

Judgment 4/2007

**Stephen Brian de Jersey – Magistrate’s Court –
8th February 2007**

Bail – Magistrate’s Court (Guernsey) Law, 1954 – Bail (Bailiwick of Guernsey) Law, 2003 – defendant failed to answer his bail – proceedings against the surety, Mr de Jersey, for forfeiture of all or part of his recognisance in the sum of £10,000 – meaning in Guernsey of the terms 'bail', 'recognisance' and 'surety' – no legislative provision for forfeiture of a recognisance in the Magistrate’s Court – if regarded as a civil debt the present claim must fail as it exceeds the Court’s present limit of £2,500

OFFICIAL TRANSCRIPT

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THURSDAY 8TH FEBRUARY 2007

IN THE MAGISTRATE’S COURT

Before

Philip Robey, Esquire
Assistant Magistrate

LAW OFFICERS OF THE CROWN

- v -

STEPHEN BRIAN DE JERSEY

APPLICATION FOR FORFEITURE OF RECOGNISANCE

Judgment handed down by the Assistant Magistrate

1. On Friday 26th May 2006, Joseph Coutts appeared before the Magistrate’s Court charged with certain serious offences- the details of those do not for the moment concern us- for which he has now been dealt with by the Royal Court.
2. On that day my colleague, Assistant Magistrate McMillen, granted Mr. Coutts bail to reappear before the Magistrate’s Court on Friday 9th June 2006. One of the conditions she attached to the bail was that Mr. Coutts should provide a surety for his return to Court in the sum of £10,000. That surety was Stephen Brian De Jersey, the Defendant in these proceedings. It is not in dispute that the Assistant Magistrate had power to require that a surety be provided. Mr. De Jersey completed a Form of Recognisance acknowledging his liability to pay the said sum of £10,000 in the event of Mr. Coutts failing to answer his bail.

3. Mr. Coutts did answer his bail on the next hearing, 9th June, before me, and the matter was further adjourned to 7th July. Bail was renewed and Mr. De Jersey again attended Court and indicated that he was willing to continue to act as surety in the sum of £10,000. Mr. Coutts, however, failed to attend Court on 7th July. A warrant for his arrest was then issued.
4. The Law Officers of the Crown now bring proceedings before the Magistrate's Court for forfeiture of all or part of that £10,000 consequent upon the failure of Mr. Coutts to surrender to Court in response to his bail.
5. Advocate Dunford appears on behalf of the Law Officers and has submitted to me a skeleton argument and authorities in support of his forfeiture application. Advocate Merrien appears on behalf of Mr. De Jersey and he too has submitted skeleton argument and authorities in resisting the application. I place on record my thanks to both Counsel for their written submissions and their oral arguments in support of their cases. Those arguments have been both succinct and well reasoned.
6. It is perhaps most convenient to begin with Advocate Merrien's grounds for resisting the application. Essentially these are twofold.
7. Firstly he questions under what authority the Crown is entitled to seek forfeiture of the amount of the recognisance in this case. I do not think I do Advocate Merrien an injustice in saying that he does so with a degree of diffidence as he acknowledges that it appears nonsensical that Mr. De Jersey can enter into an apparently valid recognisance when there is no mechanism by which the sum assured by such recognisance can be forfeited. Nevertheless, Advocate Merrien has deployed skilful arguments in favour of his case and it is incumbent upon me to consider those arguments in detail.
8. Secondly, if I find there does exist a mechanism to forfeit the amount assured by the recognisance Advocate Merrien is to argue that I should not forfeit the amount or, at least, should not forfeit all of it. Of course consideration of this second ground does not arise, if at all, until such time as I have ruled on the first ground; so I begin with the first ground.
9. It might be helpful if I begin by attempting definitions of some terms that have been used during the course of argument before me. The terms with which I am concerned in particular are "Bail" "Recognisance" and "Surety". Of course, I am concerned with what those terms mean in Guernsey. They are all terms that are familiar to the Common Law of England and Guernsey Common Law, at least in the field of Criminal Law, has tended to follow English Common Law.
10. Historically in England the term "bail" indicated a release of an accused from custody from the authorities into the custody of friends or relatives- his "sureties"- who would guarantee his return to the custody of the Court in due course. I do not know whether the same historical basis applies in Guernsey. As Advocate Dunford has helpfully pointed out, bail was certainly recognised as a concept in Guernsey at the time of the Royal Commission into the operation of

the Criminal Justice System in Guernsey in the nineteenth century but I do not consider it necessary to consider what the ambit of the term “bail” was at that time.

11. Nowadays in England or in Guernsey the concept of bail is distinct from the operation of the sureties with regard to that bail. I think bail means no more than the release of a person from custody upon an obligation on his part to surrender back into custody at some future date. It is a granting of liberty, but liberty which is subject to that obligation.
12. The “surety” is a person who undertakes to be responsible for a defendant or an accused surrendering to custody. That undertaking came to be backed up with a promise on the part of the surety to pay a sum of money, either deposited with the Court or retained by the surety, in the event of the defendant failing to surrender to custody. This is the “recognisance”, a recognition or acknowledgement of the liability to pay in that eventuality.
13. A defendant could, I consider, enter into recognisance also on his own behalf but that would be in respect of money actually deposited with the Court, also known as a “security”. A recognisance consisting of a promise to pay on the part of a defendant would effectively be worthless. The purpose of the recognisance being to secure the defendant’s appearance at Court, it would be of no value upon the defendant absconding.
14. I turn now to the development of the Law relating to bail, particularly with regard to recognisances as developed in Guernsey legislation. The starting point, it appears to me, although this has not been aired during the course of argument before me, is the *Loi Ayant Rapport a L’Institution d’un Magistrat en Police Correctionnelle et pour le Recouvrement de Menues Dettes* of 1925. Prior to 1925 petty debts and minor crime were still dealt with by the Royal Court, albeit the Ordinary Division. This was cumbersome for the Law Officers, the Bailiff and the Jurats so the Office of Magistrate was established by this Law to deal with petty debts and summary trials.
15. As I have said already, the concept of bail in Guernsey was by then well established, and this Law set out the Lower Court’s powers with regard to bail. In Article 11(3), it says this:-

“(3) *Le Magistrat pourra en toute cause à sa discretion admettre l’accusé à donner caution de sa comparution en justice, et fixer le montant de la caution à fournir, laquelle si elle est fournie, sera déposé entre les mains du Greffier du Roi.*”

16. If my translation is not as bad as my accent, I think what that means is this: here we are in the realms of a recognisance, but in terms of a fixed amount to be deposited into the hands of the Greffier. It is not clear from that whether the defendant or a third party, in other words a surety, could deposit the amount. I suspect either would have been acceptable. No specific power of forfeiture of the amount so deposited is contained within that legislation.

17. The next development, as referred to in these proceedings, was the Magistrate's Court Law 1954. This repealed the earlier Law and again there was reference to bail in Section 11- you have heard reference to this in the course of argument. Section 11(b) says this- well I must begin by reading the beginning of Section 11:-

"11. When committed for trial before the Royal Court or when remanded for trial before the Court or when a hearing of

Committal Proceedings before the Court is adjourned, the accused may-" and here we are concerned with bail:-

"(b) be admitted to bail, that is to say, by taking from him a recognisance, with or without sureties, conditioned for his appearance..."

18. Advocate Merrien has said that he believes that the recognisance here has traditionally been in the form of a deposit of funds with the Court. He has said that he knows of no case where sureties entered into recognisances to promise to pay money in event of the non-appearance of the Defendant rather than deposit monies. However, he stopped short of putting this forward as a firm proposition of either practice or law and I think he was sensible to do so. I see no reason why, when the concept of surety is mentioned in the legislation for the first time, that a surety should not just as well promise to pay a sum of money as deposit a sum of money to guarantee the Defendant's appearance before the Court. That indeed is what the form of recognisance entered into by Mr. De Jersey, a form that predated the Bail Law of 2003, contemplated, i.e. a promise to pay money rather than the deposit of monies. But again, the 1954 Law is silent on methods of enforcement of the recognisance in the event of the accused's failure to attend Court.

19. The final legislative development was the Bail (Bailiwick of Guernsey) Law 2003. The first point with regard to this Law is that it did not reinvent or redefine what is meant by "bail". Section 1(4) states:-

"(4) In this Law "bail" means bail grantable under the Law (including common or customary law) for the time being in force."

20. This 2003 Law simply tagged on extra legislative provisions to bail as it already existed. In particular, it deals with bail in criminal proceedings, although I am not quite sure in what other context bail can be granted. Bail essentially continued to mean bail as in the 1954 Law.

21. A new provision was made in the 2003 Law for bail with sureties and here we look to Section 12. I do not propose to dwell in detail on the content of Section 12- it clearly provides for the granting of bail on condition of the provision of sureties. It does not contain in itself any mechanism for the forfeiture of recognisances. It does, I would mention, contain in its Schedule at paragraph 13 onwards provision for forfeiture of securities, i.e. funds deposited with the Court to secure a Defendant's attendance.

22. The only reference to forfeiture of a recognisance however is in Section 12(5) of the Law. There is says:-

“(5) Rules of Court may prescribe the manner in which a recognisance is to be entered into under subsection (4), and the persons by whom and the manner in which the recognisance may be enforced.”

23. Rules of Court have been made. Rule 14 of the Bail (Bailiwick of Guernsey) Rules 2004 states as follows:-

“14(1) Where recognisance is entered into in respect of a person granted bail to appear before the Royal Court and it appears to the Court that a default has been made in performing the conditions of the recognisance, the Court may order the recognisance to be forfeited.”

24. But that provision relates to the Royal Court. No provision is made in respect of the Magistrate’s Court. Based on this apparent lacuna Advocate Merrien now deploys his argument: As far as the Magistrate’s Court is concerned, he says that the bail rules do not contain a power to forfeit a recognisance. The Bail Law does not contain a power to forfeit a recognisance. The 1954 Law does not contain a power to forfeit a recognisance. There is, apparently, no legislation that gives the Magistrate’s Court power to enforce a recognisance and as we all know the Magistrate’s Court is a creature of statute, it cannot invent new powers for itself. In England the Magistrate’s Court there is also a creature of statute but in England there is a specific power to forfeit a recognisance, contained in Section 120 of the Magistrate’s Courts Act. There is no similar legislative provision in Guernsey.
25. As the case law recognises- and I do not propose to cite it here as the point is not in issue between the parties- in matters of jurisdiction the Magistrate’s Court is limited by the jurisdiction given to it by statute or Superior Courts. I use the word “jurisdiction” because that is what is referred to in the case law but, in fact, I prefer Mr. Merrien’s term “powers”- they are one and the same thing in this context, I think.
26. So, Mr. Merrien says, if you have not got the specific power that they have in England to do so, you cannot forfeit a recognisance, however absurd that conclusion may seem.
27. Advocate Dunford seeks to counter Advocate Merrien’s argument in this way; he accepts, I think, that if the forfeiture of a recognisance is a matter of jurisdiction, in other words, the exercise of a power, then he will be in some difficulty, but he says it is not. He says it is a matter of procedure where the Magistrate has a discretion to make rulings in the interests of the effective administration of the Courts without specific statutory powers or specific authority of the Higher Courts.
28. The important thing, he says, is the creation of the power by legislation to take a recognisance. Implicit in that power is also the power to forfeit the recognisance

and no separate provision is required in that regard. I respectfully disagree with Advocate Dunford. The power to take a recognisance and the power to enforce it in my view are quite separate and distinct powers. One cannot be implied in the other.

29. Further, Advocate Dunford says that this is not, I think he said, a penal power. I am not sure if that is the word he used, but I think that was the gist of it. Rather, he points me in the direction of the dicta of Lord Denning in *R. v. Southampton Justices Ex parte Green* (1976) 1 QB. 11, the dicta of Lord Denning appearing at page 15. There he refers to a surety for a recognisance and says this at paragraph G:-

“The outcome is not a “trial” of the surety. There is no “possible punishment” of the surety for an “offence.” A recognisance is in the nature of a bond. A failure to fulfil it

gives rise to a civil debt, because the enforcement is different. It is enforceable like a fine. It may be enforced by a warrant of distress, or by committing the defaulter to prison.”

30. That is the position in England but there are no comparable provisions in Guernsey, as I have said. So if the statement is that it is enforceable as a civil debt then that is as far as it can go here because there is no subsequent power to commit to prison or enforce by way of warrant of distress. Lord Denning goes on:-

“But that method of enforcement does not alter the nature of the debt. It is simply a civil debt upon a bond and as such is not a criminal cause or matter.”

31. So, Mr. Dunford says that this is essentially a civil debt. The enforcement of that civil debt, if I have understood his argument correctly, he says, is not the exercise of a power, it is a matter of procedure. Again, I do not agree with Mr. Dunford’s submission. The conclusion that the enforcement of a recognisance is the enforcement of a civil debt is, I think, entirely correct. I see no reason why the position in Guernsey should be any different from the position in England in this regard and I am reassured in that view by the wording of the form of recognisance into which Mr. De Jersey entered. It said:-

“I, Stephen Brian De Jersey, as surety, acknowledge that I owe to our Sovereign Lady, the Queen, the sum of £10,000 payment thereof to be enforced against me in accordance with such order as may be made by the Court if Joseph Richard Frank Coutts fails to comply with any of the conditions endorsed hereon”

(the obvious condition being his failure to attend the Court). So it is a civil debt, I agree with Mr. Dunford in that regard, but the enforcement of a civil debt still seems to me to involve the exercise of a power rather than constitute merely a matter of procedure.

32. Quite apart from the question of whether such a power can be exercised is the question of by whom it should be exercised. Someone may stand surety in the sum of £100,000 or more, to give an example. Can it be right for me to assume the exercise of a power to forfeit such an amount when the powers of the Court in criminal matters extend generally to impose fines of no more than £10,000 and in civil matters to deal with claims of no more than £2,500, I think not.
33. Advocate Merrien, wisely, I think, does not speculate as to why the Bail Law and the Bail Rules do not contain a specific power of forfeiture for the Magistrate's Court. I do not propose to speculate either. I can understand that the issue might not have arisen in the short time since the Bail Law came into force, but I have considered something further. I find it perplexing that the issue should not have arisen at some stage since the 1954 Law came into force and that such an obvious gap in the legislation, a failure to provide for a power of forfeiture in the Magistrate's Court, should not have been filled in the interim 50 plus years.
34. The answer, I think, why the gap was not filled is this; it lies in Advocate Dunford's contention, which I have already indicated I accept, that a recognisance is in the nature of a civil debt which crystallizes, becomes due, on the failure of the Defendant to surrender to his bail. If it is a civil debt, it falls to be enforced before the Civil Courts of the Island in the usual way. This Court, of course, enjoys a civil jurisdiction. Section 12 of the Magistrate's Court Law of 1954 sets out the limit of that jurisdiction. It is there in Section 12 that is to be found the legislative provision which contains the power of the Magistrate's Court to order forfeiture of a recognisance, and Section 12 provides that:-
- "12. The Court shall have jurisdiction to hear and determine any civil action for the recovery of debt or for the recovery of damages whether arising in contract or in tort where the amount claimed does not exceed..."* and we know that the current figure is £2,500.
35. So there the Court is given specific power to determine a civil action for the recovery of a debt. If the forfeiture of a recognisance is no more than the recovery of a debt then the Magistrate's Court will have power to deal with it, subject to the monetary limit.
36. So I treat the application before me essentially as an action for the recovery of a petty debt. Of course, as I have said, the limit is £2,500 and yet the Crown seeks forfeiture of all or part of the sum of £10,000. If the Crown persists in that claim before this Court the claim must necessarily fail for want of jurisdiction. It may be open then for the Crown to pursue its claim before the Royal Court.
37. An alternative would be for the Crown to restrict its claim to £2,500 and continue with the matter before this Court. It is not a matter I am going to press either party to consider today. You will clearly need time to reflect on my ruling. It does occur to me that it is possible, and I put it no more strongly than that, that Mr. De Jersey may have gone some way to purging the default in this case. I have heard no evidence, but he may have made considerable efforts in

securing Mr. Coutts' eventual return to the jurisdiction. I can make no finding on that, I have heard no evidence as I say, but these are factors that the Crown may, and I only say may, wish to consider in deciding whether to continue before this Court or take the matter before the Royal Court. That, of course, is subject to any representations that Mr. Merrien may wish to make on the matter in due course.

38. Subject to any further representations from both parties at this juncture I propose to adjourn today's proceedings sine die. If the Crown wish to leave the matter before this Court then hopefully we can resume the hearing at short notice. If not, proceedings will necessarily fall before this Court; the Court should be notified by the Crown of its intention not to pursue but I would not require either party to attend unless any further applications were to be made by any party. Mr. Merrien, I'll turn to you first, are you happy with the matter to be adjourned sine die on that basis today?

ADVOCATE MERRIEN: In light of your judgment, sir, that seems to be the only appropriate course of action.

ASSISTANT MAGISTRATE: I can tell you that I am aware that we have a courtroom and myself free tomorrow afternoon if either party want to bring it back as soon as tomorrow afternoon, but I thought the adjournment sine die would simply give you time to reflect and either party obviously can reinstate the matter on whatever notice you seek. Mr. Dunford, are you happy with that?

ADVOCATE DUNFORD: Yes, sir.

ASSISTANT MAGISTRATE: Thank you. Gentlemen, once again many thanks for your help.

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I, Suzanne Margaret O'Neill, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

..... Suzanne M. O'Neill
Tuesday 13th February 2007