Judgment 38/2006 **De Carteret v Mann and Mann – Royal Court (Civil Action File 953) – 13th July 2006**

Sark – lease of real property – appeal from the Court of the Sénéschal – proposed surrender of sub lease – conduct of hearing before the Sénéschal – counsel unable properly to present the Appellant's arguments and submissions – pleadings wholly inadequate – duty on counsel appearing before a lay court - whether Court of the Sénéschal has power to grant relief against forfeiture for breach of a covenant – parties should seriously consider mediation (See also Judgment 13/2006)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 13th day of July, 2006 before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

Between:-

JACQUELINE GERMAINE DE CARTERET

Appellant

- v -

MICHAEL JAMES MANN

&

JULIE ALISON MANN

Respondents

WHEREAS on the 5th and 6th day of June, 2006 the Deputy Bailiff considered an appeal from the Court of the Sénéschal of Sark and heard thereon Advocates N.J. Barnes and S.H. Davies (as agent for Advocate S. Gomoll), Counsel for the Appellant and Respondents respectively, the Bailiff this day handed down judgment in the terms attached hereto and:-

1) ALLOWED the appeal

2) REMITTED the matter back to the Court of the Sénéschal

3) RESERVED the question of costs.

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

Final Judgment
13 July 2006

IN THE ROYAL COURT OF GUERNSEY
(Ordinary Division)

On Appeal from the Court of the Seneschal of Sark

Between **Jacqueline Germaine DE CARTERET** **Appellant**

-v-

Michael James MANN & Julie Alison MANN **Respondents**

Judgment handed down: 13 July 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Counsel for the Appellant: Advocate N J Barnes
Counsel for the Respondents: Advocate S Davies (as agent for Advocate S Gomoll)

Case referred to:

1 De Carteret -v- Surcouf (24 September 1999)
2 Leopard -v- Kay-Mouat 1993 16GLJ 2
3 Bodman -v- Gorselands Limited Royal Court (1991)
4 Singleton -v- Le Noury, Guernsey Court of Appeal 5 June 1990
5 Morton -v- Paint 1996 21GLJ 61
6 C -v- DPP [1996] 1 AC 1 HL (E)
7 Vaudin -v- Hamon Orders in Council XXIV p154

Background

1 In this appeal, Advocate Barnes appears for the Appellant, Mrs de Carteret, as he did in the Court of the Seneschal. Advocate Davies appears for the Respondents who were represented by Advocate Gomoll in the lower court. The proceedings before the Seneschal were not recorded so we did not have the benefit of a transcript but we did have the Seneschal's detailed notes of the hearing, as well as his judgment.

2 This is the second occasion on which Mrs De Carteret has appealed to the Royal Court against a decision of the Court of the Seneschal involving the property known as Clos de la Tour de la Cloche in Sark. The previous appeal was in the matter of *De Carteret -v- Surcouf (24 September 1999)*. The judgment in that case records that the Appellant is the widow of Philip Cecil De Carteret who died in 1994. They had married in 1950. The property was granted to her late husband's family in 1719 by the then Seigneur not as a tenement but as a freehold. In that appeal Sir de Vic Carey, Bailiff, said the property was held on terms very similar to those imposed on tenement holders, including *"the obligation to keep a man with a musket in residence for the defence of the Island".* For reasons recorded in the judgment, the late Mr Philip De Carteret was unable to vest the property in the joint names of himself and the Appellant,

as he would have liked. Instead, he granted a long lease to the Appellant, the validity of which was upheld by Bailiff Carey. Mr Philip De Carteret had no issue so, on his death, the property vested in his second cousin, Mr Surcouf, who still owns the freehold. I am told that following that appeal, the Appellant and Mr Surcouf agreed to the grant of a new lease in the Appellant's favour of half the property in return for which she surrendered the lease her late husband had granted. That new lease was dated the 5 December 2001. I have not seen it as it was not produced either in the Court of the Seneschal or on this appeal.

3 On 12 April 2002, the Appellant assigned the 5 December 2001 lease to the Respondents with effect from that day. The consideration for the assignment was the payment of £250,000 plus ten annual payments of £24,000, the first of which was due on the date of the assignment and subsequent payments on the anniversary thereof.

4 On the same day, the Respondents granted the Appellant a sub-lease of one of the dwellings on the property, known as "House Number 1", for a term expiring on 28 September 2084, at a rent of £1 per annum and subject to other covenants on the Appellant's part as set out in the sub lease.

5 There were options for surrendering the sub-lease, exercisable by the Appellant during her lifetime and by the Respondents (or their successors) after her death. Clause 4(b) provided that :-

> *"if the Sub-Lessee shall notify the Sub-Lessor in writing that she desires to surrender the Sub-Lease then:*
>
> - *on the day falling three calendar months after receipt of such notice by the Sub-Lessor (the "Completion Date") the Sub-Lessor and the Sub-Lessee shall execute a surrender document giving effect to the surrender of this Sub-Lease in such reasonable form as is required by the Sub-Lessor;*
> - *on the Completion Date the Sub-Lessee shall give vacant possession of the demised premises to the Sub-Lessor and shall remove all her personal belongings from the demised premises; and*
> - *if any personal belongings of the Sub-Lessee are left in the demised premises on the Completion Date such personal belongings shall become the absolute property of the Sub-Lessor and the Sub-Lessee shall be entitled to dispose of and deal with such personal belongings as they see fit;*
> - *in consideration of the surrender of the Sub-Lease and the giving of vacant possession of the demised premises to the Sub-Lessor the Sub-Lessor shall on the Completion Day pay to the Sub-Lessee a lump sum, such lump sum to be a sum of not more than £25 per week multiplied by the number of weeks between the Completion Date and the date of expiry of this Sub-Lease;*
> - *if the Sub-Lessor fails to pay the lump sum on the Completion Date then the Sub-Lessee shall (notwithstanding Clause 2(k)) not be required to surrender the Sub-Lease and shall be free to assign the Sub-Lease to any other person;*
> - *this clause shall not require the Sub-Lessor to accept a surrender of part only (as opposed to the whole) of the demised premises;*

6 Less than two months after the sub lease was granted, the Appellant wrote to the Respondents exercising her option. On 3 June she wrote:-

"As for my own house, as I did tell you on the Sunday (19th May) in Sark I wish to dispose of my house ***now****. I am finished with it, do not use it and wish for the agreement to be settled, I have no use for it as it stands and the capping on the roof missing, it now actually rains on my bed. I understand you want some time, to be clear of the sub lease before going into further expenditure. I on another hand, not only have no use for it but it interferes with my obtaining a building permission for storage. (I have nothing left): it is a lever.*

I see 2 alternatives:-

A We set the price ***now*** *- and you pay and take possession when you are ready for it (and let me know in good time) to empty it – with 4% each year (or indexed).*

B I would consider relieving you of your bond over it, providing you agree upon my retaining it for a substantial time at a very low rent, then I could put money into it and have it restored broadly enough to offer it for sale for the duration and at a price by the week to make it more attractive: it is in summer that I can do it: both the repairs and the sale.

Whatever must be done, must be done quickly. I am still expecting the date to be fixed for my operation".

7 The Respondents replied on 18 June 2002:

"*Your letter of 3rd June clearly states that you now wish to dispose of your house immediately and so surrender the Sub-Lease back to us. We are sorry to hear this so soon but hereby confirm that we will be pleased to accept your surrender of the Sub-Lease, as per the terms of your Sub-Lease dated 12th April 2002.*

Thank you for your kind offer to set the price now but for us to take possession later. As you are clearly have no further use for your house and are in a hurry to dispose of it, we will not delay you in any way and will stand by our commitment to pay you the price as per the amount in terms that we have already agreed and noted in your Sub-Lease.

Please have your Advocate draw up the necessary surrender document in order that the surrender with vacant possession may be completed and payment made as per the terms of your Sub-Lease. We understand that the Sub-Lease terms set a completion date of 15th September 2002 due to us having received your written notification on 15th June 2002".

8 The next letter is from the Respondents dated 13 September 2002:-

"It is very nice to see you back on Sark and whilst we have such beautiful weather.

We enclose a copy of the Surrender Document that our Advocate had raised in case it should be needed. As you can see, the surrender document is dated for surrender of your lease on 15th September 2002, which is the date according to your initial notification to us and as per the terms of your lease.

According to our calculations, on 15th September 2002 there will be a remaining term of 82 years and two weeks on your lease. This term equates to 4266 weeks which when multiplied by £25 reaches a total sum of

£106,650.00p, being the amount that we should pay to you upon surrender of your lease.

As you know, the terms of the surrender are that you give vacant possession, if this is going to cause a problem for you we will be pleased to store your personal possessions from number 1, along with your other personal possessions that are currently being stored in number 5. We will be happy to store them under the same terms as those already being stored from the Assignment of Lease and for the same period of time, which is approximately a further 19 months.

We are sorry but as explained, we do not feel that we are able to offer you a further lease on part of number 1 for storage for your furniture as this would greatly restrict us in both the renovation and re-leasing of the property.

We hope that the above is agreeable.

Kind regards,

Mick & Julie Mann"

9 What happened next is explained in the following way in paragraph 5 of the Appellant's case:-

> *"5. At the hearing on 24th August 2005 the Appellant gave evidence to the Court of the Seneschal that at a meeting with the Respondents at Clos de la Tour de la Cloche shortly before the date, 15th September 2002, when she was due to give vacant possession of the property the Respondents, who indicated that they felt that she was unlikely to be able to achieve vacant possession by the due date, indicated that they were in no hurry and that she could take more time if she wanted to. In her evidence the Appellant explained that she felt she could have left by the due date but given that they were in no hurry she would take more time and would not leave until 15th September 2003 and that the Respondents had agreed to this. The Respondents did not give evidence and the Appellant's evidence was not challenged".*

10 The Respondents' version of what happened is set out in the letter from them to Advocate Barnes (acting for the Appellant) dated 15 January 2004. A copy of the letter was produced to the Seneschal, although its contents were not agreed and hence not formally put in evidence, as I will explain below. The Respondents wrote:-

> *"Mrs de Carteret duly arrived on Sark before 15th September 2002, she had no surrender document so on 13th September 2002 we passed to her, by hand, an envelope which contained a letter from us dated **13th September 2002** (the letter that you now refer to) plus two copies of the surrender document that our Advocate had drawn up. Copy of our letter dated 13th September 2002 and our surrender document enclosed.*
>
> *Expecting to sign the surrender document and pay Mrs DeCarteret the sum of £106,650.00p we visited her on 15th September 2002 at which time she informed us that she was unable to remove all of her furniture and possessions from her house and so had changed her mind and would not be surrendering her sub-lease to us.*

> *Since 15th September 2002 we have received no further written notification from Mrs DeCarteret stating that she wishes to surrender her property as per the terms of her lease dated 12th April 2002.*
>
> *Since 15th September 2002 Mrs DeCarteret has occupied her property on many occasions and at present Mrs DeCarterets property contains some of her personal possessions, we enclose photographs of both the inside and outside of her property, taken from outside during December 2003.*
>
> *In answer to your question of when Mrs DeCarteret can expect to receive payment of £106,560.00p from us. Mrs DeCarteret informed us on 15th September 2002 that she would not be surrendering her sub-lease on that day and as previously agreed in writing. Nor did she on that day sign and return to us the surrender document, or discuss with us an alternative surrender date. We therefore consider her to have failed to complete the surrender of her sub-lease on 15th September 2002 and so will not be paying her the sum of £106,560.00p".*

11 It is accepted by the Appellant, and was accepted at the hearing before the Seneschal, that the surrender was not completed in September 2002. In the Seneschal's note of the proceedings, he records that:-

> *"The Seneschal then raised some issues with the witness (the Appellant) as to why the surrender had not been completed in September 2002 as arranged. The witness replied that she had not had time to sort out all her possessions and felt it best to delay the surrender until the following year when she could return to Sark and sort her possessions out, the Defendants had agreed to the delay".*

12 The Respondents do not accept that they agreed to the delay. They maintain that the position is as set out in a letter from them to the Appellant dated 8 April 2005:-

> *"On the morning of 15 September 2002 you notified us verbally in person that you were unable to give vacant possession of the premises and therefore had changed your mind and would not be surrendering the Sub-Lease".*

13 That letter was produced in the Sark Court, although the contents of the letter were not agreed, as I explain below. The Seneschal's note records that the Appellant could not really remember the details but it would have probably been on the day she left when she notified the Respondents.

14 Advocate Davies argues that note indicates that the Appellant gave evidence that she told the Respondents she had changed her mind and would not be surrendering the sub lease the day before leaving Sark in September 2003. He therefore argues there was conflicting evidence from the Appellant and that the Seneschal was justified in reaching the conclusion recorded by him at page 10 of the Seneschal's note of the proceedings (page 14 of the Appellant's bundle):-

> *"The surrender was again not completed, if there ever was a formal offer of surrender, by the [Appellant] and no papers have been presented to the Court showing a surrender offer from the [Appellant] in 2003 albeit that in the [Respondents'] letter of 15 January 2004, it supports the view that only the 2002 offer of surrender was ever relied upon".*

15 Prior to the hearing of the Appeal, Advocate Barnes argued there had been a valid surrender in 2003, but he did not pursue that argument, probably because the

parties did not execute a written surrender as envisaged in Clause 4(b) of the sub lease.

16 The correspondence indicates (and this may or may not have been formally in evidence) that the Appellant continued to remove her possessions until early in 2004. It is not clear whether these further items were removed from "House Number 1" or other dwellings on the property in which it had been agreed she could store her possessions. However nothing turns on that as the next significant letter was from Advocate Barnes dated 27 January 2004. The first two paragraphs deal with arrangements for shipping her effects to Guernsey. The final paragraph records:-

> *"In respect of the surrender, without prejudice to Mrs De Carteret's claim that she has already given the appropriate notice, I am instructed that she wishes to surrender the lease with effect from receipt by you of this letter so that the surrender should take place in three months time. I will make sure that you have the signed surrender document by that date".*

17 The Respondents wrote on 19 February 2004:-

> *"We confirm that we accept Mrs De Carteret's notification of surrender, which dictates a completion date of 28th April 2004. As the lease expires on 28th September 2084, we calculate that on 28th April 2004 there will be a period of 4182 weeks remaining on Mrs De Carteret's Sub-Lease".*

18 After expressing their concerns about the dilapidated condition of the property and what they described as its "*evident deterioration since the start of the Sub-Lease on 12th April 2002"*, the letter concludes:

> *"In view of the above circumstances, we consider that the sum of £15.00 per week (making a lump sum of £62,730.00 p) to be a fair and reasonable amount payable to Mrs De Carteret on the Completion Date of her surrender".*

19 This was three-fifths of the amount due to be paid under the terms of the sub lease.

20 On 24 April 2004, the Respondents wrote to Advocate Barnes enclosing a surrender document signed by them and a cheque payable to Randell and Loveridge for £62,730 in full and final settlement of:-

> " *(1) our liability to pay an amount of money on the surrender of the sub lease and,*
> *(2) her liability to us as a result of various breaches of covenant under the sub lease and her failure to surrender the sub lease in 2002.*
>
> *Our payment of £62,730.00 is being made on that basis that you hold it to our order until you confirm to us in writing that:*
>
> *(i) Mrs de Carteret has signed and completed the surrender and*
> *(ii) Our offer set out above has been accepted".*

21 The next letter shown to the court was from Advocate Barnes to the Respondents dated 1 June 2004. It reads:-

> *"I write further to my letter to you of 25th May 2004. I now have Mrs De Carteret's instructions which are to rely on the terms of the sub lease of 12th*

> *April 2002 and to require you to accept a surrender. I am therefore enclosing two copies of the surrender signed by my client.*
>
> *I look forward to receiving her copy of the completed document together with your cheque for £104,550".*

22 Also in the bundle is a copy of a surrender document signed by the Appellant and witnessed, I believe, by Advocate Barnes.

23 The Respondents did not accept the offer because they were holding out for a reduced payment.

24 It was the third offer of surrender and the only offer which, at the hearing of the Appeal, Advocate Barnes maintained had been accepted and hence, he argued, the lease had been surrendered as of April 2004.

25 Thereafter, unhurried correspondence continued between Advocate Barnes and the Respondents in which he continued to press for payment of £104,550 and threatened to issue proceedings for the recovery of that amount.

26 On 8 April 2005, the Respondents wrote to him listing breaches of a number of covenants in the sub lease and concluding:-

> *"Due to the above breaches we hereby notify you that we immediately exercise our right to terminate your sub lease dated 12th April 2002 and re-enter upon and repossess the demised premises, as mutually covenanted and agreed to under Section 4(a) of your sub lease dated 12th April 2002".*

27 By letter dated 11 April the Respondents notified the Appellant that they had re-entered the property, retaken possession and made it secure.

28 A letter from Sark Building Company Limited dated 24 June 2005 stated that it was impractical to restore the property due to its condition and it would have to be demolished and rebuilt. The letter was in the court bundle but it does not seem to have been formally produced in evidence as the Respondents called no witnesses and Advocate Barnes said he did not agree the contents of the documents.

The Proceedings

29 The Appellant commenced these proceedings in the Court of the Seneschal claiming the sum of £104,550 being the money allegedly due from the Respondents for failing to complete the surrender of the sub lease in accordance with the terms of the letter dated 1 June 2004. The case is pleaded in only four paragraphs but attached to the cause was a copy of the sub lease of 12 April 2002, Advocate Barnes' letter of 1 June 2004 and the surrender document which gave some further information but such brevity in the pleadings was wholly inadequate to set out the material facts of the case and to identify satisfactorily for the benefit of the Seneschal the issues with which he would be concerned in deciding the case. No written defence was filed and I am told that there were no interlocutory or pre-trial hearings before the Seneschal.

30 The matter was set down for hearing on 24 August.

31 By e-mail dated 17 August, Advocate Gomoll wrote to Advocate Barnes informing him that he was proposing to lodge an application for security of costs the following afternoon i.e. less than a week before the start of the hearing. He

also proposed a suggestion that the Court consider the validity of the Respondents' termination of the sub lease prior to determining the Appellant's claim.

32 The Application lodged by the Respondents sought three Orders:

> *"1. That on or before 23 August 2005 the Plaintiff who is resident outside the Bailiwick of Guernsey shall deposit with the Greffe [Sark] the sum of £10,000 or such other sum as the Court may determine by way of security for costs; and register a surrender and renunciation between Peter Francis Surcouf and [the Appellant] dated 5 December 2001.*
>
> *2. That prior to considering the Plaintiff's action for the claimed sum of £104,550.00 allegedly payable under Clause 4(b) of the sub lease made on 12 April 2002 (the "Sub Lease") the Court shall consider and determine the validity of the termination of the Sub Lease by the Defendants for the non payment of Rent and breach of various covenants, (as set out in more detail in the letter of the Defendants to the Plaintiff's Advocate dated 8 April 2005) by re-entering the Demised Premises pursuant to Clause 4 (a) of the Sub Lease on or about the 11 April 2005 (see letter of Defendants to the Plaintiff's Advocate dated 11 April 2005)"; and*
>
> *3. Until the Plaintiff shall have deposited the said security for costs and/or until the determination of the validity of the termination of the Sub Lease by the Defendants on or about the 11 April 2005 the Plaintiff's action against the Defendants shall be stayed; and the Defendants claim the costs hereof."*

33 The second paragraph amounted to a counter-claim. The content of the paragraph was wholly inadequate to set out the full particulars relied upon by the Respondents as to why they claimed to be entitled to terminate the sub lease.

34 Not surprisingly, in my view, the Seneschal was led into error. As I have sought to show by setting out the factual history in some detail, this matter had a lengthy and complex history. In order to do justice to the case, it was essential that the Seneschal should investigate the whole history and deal with matters in their chronological sequence.

35 Advocate Davies, who otherwise argued the Respondents' case with commendable thoroughness and tenacity, was unable to provide any explanation as to why it should be considered appropriate to consider and determine the validity of the termination of the sub lease prior to considering the Appellant's claim that the sub lease had earlier been surrendered.

The Hearing Before The Seneschal

36 The case came before the Seneschal for hearing on 24 August 2005. His notes record that prior to the commencement of the hearing:

> *"The Seneschal made an opening statement to the effect that having read the Plaintiff's action and the application to the court by the Defendants he would hear the application of the Defendants prior to making any decision as to the hearing of the action brought by the Plaintiff".*

37 Advocate Barnes informed me that there was no opportunity for him to address the Seneschal as to the sequence in which the actions should be heard. So, the Seneschal must have based his decision solely upon a reading of the Appellant's

summons and the Respondents' application neither of which, as I have said, properly particularised the respective cases. The Seneschal had little idea of the issues he would have to determine and he cannot be criticised for incorrectly deciding to deal with the Respondents' application first. Unfortunately, the consequence of that decision is that the Appellant did not have a fair hearing.

38 Advocate Gomoll opened on behalf of the Respondents, in support of their application. He called no witnesses but produced documents to the Court which the Seneschal records were agreed by the Plaintiff's Advocate. Advocate Barnes informs me that the documents were agreed in the sense that they were true copies and they had been produced or sent on the dates recorded in each document but he did not agree that factual statements made in any of the correspondence were true and correct. That does not appear to have been made clear to the Seneschal. The Seneschal's notes record an argument as to the admissibility of one letter which he held to be inadmissible, but he does not deal with the admissibility, or inadmissibility of the contents of the other documents.

39 In presenting his client's case, Advocate Barnes started with an opening speech. He informed me that he tried to argue his client had surrendered the sub lease but he was not permitted to develop those submissions, although when the Appellant gave her evidence (the only person to give live evidence), she was able to give all her evidence including in respect of the surrender.

40 The Seneschal's notes show that Advocate Gomoll did not cross-examine the Appellant.

41 Both counsel then made their closing speeches. Advocate Barnes told me that he was not able to develop and present properly his arguments and submissions. The Seneschal's notes show that there were interjections from Advocate Gomoll objecting to Advocate Barnes raising issues in relation to the surrenders. I am satisfied that Advocate Barnes is correct in submitting that he was not allowed properly to present his client's arguments and submissions in relation to the surrenders.

My Decision

42 In the Seneschal's decision, he purported to reach conclusions that the sub lease had not been surrendered. His conclusions may be correct, or at the very least, not so incorrect that they could normally be set aside on appeal if there had been proper argument in the lower court. However, as the Appellant's case was not fully and properly argued, the Seneschal's conclusions cannot be considered satisfactory.

43 I have every sympathy for the Seneschal who was relying upon counsel to assist him and it is only with great reluctance that I have come to the conclusion that this matter must be sent back to the Sark Court for further hearing. Sir de Vic Carey has previously commented on the very special responsibility of counsel when appearing in a lay court such as the Court of Sark (or in the Court of Alderney, as in *Leopard –v- Kay-Mouat* 1993 16GLJ 2). In *De Carteret –v- Surcouf* he said:

> *"The presentation of the parties' cases fairly and clearly should be far easier to achieve where both parties are represented.*
>
> *The Seneschal is not a lawyer. If serious litigation such as this is to be conducted before him, it is incumbent on counsel to work together to identify*

the issues which he is being asked to decide and to do all they can to prepare and present the case in a way that he can come to a reasonable decision".

44 It became apparent to me when hearing this appeal that there are a number of respects in which the counsel appearing before the Seneschal failed to discharge the very special responsibility they owed to his Court.

45 Firstly, as I have said, the pleadings from both parties were wholly inadequate to set out the material facts of the long and involved factual history of this matter. No defences were filed and there is no indication that counsel worked together to identify the issues the Seneschal had to resolve. Consequently, when presented with the Respondents' application that he decide first whether the sub lease had been validly terminated by them in April 2005, he did not have sufficient knowledge to appreciate that he needed to decide first whether the sub lease had previously been surrendered by agreement. Consequently, he would not have appreciated the importance of deciding the issues in chronological order. It does appear that when he came to give his reasoned decision, the Seneschal realised that he must first decide whether the sub lease had been surrendered and he purported to do so. The problem was that Advocate Barnes had been denied the opportunity to make full and proper submissions on the issues relevant to the surrender of the lease.

46 Secondly, what I have been told on Appeal suggests that the Seneschal's attention was not properly drawn to the evidential status of the contents of the documents that had been produced to him but not formally proved in evidence.

47 My task has not been helped by the absence of a transcript of the Sark proceedings. The Seneschal's notes do appear to be very detailed, but they are not as comprehensive, and may not be as accurate, as a verbatim transcript.

Relief Against Forfeiture

48 I heard argument from counsel as to whether the Sark Court has the power to grant relief against forfeiture for breach of a covenant. Advocate Barnes argued for relief and Advocate Davies argued the court does not have the power to grant relief. The Seneschal's decision suggests that he considers he does have a discretion because he said that neither the failure to pay rent, nor the failure to pay insurance premiums, nor the holding of an unlicensed firearm would on their own have been sufficient to grant an order for possession. He said that in each case the Court might have chosen to exercise its discretion. He does not explain the nature of the discretion nor the legal basis for exercising any discretion.

49 Counsel could not help me with any previous decisions or authorities from Sark. Nor could they draw my attention to any Guernsey case in which, under Guernsey law, the discretion to grant relief against forfeiture had been recognised. I was referred to a passage at page 22 D of *De Carteret -v- Surcouf* in which Bailiff Carey stated (obiter):

"If one takes a long lease [in] Guernsey one is faced with the difficulty of raising money on the leasehold interest created because there is no relief from forfeiture for breach of covenant".

50 I was also referred to the Royal Court case of *Bodman -v- Gorselands Limited (1991)*. No reasoned judgment is available but the Royal Court appears to have decided that where there has been non-payment of rent, the landlord will be able to retake possession.

51 In 1946, Guernsey enacted the Order in Council entitled the Law Giving the Court Increased Power To Stay Of Execution In Actions For Eviction which gives some protection to tenants but does not give relief from forfeiture. The Law applies in Guernsey but not in Sark.

52 The Seneschal's decision suggests that the customary law in Sark may have evolved differently from the customary law in Guernsey. Long leases granted at a premium for a substantial number of years have become a very important feature of property ownership in Sark but are much less common in Guernsey. So it is possible the customary law may have evolved differently in each Island.

53 It is well accepted that the coûtume does develop over the centuries. The maxim "*coûtume fait loi et la meilleure loi est la coûtume du pays*" refers to such development. Such development cannot change the fundamental and substantive common law (see *Singleton –v- Le Noury* Guernsey Court of Appeal 5 June 1990, page 18). I do not consider that the grant of relief against forfeiture is as fundamental as the principle of "*nul servitude sans titre"* which concerned the Court of Appeal in that case.

54 It may be that the coûtume in Sark has already developed to the point where it has become established that a tenant can apply to the court for relief against forfeiture, even though such relief would not be available in Guernsey.

55 If it has not already developed to that extent, the Seneschal would have to consider whether he has the power to develop the law applying the principles set out in *Morton –v- Paint* 1996 21GLJ 61 and, in particular, the "five aids to navigation" identified by Lord Lowry in *C v DPP* [1996] 1 AC 1 HL (E) and cited with approval by Southwell JA in *Morton –v- Paint* at page 54G – 55B:

> *"1 If the solution is doubtful, the judges should be aware of imposing their own remedy.*
> *2 Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched.*
> *3 Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems.*
> *4 Fundamental legal doctrines should not be lightly set aside.*
> *5 Judges should not make a change unless they can achieve finality and certainty".*

56 In England, relief against forfeiture is largely considered to be an equitable remedy and is now, I am told, statutory. Whilst it is proper to look at related systems of law (*Vaudin v Hamon* Orders in Council XXIV p. 154, at p. 165), caution must prevail when looking at English law in relation to matters of land law and to principles that have derived from, or substantially from, equity. I was not referred to any commentators on Norman customary law nor to any developments in French law which may be more persuasive than English law in this context.

57 If a landlord were to seek to determine a long lease granted at a very substantial premium in circumstances where the tenant has committed a trivial breach of covenant, it might be grossly unfair if the lease were determined at great financial loss to the tenant. In such cases justice might dictate that the tenant be granted relief against forfeiture but it is for the Sark Court to consider these matters in a Sark context at first instance. I do not wish to express any view that might influence that decision one way or another.

58 I said at the conclusion of the submissions made by counsel that I thought this was a case that should have gone to ADR rather than to a full court hearing. Prior to the hearing in the Sark Court, both parties were in agreement that they wished the sub lease to come to an end. The only issue was how much compensation the Respondents should pay to the Appellant. It is regrettable that one year later matters are still not resolved and yet substantial legal fees have been incurred.

59 I would again urge the parties to consider very seriously whether mediation would be the better way of resolving this case before further fees are incurred in progressing further in the Court of the Seneschal.

60 I therefore allow the appeal and send the matter back to the Court of the Seneschal for rehearing. I will hear any application as to costs but my present inclination is that in the circumstances of this case there should be no order for costs.

