

Judgment 6/2011

**R G Ellis Ltd v Caxton Holdings Ltd –
Royal Court (Civil Action File 1087)
- 11th February 2011**

Enforcement of civil judgment by the Royal Court – Judgment Creditor’s application for disclosure of accounting records of the Judgment Debtor – held that inherent jurisdiction of the Court to grant injunctions is similar to that given to English Courts by s.37(1) of the Supreme Court Act 1981 – order for disclosure to the Advocate for the Judgment Creditor – documents not however to be disclosed to his client without further order of the Court.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 11th day of February 2011, before Richard John Collas, Esquire, Deputy Bailiff alone

R G ELLIS LIMITED

Judgment
Creditor

and

CAXTON HOLDINGS LIMITED

Judgment
Debtor

Whereas on 13th and 20th January the Deputy Bailiff considered an application for permission to inspect and take copies of the accounting records of the Judgment Debtor arrested by HM Sheriff in execution of the Judgment Creditor’s judgment and heard thereon Advocates N J Barnes and J A Tee counsel for the Judgment Creditor and Judgment Debtor respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and ORDERED

that HM Sheriff do permit the Plaintiff by its advocates Ashton Barnes Tee to inspect and take copies of the accounting records of the Defendant held by HM Sheriff and listed on HM Senior Deputy Sheriff’s letter of 17 January 2011 provided that the Plaintiff’s advocates may not disclose those documents to any other party including the Plaintiff without further order of the court although the Plaintiff’s advocates may report their findings to the Plaintiff following such inspection.

S M D ROSS
H M Deputy Greffier

Approved Text
11.02.2011

IN THE ROYAL COURT IN THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between **R G ELLIS LTD** **Judgment Creditor**
and
CAXTON HOLDINGS LIMITED **Judgment Debtor**

Hearing date: 13th & 28th January 2011

Judgment handed down: 11th February 2011

Before: Richard John Collas Esq., Deputy Bailiff

Advocate for Judgment Creditor: Advocate N J Barnes
Advocate for Judgment Debtor: Advocate J A Tee

Cases, texts & legislation referred to:

Rules of the Supreme Court, O.48, r.1
The Civil Procedure Rules, CPR 71.1
Republic of Costa Rica v Strousberg (1880) 16 ChD 8
Loi Ayant Rapport aux Débiteurs et à la Renonciation 1929, Art. 7
J. Gallienne Traité de la Renonciation 1845 pp23-25
Maclaine Watson & Co. Ltd. v International Tin Council (No. 2) (1989) 1 Ch. 286
The Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987, s.1
Seed International Ltd v Tracey (Guernsey Court of Appeal, 18 December 2003)
Bayer A. G. v Winter [1986] 1 WLR 497

Background

1. R G Ellis Ltd (“the Judgement Creditor”), through Advocate Barnes, is seeking disclosure of accounting records of Caxton Holdings Ltd (“the Judgment Debtor”) to assist it in enforcing an outstanding judgment of the Royal Court.
2. The relevant facts can be summarised as follows.
3. A dispute between the parties as to the cost of electrical works carried out by the Judgment Creditor on behalf of the Judgment Debtor was referred to Expert Determination by William Gladstone MRICS MCI Arb. In Mr Gladstone’s decision, dated 3 September 2009, he found in favour of the Judgment Creditor in the sum of £8,628.80 and costs (“the Award”). In order

to enforce the Award, the Judgment Creditor issued proceedings in the Royal Court and on 20 November 2009 the Bailiff granted judgment by default in the sum of £8,628.80 together with (a) interest on that sum at the rate of 2% per month compounded until payment; (b) the costs of the Award in the sum of £13,586.00; and (c) costs in the Royal Court.

4. The Act of Court was delivered to the office of HM Sheriff for enforcement on 2 December 2009 but remains unsatisfied. HM Senior Deputy Sheriff Denning advised Advocate Barnes by letter dated 5 February 2010 of the outcome of his investigation into the financial circumstances of the Judgment Debtor. He reported that he conducted a formal interview with a director of the Judgment Debtor, Dr I H Johnson, on 11 December 2009. The report contains the following passages:

“During that interview Johnson stated that [the Judgment Debtor] was unable to pay the debt. He further advised that the [Judgment Debtor] was not in a position to make any realistic payment to offset it and that the [Judgment Debtor] was no longer trading.

It is Johnson’s further claim that the valuable trading assets, the machinery and equipment and printing equipment, formally owned by the [Judgment Debtor] were transferred to another trading entity (Guernsey Herald) on 5th November 2009, and that those assets are subject to finance agreements – in which case ‘Title’ of the assets would remain with the relevant Finance Company and may not be available for this Office to ‘Distrain’ upon.”

Also:

“Johnson stated that before the transfer of assets, the [Judgment Debtor] traded with ‘...a considerable loss...’ and had Company Creditors in excess of £1million, including a personal Director’s Loan in the sum of £900,000. The [Judgment Debtor] had also taken on a ‘Personal Guarantee’ of a former business partner in the sum of £1.3million, which had been reduced to £450,000.

(I am aware of a number of other creditors who are owed monies by the [Judgment Debtor], and which may be regarded by the Court in any ‘en desastre’ or similar process as ‘Preferred’).

Johnson claims that he took legal and financial advice prior to the transfer of assets, then subsequently re-negotiated the Finance Agreements, sold the assets from the [Judgment Debtor] to himself for £600,000, reducing the Director’s Loan proportionately, then personally sold those assets on to Guernsey Herald, which in turn became indebted to Johnson for the £600,000. (The ‘Sales’ were represented by ‘book entries’ so no funds actually changed hands). Johnson stated in interview that he is now a Shareholder of Guernsey Herald.”

5. The Deputy Sheriff said he had concluded that *“Under the circumstances there is little that can be done, by this Office, to enforce judgment at this time”*.
6. By email, the Senior Deputy Sheriff advised Advocate Barnes that the firm of accountants who Mr Johnson said the Judgment Debtor had consulted prior to the transfer of assets had informed him that they never gave any formal advice to Mr Johnson or the Judgment Debtor re the transfer of assets but nevertheless they felt bound by client confidentiality to their client and hence unable to provide any information to the Deputy Sheriff (email of 28 January 2010 at page 61 of the Bundle).
7. He told Advocate Barnes that he shared his concern that the transfer of assets and payment may have given rise to an unlawful preference (e-mail of 18 December at page 39).
8. Against that factual background, the Judgment Creditor applied to the Court for permission *“to inspect and take copies of the accounting records of the [Judgment Debtor] arrested by*

HM Sheriff in execution of the [Judgment Creditor's] judgement” in order to investigate the transfer with a view to seeing whether any assets now in the hands of a third party could be recovered and made available to pay the liabilities of the Judgment Debtor.

Submissions

9. The hearing commenced on 13 January and was adjourned to 28 January to enable Advocate Barnes to prepare some further submissions and to obtain from HM Sheriff a list of the accounting documents belonging to the Judgment Debtor that he had arrested at the instance of the Judgment Creditor.
10. At the first hearing, Advocate Barnes based his submissions on English procedure set out in the Rules of the Supreme Court, (O.48, r.1) and then the Civil Procedure Rules, CPR 71.1 which provide for a judgment debtor to be required to attend court to provide information for the purpose of enabling a judgment creditor to enforce a judgment against him or her.
11. I questioned whether it was appropriate for me to adopt a similar procedure when the English rules appear to have as their foundation a statutory power of which there is no Guernsey equivalent. That is apparent from the Court of Appeal's decision in Republic of Costa Rica v Strousberg (1880) 16 ChD 8. Jessel M.R. said, at page 12, that the form of order obtainable under the then rule (Order XLV., r.1 of the Rules of Court, 1875) had the same meaning as the form of order that used to be issued under section 60 of the Common Law Procedure Act, 1854. I was not told whether the 1854 Act or any re-enactment thereof is still in force but I doubted whether I could follow the English procedure if it originally relied upon a statutory basis.
12. Advocate Barnes also referred to the procedures that exist under Guernsey Law to require a debtor to produce documents in connection with insolvency proceedings (see *Loi Ayant Rapport aux Débiteurs et à la Renonciation 1929, Art. 7*) and with Saisie proceedings (*J. Gallienne Traité de la Renonciation 1845 pp23-25*). Again, I did not feel those procedures were directly relevant as we are not dealing with either insolvency or Saisie proceedings.
13. The Application was strenuously opposed by Advocate James Tee, on behalf of the Judgment Debtor. He pointed to the absence of any express statutory powers and procedural rules in Guernsey as showing that a judgment creditor has no right to apply for an order requiring disclosure of financial information by a judgment debtor. Furthermore, he submitted that the procedures governing insolvency proceedings and Saisie are of no relevance in the present case.
14. At the initial hearing, I was more sympathetic to the Judgment Debtor's submissions. After an adjournment, Advocate Barnes returned with fresh submissions based upon the decision of the Court of Appeal in Maclaine Watson & Co. Ltd. v International Tin Council (No. 2) (1989) 1 Ch. 286. Coincidentally, there is some similarity between the facts of the present case and the facts of that case (to which I will refer as “ITC”). In ITC, the plaintiffs had obtained an arbitration award against the defendant which they had converted into a judgment inclusive of costs and interest. The judgment remained unsatisfied and the plaintiffs applied for an order under RSC Ord. 48, r.1 requiring that an officer of the defendant attend court to be examined as to the nature, value and location of the assets in the United Kingdom of the defendant. That application was refused both by the master and by Millett J. on the ground that Order 48 could not be made to apply to an unincorporated association, such as the defendant. However the judge ordered disclosure of full particulars of the defendant's assets in the United Kingdom in exercise of the court's inherent jurisdiction to grant injunctions to implement a judgment already obtained.
15. On the defendant's appeal against the judge's order, the Court of Appeal assumed, without deciding the issue, that Order 48 was inapplicable to unincorporated associations. The Court of Appeal was satisfied that the court had sufficient power to grant the order sought under Section 37(1) of the Supreme Court Act 1981 and did not need to consider whether there was

any inherent jurisdiction to do so. The decision is summarised in the following passage in the head note:

“That although it was unnecessary to categorise the situations in which injunctions could be granted under the section, in the instant case two established grounds were satisfied, namely, first, the I. T. C.’s failure to pay the plaintiff’s judgment debt was a failure to comply with a court order and was a breach of an obligation towards the plaintiffs, and second, the section gave the court power to make any ancillary order, including an order for discovery, to ensure the effectiveness of another order of the court; and that, accordingly, the order for disclosure was necessary to render the plaintiff’s judgment against the I.T.C. effective.”

16. Advocate Tee accepted that the decision of the Guernsey Court of Appeal in Seed International Ltd v Tracey demonstrates that the Royal Court may make an order for disclosure in support of a freezing order but he submitted that is only in circumstances where the freezing order would otherwise be “toothless” (per Southwell J A in Seed). He argued that the judgment in the present case is not “toothless” because after the arrest of assets by Her Majesty’s Sheriff, the Judgment Creditor may bring liquidation or *desastre* proceedings and if the Judgment Debtor were to be placed in compulsory liquidation, the liquidator could investigate whether a preference has been given and, if appropriate, the liquidator could instigate proceedings with a view to recovering assets that have been paid away.
17. Advocate Tee also submitted that I T C can be of no assistance in the present case, largely because there are other procedures available to the Judgment Creditor. He relied upon a passage in the judgment of Kerr L J in I T C at page 303F:

“since the alternative means of appointing a receiver or of making an order under Order 48 are unavailable, the order for disclosure is necessary to render the plaintiffs’ judgment against the I.T.C. effective”.

Conclusion – the Royal Court’s Powers

18. Guernsey has no statutory equivalent of section 37(1). The only statutory powers enabling the Royal Court to grant injunctions are those relating to interim injunctions that are contained in section 1(1) of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 which are only exercisable by the Court “before it makes a final judgment in the proceedings or before the proceedings are otherwise concluded” and hence are not applicable in the present matter.
19. However, I consider it is well accepted that in relation to granting injunctions that are other than ‘interim’ injunctions, the Royal Court’s powers are at least as wide as those conferred by Part I of the 1987 Law and hence I am of the opinion that the inherent jurisdiction of the Royal Court in relation to injunctions is similar to the jurisdiction conferred on the English courts by section 37(1) of the Supreme Court Act 1981.
20. I am therefore minded to apply the same reasoning as the Court of Appeal in the ITC case. To do so would not, in my view, conflict with any established principle of Guernsey law nor would it offend against any public policy grounds. Indeed, it must be in the best interests of the administration of justice in this Island that the courts should have the power to make any ancillary order that it is necessary to ensure the effectiveness of any other order of the court.
21. An obvious example of such ancillary orders is the making of disclosure orders in support of freezing orders, a practice which was confirmed by the Guernsey Court of Appeal in Seed International Ltd v Tracey.
22. I do not interpret the remarks made by Kerr L.J. at page 303F of I T C (and quoted above) to mean that the court may only make an ancillary order if there is no alternative remedy available. The court must do what is just and reasonable in the circumstances of the case (to

quote from a passage in the judgment of Fox L J in Bayer A. G. v Winter [1986] 1 WLR 497 that was cited with approval by Kerr L.J. in I.T.C. at page 305G).

23. In the present case, Advocate Barnes argues that no reasonable alternative exists. *Desastre* proceedings are not worth pursuing as there no saleable assets under arrest. Liquidation proceedings would be expensive and the Judgment Creditor wishes to have more information before deciding whether to seek compulsory liquidation. Disclosure is therefore not an alternative to liquidation but a necessary step to enable the Judgment Creditor to decide what to do next.
24. The Judgment Debtor is a company registered in Alderney and I agree with Advocate Barnes that it would not be reasonable to require the Judgment Creditor to go to the Court of Alderney to apply for the Judgment Debtor to be placed in compulsory liquidation in order to obtain access to documents that are in the hands of HM Sheriff in Guernsey and that relate to a transfer of assets that appears to have taken place, not in Alderney, but in Guernsey. Aside from the convenience factor it does not seem to me to be fair and reasonable that the Judgment Creditor should have to bear the cost of such proceedings, together with the cost of a compulsory liquidator (who will no doubt require an indemnity for his fees and charges to be given by the Judgment Creditor) when there may be no available assets.
25. I am therefore persuaded that it is right, in principle, that I should make an order requiring disclosure of the financial documents that are presently under arrest. I next have to consider the terms of the order that the Judgment Creditor is seeking. The application before the Court refers only to the documents that have been arrested although at times Advocate Barnes has suggested he is seeking an order in wider terms. For example, in his Affidavit sworn on 24 January 2011, he said the Judgment Creditor was seeking “*an order for disclosure of all the [Judgment Debtor’s] accounting records to enable the [Judgment Creditor] to carry out a proper investigation*”.
26. In my judgment, an Order in such terms would be too wide; it should be limited to the disclosure needed for the purpose for which the order is sought namely, in this case, for the purpose of investigating the transfer of assets out of the Judgment Debtor. Disclosure of all the accounting records could lead to disclosure of commercially sensitive information of no relevance to the proposed investigation and which it would be unfair and unjust to have disclosed. The Judgment Creditor and the Judgment Debtor do not appear to be engaged in the same line of business but in another case it could be highly prejudicial to a judgment debtor to be required to hand confidential and sensitive documents to a competitor. Even in the present case there may be some commercial sensitivities of which I am presently unaware which, in my view, can be protected by restricting disclosure in the manner discussed later in this judgment.
27. I have considered the application before me as being in the terms of the written application dated 26 March 2010 and, therefore, limited to the documents that have been arrested and are listed in a letter from by HM Senior Deputy Sheriff dated 17 January 2011.
28. It is accepted by both parties that HM Sheriff had the necessary powers to make enquiries of the Judgment Debtor in order to establish the state of its finances; to arrest the documents; and to disclose to the Judgment Creditor information contained in the documents. As it is undisputed that the information contained in the documents can be disclosed, it seems only a small step to permit disclosure of the documents themselves and not just of the information contained within them.
29. If the proceedings were still at an interlocutory stage and a final judgment had not yet been entered between the parties, and if there were concerns that the Judgment Debtor might dissipate its assets in order to avoid enforcement of the judgment, the Court would have the power to grant a freezing injunction with a disclosure order attached. It would seem unjust if the Court no longer has the jurisdiction to do so merely because judgment had been obtained in favour of the Judgment Creditor. There is no reason why a successful plaintiff who has

obtained judgment should be in a worse position than a plaintiff who has yet to prove its case against the defendant.

30. At an interlocutory stage, the Court would be concerned with the possibility or risk of assets being dissipated. Here the evidence is, if anything, even stronger; we have the report of H M Sheriff and his findings that assets have already been transferred out of the Judgment Debtor in circumstances that in his opinion may have given rise to a unlawful preference. Accordingly, I am satisfied I have the power under the inherent jurisdiction of the Royal Court to make the order requested and, having regard to what HM Deputy Sheriff has reported about the transfer of assets and the lack of any adequate explanation from the Judgment Debtor as to why the transfer was made, I am satisfied it is just and convenient to make a disclosure order in this case.
31. As to the precise terms of the order, I have looked carefully at the list of documents arrested by HM Sheriff, as per the letter of 17 January to which I have referred. Advocate Tee accepted that most of the documents would be relevant to the type of enquiry that the Judgment Creditor is proposing. There are several categories of documents, most of which are clearly directly relevant. One such category includes a written resolution dated 5 November 2009 entitled 'Sale of Chattels' and other documents apparently created in relation to the transfer of assets, including emails to and from Close Finance in January 2010. Another set of documents appear to relate to the statutory accounts for 2006, 2007 and 2008. In my view, they must be relevant to any investigation into the financial state of the Judgment Debtor.
32. Finally, there is a short term hire agreement, a schedule of goods attached thereto dated 30 May 2003 and an addendum. Advocate Tee submitted those latter documents cannot be relevant. I am prepared to order their disclosure on the basis that the hire agreement may have continued in force until the date of the asset transfer, and if so it may be relevant. If it was no longer in force and is purely of historic interest, there seems to be little or no prejudice to the Judgment Debtor in ordering its disclosure.
33. To whom should the documents be disclosed? The purpose of the disclosure is to enable the Judgment Creditor to carry out an investigation of the circumstances surrounding the transfer of assets to ascertain whether there are grounds for recovering any assets that are now in the hands of third parties in order to satisfy in whole or in part the liabilities of the Judgment Debtor.
34. Advocate Barnes advised me that there is within his office the expertise needed to carry out such an investigation. If there was not, I might have been persuaded to permit disclosure to an accountant. In a complex case a forensic accountant would probably be required but the present case does not appear to need a high level of specialist, technical expertise.
35. As there may be some commercially sensitive information in the documents, I am not at this stage persuaded that copies of the documents should be disclosed to the Judgment Creditor. Advocate Barnes may report to his client the findings of his investigation. If he wishes to disclose copies of the documents to his client or to any person who is not a partner or employee of his firm of Advocates, he must come back to Court, on notice to the Judgment Debtor, to request an order permitting such disclosure.
36. I direct counsel to draft an Act of Court reflecting the above decision, for my approval and to come back before me if necessary to clarify the precise terms of the order, and to make any ancillary applications including as to costs.