Judgment 39/2007 **Les Banques Holdings Limited v Good and Good – Royal Court (Civil Action File 1130) – 18 October 2007**

Action relating to use of a residential car park – exceptions de fonds pleaded by the Defendants – application by Plaintiff to correct any alleged defects in the cause – the test applicable to exceptions de fonds – the function of particulars of pleadings – amendment allowed and exceptions dismissed

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil 1130

The 18th day of October, 2007 before Richard John Collas Esquire, Deputy Bailiff; sitting alone.

Between

LES BANQUES HOLDINGS LIMITED

(Plaintiff)

-v-

ALBERT FERDINAND GOOD

(First Defendant)

and

CATHERINE EILA GOOD

(Second Defendant)

ON the application of the Plaintiff, dated 25th September, 2007, for Leave to Amend the Cause, and upon the hearing of the Defendants' Exceptions de Fond, filed on the 31st August, 2007;

THE COURT, on the 10th October, 2007, having heard Advocate C.J. Hay, Counsel for the Plaintiff and Advocate S.R. Geall, Counsel for the Defendants thereon, GRANTED LEAVE to the Plaintiff to amend the Cause and DISMISSED the Defendants' Exceptions de Fond and RESERVED the reasons for the said decision;

THE COURT, this day, handed down judgment in the terms attached hereto and RESERVED the issue of costs.

M A TOSTEVIN
Her Majesty's Deputy Greffier

Approved Text
18 October 2007

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between **LES BANQUES HOLDINGS LIMITED** **Plaintiff**

-v-

ALBERT FERDINAND GOOD
and
CATHERINE EILA GOOD **Defendants**

JUDGMENT RE APPLICATION TO AMEND CAUSE AND EXCEPTION DE FONDS

Date of hearing: 10 October 2007

Judgment handed down: 18 October 2007

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Plaintiff: Advocate C J Hay
Advocate for Defendants: Advocate S R Geall

Cases, texts & statutes referred to:

1. Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited (Court of Appeal, 13 January 1982).

2. International Hellenic Corporation Limited and others v Silver Falcon Enterprises Limited (Guernsey Court of Appeal, 20 October 1994).

3. In re Clameur de Haro no.1 (Guernsey Court of Appeal 16 April 1985).

Introduction

1. This Judgment contains my reasons for allowing the Plaintiff's application to amend the Cause and for dismissing the Defendants' *Exception de Fonds:* a decision which I announced in Court on 10 October 2007 at the conclusion of a hearing that afternoon.

The Cause

2. The Plaintiff's Cause in this matter was first tabled in the Royal Court on 10 August 2007.

3. In summary, the Plaintiff pleaded that the Defendants own an apartment, 14 Alligande Building, Vega Apartments, Les Banques, St Peter Port and the Plaintiff owns the residential car park at the Vega Apartments. As owners of their apartment, the Defendants enjoy certain limited and specific rights over the car park including the right to use a post box; the right to park a vehicle on an allocated car parking space; and the right to store household refuse in a designated area. It was pleaded that the Defendants do not enjoy the right to erect a storage unit within the car park. The relief sought was: first, a declaration that the erection of a storage unit by one or both of the Defendants on land owned by the Plaintiff is unlawful; second, an Order that it be dismantled and any damage reinstated; and third, costs.

The Defences - Exceptions de Fonds

4. In reply, the Defendants tabled defences containing three *Exception de Fonds*. The first *Exception* alleged that a schedule to a conveyance ("the Schedule"), relied upon by the Plaintiff as establishing the Defendants' rights over the car park had been repealed by an amending agreement ("Reforme") registered seven days before the Summons was issued by the Plaintiff.

5. The second *Exception* pleaded that no facts upon which a servitude can be implied are pleaded in the Cause and that the Plaintiff could not rely upon the principle of *nul servitude sans titre*, as pleaded in the Cause.

6. The third *Exception* pleaded that the Plaintiff was not a party to the covenants pleaded in the Cause as establishing the Defendants' rights enjoyed by the Defendants over the car park, and the conditions governing those rights.

The Amended Cause

7. Following an exchange of correspondence, the Plaintiff made two attempts to amend the Cause in order to correct any alleged defects. The application before me sought leave to amend the Cause in accordance with a draft dated 28 September 2007.

8. The Defendants, through Advocate Geall, objected to the application to amend and at the hearing I established they had three objections.

9. First, the Defendants objected to proposed new paragraphs numbered 10 – 17 (inclusive) in which the Plaintiff wishes to plead a number of allegations tending to show that the Defendants knew permission was required but nevertheless went ahead regardless and have since refused to remove the store. It is alleged that the Defendants telephoned a representative of the Plaintiff in April 2007 requesting permission to erect a permanent storage unit within the car park. That request was refused by letter dated 25 April 2007. A meeting took place on 4 May 2007 between the representative and the First Defendant at which permission was again refused. The First Defendant then advised that the storage unit had already been erected and he asked for permission to retain it. On 16 May 2007 the representative of the Plaintiff wrote to the First Defendant informing him that permission to retain the storage unit was

refused. On 22 May the First Defendant again wrote to the representative expressing his disappointment at the decision, the manner in which it had been taken and the basis on which it was taken. On the same day, the representative wrote again to the First Defendant to inform him that the Plaintiff was not prepared to grant the permission requested and asking that the storage unit be removed on or before 14 June. Next, on 28 June the Plaintiff's Advocates wrote to the Defendants reiterating the request for the storage unit to be removed within 14 days. Finally, in the proposed paragraph 17, the Plaintiff wish to plead that, despite requests to do so, the Defendants have refused to remove the storage unit.

10. The Defendants' second objection to the amended Cause related to a proposed new paragraph 18 in which the Plaintiff wishes to plead that it is entitled to possession of the car park. The Defendants' objection is that no facts had been pleaded to support the allegation of entitlement to possession.

11. The Defendants' third objection to the amended Cause was more general, namely that the amendments should not be allowed because they fail to disclose a course of action.

12. During the course of the hearing before me, Advocate Geall indicated that if I granted leave to amend the Cause as requested, the Defendants would not seek to pursue the second of their *Exceptions de Fonds*. The reason being that in correspondence, Advocate Hay, on behalf of the Plaintiff, has indicated that it did not seek to base its cause of action upon the maxim *nul servitude sans titre*. However, the Defendants would wish to add an additional *Exception de Fonds*, namely that the proposed amended Cause would disclose no cause of action which, as I mentioned above, was the third objection raised by the Defendants to the application to amend.

The Law relating to *Exceptions de Fonds*

13. The definitive test as to whether an E*xception de Fonds* can succeed was laid down by the Court of Appeal in *Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited* (Court of Appeal, 13 January 1982). In the Judgment of the Court delivered by Hoffmann QC (as he then was) it held:-

> *"Now it seems to us that the test of whether an Exception de Fonds can succeed or not is whether there are no facts which might be proved at the trial which would allow the Plaintiff – no admissible facts consistently with the pleadings which could be proved at the trial – which would allow the Plaintiff to succeed in the action..."*

14. With that test in mind, I refused to consider an affidavit produced for the hearing by Advocate Geall to which he had exhibited copies of conveyancing documentation. (In passing, I was astonished to note that the Reforme comprises 97 pages. Needless to say, I was relieved that I did not have to read it.)

The Function of Particulars of Pleadings

15. The function of particulars was considered by the Court of Appeal in *International Hellenic Corporation Limited and others v Silver Falcon Enterprises Limited* (Guernsey Court of Appeal, 20 October 1994):

> *"(B) THE FUNCTION OF PARTICULARS*
>
> *20. The 1993 Edition of the Annual Practice describes the function of particulars as "… to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprised and incidentally to reduce costs …".*
>
> *(see 18/12/2 at p.307). In a continuing passage it is said that the function has been stated in various ways; omitting the citation of authorities, these are:*
>
> *"(1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved ….*
>
> *(2) to prevent the other side from being taken by surprise at the trial ….*
>
> *(3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial ….*
>
> *(4) to limit the generality of the pleadings …*
>
> *(5) to limit and define the issues to be tried, and as to which discovery is required …*
>
> *(6) to tie the hands of the party so that he cannot without leave go into any matters not included …."*
>
> *The passages above cited from the English Annual Practice are, in our judgment, equally applicable to procedure in the courts of Guernsey."*

I am satisfied those passages are still applicable in Guernsey today.

My Decision – the Application to Amend

16. Dealing with the Defendants' first objection, I am satisfied that the proposed new paragraphs 10-17 may properly be pleaded. The evidence of conversations and correspondence between the Plaintiff and the Defendants concerning the construction of the store will be admissible at trial for the purpose of proving who was responsible for the construction of the store and whether it was approved or authorised by the Plaintiff. Applying the passages cited above, it is right that the Defendants: should be informed that is the

nature of the case they will have to answer; so they will not be taken by surprise; they will know what evidence to prepare for trial; and the issues will be defined for the purpose of discovery. I reject Advocate Geall's submission that the proposed paragraphs plead evidence going far beyond what is required to prove the claim.

17. Before I deal with their second objection, I must observe that in correspondence between the parties' respective Advocates, Advocate Hay informed Advocate Geall that the Plaintiff is suing in trespass. Advocate Geall submitted that under English law trespass is actionable at the instance of the person in possession of land. The Plaintiff has sought to answer Advocate Geall's second objection by inserting an allegation that the Plaintiff is in possession of the car park. If Advocate Geall is correct, possession is a material fact which must be pleaded and eventually proved. The absence of an allegation of possession might found the basis of a successful *Exception de Fonds* but a pleading of possession can not do so. However the complaint, as I understand it, is that no facts are pleaded to support the allegation of entitlement to possession. If that was a valid complaint, I would expect it to be raised as an *Exception de Forme* or a Request for Further and Better Particulars under Rule 37, Royal Court Civil Rules 1989. In fact, I do not believe the complaint is valid. The Plaintiff has pleaded it is the owner of the car park, a fact which normally carries with it the right of possession. The Plaintiff has pleaded a number of rights granted to the Defendants and other flat owners over the car park but there is nothing pleaded to the effect that it has granted exclusive possession of the car park to any other party. During the hearing before me Advocate Geall suggested the Defendants will allege that someone other than the Plaintiff is in possession of the car park although he did not say who nor did he say how their entitlement arises. If that is the Defendants' case, the correct way to raise it is in the substantive defences. The *Niances* would contain a denial that the Plaintiff is entitled to possession and in the *Pretentions* the Defendants would allege who is entitled to possession. Better still, the Defendants could already have disclosed in correspondence who it is they allege is entitled to possession and hence who could, or should, have authorised the construction of the store. It is in the interests of all concerned that the real issues should be identified as early as possible and that the costs of these proceedings be kept to a minimum.

18. In support of his submission that it is only the person in possession of land who can bring an action in trespass, Advocate Geall relied upon English law text books. He submitted that the Guernsey law of trespass is the same as the English law. I will accept that submission for the purpose of this judgment but if the action proceeds to trial I will need to hear further submissions before deciding whether that is correct. They are certainly broad similarities but I do not know whether it can be said that they are identical in all respects. On the issue of protecting the possession of land it is interesting to note that in the case of *In re Clameur de Haro no.1* (Guernsey Court of Appeal 16 April 1985) it was held that "*the **Clameur de Haro** may properly be used by a person in possession of immovable property to restrain interference with his possession or enjoyment of it".*

19. The third objection raised by the Defendants is the general objection that the proposed amended cause discloses no cause of action. My understanding of the objection is that the proposed cause fails to specify expressly that the claim is brought in trespass. As I have said, this raises an issue similar to the new *Exception de Fonds* which the Defendants will raise if the amendment is allowed. I have therefore applied the test in *Cherub*. If the Plaintiff proves at trial that the Defendants have constructed a storeroom on land belonging to the Plaintiff without the right, or permission, to do so then I believe the Court would be able to grant the relief sought and hence I dismiss the objection. If all the elements of the tort are proved, I do not believe the claim will fail on the simple ground that the Plaintiff has not pleaded it is brought in trespass. One of the functions of the particulars of pleadings I have quoted above is to inform the other side of the nature of the case they have to answer. The proposed pleadings are sufficient to do so but if the Defendants were in any doubt, it was open to them to seek clarification, which they have done.

My decision – the *Exceptions de Fonds*

20. The first *Exception* takes issue with the pleading of the rights set out in the Schedule which has since been replaced by the Reforme. On the face of it, it is difficult to understand how that can be the proper subject of an *Exception de Fonds.* If it was pleaded unnecessarily, there might be grounds to apply for it to be struck out on the grounds it is irrelevant or even embarrassing. The Plaintiff justifies the pleading on the basis that it sets out the rights applicable to the car park which are relevant to the action. Also, the Reforme was completed after these proceedings started so the Schedule records the extent of the rights subsisting over the car park when the store was allegedly constructed. I accept the explanation given by the Plaintiff and therefore would not allow this *Exception* in relation to either the original or the amended cause.

21. The second *Exception de Fonds* is relied upon only in relation to the original cause and would not be pleaded if the amendments are allowed, which they have been. It claims that no facts are pleaded to imply any servitude and so the Plaintiff can not rely upon the maxim *nul servitude sans titre.* My understanding of the Plaintiff's case as originally pleaded is that the Defendants had certain rights exercisable over the car park but they did not allow the construction of a store which was therefore in breach of those rights or an aggravation of them. In pleading the maxim *nul servitude sans titre,* the Plaintiff was anticipating a defence that might or might not have been relied upon. In my view, it was not wrong to do so.

22. The third *Exception* argued that the Defendants were not a party to the covenants in the Schedule pleaded. If that is correct, it does not amount to a successful plea in bar because the Plaintiff was not suing for a breach of the covenants. They were set out solely for the purpose of showing the extent of the rights exercisable over the car park.

23. At the hearing, Advocate Geall said that if the amended cause is allowed he will raise another *Exception* alleging it discloses no cause of action. I have dealt with that argument above and do not need to say any more about it.

Costs

24. Both parties have indicated they wish to make applications for costs. I said they should await receiving this judgment with the reasons for my decision. I will hear any submission and I have an open mind about costs. My thoughts are that the original form of the Cause was adequate to commence the action but it was far from perfect and almost certainly would have required amendment before trial. That is probably still true even after the amendments that have now been made. So there was some justification in the Defendants' criticisms although I do not consider it was correct to raise them through *Exceptions de Fonds.* The quickest and most cost effective way of proceeding would have been, as is usually the case, to plead a substantive defence so the real issues can be identified (especially if the defence is that the person entitled to possession of the car park and entitled to bring these proceedings is other than the present Plaintiff even though the Defendants allegedly asked for the Plaintiff's permission). I direct the Plaintiff to issue a summons for defences as soon as possible returnable in, say, three weeks. I would not object if the Plaintiff delayed its application for costs until after we have seen the substantive defences.

