

Judgment 39/2010

Hitchins et al v Hill – Royal Court –
(Civil Action File 1076) –
16th November 2010

Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 – reforming statute had been enacted but not yet brought into force – application for pending trial to be postponed until the 2009 Law came into force – significant impact of the existing Hearsay Rule on the present case – injustice of excluding important evidence outweighs injustice of further delay – application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

16th day of November, 2010 before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

Between:-

ROGER HITCHINS

First Plaintiff

PAULA LEVY

Second Plaintiff

SIMON HITCHINS

Third Plaintiff

and

JACQUELINE HILL

First Defendant

LLOYDS TSB OFFSHORE TRUST COMPANY LIMITED
(formerly known as HILL SAMUEL OFFSHORE TRUST COMPANY LIMITED)
Second Defendant

ON THE APPLICATION of the Plaintiffs for an adjournment of the Trial of the above action, due to commence on the 15th day of November 2010;

WHEREAS THE COURT, on the 8th day of November, 2010, having heard Advocates C.J. Hay, and J.J. Barclay, Counsel for the First, Second and Third Plaintiffs and First Defendant respectively, GRANTED the adjournment and reserved its written reasons;

THE COURT this day handed down its written reasons in the terms attached hereto.

M A TOSTEVIN
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between

ROGER HITCHINS

First Plaintiff

PAULA LEVY

Second Plaintiff

SIMON HITCHINS

Third Plaintiff

and

JACQUELINE HILL

First Defendant

LLOYDS TSB OFFSHORE TRUST COMPANY LIMITED
(formerly known as Hill Samuel Offshore Trust Company Limited)

Second Defendant

Hearing Date: 8th November 2010

Judgment handed down: 16th November 2010

Before: Richard John Collas Esq., Deputy-Bailiff

Advocate for the Plaintiffs: Advocate C J Hay
Advocate for First Defendant: Advocate J J Barclay

Cases, texts & legislation referred to:

Evidence in Civil Proceedings (Guernsey and Alderney) Law 2009
The Royal Court Civil Rules, 2007, Rule 1(1)
Willow Wren Canal Carrying Co v British Transport Commission [1956] 1 All ER 567
Sparks v Harland [1997] 1 WLR 143
Hill v C A Parsons & Co Ltd [1972] Ch 305

1. The Plaintiffs applied for an adjournment of a two week trial listed to commence on Monday, 15th November, until after the Evidence in Civil Proceedings (Guernsey and Alderney) Law 2009 has come into force (“the Civil Evidence Law”).

2. Civil litigators in Guernsey and Alderney have been waiting a long time for the rules of evidence (which presently are broadly similar to the rules of evidence in criminal proceedings) to be relaxed. Section 1(1) of the Civil Evidence law provides that:

“In civil proceedings, evidence shall not be excluded in the ground that it is hearsay”.

3. Section 4 provides that the court is to have regard to the circumstances when deciding the reliability or otherwise of the evidence.
4. The significance in the present case is that both parties wish to adduce evidence of statements made by their deceased parents, mostly statements by their late mother. Counsel are agreed that most of those statements concerned would not be admitted under any of the well recognised common law exceptions to the hearsay rule. (Although Advocate Hay reserves the right to argue that the list of common law exceptions is not closed).
5. The parties could agree to waive the hearsay rule for the purpose of the present case and leave the court to decide the weight to be given to such evidence, but Advocate Barclay (for the First Defendant) is instructed not to do so, on the ground that his client fears the admission of all the hearsay statements would be unfairly prejudicial to her case.
6. By way of background, I should explain that the Plaintiffs and the First Defendant are brothers and sisters. Their father was a successful businessman and, together with his wife, he built up (I am told) substantial wealth during his life time. Their mother, Mrs Kathleen Hitchins survived her husband but passed away on 2nd December 2005.
7. A short while before her death, on 14th November 2005, Mrs Kathleen Hitchins purported to transfer all her beneficial interest in the shares of a company called Compton Farms Ltd to the First Defendant. Compton Farms Ltd holds the benefit of an agricultural tenancy of a farm in Somerset, the freehold of which is owned ultimately for the benefit of all the children of the late Mr and Mrs Hitchins.
8. Compton Farms Ltd is a Guernsey company administered by the Second Defendant and for that reason this dispute is before the Royal Court.
9. The Plaintiffs seek to set aside, or have declared void, the purported transfer of the shares in Compton Farms Ltd on the grounds that:
 - a) they are impressed with a trust in favour of all the children equally (the precise nature and legal basis of such trust as will be asserted is not yet clear to me);
 - b) the transfer was obtained by the actual or presumed undue influence of the First Defendant; and
 - c) the signature of Mrs Kathleen Hitchins is a forgery.
10. At a Pre-Trial Review on Friday 5th November, Advocate Hay (on behalf of the Plaintiffs) indicated he will also be advancing an argument that the instrument of transfer allegedly signed by Mrs Kathleen Hitchins was of no legal effect.
11. The matter came before me at a Pre-Trial Review on Friday 5th November. On reading the witness statements beforehand I was immediately struck by the number of conversations with the deceased that both parties were seeking to adduce in the evidence of a number of witnesses. I was then astonished to be told, at the Pre-Trial Review, that Counsel had not agreed any variation or relaxation of the rules of evidence to enable such statements to be admitted. When I asked whether either party was insisting upon a strict application of the Hearsay Rule, Advocate Barclay (who had only recently assumed conduct of the case for the First Defendant), requested a short adjournment to enable him to take instructions.

12. When Advocate Barclay confirmed his instructions were to insist on a strict application of the Hearsay Rule, Advocate Hay advised he would apply for an adjournment of the trial. That adjournment application was heard by me on Monday 8th November and at the conclusion of the hearing, I granted an adjournment and reserved my detailed reasons.
13. The Civil Evidence Law has had an unusually long and troubled journey through the legislative process, the details of which I do not need to recite. Its present status is that the *Projet de Loi* has been approved by Her Majesty in Council and the resulting Order in Council has been registered in the Royal Court. However, it is not yet in force as it requires a commencement Ordinance. The Law makes provision for the enactment of rules of court and practice directions to deal with a number of issues concerning the operation in practice of provisions of the Law. I understand the Law Officers are currently drafting the same and it is expected the States will be asked to approve the necessary commencement Ordinance when the Rules and practice directions are ready.
14. The Transitional Provisions in Section 25 of the Civil Evidence Law are relevant:
 - “25. (1) *Subject to subsection (2), the provisions of this Law shall not apply in relation to proceedings begun before commencement.*
 - (2) *Transitional provisions for the application of the provisions of this Law to proceedings begun before commencement may be made by rules of court or practice directions.*”
15. We do not yet know what the rules of court or practice directions will say. At the hearing on 5th November I said I expected they might say that the provisions of the Law will apply to existing proceedings unless the court orders otherwise. On 8th November, I made it clear that was my personal view but I had not discussed it with the Bailiff or other members of the Court. Such an approach would, in my view, represent the current trend in civil litigation, where increasingly parties are agreeing to admit hearsay leaving the Court to decide the weight to attach to it.
16. At the hearing of the application on 8th November, I said I would approach it on the basis that Section 25 appears to confer a discretion on the Court. In exercising such discretion, the Court will no doubt wish to be able to do justice between the parties. It remains to be seen whether the rules or practice directions will give any guidance as to how any discretion is to be exercised.
17. The point I wanted to emphasise is that granting an adjournment will not inevitably lead to the admission of hearsay evidence at the trial. There will have to be a direction from the Court as to whether the Civil Evidence Law will, or will not, apply to this case. In reaching that decision, the Court will be directed to take account of any guidance in the rules or practice direction and all the relevant circumstances. It would be wrong for me to pre-judge the outcome.
18. Both counsel told me that they were otherwise ready to start on 15th November. We have not completed the Pre-Trial Review, but I have the impression that they have left a lot of their preparation until late in the day and still have much to do. I was almost certain that we would not be ready to start the hearing before the Jurats on 15th November as there seemed to be a number of preliminary issues still outstanding. If I had not already granted an adjournment, I would be waiting to see the outcome of all the outstanding preliminary issues before deciding whether we are ready to call in the Jurats. However, for the purposes of this decision, I assumed that counsel would have been ready to start the trial on 15th November if required.
19. I am told that prior to last week, there had been no discussion between counsel as to whether they would agree a relaxation of the Hearsay Rule. Importantly, neither party had said anything to the other to lead them to believe they would agree to witness statements containing a lot of hearsay.

20. Advocate Hay told me that he had been aware of the issue but he had in mind that in all likelihood the Civil Evidence Law would come into force before the trial. I find that to be a weak explanation, especially as the transitional provisions in Section 25 leave doubt as to whether hearsay would be admitted.
21. The impact of the Hearsay Rule on this case is so significant that the issue should have been drawn to the attention of the Court much earlier, not least when the parties sought a hearing date.
22. The trial date of 15th November was in fact the third that had been given to this case. The first was vacated by mutual agreement to enable mediation to take place. The second was vacated at the request of the Plaintiffs and in the face of opposition from the First Defendant. Pressures on Court time are such that a third adjournment should only be granted if there are very good reasons to do so, as Advocate Barclay argued.
23. Advocate Hay's main argument for an adjournment was that the case necessitates the admission of hearsay evidence. Without it, his clients would be unable to properly present the evidence in support of their trust arguments. In the interests of dealing with the case justly, hearsay should be admitted and he relied upon the over-riding objective set out in Rule 1(1) of the Royal Court Civil Rules, 2007.
24. He said that a procedural change of this nature applies to both parties and so is neutral by nature. That was unlike the legislative reforms anticipated in Willow Wren Canal Carrying Co v British Transport Commission [1956] 1 All ER 567 which would have relieved the defendants of the statutory obligations which were the subject of the substantive dispute.
25. In relation to prejudice, he submitted that as the shares in the company are presently held by the Second Defendant for the First Defendant, decisions could be taken in relation to them that would be detrimental to the Plaintiffs.
26. On the other hand, Advocate Barclay made very strong submissions that the balance of prejudice favoured his client who has had serious allegations of forgery hanging over her for four or five years and wishes them to be resolved. As Advocate Barclay said "*justice delayed is justice denied*". He was concerned at the additional costs, estimated at between £50,000 and £100,000 for an extra two weeks although he failed to persuade me that so much extra time would inevitably be needed.
27. He said the Plaintiffs knew the state of the Guernsey law of evidence when they started the proceedings and should be taken to have accepted it as it was.
28. He also submitted it would be wrong to anticipate the transitional provisions when we do not know what they will say.
29. In my judgment, the guiding principle that I have to apply is the over-riding objective in Rule 1(1) "*to deal with cases justly*". Unfortunately, it is difficult to see a "*just*" solution. Whatever I decide would be seen as unjust by one side or other. I have to balance the prejudice and decide what, in my view, is the least unjust.
30. I accept that, as Sedley J said in Sparks v Harland [1997] 1 WLR 143, at page 147 F:

"there is no rule of law that impending legislative change is never a material consideration in the exercise of the court's powers and discretions."
31. He followed the Court of Appeal decision in Hill v C A Parsons & Co Ltd [1972] Ch 305 where Sachs LJ had taken account of legislation (the Industrial Relation Act 1971) which was yet to be brought into force, in that case, by ministerial order.
32. In the present case, the Order in Council has been registered. The only unknowns are the commencement date and what the transitional provisions will provide.

33. I was told by counsel that in a recent hearing in a confidential matter, the Guernsey Court of Appeal expressed concern at the possibility of injustice arising as a result of the delay in enacting a civil evidence law.
34. In my judgment, it would be highly unjust to allow the present case to proceed in the knowledge that important evidence necessary to the case of one of the parties would be excluded on the grounds that it is hearsay and does not fit any of the established common law exceptions to the hearsay rule.
35. That injustice, in my opinion, outweighs the injustice to the First Defendant in further delaying the outcome of this trial, prolonging the serious allegation made against her and any further costs that will be incurred.
36. It may seem unfair to allow the procedural rules to change during the course of the action. It begs questions as to why the Plaintiffs pleaded the case as they did if the law did not permit them to adduce essential evidence, and why they did not subsequently attempt to agree a waiver of the hearsay rule with their opponent. The decision is finely balanced but that should not, deny the Plaintiffs the opportunity to await the coming into force of the new legislation and to apply to the court, if the transitional provision so require, for the hearsay rule to be waived. Any cost issues arising therefrom can be addressed in an appropriate order even though it does appear from the written statements produced that the First Defendant may already have prepared her case on the basis that hearsay will be admitted.