Judgment 7/2005 **Goddard v. Fosse Investments Limited et al – Royal Court (Civil action file 847) – 20 January, 2005**

Royal Court Civil Rules, 1989 – security for costs – application for adjournment of hearing granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 20th day of January, 2005 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

Between RAYMOND CHARLES GODDARD

Plaintiff

and

(1) FOSSE INVESTMENTS LTD.
(2) VULCAN HSE MANAGEMENT UK LTD.
(3) MICHAEL EDWARD GODDARD
(4) PAUL WHITAKER
(5) MERCATOR TRUSTEES LTD.
(6) WINSLOW SECRETARIES LTD.

Defendants

Whereas on the 17th day of January, 2005, the Lieutenant Bailiff considered an application by the Plaintiff for an adjournment of the security for costs hearing in these proceedings and heard thereon Advocates A.M. Ozanne and P. Richardson, Counsel for the Plaintiff and Defendants respectively. The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and granted the application and Directed that the matter be listed for review on the 4th day of February, 2005.

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

Approved Text

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between: **Raymond Charles Goddard…….……..……...…Plaintiff**

And

(1) Fosse Investments Ltd }
(2) Vulcan Hse Management UK Ltd}
(3) Michael Edward Goddard }…….…..Defendants
(4) Paul Whitaker }
(5) Mercator Trustees Ltd }
(6) Winslow Secretaries Ltd }

Judgment

1. By an *ex parte* Order of 28th May, 2004, at the instance of the Plaintiff in this action (therein named as the Applicant) the Bailiff granted a freezing Order restraining the six Defendants (then the first six Respondents) and Lloyds TSB Offshore Ltd (the Bank), and each of them, from, *inter alia*, registering the disposal of shares in the First Defendant or disposing or assisting in the disposal of the assets or interests particularised in the Order, or of any monies receivable in relation to any of the properties described in Schedule 3 to the Order (the said properties). The Seventh Respondent, the Bank, who is not a Defendant in the substantive action, was ordered not to dispose of any assets which it might have belonging to the first three Respondents.

2. The usual appurtenant Order for disclosure, directed only to the Bank, was included as specified in paragraphs 3.1 to 3.3 of the Order, and by paragraph 4 of Schedule 2 the Plaintiff, Raymond Charles Goddard (Raymond), undertook to commence substantive proceedings within twenty one days of the injunction, which he did by a Cause tabled on 25th June, 2004, which was technically out of time. This recited, as did Raymond's Affidavit of 26th May, the history of events from his point of view following the death of his and Michael's father intestate in March, 1984, the devolution of his various properties and interests consequent thereon, and the acquisition of further assets and interests, notably the First Defendant, Fosse Investments Ltd which was registered as a Guernsey Company on 14th September, 1988.

3. Prior to the institution of the Guernsey proceedings the High Court in London (Peter Smith J.) on the Plaintiff's application granted an interim injunction in similar terms in respect of the said properties (with the exception of the half interest in Sunnycroft Hotel, Guernsey) against these same Defendants on 27th May, 2004, as varied by consent by Lewison J. on 14th June. There then followed two applications by the first four Defendants on 9th and 14th July, respectively, that the Plaintiff should lodge £51,229 as security for their costs under Rule 48, and for a stay until this was furnished, and to strike out the action under Rule 36. In a sense, the issue which has now arisen, during the hearing of the Security for Costs application, is the order in which these two applications should be heard.

4. The Security for Costs Application, having appeared in the list for the Ordinary Court on 9th July, was the first in point of time. It was then adjourned into the Interlocutory Court on 16th July, when the strike out Application, which was lodged with the Greffe on that day, was also listed. In the presence of Advocates Ozanne for the Plaintiff and Mark Ferbrache for the Defendants the latter was adjourned generally and the former ordered to be listed for hearing on 21st October. Prior to that both Applications were postponed to 19th November when I first became seised of the matter. My note reads:

"P.R. Previously agreed S for C Appln. first. £51,229 Joint Bill.
A.M.O. No indication of substantive Defence. Agree S for C first."

After the estimates of time were made there were three Consent Orders:

1) Skeleton Argument of Plaintiff/Respondent by 3rd Dec. 5p.m.
2) Skeleton Argument of Defendant/Applicant by 17th Dec. 5p.m.
3) Hearing 6th January 10.30.a.m.

I understand that the time limit for 2) was by consent extended to 20th December.

5. On 6th January there was virtually a full days' hearing. Advocate Richardson made no bones about the objective of his submissions. He intended to try to persuade the Court that the Plaintiff's case is so flawed factually that it is extremely unlikely that it will succeed, and submitted he is entitled to refer to the evidence in order to do so. In other words that the case put forward by the Plaintiff is so contradictory and/or discredited that no tribunal properly directing itself (in Guernsey that no Bench composed of Jurats properly directed by the Bailiff or by his Deputy or his lieutenants) could find in his favour.

6. Mr. Richardson, despite occasional protests from Advocate Ozanne, embarked on a course of drawing to the Court's attention passages from the Affidavits filed in support of his Clients' Application for Security for Costs, together with the two filed on behalf of Raymond (the Plaintiff) in order to demonstrate inaccuracies and inconsistencies between Raymond's Cause, his two Affidavits and those filed on behalf of the Defence. In view of the main thrust of his submissions I was unable to rule that he was not entitled to do so.

7. The aggregate of these discrepancies, so Mr. Richardson submits, will demonstrate a high probability that the action will fail, within the well-known *dictum* of Browne-Wilkinson V –C in Porzelack A.G v. Porzelack (UK) Ltd [1987] 1 AER 1074, which features in Miss Ozanne's skeleton argument, and contains the following passage at page 1077 d to f:

"…….the parties have sought to investigate in considerable detail the likelihood of success or otherwise in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed exam-amination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.

Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in succeed, in the sense that there is a very high probability of success, then it is a matter that can properly be weighed in the balance. Similarly, *if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed.* But for myself I deplore the attempt to go into the merits of the case *unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure*." My italics.

8. In the interval between the hearings of 6th January and 17th January, Collas Day filed an amendment to the strike-out Application which added a prayer that the injunction issued by Carey. B. should be discharged. This led to an objection by Miss Ozanne, at the outset of the hearing on 17th January, that the pattern of Mr. Richardson's submissions in support of the Security for Costs Application, which required a detailed assessment of the merits of the case, would also be applicable to the strike-out Application, and that, for the reasons appearing in her letter of the 14th January, an adjournment would be sought.

9. Miss Ozanne submitted, because of that which had now become apparent as the double purpose of Mr. Richardson's submissions, that it would be grossly unfair not to allow her at least to consult with her client Raymond and consider whether any further affidavits were

necessary. This course of action, adopted on behalf of the first four Defendants, amounted to an abuse of process. Logically the strike out Application should be dealt with first, for the reason that, if it were successful, quite obviously the Court would have no need to consider the Application for Security for Costs.

10. The pattern and context of Mr. Richardson's Skeleton Argument filed on 17th December, Miss Ozanne continued, was misleading, not to mention the inaccuracy in paragraph 18, which said that proceedings had been, or would be, brought in the United Kingdom to discharge the freezing order of 14th June. That paragraph goes on to state expressly:

"Those applications are pending."

Having dwelt at length on other factors which were material, such as the difficulties that might be encountered in enforcing an order for costs against a non-res ident plaintiff, and the risks of stifling a valid claim by an excessive order for security, together with other factors appearing in the leading cases of Nasser v. United Bank of Kuwait [2002] 1AER 401 and Oded Moshe Leyvand v Barasch and Others [2000] High Court 15th February, there was then, in paragraphs 16 and 17 only a passing, relatively scant, reference to the merits of the claim, with no indication of the brick by brick approach Mr.Richardson was now pursuing.

11. Mr. Richardson responded that it was idle for the Plaintiff's Advocate to complain of a course to which she had herself agreed on 19th November, and which, in her own skeleton argument, not only was there nothing about the competing applications, but there was express reference to the Porzelack case, which, indeed, was included in Miss Ozanne's Bundle, and which showed that she was well aware that the issue as to the merits of the case was going to be argued *in the context of the Security for Costs Application.*

12. Mr. Richardson submitted his Skeleton Argument was intended to follow the pattern adopted in that of Miss Ozanne, and that he was responding to the points made therein. Furthermore the time frame set on 19th November was in the light of the Advocates' prior arrangement, which had been formally consented to on that day, (and not dissented from on 16th July) that the Security for Costs Application should be heard first. This, said Mr. Richardson, often happened because costs would inevitably be incurred on a strike-out application, due to its drastic nature, and thus some protection was necessary in respect of those potential costs.

13. He said that these were perfectly legitimate tactics and that it was now far too late to seek make this application, when he was in full flood in his submissions. Miss Ozanne, on behalf of her client, had been fully aware of the position from the inception of this part of the proceedings and it did not lie in her mouth to mount this late complaint. The hearing should continue as there was nothing to be gained by an adjournment, of which he received no warning until her letter, which reached Collas Day virtually on the eve of the adjourned hearing.

14. Most applications for an adjournment can be dealt with there and then. This is the most desirable outcome/, for if the Court has to retire for any length of time then it is manifest that the applicant will have been successful whichever way the Court decides. Here Miss Ozanne has asked for three weeks, and, as her client is, as I understand, still in England it has to be judicially noticed that a reasonable period must be given to enable advice to be proffered and instructions to be given, especially in a family dispute, which is the background of this case.

15 In my judgment the present application for the adjournment involves issues of medium complexity. I do not think in any way that Mr. Richardson intended to mislead anyone by the format of his Skeleton Argument. Certainly he has con- ducted the case with scrupulous correctness. At the same time I accept that Miss Ozanne, while she undeniably agreed to the sequence of the hearing of these two Applications, was unprepared for the way in which Mr. Richardson developed his argument on the 6th January. I cannot say that this was Miss Ozanne's fault, and her fears were enhanced by the relatively late emphasis, in Collas Day's 2nd letter of the 12th January, that the strike-out Application was still very much alive.

16. I would finally observe that Miss Ozanne's comment, and this is a factor which has weighed heavily in my decision, that if the Defendants succeed in the Security for Costs Application, on the grounds now being advanced on their behalf, she will in effect be faced with arguing against the strike-out Application on a basis on which a decision has already been reached. While I am sure that I, or any member of this Court, would intend to, and would, afford a fair hearing to any submissions that would be made, and would not be guilty of pre-judging such issues, I do not think it can conclusively be said, to draw an analogy from another branch of the law, that a fair-minded and informed observer would not conclude that there was at least a possibility that this consequence could ensue.

17. For the reasons I have endeavoured to give, I grant the application for the adjournment of the Security for Costs hearing. For the avoidance of doubt, I am not to be taken, hereby, as deciding the issue of the priority of the Defendants' two Applications henceforth, but this is a matter which Counsel may be able to agree.

A.R.W.Hancox
Lieutenant Bailiff
20th January 2005.