

**Judgment 46/2004**

**In re X and the Registrar of the Ecclesiastical Court  
of the Bailiwick of Guernsey – Royal Court (Civil  
action file 878) – 18 October, 2004**

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**Grant of probate by the Ecclesiastical Court – Law Reform (Miscellaneous Provisions) Guernsey Law, 1987 – Ecclesiastical Court (Jurisdiction) Bailiwick of Guernsey) Law, 1994 – application for disclosure of information held by the Registrar – heard ex parte – application granted**

*[Although the Lieutenant Bailiff agreed that this edited report of her judgment be published, the papers relating to the application will be sealed and not open to public inspection save with the leave of the court.]*

**IN THE ROYAL COURT OF GUERNSEY**

The 18th day of October, 2004 before Rosalyn Le Couteur Brelsford, Lieutenant Bailiff; sitting alone.

IN THE MATTER OF

X

Applicant

and

THE REGISTRAR OF THE ECCLESIASTICAL COURT  
OF THE BAILIWICK OF GUERNSEY

Respondent

WHEREAS on the 13th October 2004 the Lieutenant Bailiff considered an application for the disclosure of all documents of whatsoever nature in the possession, power or control of the Respondent relating to the Applicant's late husband and his estate and whereas the Lieutenant Bailiff heard thereon Advocate Mark Dunster, Counsel for the Applicant, the Respondent in person and Her Majesty Comptroller attending as Amicus Curiae, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and ORDERED that disclosure be made to the Applicant as sought.

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

**Approved Text**

IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)

Between:

X

Applicant

and

THE REGISTRAR OF THE ECCLESIASTICAL COURT  
OF THE BAILIWICK OF GUERNSEY

Respondent

**BEFORE Rosalyn Le Couteur Brelsford, Lieutenant Bailiff**

Advocate for the Applicant: Mark Dunster.

The Respondent in person.

H.M. Comptroller attending as amicus.

Date of Hearing: 13<sup>th</sup> October 2004

Date Judgment handed down: 18<sup>th</sup> October 2004

Note: This Judgment has removed (for the purposes of circulation) references to the specific allegations or matters relating to X's application because of their sensitive nature.

1. This is an application by the Applicant for the disclosure of all documents of whatsoever nature in the possession, power or control of the Respondent relating to an estate of personal property.
2. The matter relates to a grant of probate by the Guernsey Ecclesiastical Court. There is a prima facie case that the Will at least, and probably the application for the grant of probate, was fraudulent.

Request for Ex Parte Application

3. The Applicant, through Advocate Dunster, has requested that the present application be ex parte and in camera as "the issues involved are of a sensitive nature and the potential prejudice to be suffered by the Applicant by putting interested parties on

notice far outweigh the prejudice to be suffered by their non-attendance”. Paragraph (c) of the Application states:-

- c) That in any event, due to the confidentiality of this matter, and the fact;
  - i) civil and/or criminal fraud proceedings may be commenced;
  - ii) injunction proceedings may be commenced if funds are located; and
  - iii) A Guernsey firm of Advocates were previously instructed

That this matter be heard in camera and without notice to those who obtained the Guernsey grant of probate.

H.M. Comptroller stated that for his part he had difficulty submitting what should be the “downside” of Advocate Dunster’s argument in that the Applicant was a clearly interested party and the Court might well be in some difficulty to require the attendance of persons yet to be identified. There was prima facie evidence of fraud having been committed and the matter should stand alone on the Norwich Pharmacal principle. I find therefore that the present application is not an application for pre-action disclosure against an alleged wrongdoer, rather it is a wholly separate action against a third party for disclosure of documents. The party who obtained the (possibly) fraudulent grant of probate is neither a necessary nor a proper party to the application and in these special circumstances I confirm that the application can be heard ex parte.

#### The Application

4. The applicant is applying for –

- (a) a declaration that the documents sought are a matter of public record and therefore open for inspection and the taking of copies thereof by the Applicant, further or alternatively
- (b) For an order pursuant to

“a. Section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law 1987; alternatively

b. The Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law 1994; alternatively

c. The Court’s inherent jurisdiction

that the Respondent do produce to the Applicant copies of the documents relating to the disputed Guernsey grant of probate.

#### Ecclesiastical Law on Procedure

5. Advocate Dunster argues that over the centuries rules of procedure and/or conduct and/or disclosure of documents in respect of the Ecclesiastical Court have never been laid down and that all that can be proved is a negative i.e. that such rules of procedure do not exist to cover the situation of this case. Advocate Dunster also referred me to Laurent Carey in his book “Les Institutions, Lois et Coutumes d L’ile de Guernesey” at page 21 which states:

*“Les testaments doivent être reconnus par devant le Juge d’Église, et c’est à lui qu’en appartient l’enregistrement. Mais toute contestation qui survient à l’occasion d’un testament, soit à l’égard de sa validité, ou pour toute autre cause que ce soit, c’est à la Cour Royale à en connaître.”*

6. Advocate Dunster also asked me to consider section 3 of the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law, 1994 which states that the Ecclesiastical Court has no jurisdiction in the cases of dispute and that the “*Royal Court may, in any proceedings before it, give such directions to the Ecclesiastical Court in relation to the grant of probate or letters of administration as the Royal Court thinks fit*”. Advocate Dunster argues that this present application concerns a fraudulent issue of a grant of probate and therefore the Royal Court, in accordance with section 3 aforesaid, has jurisdiction to give directions to the Ecclesiastical Court and order the disclosure of the Documents.

#### Nature of probate jurisdiction in England and Wales

7. I have also been helped by the opinion of Counsel an English Barrister with a wide experience of the law and practice of the English courts in relation to probate matters. He suggests that there are at least three ways in which the application for disclosure of the documents might successfully be put under English law. These can be summarised as follows:-

- a. Under Section 124 of the Supreme Court Act 1981 which in general terms states “any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection,”;
- b. Under Rule 5.4(2) and (3) of the Civil Procedure Rules (which has the same effect as Order 63, rule 4(1) of the Rules of the Supreme Court) a party who

pays the prescribed fee may, during office hours, search, inspect and take a copy of any document if the court gives permission. The application may be made without notice. Counsel has little doubt that the English Court would be willing to order disclosure of the Documents under CPR 5.4(3) on the *prima facie* evidence that the grant of probate has been procured by fraud; and

- c. Under the Court's inherent jurisdiction to govern its own procedure. Counsel states that if the Documents were in the hands of an innocent third party he has little doubt that the English Court would order the disclosure of the Documents from the third party under the *Norwich Pharmacal Co v. Commissioner of Customs and Excise* [1974] AC 133. ("Norwich Pharmacal") principle. The Norwich Pharmacal principle would apply to the Documents if they were in the hands of any other person other than a court and were not subject to privilege. Nevertheless the Norwich Pharmacal principle would provide powerful guidance to the Court as to how it should exercise its discretion to disclose the Documents under its inherent jurisdiction."

Counsel states:- (paragraphs 20, 22 and 23

- "20 If the documents in the Guernsey court file were in the hands of an innocent third party individual, I have little doubt that an English court would order disclosure of the documents from the third party. In the case *Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1974] AC 133, the House of Lords ordered the English Commissioners of Customs and Excise in an action for disclosure to disclose the identity of individuals who were infringing the Claimant's patents. In his speech, Lord Reid stated the following principle (at 175):

"They (*the authorities*) seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in writing the wrong if he unwittingly facilitated its perpetration."

21. The scope of the principle is not limited to identifying wrongdoers but can also incorporate disclosure of documents relevant to the applicant's cause of action against the wrongdoers (*CHE Software Care v Hopkins & Wood* [1993] *Fleet Street Reports* 241).
22. It appears that the Guernsey grant of probate, effected by the Guernsey Ecclesiastical Court, has allowed the executor to make off with money of the deceased's estate which should properly have been payable to X, whether as beneficiary or as personal representative. The witness statement therefore discloses strong *prima facie* evidence that the executor has acted either so as to convert the deceased's property or in fraudulent breach of trust as executor or has received the trust property knowing that the monies had been received by him in breach of trust. Any of these causes of action (conversion, breach of trust or constructive trusteeship) would count as "wrongdoing" within the principle (*Ashworth Hospital Authority v MGN Limited* [2001] 1 *WLR* 515), so

that the Guernsey court has become “mixed up” (in the words of Lord Reid) in the executor’s wrongdoing.”

#### The Registrar’s submission

8. Advocate Ozanne, Registrar of the Ecclesiastical Court, expressed his concern that if there were to be general public access to his archives, not only would this be an administrative burden but he considered there would be considerable potential harm in a tiny community such as Guernsey if estate values were to be public knowledge. He was also concerned as to what documents in particular would be deemed to be “public”. He considered that if the Court were to make an order in the present case to allow access to the documents then it should refer solely to the present case and the present circumstances. The decision could still be seen as a precedent, i.e. the Court having the right to make such an order in certain circumstances but that future cases would still be considered as individual cases.

#### H.M. Comptroller’s submission

9. H.M. Comptroller stated that he was not convinced that the English and Wales position was of much value in that the position needed a statement in statute. The practice of the Ecclesiastical Court had not been to open its records widely to the general public and it would be a significant step to take to disturb the present situation without pressing reason. This was a matter that might be considered by the Inheritance Law Review Committee. While the Court, in his opinion, clearly had an inherent jurisdiction to right an injustice and assist parties in so doing, he did not consider that it was necessary to invoke that power in that in his opinion section 3 of the Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law, 1994 which states that the Ecclesiastical Court has no jurisdiction in the cases of dispute and that the “Royal Court may in any proceedings before it give such directions to the Ecclesiastical Court in relation to the grant of probate or letters of administration as the Royal Court thinks fit” did already give the Royal Court the statutory jurisdiction to make the order sought.

#### Conclusion

10. As Advocate Dunster pointed out it is clear from the history of the Ecclesiastical Court that despite the best efforts of people over the centuries rules of procedure and/or conduct and/or disclosure of documents in respect of the Ecclesiastical Court

have never been laid down and that the only documents which he could produce showed a negative i.e. that such rules of procedure do not exist to cover the situation of this case. In view of this and bearing in mind the helpful submissions of H.M. Comptroller and Advocate Ozanne I am not at this time going to make a declaration that all Ecclesiastical Court documents are on the public record and open to inspection, although I would suggest that it might be helpful if the position and general procedure be clarified by statute.

11. In my opinion the Court clearly has an inherent jurisdiction to right an injustice and the Registrar of the Ecclesiastical Court has a duty to assist in the righting of any wrong. I also agree with H.M. Comptroller that the 1994 Law gives this Court power to make an order that the documents as contained in paragraph 4 of the application should be disclosed to the applicant and I so order.