

**Judgment 9/2007**

**Singleton v Duncan and Duncan – Royal Court (Civil  
Action File 614) – 24<sup>th</sup> April 2007**

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**Claim arising from a building dispute –Guernsey doctrine of péremption – application to restore an action which has become périmée – Royal Court Civil Rules, 1989 (Rule 50) – matters to be taken into account in exercise of discretion – application to the present case – application granted – parties encouraged to seek mediation**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

No. 614

Civil

**The** 24<sup>th</sup> April 2007 before John Russell Finch Esquire, Lieutenant Bailiff, sitting alone.

**BRIAN LESLIE SINGELTON**

(Plaintiff)

V

**(1) ALISTAIR MICHAEL CLARK DUNCAN**

**(2) ALEXANDRA DENISE DUNCAN**

(Defendants)

Whereas on the 18<sup>th</sup> April 2007 The Lieutenant Bailiff considered an application by the Plaintiff to restore this action to the Role des Causes en Preuve and heard thereon Advocates P Richardson and N J Barnes counsel for the Defendants and Plaintiff respectively the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and restored the action to the Role des Causes en Preuve.

S M D ROSS

Her Majesty's Deputy Greffier



documents. On 30 March, 2007, Advocate Richardson for the Defendants, took the périmée point and it was adjourned until 18 April 2007, when argument was heard from both parties. Following this I indicated to Counsel that I would prepare a written judgment as expeditiously as possible.

2. Advocate Barnes, for the Plaintiff, had provided an affidavit setting out the facts he relied upon, dated 16 April, 2007. The Court of Appeal case of *Guernsey Annandale (1997)* was appended. Advocate Richardson, for the Defendants, did not produce an affidavit, but prayed in aid the Royal Court decision of Talbot LB in *Henniger –v- Robinson (2005)*.
3. Advocate Barnes made submissions relying upon his affidavit. Advocate Richardson (and Advocate Barnes) essentially relied upon the five “*relevant circumstances*” set out by Southwell J A in the *Annandale* case, at page 5 of the judgment. Advocate Richardson pointed out that the action as it stands is not only périmée but also outside the prescription period.

### Applicable Legal Principles

4. These are set out in detail in the cases cited. For the purposes of this application the framework is: -
  - (i) this “*particularly Guernsey doctrine or principle*” (Talbot LB at p.5 of the *Henniger* judgment) is a procedural barring of the continuation of a legal process if no action is taken for a period of one year and one day after the last step in the proceedings. See, e.g. the “*Ordonnance ou sujet de la Perémption d’Instance et du Rôle des Causes à Plaider (1848, 1850, 1851) Article 4*”:

*“4. Toute Acte d’Inscription sur le Rôle des Causes à plaider sera perimée par la laps d’an et jour”;*
  - (ii) Before the Royal Court Civil Rules, 1989 came into force, if an action became périmée at a time when prescription had run, that was the end of the matter – the claim could not be revived or renewed;
  - (iii) However, Rule 50 of the 1989 Rules states that where an action becomes périmée “*any party to the action may apply to the Court for an order that the action be restored*”.
5. Accordingly, I have to decide whether I should grant the Plaintiff’s application under Rule 50. The Royal Court has (in the words of Southwell JA in the *Annandale* case at page 5) “*a discretionary jurisdiction to order the restoration of actions that have become périmée*”. Southwell JA went on to say: -

*“That discretion is not fettered by the terms of Rule 50. It is for the plaintiff to satisfy the Royal Court that in all the circumstances it is just to exercise the discretion in the plaintiff’s favour. I emphasise the words ‘in all the circumstances’. In each case the circumstances will be different, and it would be wrong for the Court of Appeal to impose fetters on the exercise of the jurisdiction which have not been included in Rule 50 itself.”*

6. In his recent judgment in the *Henniger* case (supra) Talbot LB referred to a helpful examination of the position by Day DB in *Stoneman -v- Cummings & Others (1999) R.C.* In his judgment Day DB set out the five factors alluded to by Southwell JA in his Judgment (supra). The whole passage is worth setting out:

*“3. Matters to be taken into account:*

*As indicated in the last paragraph quoted above, Southwell JA earlier in his judgment had set out certain matters which the Court of Appeal considered needed to be taken into account when considering Rule 50 applications. With regard to those matters Southwell JA had this to say (at p.5):*

‘Naturally the Court will take into account as part of the relevant circumstances-

- (1) the position of the plaintiff, and the effect on the plaintiff and Plaintiff’s case if the action is not restored;
- (2) the history of the action, and the activity or inactivity of the plaintiff, and of the plaintiff’s legal representatives, which have led to the action being périmée;
- (3) the position of the defendant, and the effect on the defendant and the defendant’s case if the action is restored;
- (4) any other special circumstances relating to the action and its conduct by the parties, including such matters as settlement discussions or any express or implied agreement not to take further steps in the action for the time being;
- (5) the general circumstances in Guernsey relating to the relevant class of litigation, including, for example, any difficulties in securing legal representation for impecunious plaintiffs, or in securing medical reports for plaintiffs suing for personal injuries.’

*It is my understanding from the above quotation and that immediately preceding it, that Southwell JA was not drawing up a finite or*

*exclusive list; it merely contained some of the pertinent matters which should be taken into account, but together with any other matters relevant in all the circumstances of a particular case. Southwell JA went on to emphasise that the Guernsey Courts should not simply adopt the principles applied in English cases in relation to the automatic striking out of County Court actions; and that the correct approach to be adopted locally was as he had stated (in quotation immediately above).*

7. Day DB then went on to refer to “*Guernsey factors*”, relating to the “*circumstances of particular litigants being viewed in the context of the particular features of the Guernsey situation*”. I do not consider it necessary to refer to the whole passage, but summarize it by saying that it refers to “*impecunious Plaintiffs*” in personal injury type cases, or “*any other factors having a similar effect on the scales of justice*”. Day DB considered that Guernsey factors must be given “*all due weight*”. I am unable to discern any such factors in the present case. This leads me to Day DB’s conclusion: -

*“.....in the absence of some or all of such factors, the task of Plaintiffs in discharging the burden of persuading the Royal Court to show indulgence to them when Causes have been allowed to become périmée, and thereby prescribed, will necessarily and proportionately be that much greater.”*

#### **Application of the law to the circumstances of the present case**

8. Advocate Richardson’s points on the antiquity of the events that led to the action and the effluxion of time since then were valid. In the absence of any special considerations I would have found that the history of the action would lead me to refuse the application; it is in the interests of justice that Royal Court civil actions proceed timeously. It is also worthy of note that the amount is on the lower end of the scale for Royal Court actions and the work took place around a decade ago. Accordingly, on general principles, I would have had considerable difficulty holding that the Plaintiff had discharged the burden attaching to him in this application.
9. But the previous decisions are not a straitjacket into which the individual facts of a case must be forced. There is a danger in construing the points set out in other judgments as if they were a statute. There is always room to accommodate the individual facts of a particular case. Indeed point (4) set out by Southwell LB is:-

*“(4) any other special circumstances relating to the action and its conduct by the parties, including such matters as settlement discussions or any express or implied agreement not to take further steps in the action for the time being”;*

10. When considering this it is helpful to review the correspondence between the Advocates in the Court Bundle. In doing so it will be remembered that the action was périmée on 30<sup>th</sup> September, 2004: -
- (i) Advocate Barnes to Advocate Richardson, 30<sup>th</sup> September, 2003. Application for trial date plus copy documents;
  - (ii) Advocate Barnes to Advocate Richardson, 16<sup>th</sup> April, 2004. “Chase-up” letter on above;
  - (iii) Advocate Barnes to Advocate Richardson, 28<sup>th</sup> July, 2004. Further “chase-up” letter;
  - (iv) Advocate Richardson to Advocate Barnes, 30<sup>th</sup> July, 2004 willingness of Defendants to enter into mediation;
  - (v) Advocate Barnes to Advocate Richardson, 17<sup>th</sup> August, 2004. Agreement to mediation;
  - (vi) Advocate Richardson to Advocate Barnes, 17<sup>th</sup> August, 2004. Question of instructions on who shall be mediator;
  - (vii) Advocate Barnes to Advocate Richardson, 12<sup>th</sup> November, 2004, “chase-up” letter on client’s instructions. Possible re-tabling of application for trial date;
  - (viii) Advocate Richardson to Advocate Barnes, 16<sup>th</sup> November, 2004. Suggested names for mediator;
  - (ix) Advocate Richardson to Advocate Barnes, 22<sup>nd</sup> November, 2004. Correction to suggestion in letter (viii);
  - (x) Advocate Barnes to Advocate Richardson, 1<sup>st</sup> December, 2004. Further discussion on who shall be suitable as mediator;
  - (xi) Advocate Barnes to Advocate Richardson, 2<sup>nd</sup> March 2005. Reply needed within seven days or application for hearing date to be made;
  - (xii) Advocate Richardson to Advocate Barnes, 3<sup>rd</sup> March, 2005. Three names put up as possible mediators;
  - (xiii) Advocate Barnes to Advocate Richardson, 14<sup>th</sup> March, 2005. Agreement to one of those named to act;
  - (xiv) Advocate Richardson to Advocate Barnes, 21<sup>st</sup> March, 2005. Acknowledgement of suggestion and will advise of client’s views;
  - (xv) Advocate Barnes to Advocate Richardson, 17<sup>th</sup> October, 2005. “Chase-up” letter on above.

The next development was Advocate Richardson appearing on the 30 March 2007 to take the périmée point, which was adjourned for the present hearing. In paragraphs 7 and 8 of his affidavit, Advocate Barnes states: -

“7. *In March 2005 however it had been agreed to refer the dispute to mediation and the Defendants’ Advocate gave a clear undertaking to contact the agreed mediator to organise the mediation. The Defendants’ Advocate has not complied with that undertaking nor responded to subsequent correspondence.*

8. *I cannot recall precisely what was said during the discussion that I had with Advocate Richardson in February 2006 but it was along the lines that I made the point that the issue of mediation was still outstanding and that Advocate Richardson said that he would look into it.”*

11. I put the contents of para 8 to Advocate Richardson, who indicated that whilst he had no recollection of such a conversation, he did not dispute Advocate Barnes’ account of it. Advocate Barnes, also very frankly, accepts that he did not act with due expedition to prevent this action becoming périmée. In para 11 of his affidavit he admits that he should have applied for a trial date after the absence of a reply to letter (xv) of 17 October, 2005.
12. It would not, in my judgment, be right to refuse Advocate Barnes’ application, when this is placed in the context of this action, particularly the correspondence which has been outlined. Ongoing discussions on the nomination of a mediator took place both before and after the relevant date of 30 September, 2004. Indeed, a mutually suitable mediator was on the point of being appointed well after that date. There then followed a long silence from Advocate Richardson, inaction by Advocate Barnes, and then the sudden appearance of this point that the action was périmée. To refuse to restore the action would be inequitable and unjust. I consider that the individual facts of this case fall within item (4) of the considerations set out by Southwell JA and referred to above.
13. Nevertheless, this case has gone on for far too long. It was wholly suitable for mediation rather than the cost in time and money of a contested Royal Court trial for a (relatively) modest amount. Neither side has covered itself in glory in the progression of this old action. Even now it should be mediated sensibly and without fuss. I strongly encourage the parties to do this; it is not *Jarndyce -v- Jarndyce*.

## **Conclusion**

14. Advocate Barnes’ application for restoration, on the facts of this matter, succeeds.

## **Costs**

15. I am inclined to make no order, but will hear submissions if thought necessary.