, there is to be found in the interpretation legislation a provision that documents which are authorised or required to be served, given or sent by post shall be deemed to have been served in the ordinary course of post by properly addressing, prepaying and posting the letter in question.

6. Section 73(2) does not mention the act of posting, but requires the documents to be 'delivered'. The Procureur, in the course of his submissions, invited comparison with sub-section (4) of Section 116. Having regard to this, it is, in my view, a reasonable extension of the presumption in Section 11 of the Interpretation (Guernsey) Law 1948 to hold that if the requirements of that section are satisfied, the presumption may, in the discretion of the Court, apply so that there would be good delivery if there is credible evidence that the document was properly posted.

7. However, a difficulty presents itself in the instant case because of the provisions of Section 116(7) of the Companies Law, to which the Applicant quite properly drew the Court's attention in the supporting Affidavit. That sub-section states:

> "Notwithstanding the provisions of this section and of any other rule of law in relation to the service of documents, no document to be given or delivered to or served on the Greffier under or for the purposes of this law shall be deemed to have been given, delivered or served until it is received."

8. The terms of the sub-section are so specific, commencing as it does with the words

> "Notwithstanding the provisions of this section *and of any other rule of law in relation to the service of documents……*"

that I confess to a first impression that they formed an insurmountable obstacle in the path of the Applicant, especially in view of the words of Lord Simon L.C. in King-Emperor v. Benoari Lal Sarma [1945] 1 A.E.R at page 216:

> "Again and again this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."

9. According to paragraph 6 of the Affidavit of the non-executive Director of the Company and of Mourant, Mr. Stokes, the results if the Special Resolutions are null and void (let alone the possibility of the company being guilty of an offence, as to which H.M.Procureur specifically reserved the Crown's position) will indeed be severe, nay catastrophic. This will be so, especially if the further consequences adumbrated by Advocate Greenfield in his address on 28th June, which include de-listing on the L.S.E, ensue.

10. Am I therefore entitled to take these consequences into account in interpreting the provision in question? Mr. Greenfield submitted that the Court can, in view of the manifest injustice that will occur to shareholders (and others) who have acted in perfect good faith, and have concluded transactions in the newly designated shares, during the period since 20th December—in the genuine belief that the Special Resolutions were validly passed. In resolving this difficult question I am indebted to Her Majesty's Procureur for his invaluable assistance to the Court at the hearing on 1st July, for which purpose the Application was adjourned on 28th June.

11. As I indicated in my *ex temporé* Ruling on 28th June I felt some hesitation as regards the form of the Application, inasmuch as there is no specific provision in the Guernsey Rules enabling the Court to grant a declaration *simpliciter*, as opposed to a prayer seeking the relief at the conclusion of a cause tabled under Rule 9. H.M.Procureur has allayed those doubts by drawing to my attention a passage from the Commentary in the White Book in relation to Rule 40.20 of the new C.P.R's, which permits the Court to make binding declarations whether or not any other remedy is claimed.

12. Rule 40.20 is to the same effect as the former Order 15 Rule 16 of the Rules of the Supreme Court, the 1999 version of which is still followed in the Royal Court. Although claims for declarations alone are unusual it is perfectly clear that the High Court has a discretionary power to grant such relief if it regards this as a proper course, see the Commentary at 15/16/2 at pages 267 and 268 of the 1999 White Book. The power to exercise this discretion stems from the paramount duty of the Court to do the fullest justice to the plaintiff, or applicant, as the case may be.

13. This aspect of the English Court's jurisdiction is exemplified by the decision of Neuberger J. in Financial Services Authority v. Rourke [2001] 19th October in which the Financial Services Authority (the FSA) sought, *inter alia,* declaratory relief against the defendant who had been carrying on an unauthorised deposit business for some years. At page 6 of the judgment Neuberger J. said:

> "….Of course the Court has to be particularly careful before it grants a remedy which is discretionary and which can' [here I interpolate 'could'] 'have a wide-ranging effect, at a summary stage.

14. In the Jersey case of Victor Hanby Associates Ltd & Hanby v. Oliver [1990] JLR 337, the Court of Appeal said in relation to a discovery application that unless there was something in the language of the relevant rule which compelled a contrary conclusion, it was open to the Royal Court to develop its own practice as to the circumstances in which it allowed a party to challenge his opponent's list of documents. Again in News International PLC & Others v. Michael Clinger & Others [1996] 10th May, in the following passage at page 3 E —F, Carey D.B., as he then was, said:

> "…...I find nothing incompatible with adopting English principles of equity and affording relief to plaintiffs who claim their money has got into a bank account in another person's name as a result of `fraud or other wrongdoing'....."

15. In the present case, as the Procureur has said, the only other possible party to the Application is the Registrar of Companies, that is Her Majesty's Greffier. There is no suggestion that there is a risk of prejudice to persons not before the Court. Accordingly, having regard to the authorities I have just mentioned, without wishing to be taken as indicating that the Court would necessarily entertain this unusual type of Application in other cases, I am prepared to accept that the English remedy is capable of being adopted in Guernsey in an appropriate case.

16. The other aspect of this Application requiring the Court's consideration is whether, despite the wording of Sub-section (7), to adopt the phraseology of Neuberger J. in the FSA case, at page 5, that

> "…..' [The Court]'…'[can be] 'satisfied, nonetheless on' [its] 'own view that it is appropriate to make the order." [My interpolation].

17. H.M. Procureur traced the history of the companies' legislation in Guernsey, from the original Law in 1883, through the 1908 Law and down to the present statute. He submitted that it was a reasonable inference that the 1883 Guernsey law was intended by the then legislature to follow the English Companies Act 1862. Section 53 matches the Guernsey Section 73(2), and similarly provided that a copy of any Special Resolution passed should be printed and forwarded to the counterpart of the Greffier, namely the Registrar of Joint Stock Companies, and recorded by him. Here it has to be entered in the Register of Companies within twenty-one days of being passed.

18. However instead of that which Mr. Greenfield described as the Draconian provisions of sub-section (3), Section 53 of the 1862 Act provides that if default is made after the expiry of fifteen days from the confirmation of the Special Resolution then the Company, and its Directors and Managers who knowingly authorise or permit the default, would incur a £2 penalty for each day of the default. Mr.Greenfield suggested that a much fairer provision

would be a penalty similar to Section 53, or that there should be a late filing fee—even if stringent.

19. The Procureur is on record as stating that if ever there was a case where a declaration on the lines of that sought in the instant case would be considered appropriate, it is this one. In many cases, of course, the default could be cured by the simple expedient of passing fresh resolutions. But here, the shareholders were in blissful ignorance of the reality of the situation until the company received an advice of supposed inaccuracies in the Annual Return from the Greffe on or about 29th April, followed by Mr. Dorey's letter of 2nd June. Accordingly, as I indicated in paragraph [9] hereof the transactions that have been carried out *bona fide*, as described in paragraph 6 of Mr. Stokes' Affidavit, cannot be unravelled.

20. Given the massive support for this course by H.M.Procureur, coupled with Mr. Stokes' expressed belief that Westbury has acted in accordance with shareholders' wishes, it seems to me that it is a proper course for the Court to hold, as Neuberger J. did in the FSA case, that the power to make declarations is unfettered, and that the Court can so act if the facts have been established to the Court's satisfaction.

21. It is impossible to speculate as to what might have happened to the letter of 20th December, 2004, and the minutes of the shareholders' meetings enclosed from the moment the package was placed in the Company's outward tray. The considerable expense and anxiety occasioned by the lapse which occurred here behoves those who are charged with the duties of ensuring the safe transmission of a company's records, especially ones of the importance which has been attached to those in the instant case, to leave no stone unturned in the process of ensuring that they are duly received by the Registrar of Companies and entered in his records. By not diligently following the transmission through the officer concerned was obviously asking for trouble.

22. Nevertheless, as H.M.Procureur says, there is credible evidence on the record on which the Court is entitled to conclude that the letter of 20th December and its enclosures were received by H.M.Greffier, and there is nothing to set against Miss Simon's testimony that she collected the contents of the outward box and delivered them to the Post Office on that day. Neuberger J. (at page 8) makes it crystal clear that the Court should not grant declarations merely because the right, facts or principles, as the case may be, have been established and one party asks for a declaration. It must be satisfied that, in all the circumstances it is appropriate to make the order in question.

23. After considering the submissions of H.M. Procureur and of very experienced Counsel, together with the material adduced, I find myself satisfied that the factual basis for the declaration sought has been made out. The considerations which move me to acceding to the Application overwhelmingly transcend the mischief that will occur if it is rejected. For these reasons the declaration sought in the Application of 20th June 2005, down as far as the words 'section 73(2)' and 'of the Companies (Guernsey) Law, 1994' is granted. The remainder is, in my view surplusage.

24. The declaration will therefore go in the following terms:

> "That the Special Resolution dated 17 December 2004 is deemed to have been received by H.M. Greffier in accordance with the requirements of section 73(2) of the Companies (Guernsey) Law 1994."

25. Order accordingly.

A.R.W.Hancox.
Lieutenant Bailiff
4th July 2005