Judgment 42/2007 **Barclay v (i) Beaumont (Seigneur of Sark) and (2) Guille (Seneschal of Sark) – Royal Court (Civil Action File 1099) – 15 October 2007**

Sark – conveyance of tenement – action seeking declaration that payment of treizième to the Seigneur was unlawful - Seneschal performing a judicial function when deciding whether or not to pass a conveyance – distinction between the roles of the Seneschal and the Greffier – action against the Seneschal dismissed as unsustainable

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

Civil 1099

The 15th day of October, 2007, before Patrick John Talbot, Q.C., Lieutenant Bailiff; sitting alone.

In the matter of

DUNCAN BARCLAY

(Plaintiff)

- v -

JOHN MICHAEL BEAUMONT, SEIGNEUR OF SARK

(First Defendant

and

LT COL REGINALD JOHN GUILLE, MBE, SENESCHAL OF SARK

(Second Defendant)

In the matter of the action which was placed on the Pleading List on 25 May 2007 and in the matter of the application by the Second Defendant for the proceedings to be struck out as respects him, of which notice was given by email dated 24 May 2007;

THE COURT, having on 8 June 2007 heard HM Comptroller for the Second Defendant, Advocate G S K Dawes for the Plaintiff and Advocate C J Hay for the First Defendant, having STRUCK OUT the proceedings as respects the Second Defendant, with costs on the recoverable basis, reasons being reserved, and having REFUSED LEAVE to appeal to the Court of Appeal, this day HANDED DOWN JUDGMENT in the attached terms.

K H TOUGH
Her Majesty's Greffier

Finalised per PJT 5.12.07

MONDAY 15TH OCTOBER 2007

IN ROYAL COURT 5

Before

Patrick John Talbot, Esquire, QC
Lieutenant Bailiff

DUNCAN BARCLAY

- v –

John Michael Beaumont, Seigneur of Sark (First Defendant)
Reginald John Guille, Seneschal of Sark (Second Defendant)

Advocate for the Plaintiff: **Gordon S.K. Dawes**
Advocate for the First Defendant: **Christian J. Hay**
Advocate for the Second Defendant: **H.M. Comptroller**

Judgment of Lieutenant Bailiff Talbot, Esq., QC

1. On about 8th June 2007 I struck out these proceedings against the Second Defendant who is the Seneschal of Sark ("the Seneschal"). These are my reasons for doing so.

2. By the Cause, the Plaintiff Mr. Duncan Barclay ("Mr. Barclay") sought declaratory relief against the First Defendant who is the current Seigneur of Sark ("the Seigneur") and also against the Seneschal to the effect that the Seneschal's demand for payment of a treizième as a condition for giving his congé to the sale to Mr. Barclay of La Friponnerie, which I shall call ("The Property") which is one of the 40 tenements on the Island of Sark, was unlawful.

3. By his Cause Mr. Barclay contends that the payment of treizième, which has, it seemed, formed part of the Law of Sark since about the

   16th Century, is unlawful. His challenge to the legality of treizième is a fundamental, root and branch challenge. It is based on wide-ranging arguments and includes a challenge based on the Bailiwick Law relating to Human Rights, which came into our municipal law

in 2006. These arguments will be put at a later hearing which is presently fixed for mid-November 2007.

4. The Seigneur maintains his right as the Seigneur of Sark to demand and receive, if he so decides, treizième on any sale of a Sark tenement as a condition to giving his congé. The issue at the heart of these proceedings arose as a result of correspondence between the Advocates for Mr. Barclay, Messrs. Ozannes, and the Seigneur, between 15th March and 3rd May 2007. This correspondence shows that the Seigneur accepts the suitability of Mr. Barclay as a prospective owner of the Property, and that the Seigneur would provide his congé so long as treizième were paid. The issues between Mr. Barclay and the Seigneur were clearly expressed in the correspondence. On this application I need say nothing more about them.

5. On 16th April 2007, Ozannes wrote, for the first time, to the Seneschal in these terms:-

> *"Please find enclosed exchanges of correspondence between myself and the Seigneur concerning the proposed sale and purchase of the above tenement. In this day and age, the requirement that my client, a member of the Barclay family, should be required to pay one-thirteenth of the purchase price of the above property to the Seigneur for his personal benefit as the price of being allowed to purchase that property is repugnant. It is inconsistent with, inter alia, Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November 1950, as it has effect for the time being in relation to the Bailiwick of Guernsey."*

Advocate Dawes, who wrote the letter on behalf of his firm, continued:-

> *'I suggest that it is widely recognised that the requirement of congé/treizième is no longer appropriate. The fact that a document duty has yet to replace the treizième is, I suggest, neither here nor there. It seems likely to be many months, if not longer, before the change is effected. My client wishes to complete this transaction immediately.*
>
> *Please confirm that your Court will recognise and give effect to the transfer of ownership of the tenement. Failure to give that confirmation will lead to proceedings seeking declaratory relief and an order requiring the Court of the Seneschal to,*

> *inter alia, recognise the sale and purchase. I give you fair warning as to the likely cost consequences should the application be opposed. I assume you are content for the matter to proceed in Guernsey rather than Sark given the issues and the identities of the respondents, namely, the Seigneur and yourself, or rather your office."*

6. The Seneschal responded on 25th April 2007, in these terms, so far as is material:-

> *"The Court of the Seneschal can only, must and will, apply the Law as it is, be it customary law or statute law. Under the customary law of Sark the Seneschal's Court requires to have presented to it the Seigneur's congé and the Court asks for the treizième to be handed to it to conclude the transaction prior to the Court giving effect to the conveyance."*

I now refer to the last sentence of your letter:-

> *'The Reform (Sark) Law, 1951, as amended, provides that the Court of the Seneschal shall be the sole Court of Justice in the Island and that in civil matters a right of appeal lies to the Ordinary Court in Guernsey. It would not therefore be proper for me to say that…"*

and here the Seneschal quoted:-

> *" 'I am content for the matter to proceed in Guernsey rather than Sark' nor for you to make that assumption.*
>
> *Please contact the Greffier to arrange a suitable date for the parties to appear before the Seneschal's Court on the above matter of land conveyance.".*

7. Mr. Dawes responded promptly the next day. In his letter of reply he referred the jurisdiction of the Court of the Seneschal as the sole Court of Justice in the Island. He referred and quoted extensively from the decision of the then Bailiff in *Matthews v. Monaghan and Others (20th April 2000)* and then said this:-

> *"In any event it must be evident to you and the Seigneur that this matter cannot sensibly be dealt with by the Court of the Seneschal given the nature of the challenge to the treizième and the relief sought against the Court or the Seneschal itself. There is no doubt that the Royal Court has, by one means or another, jurisdiction to deal with this matter at first instance,*

if only through the residual jurisdiction which was conceded by the Defendant in the case I have referred to."

8. Mr. Dawes then asked the Seneschal for his agreement to bring proceedings in this Court, the Royal Court of Guernsey, and to provide an address for service.

9. The material correspondence between the Advocates for Mr. Barclay and the Seneschal concluded with the letter of the Seneschal to Mr. Dawes, dated 3rd May 2007. In the second paragraph the Seneschal reaffirmed his position. He said:-

"I refer to your second paragraph and confirm that the Court of the Seneschal can only, must and will, apply the law as it is, be it customary law or statute law. Effect is given to a conveyance after congé and treizième has been dealt with in Court."

10. The Seneschal then dealt with questions of jurisdiction and *Mathews v. Monaghan* and referred to another decision, *Godfray v. Constables of Sark,* and made it clear that he had not changed his view as to the proper forum for any proceedings but said:-

"... you will no doubt institute proceedings in such form, against such parties, and in such court, as you see fit. If I am given notice of such proceedings being commenced in Guernsey, I will take advice and decide at that point what part to play therein."

He concluded with these words:

"I once again request that you contact the Greffier to arrange a suitable date for the parties to appear before the Seneschal's Court on the above matter of conveyance of La Friponnerie."

11. No question arose on this application, despite the terms of Section 23(1) and (2) of the Reform (Sark) Law, 1951 ("the 1951 Law"), which required me to decide the jurisdiction of this Court, since all parties before the Royal Court of Guernsey in these proceedings, as I understand it, have given addresses for service within the Island of Guernsey itself.

12. The principal issue before the Court as between Mr. Barclay and the Seneschal on the application of the Seneschal to have the proceedings struck out as against him was, therefore, whether or not the Cause shows a reasonable cause of action or contains a

reasonable claim as against the Seneschal in respect of the statement of the Seneschal, as the Judge of the Seneschal's Court (i.e. a Court with unlimited jurisdiction in civil matters on the Island of Sark, and the sole court of justice in the island) that he would apply the Law of Sark. That Law, in my view, is the Law which, in effect, he swore to apply when giving his oath of office before this Court under Section 22(8) of the 1951 Law.

13. The Seneschal has contended that the Cause should be struck out as against him on the ground that it is frivolous and vexatious and also

that it might be scandalous as well. Those terms have special legal meaning.

14. In paragraphs 3 to 5 of the Cause Mr. Barclay's case as against the Seneschal is set out in the following terms. Under the heading:-

"The Second Defendant and Sark Conveyancing:

3. The Second Defendant is the Seneschal of Sark and is proceeded against in a representative capacity as the embodiment of the Court of the Seneschal.

4. The Court of the Seneschal will not declare, inter alia, the conveyance of a tenement to be effective for the purposes of Sark law without first receiving (i) the First Defendant's congé and (ii) payment from the purchaser of the treizième for onward transmission to the First Defendant.

5. When paid the treizième is received by the First Defendant in his personal capacity and for his exclusive personal benefit."

15. The relief claimed against the Seneschal is both declaratory to the effect that the congé and payment of treizième to the Seigneur are no longer lawful and an order requiring the Court of the Seneschal, when requested, to give effect to the conveyance of the tenement to the Plaintiff.

16. In my judgment, this was a most unusual course for Mr. Barclay to take, that is to say, suing the Judge of the Seneschal's Court, without taking proceedings in that Court, on the basis that the Seneschal, (who is a lay person,) had expressed a view on the law of Sark which had been the law it seems for centuries past, and then said that, as the Judge of the Seneschal's Court, he would apply the Law. I formed the view that this was unusual, but I record also that in his oral submissions Mr. Dawes accepted in argument that:-

> *"The Seneschal would not have to play an active part in these proceedings, I would expect the Seneschal to respect the judgment of this Court and do whatever he is ordered to do."*

17. It is most unusual, and, in my judgment, to be avoided so far as is possible, (especially in a jurisdiction like Sark where the Judge is a lay person), for Advocates to engage in correspondence directly with the Judge with a view to finding out the Judge's view of the law applicable in his Court. I can envisage circumstances where such an approach to the Judge might be appropriate, for instance, on procedural matters, but I very much doubt whether it was appropriate here.

18. Nevertheless, it is of course necessary for me to deal with Mr. Barclay's alleged claim against the Seneschal on its merits as they appear from the Cause and his Advocate's helpful skeleton argument and oral argument before the Court. Despite the terms of paragraph 3 of the Cause, it became apparent during the oral hearing on 8th June 2007, that Mr. Barclay's primary case against the Seneschal was based on the role of the Seneschal's Court in relation to conveyancing transactions, in particular, the passing of conveyances on the sale and purchase of *"les tenements"* on the Island of Sark.

19. Mr. Dawes' argument concentrated on the role of the Seneschal as the Judge of the Seneschal's Court in passing a conveyance of a tenement. Mr. Dawes attempted to draw an analogy between the Seneschal's Court in performing that role and a land registry in another jurisdiction, whether in England and Wales or elsewhere. Mr. Dawes argued that the Seneschal was not being sued as a Judge, but as a person who refuses to pass the conveyance of the property without the congé of the Seigneur and without paying treizième. That appeared to me to be the heart of Mr. Dawes' argument.

20. In my judgment, the claim brought by Mr. Barclay against the Seneschal was obviously unsustainable. I considered that the Cause, amplified by the skeleton argument and oral argument of Counsel, did not disclose a reasonable claim in law as against the Seneschal, that is to say, it did not disclose a reasonable cause of action, and that it should
be struck out under Rule 36 of the Royal Court (Civil Rules) 1989. If I need to do so, I record that in my judgment the alleged claim against the Seneschal was also capable of being described as frivolous and vexatious, and I leave open the question whether or not it could properly be described as scandalous as well.

21. In paragraph 8 of his skeleton argument Her Majesty's Comptroller, who appeared for the Seneschal, provided what he helpfully called *"A little history",* which Mr. Dawes accepted in oral argument was *"essentially correct."* The Comptroller set out the role of the Seigneur, and especially that of the Seneschal, within Sark. Paragraph 8 of the skeleton argument of the Comptroller contains helpful passages, both relating to the original Letters Patent of 1565, confirming the grant of Sark to Helier de Carteret, and also in paragraph 8C to E in the following terms, when dealing with the jurisdiction of the Seneschal's Court to pass contracts. The skeleton argument reads (omitting words that I may properly omit) as follows:-

> *"8C The Greffier registers the contract, but may only do so once passed by the Court. The Greffier's is also a Seigneural appointment, and the keeping of the records of manorial grants and transactions is his duty. His responsibilities were referred to in an Order in Council dated 24th April 1583 as keeping a register and a 'true and loyal record of all cases coming before the Court', which presumably includes a record of property transactions. The implication must be that cases not coming before the Court- e.g. conveyances not 'passed' by it - have no place in the Greffier's register or record."*

22. In paragraph 8D it appears that, by the same Order in Council dated 24th April 1583, it is the obligation of the Greffier to have charge of the records of the Island of Sark. The last sentence of that paragraph of the skeleton argument reads:-

> *"It thus is the Sark Greffier's duty, just as it is the Guernsey's Greffier's duty, to keep a true record of conveyances coming before the Court."*

I have found paragraph 8E of the Comptroller's skeleton argument particularly helpful. It reads:-

> *"8E It may also be appropriate to outline the practice of the Seneschal's Court. The Conveyance is presented to the Court, the Seneschal confirms that both parties are present, or represented by someone with power of attorney, and that both parties and the Court are satisfied with the terms of the conveyance. The Seneschal then asks the Greffier for the Seigneur's congé and requests that the cheque for treizième is handed to the Court; when all that is in place the Seneschal signs the conveyance. The signed conveyance is then passed*

> *to the Greffier, who registers the conveyance in the records of..."* the Island of Sark, described elsewhere as Les Records de l'Isle de Serque. *"The Court is not the Land Registry and the Seneschal is not the Land Registrar."*

Once again I repeat that what was described as *"A little history"* was accepted in oral argument by the Plaintiff's Counsel, as being essentially correct. It is therefore, in my judgment, safe for me to accept what are set out in the skeleton argument as agreed facts.

23. I am convinced that the Seneschal, as the Judge of the Seneschal's Court, (and I stress not acting in any of his other capacities which include President of Chief Pleas), when deciding whether or not to pass a conveyance for registration by the Greffier of Sark in the Records of the Island, is acting as a Judge and carrying out a judicial function. In my judgment, it is necessary for the Seneschal to decide as facts in relation to a conveyance of a tenement presented to him to pass or not pass, first, whether the parties named in the conveyance are before the Court or represented by valid and effective powers of attorney, secondly, that they both or all consent to the transaction set out in the conveyance and to the terms of the conveyance, thirdly, that the congé of the Seigneur has been given, or, if appropriate, waived by the Seigneur and, lastly, that the treizième has been paid or is paid in Court, or, if appropriate, has been waived by the Seigneur.

24. In my judgment, these are all judicial acts in the sense that each of them requires the Seneschal, as the Judge of the Seneschal's Court, to decide the questions listed above as fact, acting judicially in so doing.

25. An appeal would lie to this Court against any decision of the Court of the Seneschal, for instance, not to pass a particular conveyance. That appeal would lie under Section 23(2) of the 1951 Law, and would be against the decision of the Court of the Seneschal *"in civil actions."* A proper comparison may, I think, be made with the position which applies when this Court, the Royal Court of Guernsey, sits as the Conveyancing Court and decides whether or not to pass conveyances of Guernsey realty.

26. In summary, I decided that the arguments of Her Majesty's Comptroller were right in law, that is to say, under the Law of Sark, and that the alleged claim of Mr. Barclay against the Seneschal was unsustainable. For the reasons I have given, I conclude that it was in a legal sense also unnecessary and inappropriate for Mr. Barclay to make any claim against the Seneschal.

27. I dismiss the proceedings against the Seneschal with costs on the recoverable basis. I record that I made that order on the oral hearing.

Mr. Comptroller, does anything arise as a result of those reasons?

H.M. COMPTROLLER: Not so far as the Seneschal is concerned, sir.

THE LIEUTENANT BAILIFF: Mr. Dawes?

ADVOCATE DAWES: No, sir. Nothing that-

THE LIEUTENANT BAILIFF: I notice that Mr. Hay is here as well, and I expect interested in a proper sense to see what reasons I gave. Are you able to bring the Court up to date, Mr. Dawes and Mr. Hay, about the hearing which is presently listed? I think you know along with another case which is still standing up for something like- Greffier, 19th November?

H.M. GREFFIER: November, sir, yes.

ADVOCATE DAWES: Sir, the situation is that since the Court last sat on this matter a number of conveyances have, in fact, been passed by the Seneschal, because there was the question of employing long leases and that-

THE LIEUTENANT BAILIFF: That I had hoped had been dealt with on other facts in another case.

ADVOCATE DAWES: It hasn't been dealt with, it's simply practice, what has happened in practice, and so-

THE LIEUTENANT BAILIFF: I meant several years ago in a decision of Bailiff Carey.

ADVOCATE DAWES: That's correct sir, yes. So the question in this case has become academic because of the amount of treizième involved was very small and the situation is that it is very unlikely that the Court time in November will be required. My friend and I are exchanging correspondence on the issue. We think it very likely that agreement will be reached and indeed I spoke to Deputy Greffier Tostevin the other day to warn her that it's very likely that we won't need that time. Sir, the matter isn't quite concluded but-

THE LIEUTENANT BAILIFF: Well, the other case is standing up, Mr. Dawes, so if the discussions between the parties and their

lawyers should not prove successful, and I very much hope they do, then you would at the moment have to come second in order. It is possible that we would find time for you but it can't be guaranteed at the moment. But it sounds as though there is a very reasonable chance that the time of the Court will not be needed.

ADVOCATE DAWES: I'd be very surprised if the time of the Court is needed and, indeed, there were similar proceedings brought by Sir David and Sir Frederick Barclay and again against the Seigneur, for

some of the other prospective transactions and the same goes for those transactions also.

THE LIEUTENANT BAILIFF: With the same points, no doubt. I see, I didn't know that but I knew that such proceedings were possibilities.

ADVOCATE DAWES: But they are now, as I say, academic.

THE LIEUTENANT BAILIFF: That's good news, if I may say so, for the representatives of all interested parties here. Thank you.

Approved as amended
P.J. Talbot, LB
4.12.07