

Judgment 43/2004

In re Brownstone Insurance (Guernsey) Ltd (in compulsory liquidation) – Royal Court (Civil action file 785) – 6 October, 2004

Companies (Guernsey) Law, 1994 – Insurance Business (Bailiwick of Guernsey) Law, 2002 – liquidator’s application for directions – admissibility of affidavits by arbitrators in civil trial pending before the Lieutenant Bailiff and Jurats – Loi relative aux Preuves, 1855 – Royal Court Civil Rules, 1989, Rule 43 – affidavits in the form submitted ruled to be inadmissible

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 6th day of October, 2004 before Catherine Mary Newman, QC, Lieutenant Bailiff; sitting alone.

In the matter of

BROWNSTONE INSURANCE (GUERNSEY) LIMITED
(in Compulsory Liquidation)

In the matter of

THE COMPANIES GUERNSEY LAW, 1994

In the matter of

THE INSURANCE BUSINESS (BAILIWICK OF GUERNSEY) LAW, 2002

Whereas on the 5th day of October, 2004, the Lieutenant Bailiff considered an application by Brownstone Agency Incorporated and Rebore Thorpe & Pisarello P.C. creditors of Brownstone Insurance (Guernsey) Limited (in liquidation) to rule inadmissible two affidavits (of Robert Hall and Edmond Rondepierre) in these proceedings and heard thereon Advocates A.M. Ozanne and R.G. Shepherd, Counsel for the Applicants and Respondent respectively, the Lieutenant Bailiff this day gave judgment in the terms attached hereto and:

- 1) RULED the said affidavits inadmissible;
- 2) AWARDED costs on the standard recoverable basis to the Applicants in respect of this application;

and the Lieutenant Bailiff ORDERED:

- 1) THAT the Respondent file its cause within 21 days;
- 2) THAT the Applicants file their defences 21 days thereafter;
- 3) THAT Counsel lodge in addition an agreed statement of issues as to which matters in this action are governed by the Law of New York and which by the Law of Guernsey.

S. M. D. ROSS
Her Majesty's Deputy Greffier

OFFICIAL TRANSCRIPT

smon/BrownstoneIns6.10.04
Approved Text

WEDNESDAY 6TH OCTOBER 2004

IN LA COUR ORDINAIRE

Before

Miss Catherine Mary Newman, QC

Lieutenant Bailiff

BROWNSTONE INSURANCE (GUERNSEY) LIMITED
(In Compulsory Liquidation)

(3.30 p.m. hearing commences)

Judgment delivered by Miss Catherine Mary Newman, QC

INTRODUCTION:

1. By an application issued in this Court on 20th September 2004, Brownstone Agency Incorporated and Rebore Thorpe & Pisarello P.C., creditors of Brownstone Insurance (Guernsey) Limited, which is being wound-up by this Court, asked the Court to rule inadmissible two affidavits, one from each of Robert Hall and Edmond Rondepierre, who comprise two of three arbitrators in an arbitration brought by Reliance National Indemnity Company against Brownstone in November 1999.
2. A third affidavit from the only other panel member, Patrick Foley, has been withdrawn because Mr. Foley is no longer willing to permit his affidavit to be used.
3. The application is made within the framework of an application for directions brought by the liquidator of Brownstone Insurance (Guernsey) Limited, a dispute having arisen between Brownstone and Reliance about the meaning of the word “losses” in the award dated 28th June 2000, and Order of the Supreme Court of the State of New York dated 4th December 2000, which the liquidator has decided that he cannot resolve. The application for directions was commenced, Brownstone and Reliance were joined, and the dispute is to be adjudicated upon by this Court as one arising between Brownstone and Reliance, with the liquidator adopting a neutral stance.
4. There being no special court procedures applicable to this matter, the dispute must therefore be treated as any other piece of adversarial litigation. It follows that the present application to exclude the affidavits of Mr. Hall and Mr. Rondepierre is governed by the Guernsey Law of Evidence to which I must now turn:-

Parole Evidence

5. Article 35 of the Loi Relative aux Preuves of 1855 provides-

“35. Lorsqu’il s’agit d’une convention par écrit il n’est reçu aucune preuve par témoins contre ou outré le contenu de la pièce.”

Thus, where an agreement has been reduced to, or recorded in writing, the writing generally becomes the exclusive record thereof, and no evidence may be given to prove the

terms of the transaction, except the document itself or secondary evidence of its contents. I say “generally” because there are some well-established exceptions, many of which are of no relevance to the present case.

6. Two such exceptions are of relevance, potential or actual-
 - 6.1 Where a claim is made to rectify a document, evidence will be admitted of mistakes in the document; this is not a claim for rectification, so this exception has no actual relevance.
 - 6.2 Where the Court has to construe the meaning of the words used in an agreement or any other utterance, the Court will look at evidence of the surrounding matrix of fact. Thus it is common ground between the parties that at the trial the Court will be able to, and should, look at materials other than the award itself. This application will not determine which other materials it should look at. It will only determine whether it will look at the two affidavits to which I have referred above.
7. However, it is vital not to lose sight of the fact that in the present case the Court will not be construing a contract. The role of the Court will be to construe the order of the New York Court and the arbitration award to which the Court Order gives the force of a judgment.
8. Extrinsic evidence is in general inadmissible to contradict or vary judicial documents. An award in an arbitration generally speaks for itself and no evidence to contradict, vary, or, add to it, is receivable. This is not an absolute rule, however, and evidence contemporaneous or roughly contemporaneous with the judgment or award is frequently resorted to in cases where it is necessary to identify the issues resolved by the decision or the award. In some such cases judges have even given evidence about what occurred during the course of cases tried by them. Likewise, arbitrators can give evidence about what happened during an arbitration where such evidence will assist in a later matter, and may give evidence where necessary about what matters were included in the submission, but not about the reasons for the award.
9. Judges can, of course, eliminate ambiguities from, or correct errors in, their judgments after they have been given. This is what happened in the case of Lowry v. Walker (1911) App. Cas. 10. In civil matters of any weight the Court’s order itself is likely to be drawn up with some input from the parties. In the course of that process the parties should spot any ambiguities which are likely to cause problems in the future and can then make a prompt application to the judge in order to clarify matters. Settling of orders in this way does not usually happen in arbitrations, but in the present case the award was embodied in a Court Order only a few months after it was delivered, and no problem appears to have been spotted in that process.
10. In the Lowry case it appears that the judge clarified his judgment of his own motion. The report does not suggest that he did so at the request of either or both of the parties. In principle, however, I can see no fundamental objection to a judge clarifying his judgment in response to a request from the parties. The same must in principle be true of a request for clarification made to an arbitrator or arbitrators, subject to what I say below. Where an approach is made to any tribunal, whether in the course of its dealing with a case or afterwards, it should either be a joint approach or, where the circumstances warrant it, an approach by one party of which the other is kept fully and contemporaneously informed by being copied in on all communications. Anything else may tend to bring the administration of justice into disrepute. Where the tribunal or arbitration panel consists of more than one member, selective approaches must, in my judgment, be discouraged, and legal advisors should not only copy each other into such communications as they may think proper to

have with the tribunal or panel members but also, generally speaking, all the tribunal or panel members as well.

11. What if, as in the present case, contrary to the good practice to which I have referred, approaches are made to the members of the arbitration panel without notification to the opposing team? Does that failure to follow good practice render any evidence thus obtained automatically inadmissible? In my judgment, absent any specific provision prohibiting the use of evidence obtained in this way, and none has been cited to me, it does not.

12. That is not the end of the matter; I have been designated to hear this case by the Bailiff and I am hearing this application in my capacity as the judge who will conduct the trial, which will be a trial with Jurats. Order 43 of the Royal Court (Civil Rules) 1989 provides-

“43. The Court may by order give directions as to the hearing of any action or any question raised by the pleadings, including any exception, fin de non-recevoir or other preliminary point in issue, and may (without prejudice to the generality of the foregoing)-

- (a) order that any facts specified or described in the order shall be proved by affidavit;
- (b) order that not more than a specified number of expert witnesses may be called;
- (c) order that the evidence of a particular witness shall be taken by commission; and
- (d) order the manner in which such evidence is to be taken.”

13. I can and therefore should consider whether the affidavit evidence of Mr. Hall and Mr. Rondepierre should be evidence at the trial of this matter. In considering the matter in this way I am exercising my discretion as to the proper management of this trial. In exercising that discretion, the following matters appear to me to be relevant-

13.1 The Court has not ordered that any facts should be proved by affidavit. However, subject to any application that may be made, it seems to me prudent to confine the scope of any evidence to be given in clarification of the word “losses” to be written down in advance and I would be inclined to grant any application to introduce this type of evidence-in-chief by affidavit. My decision in the matter today is not governed, however, by the form in which the evidence is being presented but by the substance of it.

13.2 Although it has been argued that this evidence would not be permitted to be given under New York Law, I cannot allow that to be determinative of what is admissible in this case. While the meaning of the word “losses” is governed by New York Law, and there is a dispute about what that is, the Court process and admissibility of evidence is a matter for Guernsey Law.

13.3 It may be that this evidence was obtained in breach of an agreement as to the confidentiality of the decision. As the parties to the arbitration and the parties to this litigation are the same, I do not find this argument determinative.

- 13.4 Were all three arbitrators formally expressing a clarification of their award it would be capable of being relevant and admissible evidence on the meaning of the word used.
- 13.5 The evidence of two of the three members of the panel as to what each of them subjectively meant by the word purely as individuals is not relevant and likely to confuse or prejudice the Jurats not to help them. In addition, to give evidence about the intent of an individual member would tend to trespass on the deliberations of the panel, which is not permitted. Individual members cannot give evidence of their individual thoughts on the matter Duke of Buccleuch & Queensbury v. Metropolitan Board of Works (1872) 5 English & Irish Apps. 418.
- 13.6 Nor can only two of the three properly speak for the decision of the panel as a whole, as these witnesses both purport to do. There may be circumstances in which a Court might properly permit them to do so, for example, if one of their number were dead, but that is not the case here. Absence some evidence that this panel is entitled to speak by a simple majority, and none has been advanced to me, I am not prepared to assume that they can do so. Equally, if Mr. Foley had authorised them to speak on behalf of the panel as a whole, the position might be different, but, again, there is no evidence that he has done so.
14. I, therefore, rule that these affidavits in this form are inadmissible and that evidence from some but not all of the panel members about what they as individuals believed the panel to have meant by the word “losses” is not going to be admissible in a trial with Jurats, before me. I leave open the possibility of evidence being given in such form as this Court may direct, which is the evidence of the entire panel acting as a body.
15. I should say that I have not been presently influenced by the fact that Brownstone has sought and obtained a preliminary injunction in the Supreme Court of the State of New York against Mr. Hall and Mr. Rondepierre, restraining them from offering testimony in clarification of the award. First, the affidavits were given prior to the grant of the order; second, Reliance was not a party to that application and had no opportunity to be heard on it; third, the US Courts have yet to hear from Mr. Hall and Mr. Rondepierre; fourth, the Guernsey Court must be master of its own procedure. The order of the New York Court may affect Reliance’s ability to tender this evidence, but that is another matter. For example, the New York Court may decide, having heard argument, that some agreement between the parties governed by New York Law exists, which prevents any evidence being given about this matter now. No discourtesy to the US Court is intended by my disregarding the interim order in this way. If Reliance were itself restrained, following an inter partes argument on the merits from tendering any evidence in a foreign Court, namely, this one, on this issue, I, for one, would want to hear further argument before exercising the discretion to admit or reject such evidence, but we are not at that juncture yet and may never be.

Any other applications?

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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
Friday 22nd October 2004