

**Judgment 40/2007 Ogier v Grand Havre Holdings Ltd – Court of Appeal
(Civil Appeal 374) – 25 September 2007**

Royal Court Civil Rules, 1989 (Rule 36) – leave sought to appeal from order striking out claim for want of prosecution – application for leave to introduce further evidence – péremption – application for restoration of action under Rule 50 – correct principles applied by the Lieutenant Bailiff – leave to appeal refused – leave to appeal to the Judicial Committee of the Privy Council refused

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 374

The 25th day of September, 2007 before Jonathon Philip Chadwick Sumption, OBE, QC, presiding, Dame Heather Steel, DBE and James Walker McNeill, QC

MAUREEN SYLVIA OGIER

(Applicant)

- v -

GRAND HAVRE HOLDINGS LTD

(Respondent)

On the application of the above Applicant for leave to appeal from the decision of the Royal Court on 30th May 2007;

THE COURT, having, on the 24th day of September 2007, heard Advocates N.J. Barnes and M.G.A. Dunster for the respective parties thereon, this day GAVE JUDGMENT in the attached terms and:

1. REFUSED leave to appeal;
2. AWARDED costs to the Respondent; and
3. REFUSED an oral application for leave to appeal to the Judicial Committee of the Privy Council.

K H TOUGH

Registrar of the Court of Appeal

**Approved Text
3 December 2007**

**IN THE COURT OF APPEAL
OF THE ISLAND OF GUERNSEY**

CIVIL DIVISION

Tuesday 25 September 2007

**Before: Jonathan Philip Sumption., Esq., QC, President
Dame Anne Heather Steel DBE
James Walker McNeill., Esq., QC**

Between: MAUREEN SYLVIA OGIER Appellant

And

GRAND HAVRE HOLDINGS LTD Respondent

Advocate N J Barnes for Ogier
Advocate M G A Dunster for Grand Havre Holdings Ltd

The President:

1. This is the Judgment of the Court on Mrs. Ogier's application for leave to appeal from an order made by the Lieutenant Bailiff on 30 May 2006, striking out her claim for want of prosecution.

2. In support of her appeal, Mrs. Ogier seeks leave to rely on further evidence, which was not before the Lieutenant Bailiff, consisting of correspondence between herself, various advocates, and the Guernsey Legal Aid Service. In the interest of coherence, we will refer in this Judgment to parts of the new evidence, but without prejudice to the question whether Mrs. Ogier should be permitted to rely on it.

The dispute

3. The dispute between these parties can fairly be described as antique. It dates back to the late 1980s, when Mrs. Ogier was running a hotel called the Hotel Houmet du Nord from premises demised to her by Guernsey Brewery Ltd. under two leases executed on 20 June 1988. On 16 March 1989, Mrs. Ogier let nineteen rooms to Grand Havre Holdings Ltd. They were the operators of a nearby hotel, and they proposed to use the rooms to accommodate some of their staff. The initial period of

the letting was one year. Its terms included an obligation on the part of Grand Havre to pay for any 'damage, breakages or removal of items' by any of the occupants. In late April 1990, there was an exchange of correspondence in which it was agreed that Mrs. Ogier would let the rooms to Grand Havre for a further year starting on 1 May 1990. There is an issue about the terms of this letting to which we shall return. What is clear is that at the end of the second period, Grand Havre declined to renew the letting and surrendered possession. On 24 June 1991, Guernsey Brewery recovered possession of the whole premises under an order of the Royal Court, on the ground that Mrs. Ogier had defaulted in the payment of rent. Her lease and sub-lease thereupon came to an end and with it her business as a hotelier there.

4. This action was begun on 15 April 1997 and placed on the pleading list by act of the Royal Court three days later. Mrs. Ogier's case is that on the expiry of the second letting Grand Havre surrendered possession of the nineteen rooms let to them in such an appalling condition that she was unable to continue her business running a hotel with an acceptable Tourist Board classification until the dilapidations were made good. Because of this, she says, she was unable to pay the next quarter's rent to Guernsey Brewery, and that in turn led to the termination of her leases and destruction of her business.

5. Four main issues are disclosed by the pleadings:

(1) Grand Havre say that the condition of the premises at the end of the first letting was better than it was at the commencement of that term. There appears to be limited documentary evidence of their condition at the beginning. This would presumably have to be proved by oral evidence. For the condition at the end of the first letting, Grand Havre relies on a report by their surveyor Mr. W.R. Chapman. Mrs. Ogier relies, at least in part, on an inventory which she says (but Grande Havre denies) was agreed by the parties on 27 April 1990.

(2) There is an issue about the terms of the second letting. Mrs. Ogier says that the agreement was that the premises would be surrendered in a fit condition to be run as part of a hotel. Grand Havre say that the agreement was to vacate the premises at the end of the term in the same condition (fair wear and tear excepted) as that recorded in a 'Schedule of Conditions' agreed between the surveyors of the two parties, Mr. Finch and Mr. Chapman respectively. This issue would appear to turn mainly if not entirely on the terms of the correspondence by which the agreement was made. However, the correspondence included in Mrs. Ogier's new evidence suggests that Mrs. Ogier may wish to introduce further evidence on the terms of the agreement.

(3) Grand Havre says that when the premises were surrendered at the end of the second term, on 9 May 1991, it was in a better condition than at the beginning of that term. They rely on a survey by Mr. Chapman on 18 April 1991. Mrs.

Ogier relies on a schedule of dilapidations prepared on her behalf, and sent to Grand Havre on 10 April 1991. It appears from correspondence forming part of the new evidence on which Mrs. Ogier seeks to rely, that she may also wish to rely on the oral evidence of her surveyor Mr. Finch and her daughter Elizabeth.

- (4) There are issues regarding causation and remoteness of the damage alleged by Mrs. Ogier. Grand Havre deny that they are liable for the fact that the rooms may not have been up to the standard required for operation as part of a hotel with the required Tourist Board certificate, or for the inability of Mrs. Ogier to pay her rent to Guernsey Brewery.

The course of the proceedings

6. The action was commenced within a few days of the expiry of the limitation period, and thereafter followed a rather leisurely course. On 13 June 1997, Grand Havre filed their defence. Between that date and January 2001, there was a number of interlocutory applications, most of them occasioned by Mrs. Ogier's concurrent proceedings against Guernsey Brewery. These were ultimately dismissed by the Lieutenant Bailiff on 11 January 2001.

7. On 3 September 2001, there was a directions hearing before the Lieutenant Bailiff, at which he ordered that this action should be adjourned for one month while Mrs. Ogier sought legal aid under the legal aid scheme which was then about to come into force. On 4 January 2002, Mrs. Ogier was granted legal aid for the purpose of obtaining legal advice, but not for the purpose of legal representation in the proceedings before the Court. Mrs. Ogier had some difficulty in finding an advocate willing to represent her. On 14 January 2002, Mrs. Ogier wrote to Advocate Dunster, who was acting for Grand Havre, telling him this, Advocate Dunster replied on 16 January 2002 with a letter which opens with a statement that the time had come to be 'blunt'. 'Whether or not you get legal aid,' he said, 'it is you who must now get this matter on to trial without any further delay. Please action this case, answer all the points which I have made previously, and get it onto trial forthwith.'

8. Shortly after this challenge, in February 2002, Mrs. Ogier found an advocate, Advocate Merrien, to advise her. However, no steps were taken to progress the action until 28 January 2005, when it came before the Lieutenant Bailiff on Mrs. Ogier's application for directions. At that hearing, the point was taken that the action was *périmé*, by reason of the lapse of a year and a day since the last step was taken, and could not proceed unless it was ordered to be restored to the roll under Rule 50.

9. What was Mrs. Ogier doing during the period between February 2002 when she obtained the services of Advocate Merrien and the directions hearing in January 2005 when the possibility was first raised that the delay might prevent the action from

being allowed to proceed? When the present issues were before the Lieutenant Bailiff, the material before him dealing with this question consisted of a small number of documents dealing with Mrs. Ogier's legal aid status, and a chronology which referred to many more documents but without actually disclosing them. This disclosed that after two years in which Advocate Merrien had pursued his investigations into Mrs. Ogier's case and the evidence that might be available to prove it, he had concluded by February 2004 that he could not recommend the Legal Aid Service to support her claim because it did not have sufficient prospects of success. Nor would he recommend a privately funded client of average means to pursue it. The Legal Aid Administrator informed the Court, presumably in the light of the Lieutenant Bailiff's original intimation that she should have legal aid, that he would fund the action if the Court was of the view that the public interest required it, but (by implication) not otherwise.

10. The new evidence on which Mrs. Ogier wishes to rely consists of further documentation filling out that picture but not significantly changing it. It shows that the time was spent in (i) reviewing the papers and seeking further information from Mrs. Ogier and potential witnesses, and (ii) negotiating with the Legal Aid Administrator with a view to widening the terms of the legal aid certificate so as to fund the successive stages of (i). Mrs. Ogier was of course in a position to produce this material to the Lieutenant Bailiff. But she was advised that it was privileged and prejudicial to her case, and so she did not.

The Lieutenant Bailiff's Judgement

11. There were two issues before the Lieutenant Bailiff. The first was about peremption, the second about want of prosecution. The Lieutenant Bailiff held that an action became *périmé* if no procedural steps were taken in court for a year and a day. Dealing between the parties out of court did not count for this purpose. On that footing, this action was unquestionably *périmé* by January 2005. The question was whether it should be restored to the roll. The Lieutenant Bailiff held, although without giving reasons, that in principle he would in his discretion have restored it to the roll. He did not in fact do so, because he considered that it should be struck out for want of prosecution.

12. The jurisdiction to strike out proceedings for want of prosecution is governed by Rule 36 of the Royal Court Rules, to which the courts of Guernsey have generally applied the authorities of the corresponding practice in England. Broadly summarised, the Lieutenant Bailiff held that the action should be struck out because the delay taken as a whole was inordinate, because while parts of it may have been excusable, the greater part was not. In his view, the fading of recollections over the whole period of delay gave rise to a significant risk that a fair trial would not be possible.

The Appeal

13. Both parties submitted that there was an inherent illogicality about the Bailiff's decision to strike out the action for want of prosecution in circumstances where he would have restored it to the roll under Rule 50. The criteria to be applied for restoration to the roll were considered by this Court in *Guernsey Annandale Tile Co. v. Haines*, 16 Oct. 1997, 24 GLJ 48,42. Although the two jurisdictions are distinct, the criteria are very similar to those which guide the courts in deciding whether to strike out for want of prosecution. In particular the question whether the delay was excusable and prejudicial arise in both jurisdictions. It is not impossible but must be very rare for a court to strike out for want of prosecution a case which it would have been prepared to restore to the roll. We do not know how the Lieutenant Bailiff squared this particular circle in the present case because he does not give his reasons for concluding that the action might properly be restored to the roll.

14. But however that may be, it is clear to us that the question whether the action should be restored to the roll is no longer relevant. The Lieutenant Bailiff has decided that issue in Mrs. Ogier's favour, subject to the outcome of the application to strike out her claim for want of prosecution. The ratio of his decision was that the action ought to be struck out for want of prosecution, and the real question before us is whether there are grounds for challenging his view on that point. It may well be that if Mrs. Ogier fails on the striking out issue, she should have failed on the peremption issue as well, but that can hardly affect the outcome of her appeal.

15. It is not suggested that the Lieutenant Bailiff misdirected himself in law on this issue. The legal test is well-established and the Lieutenant Bailiff applied it. It depends on whether the delay has been (i) inordinate, (ii) inexcusable, and (iii) prejudicial to the Defendant. The application of the test is a great deal more difficult than the statement of the principle. But in an appellate court, it is important to bear in mind that although not exactly a question of discretion, the decision of the court of first instance involves 'balancing a variety of different considerations on which the opinions of different judges may reasonably differ as to their relative weight': *Trill v. Sacher* [1993] 1 WLR 1379, 1399-1400 (Neill LJ). An appellate court should therefore intervene only if the Judge can be shown to have erred in principle or reached a conclusion which was manifestly wrong.

16. It does not appear to us that the Judge has erred in principle in this case. He applied the correct principles. He correctly understood the facts. His conclusion was certainly not manifestly wrong. Without seeking to exercise his discretion afresh, we would make the following points for our own part:

- (1) The adjournment ordered on 3 September 2001 expired on 3 October, a month later. The delay of more than three years between that date and January 2005

was by any standards inordinate.

- (2) The only excuse for this delay advanced by Mrs. Ogier is her lack of resources to prosecute her action without financial support, and her difficulties in obtaining support for the Legal Aid Service. We regard this as a relevant factor, which may excuse some measure of delay. But we do not think that it can be allowed to excuse any amount of delay, and certainly not the delay of more than three years which occurred in this case. The jurisdiction to strike out an action for want of prosecution exists to protect the interests of Defendants and the interests of justice. A Plaintiff who has elected to begin an action inevitably inflicts difficulty, expense and risk on the Defendant. A Defendant is entitled to have the proceedings progressed expeditiously to trial. He is not concerned with or, usually, aware of the Plaintiff's financial difficulties or her dealings with her lawyers. It follows that while a measure of indulgence should be allowed to a Plaintiff who has difficulty in funding an action, this cannot excuse a prolonged period of delay. Advocate Dunster's letter of 16 January 2002 calling on Mrs. Ogier to bring her action to trial made it perfectly clear that the Defendants were not prepared to tolerate further substantial delay on top of the delay in bringing the action in the first place and prosecuting it during the first five years of its existence.
- (3) The advent of legal aid in this Bailiwick inevitably means that lack of resources to prosecute an action will only rarely afford an excuse for inaction. Mrs. Ogier's difficulty in obtaining legal aid was largely due to the fact that she began her action without a full investigation of the evidence that would be available to support her allegations, and that once her advocate had conducted such an investigation, he concluded that the action was without merit. We cannot form a firm view of our own about whether he was right about that, nor do we need to do so. We will only point out that there are clearly serious difficulties of causation and remoteness in her claim for damages. On the face of it, the failure of her business was due to factors independent of the dilapidations at the end of the second letting, in particular her inability to get the appropriate classification from the Tourist Board in the absence of a letting to Grand Havre, and the cash-flow problems which prevented her from paying on time the rent due to Guernsey Brewery. It cannot in our judgment be an excuse for failing to prosecute an action that its intrinsic lack of merit has made it difficult to obtain legal aid.
- (4) A trial fixed now would be held seventeen or eighteen years after the relevant events and eleven years after the commencement of the action. This kind of delay is bound to create serious difficulties for parties, witnesses and the Court. It is true that much of the evidence in this case is documentary evidence. But it cannot be said that all of it is. Evidence of the state of the premises at the beginning of the first letting would be critical, if it were

available. The same is true of evidence to explain and support the various surveys and inventories recording the state of the premises at the end of the first and second lettings. The precise evidential basis of Mrs. Ogier's case on the state of the premises at various times and on the terms of the agreement has never been entirely clear, and her pleadings leave open the possibility of extensive oral evidence which it would be exceptionally difficult for Grand Havre to counter after all these years. Managers and staff have moved on. Memories have faded. In our judgment, the delay has caused substantial risk that a fair trial could not be had.

17. We have reached these conclusions on the material that was before the Judge. The new evidence on which Mrs. Ogier seeks to rely could without difficulty have been put before the Lieutenant Bailiff. But it would not in any event assist her. We think that it does her case more harm than good, by pointing up the extent to which her difficulties in getting legal aid were due to the inherent weaknesses in her case from the outset.

18. In our judgment there are no substantial grounds for challenging the Lieutenant Bailiff's conclusions in this case. We therefore refuse leave to appeal.