Judgment 5/2009 | **(i) Barclay and Barclay (ii) The Barclay Foundation v Latrobe –Bateman et al (Trustees of the Sark School and Community Centre Trust) – Court of the Seneschal – 28 January 2009 and 4 February 2009**

(i) Sark – charitable donation in aid of the New Island Hall – whether the Hall was being used in breach of the Trust Deed – plaintiffs' application for declaratory relief and a permanent injunction - held that the Trust Deed must be construed using the 'four corners test' of construction and having regard to the matrix of fact – held that the present use of part of the Hall under a public house licence is lawful and within the terms of the Trust Deed – held that there had been no negligence or innocent misrepresentation by the defendants – held that no express condition had been imposed by the plaintiffs therefore 'the Sark law of gifts' could not be applied – proceedings dismissed

(ii) Trustees application for costs on a full or partial indemnity basis – Reform (Sark) Law, 2008 (s.18) – extent of judicial discretion as to costs – Royal Court Civil Rules, 2007 (r.83) provide persuasive guidance – held that the plaintiffs had not acted unreasonably and that there were no special circumstances which would justify an order for costs on the full indemnity basis – defendants awarded costs equivalent to the recoverable basis applicable in the Royal Court of Guernsey, subject to specified exceptions and additions

IN THE COURT OF THE SENESCHAL OF SARK

Mr Patrick John Talbot QC, sitting as a Lieutenant Seneschal

Wednesday the 28th January 2009

BETWEEN

(1) SIR DAVID BARCLAY and SIR FREDERICK BARCLAY

First Plaintiffs

(2) THE BARCLAY FOUNDATION

Second Plaintiff

and

(1) CHARLES JEREMY LATROBE-BATEMAN
(2) JOHN RAYMOND BARROWS
(3) JOHN PHILIP CARRE
(4) BERTHA HELEN COLE
(5) DAVID WOODS MELLING
(6) JANE NORWICH
(7) BRIAN GARRARD
(8) LOUIS HEALD

Defendants

JUDGMENT
(approved)

of Lieutenant Seneschal Patrick Talbot QC

28 January 2009

Advocates Peter Ferbrache and Gordon Dawes (Ozannes) for the Plaintiffs Sir David Barclay, Sir Frederick Barclay and The Barclay Foundation

Advocate Christian Hay (Collas Day) for the Defendants, the present and past trustees of The Sark School and Community Centre Trust

HM Comptroller (Howard Roberts QC) as *amicus curiae* (who addressed the Court in writing

Hearing dates 27-29 October 2008 and 29-30 November 2008

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1. These are somewhat unusual proceedings about a Sark charity, (of which the Defendants are the present and past trustees of the charity,) called The Sark School and Community Centre Trust, ("the charity").

2. The charity is governed by the trusts declared in a Trust Deed dated 24 May 2001, ("the Trust Deed"), to which I shall return in due course.

3. Before dealing with the specific facts of the case, I refer shortly to ***The Queen on the application of Barclay v The Secretary of State for Justice***, 2 December 2008, [2008] EWCA Civ 1319, the Court of Appeal in England, on appeal from the decision of Wyn Williams J., [2008] 3 WLR 867, in which the validity of The Reform (Sark) Law 2008 ("the Reform Law") was considered. (The First Plaintiffs in these proceedings, Sir David Barclay and Sir Frederick Barclay, were the appellants in the Court of Appeal.) The issues in that case are not relevant to the instant case, but there are some helpful introductory comments in the judgments of the learned Judge and Lords Justice which, I think, assist me in putting these proceedings into general

context. In the Court of Appeal Lord Justice Pill, in giving a short historical introduction, which I accept for the purposes of these proceedings, said:

> "*Sark*
>
> *The Island of Sark is a Crown Dependency. The United Kingdom government is responsible for Sark's international relations but Sark is not a part of the United Kingdom. Following Anglo-French conflict, the King of England became the overlord of the Channel Islands, including Sark, in that capacity and not as Duke of Normandy. The present form of government arises from Letters Patent issued by Queen Elizabeth I in 1565 making the grant of the island to the first Seigneur as a royal fief (Lé Rouai, Nouot' Duc; Professor Paul Matthews (1999) 3 Jersey Law Review). …. Sark is part of the Bailiwick of Guernsey. Both under the 1951 Law and the Reform Law, it has its own unicameral legislature (Chief Pleas) and its own court (the court of the Seneschal), as well as a Seigneur. Subject to the powers of the Privy Council, Chief Pleas has powers to legislate for the island. The two territories, Guernsey and Sark, share a Lieutenant Governor and the Reform Law makes provision for dealings with Guernsey. The Royal Commission on the Constitution (the Kilbrandon Report (1973))*
> *("Kilbrandon") reported (paragraph 1448) that the Chief Pleas of Sark and the States of Guernsey both argued that the constitutional arrangements between Sark and the United Kingdom were, broadly speaking, the same as between Guernsey and the United Kingdom. Sark has an "independent relationship with the United Kingdom" (paragraph 1355). The parties agree that the current position is that accepted in Kilbrandon, which also states, at paragraph 1362, that "by convention Parliament does not legislate for the Islands [including Sark] without their consent in matters of taxation or other matters of purely domestic concern. … It has not been suggested, however, that, constitutionally, Sark is in any way subject to the other Island or that its relationship with Guernsey affects the outcome of the issues in this appeal. The appeal has been argued on the basis that, subject to the Privy Council, Sark has an autonomous legislature. The population of Sark is about 600…".*

4. With the assistance of a legacy from the late Mrs Joyce Violet Betty, (who died on 19 November 1997,) of about £845,000, (including earned interest,) the charity has erected, at a total cost of about £2,100,000, a most substantial building, or set of buildings, on an impressive site in the middle of the Island. On 1 July 2001 the land upon which the buildings now stand was leased by the Island Trustees to the then trustees of the charity for a term of 100 years at a nominal rent.

5. The charity's buildings, and the land adjacent to them, have many different uses, which seem to me to benefit all ages of residents on the Island of Sark, and in that way benefit the Island community as a whole.

6. First, at one end of the buildings, there is the Island School, which has been leased by the trustees to the Island's Education Committee for 100 years at a rent of £1. Since September 2004, when the new school first opened, up to 45 schoolchildren, and their teachers, have enjoyed splendid up-to-date facilities; the new school replaced two different old school buildings, which are now used, *inter alia*, respectively (i) for this Court, and the sittings of Chief Pleas, and (ii) as the Sark Visitors' Centre and room for the archive and work of *La Societé Serquiaise*.

7. Secondly, at the other end of the buildings there is a playschool for pre-school children, which is let by the trustees of the charity at a rent of £150 *per annum*.

8. Thirdly, adjacent to the buildings are substantial playing fields called The Millennium Fields, which were leased to the charity by The Island Trustees. The trustees of the charity have sublet them to the Sark Sports Club for a term of 10 years by a sublease, which was granted in February 2003; the Club looks after the playing fields and surrounding area, thereby releasing the trustees of the charity from this financial burden.

9. At the centre of the buildings lies a large hall, with its associated facilities, called The New Island Hall, (and which I shall, therefore, call "the Hall"). The Hall includes a very large sports and leisure hall at the rear, a cafeteria on the ground floor and two licensed bars, one on the ground floor and the other on the first floor, a meeting or board room, and changing rooms on the ground floor. As the evidence of Mr John

Carré and Mr Jeremy Latrobe-Bateman established, there have been over 700 different bookings of parts of the Hall in the last year, including (i) indoor sports, like badminton, snooker and P.E. for the schoolchildren, (ii) the weekly 'Thursday Club' lunches for the older residents of Sark, (iii) theatre group meetings, including rehearsals for, and the performances of, the Sark Christmas pantomime and (iv) ladies' keep-fit groups.

10. On any view, therefore, the Hall is already being used, on a regular basis, very often indeed, by members of the Island's community for various leisure activities, including using the cafeteria and the licensed bars. It seems that the Hall has replaced the Old Island Hall, (which is very close to this Court room and which had, according to Mr Carré's evidence, become expensive to maintain,) as the main community centre for the Island's population. In doing so, the terms of Mrs Betty's Will have been performed, since her large residuary gift, (which is recognised by a stone plaque on the front of the Hall,) has been used to build a '*…new Island Hall … for the benefit of the inhabitants of Sark'* (clause 4(14) of her Will).

11. The Plaintiffs contributed most generously to the charity, to the extent of a total of £200,000, so as to enable the construction and completion of the Hall and the new school for the Island of Sark to take place, but now the Plaintiffs are aggrieved by the use to which *parts only* of the charity's buildings are being put.

12. Sir David and Sir Frederick Barclay, both on their own part and on behalf of the Second Plaintiff, (which is a corporate charity,) seek relief by their Re-Amended Cause against the Defendants, as the present and past trustees of the charity. Their *locus standi* to seek such relief caused me some concern and I asked HM Comptroller, on behalf of the Law Officers, to provide the Court with written submissions on the point as *amicus curiae*. His submissions, which were received by me between the October and November 2008 oral hearings of these proceedings, removed my concern and the proceedings are agreed between Counsel for the parties to be justiciable at the suit of the Plaintiffs.

13. The Plaintiffs ask for relief on two different grounds.

14. First, they seek declaratory relief, and a permanent injunction, so as, in effect, to require those of the Defendants, who are the present trustees of the charity, to comply with the construction placed by the Plaintiffs on the primary charitable trust declared in the Trust Deed by ensuring that the Hall, which forms part of the property of the charity subject to the Trust Deed, is not hereafter operated as a public house, whether by the present trustees or by their successors or by any managers of the Hall from time to time appointed by the trustees, on the ground that such use is, and would in the future be, in breach of clause 3 of the Trust Deed.

15. The Plaintiffs contend that the Hall is being run by the present trustees of the charity as a public house and that, upon the true construction of the primary trust, such user is not permitted. Whereas the Defendants argue that their user of the Hall is lawful under the Trust Deed and, in any event, that they are neither running a commercial business there nor allowing a public house to operate there under the management of the two managers, Mrs Sandra Williams and Mrs Sharon Boerenbecker, ("the managers").

16. Secondly, by way of an alternative, (which their Counsel described in his opening as "*very much a second option*",) they seek the return of two separate donations of £100,000 each, which were contributed to the charity in late June 2001 (by the Second Plaintiff The Barclay Foundation, which, as I have said, is a charitable corporation,) and on about 25 September 2003 (by the First Plaintiffs, Sir David Barclay and Sir Frederick Barclay).

17. Under this head of claim, the Plaintiffs seek recovery of their charitable donations on the ground that the trustees at the time of the two contributions, - and principally Mr John Carré, the chairman of the trustees from the inception of the charity in May 2001, - misrepresented the factual position to them by failing to inform them of their intention that there would be licensed bars in the Hall and that the management of the Hall, *including the licensed bars*, would be either franchised or licensed to commercial operators, with the result that, by such failure to inform, the Plaintiffs, (whose policy for charitable giving did not include making donations to any commercial concerns,) made the two gifts to the charity in reliance upon their belief, induced by Mr John Carré's failure so to inform them, that there they would not be

any such commercial concern operating in the Hall. In other words, the Plaintiffs argue that they would not have made any financial contribution to the charity at all had they known of the trustees' intention to have licensed bars operating as a public house in the Hall buildings.

18. The Plaintiffs also seek recovery of their two separate donations (i) on the ground that it would be unconscionable for the trustees not to repay them and (ii) pursuant to what they describe as the '*Sark law of gifts'*.

19. It is noteworthy, I think, that, although their donations may have been used rateably across the whole capital project, since, as Sir David accepted, there was no specific requirement made or condition imposed by the Plaintiffs either that their donations should only be used on the school part of the project or for any other express limited purpose, the whole of the donations are said by the Plaintiffs to be repayable to them and not, say, either such proportion of the total capital cost as £200,000 represented (£200,000/£2,100,000) or such proportion of the total capital cost, including the furnishing and equipping of the ground and first floor bars, as £200,000 represented, since, the Plaintiffs argue, it would be unconscionable for *any* part of either of the two donations to be retained by the trustees.

20. The Plaintiffs, through their Counsel, stress that they accept that the Defendants have acted in good faith in their dealings with them and that any such alleged misrepresentation was, at the highest, negligent, or, at the lowest, innocently made.

21. As a further limb of this argument, the Plaintiffs seek to rely upon Norman, Guernsey or French principles of the law relating to gifts to recover their donations.

The Trust Deed

22. I turn now to the central issues in the case, which I shall seek to decide in this Judgment.

23. The primary case raised by the Plaintiffs relies upon the Trust Deed itself. It is, therefore, a question of construction of a deed, under which a Sark charity has been

established – see clause 2 of the Trust Deed where it is provided that the trustees hold the assets of the charity

> '*for the benefit or support or in furtherance of the primary charitable purposes … **provided** that no payment or application shall be made for any purpose which is not charitable under the law of Sark.*"

24. Although the Trust Deed is expressly made subject to it the law of Sark, little or nothing is known of Sark charity law. This is to be expected, I think, since there has been no need, it appears, for this Court to deal with questions relating to Sark charities in the long centuries from 1565 to the filing of the present cause. In this respect, there is no difference, I think, between Sark and Guernsey – see ***In re Moore deceased*** (1972) 21 March, *per* Loveridge DB at p. 13, where he said, in relation to the law of Guernsey, that:

> "*… the law of this Island on charitable trusts is vague, unsettled and uncertain and that plainly gives rise to difficulties.*"

25. It falls to me to construe the Trust Deed in the absence of relevant authority, but that has not caused me to look elsewhere for judicial aid since I do not think it necessary for me to do so.

26. Clause 3 of the Trust Deed is the heart of the Trust Deed and reads as follows:

> "*The primary charitable purposes of the Trust are the provision maintenance and support in Sark of a school and community centre and facilities for education training instruction culture recreation sport and leisure for the benefit of the inhabitants of Sark.*"

27. It is common ground between the parties that the Trust Deed, and especially clauses 2 and 3, established a binding charitable trust. The dispute between them is whether or not clause 3, the primary charitable purposes clause, permits the trustees of the charity for the time being to use and run specific parts of the Hall, *i.e.* the two licensed bars,

in the present manner under a public house licence. The Plaintiffs say, No, whereas the Defendants say, Yes.

28. Before deciding this question, I record that, whereas at the outset the Plaintiffs appeared to challenge *all* uses of parts of the Hall under any of the public house licence, the restaurant licence and the off-licence granted in this Court to Mrs Sandra Williams, one of the managers, in 2006 and 2007 and continued annually thereafter, it became clear from the opening of the Plaintiffs' Counsel and from Sir David Barclay's evidence that the use which they contended was unlawful, in that it offended clause 3, was use of parts of the Hall *as a public house* under the public house licence, and that they did not wish to contend any further that the use of either the restaurant licence in the cafeteria or the off-licence was in breach of clause 3. For this part of their case to succeed, I would, therefore, have to find that the present use of the Hall under the public house licence was in breach of clause 3.

29. I conducted a *vue de justice* on the first day of the hearing of the trial, accompanied by Counsel and representatives of the parties and, in the usual way, what I saw then, including what was pointed out to me, forms part of the evidence in the case.

30. I also heard oral evidence during the hearing in October and November 2008 from four witnesses, each of whom, in my view, strove to assist the Court as much as possible. Each of the witnesses had given a written witness statement, in accordance with directions which had been agreed earlier in the course of the proceedings, and confirmed that the contents of his statement were true.

31. First, on the second day of the hearing, on behalf of all the Plaintiffs, Sir David Barclay and Sir Frederick Barclay, the First Plaintiffs, each gave evidence. This part of the hearing took place in Brecqhou, to which island I had adjourned the hearing so that Sir David, whose physical health is somewhat frail, could give oral evidence. It was convenient, since the Court was sitting in Brecqhou, for Sir Frederick's evidence to be heard there too, and so I agreed to his evidence being heard there too. (I mention in parenthesis that it was agreed by Counsel for the Plaintiffs, for the purposes of these proceedings, that Brecqhou formed part of Sark, or alternatively

was subject to the jurisdiction of this Court, and that, therefore, this Court could sit at the castle owned by Sir David and Sir Frederick Barclay on that island.)

32. Secondly, on the third and fourth days of the hearing, on behalf of the Defendants, Mr John Carré and Mr Jeremy Latrobe-Bateman gave evidence.

33. I say at the outset that each of the witnesses was impressively careful, when giving his evidence, to try to limit it to what he personally recalled and that there were, in the detailed analysis of the evidence, no conflicts between the two sides to the litigation. I accept all the evidence of the witnesses.

34. But there were parts of the evidence of each of the two sides, which, as it were, never factually coincided. Two important examples were as follows. First, Sir David Barclay and Sir Frederick Barclay said that they had a clear policy for their charitable giving, under which they did not intend to benefit any commercial enterprise, but Sir David accepted that in his dealings with the trustees' representatives, primarily Mr Carré, he did not at any time communicate this policy to them or otherwise impose any express limitation or condition on the use by the trustees of either of the Plaintiffs' two donations of £100,000. And secondly, the trustees' witnesses, primarily again Mr Carré, said that the trustees of the charity, and their predecessors on the project team or the joint committee for the old Hall and education, always intended that the Hall would include a licensed bar, or two licensed bars, but they did not, before either of the two donations of £100,000 to which these proceedings relate was made, expressly inform either Sir David Barclay or Sir Frederick Barclay of this proposed feature of the Hall buildings.

35. I accept, in particular, the evidence of Sir Frederick Barclay and Sir David Barclay that, on behalf of them both, during their joint visit to Sark on 24 September 2003 Sir Frederick inspected the school and Hall building in its then state of construction, *i.e.* a shell without internal walls, and that no licensed bar was mentioned by Mr Carré during that visit either to him or to Sir David, (who, by reason of ill health, remained outside sitting on a stone). It was also clear from the evidence of Sir Frederick Barclay and Sir David Barclay that neither Sir David nor Sir Frederick has personally seen and experienced the uses to which the Hall, and, indeed, the new Island School,

are now being put. Their evidence must, therefore, depend on what they have been told by others about the present use of the Hall, and thus must depend in material part on hearsay evidence, which the law of the Bailiwick still rejects. Nevertheless, that does not, in my judgment, prevent the Plaintiffs from *arguing*, in reliance upon the evidence of the Defendants' witnesses, Mr Carré and Mr Latrobe-Bateman and upon the *vue de justice*, that the use of parts of the Hall as licensed bars under a Sark public house licence, which requires the Hall to be open for stated hours in summer and winter, is in breach of the trust declared in clause 3 of the Trust Deed. I appreciate that the Plaintiffs contend that the public house licence itself, and the Sark licensing regime, are not relevant to this case, but I disagree. These matters seem to me to form part of the relevant facts of the case.

36. In construing clause 3 of the Trust Deed, I must construe it in the context of the whole document, using the so-called '*four corners test'* of construction. I am also entitled, in my judgment, to take into account, if they were to provide assistance, the circumstances surrounding its making, that is to say, what is often called the matrix of fact in the context of which the Trust Deed was made. But, for the sake of completeness, I find that it is not relevant to this part of the Plaintiffs' case that a copy of the Trust Deed had been supplied to Sir David Barclay by the trustees' then advocate, Advocate J.N. van Leuven, (as he then was,) with his letter to Sir David dated 7 June 2001.

37. The only other provisions in the Trust Deed which might provide limited assistance are, in my view, clauses 6 (a) and (c), and paragraph 1 of the Second Schedule, under which the trustees of the charity were granted "*[i]n the administering of the Trust Fund all the powers of an absolute owner* ...", but, in my judgment, these provisions cannot *limit* the operation and application of clause 3. I also note that there is no provision of the Trust Deed which mentions the future use of part or parts of the charity property as a licensed bar.

38. The evidence of Mr Carré and Mr Latrobe-Bateman on behalf of the Defendants and the terms of Mrs Betty's testamentary residuary gift under her Will dated 27 November 1995, established (i) the need perceived by the inhabitants of Sark for a new community hall and (ii) the 'marriage' of that perceived need with the need for a

new, up-to-date school. But, whilst the evidence of the Defendants' witnesses dealt, a little generally, with the apparent wishes of local residents for a licensed bar to be included within the Hall, I do not consider that such a wish can properly *govern* the construction of clause 3.

39. Accordingly, in my judgment, the wording of clause 3 must be read and interpreted on its own.

40. Does, then, the express wording of clause 3 render the present use of the Hall by the trustees and the managers unlawful?

41. It seems to me that the wording of clause 3 does not go so far as to prevent the trustees of the charity for the time being from allowing the use of a relatively small part of the ground floor, and a more substantial part of the first floor of the Hall, as licensed bars under a Sark public house licence, (whether they do so themselves or permit managers, who run the administration of the Hall as a commercial concern to do so,) *so long as* the use of those parts does not either materially prevent the use of the other parts of the Hall, including the main hall part at the rear of the building, for the charitable purposes listed in clause 3 or substantially reduce the useable parts of the Hall so that the school and community centre purposes cannot properly be achieved.

42. On the *evidence* before the Court from Mr Carré and Mr Latrobe-Bateman of the very many uses to which parts of the Hall are put by inhabitants of Sark and by visitors to Sark, including exhibit 'JLT 1' produced by Mr Latrobe-Bateman in his evidence, and on the basis of what I myself saw, and had pointed out to me, at the Hall during the *vue de justice*, I am convinced that those charitable purposes are presently being achieved, and can be achieved in the future if terms like those contained in the 'hand-made' Management Agreement dated 1 April 2006 are imposed on managers of the Hall. In reaching this conclusion, I accept the evidence of Mr Carré about the financial cost of the trustees keeping the Hall open and the costs, including outgoings, which are being saved by the charity by licensing the management of the Hall to the managers. This feature of the case was also, I believe, highlighted by Mr Carré's evidence about how fragile the Hall's finances might well be in the event that the

managers were to decide at the end of March 2009 not to renew their agreement with the trustees.

43. I add that, to my mind, and contrary to the Plaintiffs' contention, the Hall cannot, on the same evidence, properly be described as a public house. The Hall, in my judgment, is a community hall/community centre, which includes two licensed bars, as well as many other facilities, including a cafeteria, a very large sports hall, a snooker hall and a meeting room or boardroom. Accordingly, I find that the present use of the Hall by the current trustees of the charity, including its use by the managers, is lawful under the law of Sark and within the terms of clause 3 of the Trust Deed and, in particular, that the use of two parts of the Hall as licensed bars under a Sark public house licence is lawful use under the law of Sark and within the terms of clause 3 of the Trust Deed. In my judgment, this major plank of the Plaintiffs' case has not been made out *on the evidence led on their behalf*, including the evidence received by me on the *vue de justice*.

44. I, therefore, reject the primary part of the Plaintiffs' case in respect of which they claimed declaratory relief and a permanent injunction.

45. The secondary limb of the Plaintiffs' claim is, I believe, novel. Of course, that does not mean that it is necessarily wrong, but just that it requires careful analysis and consideration on my part.

46. During oral argument, I encouraged both Advocate Peter Ferbrache and Advocate Gordon Dawes to explain quite what the Plaintiffs' case was on '*unconscionability*'. I did not, in my view, succeed and their later written submissions did not, I think, provide a better explanation. In any event, I do not consider that, when analysed, this legal argument adds anything to their case on misrepresentation or on the law of gifts.

47. The case of the Plaintiffs on misrepresentation is put as either negligent or innocent misrepresentation.

48. I shall deal first with negligent misrepresentation. In my judgment, this case fails *in limine*. The most that the Plaintiffs can establish is a duty, (the existence of which in

law is, I think, doubtful,) on the part of the trustees, owed to substantial donors to the charity, including the Plaintiffs, to apply the funds of the charity lawfully, *i.e.* in accordance with the Trust Deed, and to comply with any express condition which such donors might have communicated to the trustees at the time of their donations. I have already decided earlier in this Judgment that, in applying the funds of the charity to finance or support the use of parts of the Hall as licensed bars operating under a Sark public house licence, the trustees are not acting unlawfully and it was accepted by Sir David Barclay in cross-examination that he had not imposed any express condition or limitation on the use of either of the two donations of £100,000 made by the Plaintiffs in June 2001 and September 2003 respectively. Furthermore, Mr Carré said in his evidence, which I accept, that he did not know of any policy of the Plaintiffs not to make charitable gifts to any commercial concern until he received the letter from Sir David Barclay dated 3 September 2007. Accordingly, assuming such a duty exists in law, there has been no breach of it, and so no negligence can be established.

49. The case in innocent misrepresentation is a little hard for me to understand. It appears to be based upon an alleged failure on the part of the then trustees, and of Mr Carré in particular, to bring to the attention of the Plaintiffs the intention or plan of the trustees of the charity to include within the Hall a licensed bar or bars operating under a public house licence. I accept the evidence of Mr Carré and Mr Latrobe-Bateman about the enquiries made of the inhabitants of Sark well before the establishment of the charity under the Trust Deed and that most of them knew all along that the Hall would include such a bar and, indeed, positively encouraged the inclusion of such a bar within the plans for the new Island Hall. But I also accept that neither Sir David nor Sir Frederick Barclay knew of such a plan until very much later, indeed, until after the Plaintiffs' two donations had been made to the charity.

50. I do not, however, consider that the trustees of the charity were obliged to inform the Plaintiffs specifically of their intention or plan to include within the Hall a licensed bar operating under a public house licence. The Plaintiffs had received a copy of the Trust Deed from the trustees' then advocate, Advocate van Leuven, with his letter dated 7 June 2001, *i.e.* about 3 weeks before the Second Plaintiff made its donation of £100,000 in late June 2001, and they, therefore, had the time and opportunity to ask

any questions of the trustees, and of Mr Carré in particular, and, if they wished, to take legal advice on the terms of the Trust Deed and Mr van Leuven's letter, before they made a donation to the charity. They made their donations without informing the trustees of any express condition to or limitation on the use of the funds donated and, in my judgment, the trustees were fully entitled to accept the donations as unconditional gifts to the charity and to use them lawfully to achieve the charitable trusts declared in the Trust Deed; and, again, I repeat that I have found that they have not acted in breach of the Trust Deed– *cf* the different position in ***In re Brandreth*** (1842) I Y & CC 200, *per* Lord Justice Knight Bruce.

51. Furthermore, in my judgment, the trustees did not need to inform the Plaintiffs any further of their intention or plan to include within the Hall a licensed bar operating under a public house licence *after* the donations had been made.

52. I repeat that the Plaintiffs' case throughout has not been based in any way on alleged bad faith on the part of the trustees.

53. I, therefore, reject the part of their case based on innocent misrepresentation.

54. In paragraphs 58-75 of their original skeleton argument, the Plaintiffs' Counsel developed a detailed and interesting argument on why the Plaintiffs' two donations to the charity should be revoked, relying upon what they called '*the Sark law of gifts'* based, in part, on the works of learned Norman, French and Guernsey writers about the revocation of gifts on the ground of what they called *l'ingratitude du donataire*, including Hoüard's *Dictionnaire du Droit Normand* (1780), Pothier's *Traité des Donations entre Vifs*, Section III Article III, and Juré Justicier Laurent Carey's *Essai* sur les *Institutions, Lois et Coûtumes de L'Île de Guernesey* (1765/9, published 1889), and the Code Civil.

55. In my judgment, in the circumstances of this case, these writings *might*, as a matter of Sark law, relate to gifts made on express conditions or obligations in the contract of gift under which the gifts were made. In other words, *if* the Plaintiffs had imposed express conditions on either of their donations of £100,000, then either gift might, as a matter of legal analysis, be capable of being revoked if there was clear evidence of

breach of the express condition or obligation; but absent express condition or obligation, *i.e.* where no such express condition or obligation was imposed on either gift by the Plaintiffs to the charity, (as, on Sir David Barclay's and Mr Carré's evidence, is the case here,) and accordingly absent breach, the doctrine cannot be applied.

56. Accordingly, interesting though the legal argument is, on the facts of this case there is, in my judgment, no room for the operation of such a doctrine.

57. In the light of this Judgment, I shall dismiss the proceedings and now hear any applications for costs and any other post-judgment matters which either party wishes to raise.

PATRICK TALBOT QC
Lieutenant Seneschal
28 January 2009

PATRICK TALBOT QC
Lieutenant Seneschal
Approved - 29 January 2009

IN THE COURT OF THE SENESCHAL OF SARK

Mr Patrick John Talbot QC, sitting as a Lieutenant Seneschal

Wednesday the 4th February 2009

BETWEEN

(3) SIR DAVID BARCLAY and SIR FREDERICK BARCLAY

First Plaintiffs

(4) THE BARCLAY FOUNDATION

Second Plaintiff

and

(9) CHARLES JEREMY LATROBE-BATEMAN
(10) JOHN RAYMOND BARROWS
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(12) BERTHA HELEN COLE
(13) DAVID WOODS MELLING
(14) JANE NORWICH
(15) BRIAN GARRARD
(16) LOUIS HEALD

Defendants

JUDGMENT on COSTS
(approved)

of Lieutenant Seneschal Patrick Talbot QC

4 February 2009

Advocates Peter Ferbrache and Gordon Dawes (Ozannes) for the Plaintiffs Sir David Barclay, Sir Frederick Barclay and The Barclay Foundation

Advocate Christian Hay (Collas Day) for the Defendants, the present and past trustees of The Sark School and Community Centre Trust

Hearing date 28 January 2009

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58. On 28 January 2009, I dismissed these proceedings and gave judgment for the Defendants. I also ordered that the Plaintiffs, the losing parties, should pay the costs

of the Defendants and the Court fees; Advocate Peter Ferbrache, on behalf of the Plaintiffs, did not oppose the making of an Order for costs against them.

59. On the same day, I also heard oral argument from Counsel for the parties about the *basis* upon which costs should be assessed or taxed and paid.

60. Advocate Hay, on behalf of the Defendants, the successful parties, argued that the costs should be paid on the basis of a full, or alternatively a partial, indemnity; so, if they were to recover on such a basis, the Defendants would recover all their costs, so long as no part of them had been incurred unreasonably, the burden of proof being on the Plaintiffs to prove that any such costs had been incurred unreasonably. On behalf of the Plaintiffs, Advocate Peter Ferbrache argued that the Defendants' costs should be paid by his clients on a basis equivalent to the recoverable basis used in Guernsey ("the recoverable basis"), under the Royal Court (Costs and Fees) Rules, 2000, as amended, ("the Guernsey Costs Rules"), under which, in summary, the Defendants would recover such of their costs as had been reasonably incurred, the burden of proof being on the Defendants to prove that all such costs had been incurred reasonably. After the close of oral argument, I said that I would give my decision and reasons in writing at a later date, which I now do.

61. The starting-point is Section 18(1) of the Reform (Sark) Law, 2008, ("the Reform Law"), which is in the following terms:

> "*The costs of and incidental to all proceedings shall be in the discretion of the Court, and the Court shall have power to determine by whom (including a person not a party in the proceedings) and to what extent the costs are to be paid.*"

62. Although there is an express power in Section 18(2) of the Reform Law for the making of rules relating to the costs, fees and expenses of proceedings in the Court of the Seneschal, (which rules require the approval of the Royal Court of Guernsey before they can come into force,) no such rules have yet been made. Accordingly, on the present state of the law of Sark, the terms of Section 18 (1) of the Reform Law alone govern the costs of and incidental to these proceedings.

63. As was made clear at page 8 of the judgment of Judge of Appeal Richard Southwell QC in the Court of Appeal of Guernsey in ***Hulme v Matheson Securities (Channel Islands) Limited [No. 2]*** (1997), 24 GLJ 80, in relation to rule 48 of the (Guernsey) Royal Court Civil Rules 1989, the predecessor of Rules 82 and 83 of the Royal Court Civil Rules 2007, (which are in quite detailed terms,) the discretion vested in the judges of the Royal Court of Guernsey, (to which any appeal would lie from my decision,) as to costs is

> "*... not to be fettered or circumscribed, and is a discretion to be exercised judicially in the light of the particular facts of each case.*"

In my judgment, the discretion vested in the Court by Section 18(1) of the Reform Law is to be exercised by me in the same way as the Court of Appeal of Guernsey have decided in relation to the Royal Court Civil Rules. This, in my view, is the true construction of the discretion granted by the sub-Section.

64. In my judgment, the words "*to what extent the costs are to be paid"* contained in Section 18(1) of the Reform Law give the Court the power to order costs to be paid, in any appropriate circumstances, on either a full or a partial indemnity basis or on the recoverable basis, since each such basis would, as I read the sub-Section, affect the *extent* to which the paying party is ordered to pay the successful party's costs. Further, I consider that, in the absence as yet of any rules made under Section 18(2) of the Reform Law, persuasive guidance on the circumstances in which the Court might order costs to be paid on a full or a partial indemnity basis is to be found in rule 83(2)(b) of the (Guernsey) Royal Court Civil Rules 2007, where such circumstances are defined as including circumstances

> "*...where any party has pleaded or otherwise pursued ... any action, [or] claim ... unreasonably, scandalously, frivolously or has otherwise abused the process of the Court."*

65. In both his helpful written submissions dated 28 January 2009 and in his oral submissions, which were presented after Judgment had been delivered, Mr Hay put his case in support of an indemnity costs order principally on four different grounds.

66. First, he argued that the Plaintiffs had unreasonably pleaded or pursued their claim, especially in ways which, he said, had unreasonably increased the costs of the proceedings. It was contended that the Plaintiffs had acted unreasonably in pursuing, at least until Advocate Ferbrache's opening speech, their claim that not only was the use of parts of the Hall as two licensed bars, operating under a Sark public house licence, unlawful, but so also were the use of the cafeteria under a Sark restaurant licence and the use of a Sark off-licence for the sale of alcohol from the Hall.

67. In this regard, I recorded in my Judgment that, "*whereas at the outset the Plaintiffs appeared to challenge all uses of parts of the Hall under any of the public house licence, the restaurant licence and the off-licence granted in this Court to Mrs Sandra Williams, one of the managers, in 2006 and 2007 and continued annually thereafter, it became clear from the opening of the Plaintiffs' Counsel and from Sir David Barclay's evidence that the use which they contended was unlawful, in that it offended clause 3, was use of parts of the Hall as a public house under the public house licence, and that they did not wish to contend any further that the use of either the restaurant licence in the cafeteria or the off-licence was in breach of clause 3"*.

68. Secondly, Mr Hay argued that the use by the Plaintiffs of two established Guernsey Advocates from Ozannes, (Advocates Peter Ferbrache and Gordon Dawes,) had required the Defendants to use not only the services of himself and his firm, Collas Day, but also the services of a very experienced English solicitor, Mr Paul Arditti, and, although Mr Hay mentioned '*equality of arms*' in this context, I think he was really suggesting that, in the circumstances of this case, including the relative lack of funds within the charity, it had been unreasonable of the Plaintiffs to pursue their claim at such a high level of attention and legal costs, *i.e.* that the Plaintiffs themselves had incurred costs at a level beyond the limits of acceptability which the circumstances of the case demanded and that the Plaintiffs' approach had to met by an equal display of commitment by the lawyers on behalf of the Defendants at a consequent higher cost than would otherwise have been appropriate.

69. Thirdly, Mr Hay submitted that the Plaintiffs had unreasonably rejected a proposal made by Mr Arditti on behalf of the Defendants that the dispute between the parties should be referred to a mediator to see if an agreed compromise could be agreed, and they should, therefore, be ordered to pay all or some of the Defendants' costs on the indemnity basis.

70. And fourthly, Mr Hay argued that, since these proceedings were brought by the Plaintiffs against past and present trustees of a Sark charity, or alternatively since the proceedings had, he said, been permitted to be continued against the trustees by this Court as *parens patriae* on behalf of Her Majesty, there were '*special circumstances*', which should lead to an Order for costs on the indemnity basis.

71. These four points, therefore, require me to consider all the circumstances of the case, including the way in which the Plaintiffs have pursued it, their attitude to a possible settlement whether by negotiation through lawyers or via mediation, and the importance of the central issues to the parties.

72. I addressed the circumstances behind the setting up of The Sark School and Community Centre Trust, ("the charity"), which is governed by the trusts declared in a Trust Deed dated 24 May 2001, ("the Trust Deed"), in my Judgment. It will be helpful, I think, if I shortly summarise my findings on the issues in the case.

73. As I made clear in my Judgment, the witnesses for each side did their best to assist the Court and I accepted all the evidence of the witnesses, including that of Sir David and Sir Frederick Barclay.

74. The Plaintiffs' case was that the Hall, as defined by me in my Judgment, was being operated as a public house contrary to clauses 2 and 3 of the Trust Deed. I found that the current use of the Hall by those of the Defendants who are current trustees of the charity, including use by the current managers appointed in the Agreement dated 1 April 2006, was lawful within clauses 2 and 3 of the Trust Deed and I further found, in the light of such use of the Hall, that it was not correct, on the facts of the case including those resulting from my *vue de justice*, to describe the Hall as a public

house. On the contrary, I found that the Hall was "*a community hall/community centre, which includes two licensed bars, as well as many other facilities, including a cafeteria, a very large sports hall, a snooker hall and a meeting room or boardroom"*.

75. The secondary limb of the Plaintiffs' claim contained claims for damages for alleged negligent or innocent misrepresentation or for recovery of the two donations of £100,000 made by the Plaintiffs to the charity on the ground of alleged '*unconscionability*' or pursuant to what was called the 'Sark law of gifts'. For the detailed reasons given in my Judgment, I rejected all these claims.

76. I now turn to consider the four arguments put forward by Advocate Hay on behalf of the Defendants in support of his case that I should exercise my discretion as to costs by ordering that the Defendants' costs be paid on a full or partial indemnity basis.

77. Dealing then with Mr Hay's first point, there was, in my judgment, no unreasonableness in the manner in which the Plaintiffs' evidence was given or in the nature of the facts which they sought to establish; indeed, having heard and seen each of them give evidence in Brecqhou, I formed a quite contrary impression of each of them. As I recorded in my Judgment, they were, to my mind, impressively careful to try to limit their evidence to what they themselves recalled.

78. Nor do I consider that the Plaintiffs acted unreasonably either in putting their case at the outset on the wide basis mentioned in paragraph 9 above or in pursuing their limited primary case and their secondary case until judgment; in my view, they did not decide unreasonably late to limit their case to the 'public house' point, to which I have referred in that paragraph.

79. In my experience, civil cases are often honed down by the litigants' Counsel between lodging the original pleaded Cause and final pre-judgment submissions to a few only of the points originally pleaded, with other points going by the wayside, and this is what I consider has happened here with the Plaintiffs' case. Although there were some early comments by Advocate Ferbrache in his *inter*-lawyers correspondence with Mr Arditti, which Mr Ferbrache might, in the light of the limited basis of the case run at the trial, perhaps now regret having made, I have concluded, in the

exercise of my discretion as to costs, that his clients should not be visited with an Order that the Defendants' costs should be paid on a full or partial indemnity basis because of the way in which for some time the Plaintiffs' case was being presented both in correspondence and in the original, amended and re-amended versions of the Cause. In my judgment, it would not be just for me to do so.

80. Furthermore, having read and re-read this correspondence and the three versions of the Cause, I have concluded that, whilst they contained clear statements by the Plaintiffs' Advocates of their clients' then case, they did not do so in terms which can be properly be described as unreasonable pursuance and pleading of their case, within the meaning of rule 83(2) of the (Guernsey) Royal Court Civil Rules 2007, which I considered in paragraph 7 above.

81. Nor am I persuaded by Mr Hay's second ground for the making of an indemnity costs Order against the Plaintiffs, *i.e.* the 'equality of arms' point, upon which he relied, *inter alia*, on some remarks of Deputy Bailiff Carey, (as he then was,) in the Royal Court of Guernsey case of ***Le Moigne v Hargetion (No. 2)*** (1998), 26 August, 26 GLJ 42. I certainly never had the impression at any time of the proceedings in open Court that there was any apparent inequality of arms or of available funding between the parties' lawyers. Further, this impression is not, in my view, apparent from the correspondence between lawyers. I, therefore, reject this point on the facts as presented to me and as they appeared to me during the hearing.

82. I also reject Mr Hay's third point. In doing so, I have had the opportunity of reading correspondence between the parties' lawyers, including some 'without prejudice' correspondence which was, properly, only shown to me after judgment. The 'without prejudice' correspondence disclosed more than one occasion on which the parties' lawyers had attempted to negotiate a settlement of the case.

83. It is now accepted that very often a seemingly insoluble and 'unsettleable' case somehow yields to the skills of a mediator, with a consequent compromise ocurring, but, in my judgment, that did not mean that when the Plaintiffs in this case refused an offer to go to mediation, they put themselves at real risk, in the event that at the end of the case they were to lose the proceedings, of being ordered to pay the Defendants'

costs of the proceedings on the indemnity basis, whether fully or partially. On the particular facts of this case, I do not accept this argument. The 'without prejudice' correspondence shown to be during oral argument after the delivery of my Judgment disclosed that on more than one occasion the parties' lawyers had, with apparent genuineness, attempted to negotiate a settlement of the case. In these circumstances, I do not agree that the Plaintiffs acted unreasonably in refusing to seek a compromise of the dispute between them and the Defendants and I see no justification for making an indemnity costs Order against the Plaintiffs on this ground.

84. Lastly, I also reject the points made in paragraph 19 of Advocate Hay's written submissions on costs. In that paragraph he invited me to order costs on the full indemnity basis in order '*that the [c]harity's funds [should] be made whole*' or alternatively on the ground that, if rule 83(2) of the Royal Court Civil Rules 2007 were applicable to these proceedings, the prosecution of these proceedings against the Defendants *ipso facto* made the circumstances of the case '*special circumstances*'. I consider that there is no merit in either of these points.

85. The proceedings were brought against the Defendants in their capacity as the past and present trustees of the charity and as trustees. Since their conduct has been found by me to have been lawful, they would be entitled under established principles of English and Guernsey trust law, (which I believe would also apply in the case of the charity, a public charitable trust established under Sark charity law,) to recover out of the funds of the charity, present or future, so as to make the funds of the charity 'whole', any part of their costs, disbursements and expenses which were not, in the event, payable to them under the Order for costs made by the Court in their favour at the end of the case.

86. If it were otherwise just and appropriate for me to make an Order for costs on a basis equivalent to the Guernsey recoverable basis, neither of the two factors relied upon by the Defendants under this part of Advocate Hay's argument would, in my judgment, render such an Order unjust.

87. In my judgment, each of the Plaintiffs had reasonable grounds for pursuing these proceedings against the Defendants, as part and present trustees of the charity.

Whereas the proceedings may, on one view, have been of relatively small *financial* importance to the Plaintiffs, they were clearly of the highest *financial* importance to the Defendants, and especially to them as past and present trustees of the charity. But I believe that these proceedings were of very considerable *non-financial* importance to both sides, as parties with declared interests in the well-being of Sark, and especially in the future running of the charity and the Hall.

88. In the exercise of my judicial discretion under Section 18(1) of the Reform Law, I have decided that the costs of the Defendants should be paid by the Plaintiffs on a basis equivalent to the recoverable basis used in civil cases in the Royal Court of Guernsey under the Guernsey Costs Rules, *with the following exceptions or additions*, which I have decided would, in all the circumstances of the case, be just to allow:

    a. that, taking into account the clear importance of the case to the parties and the relative difficulty and novelty of the Plaintiffs' legal arguments, the hourly recoverable rate for the Advocates' fees and solicitor's fees of the Defendants shall be increased from the rate currently used under the Guernsey Costs Rules of approximately £210 per hour to £300 per hour;
    b. that the Defendants shall be entitled to recover in full, as a disbursement or as expenses, the costs incurred by their Advocate and their solicitor respectively for the purposes of the proceedings (i) in travelling to and from Sark and (ii) for their board and lodging on Sark, subject to the travel costs of Mr Arditti being limited to costs to and from Alderney, where I understand he keeps a home within the Bailiwick; and
    c. that the Defendants shall be entitled to recover in full, as a disbursement, the costs incurred by them in instructing English Leading Counsel, Mr Robert Miles QC, who provided an affidavit of English law; I thought Mr Miles' evidence was a valuable aid to the applicable English charity law, and, as such, was, strictly speaking, foreign comparative law in the Court of the Seneschal in Sark, and admissible in the proceedings as evidence of foreign law.

    PATRICK TALBOT QC

    Lieutenant Seneschal

    Approved - 4 February 2009

