Judgment 30/2012

Ozannes v Deryck Mourton
Royal Court
Civil Action File 1437
16th August 2012

Application to restore action to Witness List.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 16th day of August, 2012 before Richard James McMahon, Deputy Bailiff sitting alone

Between:

ROGER ALLEN PERROT
DAVID CHRISTOPHER MOORE
EDWARD ARTHUR GERALD PRENTICE
GARTH TRISTAN ATHELSTON BAINBRIDGE
GAVIN JOHN FARRELL
GORDON STEPHEN KNIGHT DAWES
JEREMY MARC WESSELS
JESSICA ELIZABETH ROLAND
PETER TERENCE RICHARD FERBRACHE
PETER ANDREW HARWOOD
ROBERT GEORGE SHEPHERD
PAUL ROBSON PRESTOE CHRISTOPHER

Practicing together as a firm of Advocates under the name of OZANNES

Plaintiffs

-v-

DERYCK MOURTON

Defendant

UPON the application of the Plaintiffs, dated 28th December, 2011 to restore an action to the Rôle de Causes en Preuve, ("Restoration Application") pursuant to rule 86 of the Royal Court Civil Court Rules, 2007, in respect of unpaid fees for professional services provided and disbursements in accounts rendered in the summer of 2009, and

WHEREAS on 18th July 2012, the Court heard thereon Advocate A M Merrien, Counsel for the Plaintiffs and Advocate J P Greenfield, Counsel for the Defendant.

THE COURT this day handed down written judgment in the terms attached hereto and:

GRANTED the Plaintiffs' application to restore the action to the Rôle de Causes en Preuve;

ORDERED that the costs of the Restoration Application be paid by the Plaintiffs; and

DIRECTED the parties attempt to agree directions up to a pre-trial review to take place at the earliest practical time, which can then be set out in a Consent Order to be put before the Court no later than 28 days from the handing down of this Judgment OR in default of such agreement, DIRECTED that an application to the Court for directions be made within the same timeframe in order to progress towards its conclusion.

S J COLLINS
Her Majesty's Deputy Greffier

Approved Text
16.08.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(ORDINARY DIVISION)

Between: **ROGER ALLEN PERROT**
DAVID CHRISTOPHER MOORE
EDWARD ARTHUR GERALD PRENTICE
GARTH TRISTAN ATHELSTON BAINBRIDGE
GAVIN JOHN FARRELL
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Practicing together as a firm of Advocates under the name of OZANNES

Plaintiffs

-and-

DERYCK MOURTON

Defendant

Application to restore action to Witness List
Hearing date: 18th July 2012

Judgment handed down: 16th August 2012

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiffs: A M Merrien

Advocate for the Defendant: J P Greenfield

Cases & legislation referred to:

Royal Court Civil Court Rules, 2007

Loi Relative à L'Examen des Temoins à Futur of 1908

Terrien, Commentaires du Droit Civil tant public que privé, observé au pays & Duché de Normandie, Livre IX, Chap. XXXIX

William Place Investments Ltd v States of Guernsey (1995) 20.GLJ.52

Gallienne, Traité de la Renonciation par la Loi Outrée

Royal Court Civil Rules, 1989

Haines v Guernsey Annandale Tile Company (1980) Limited (unreported, 13 May 1997, Royal Court) and (1997) 24.GLJ.82 (Court of Appeal)

IFS Investments Ltd v Manor Park (Guernsey) Limited (unreported, 13 April 2010)

Ogier v Grand Havre Holdings Limited [2005-06] GLR N29 (Royal Court) and [2007-08] GLR N15 (Court of Appeal)

Stoneman v Pannell Kerr Forster (1999) 27.GLJ.69

Henniger v Robinson [2006-06] GLR N10

Saromaje Ltd v Janet Holdings Ltd (1993) 15.GLJ.53

Introduction and background

1. The Plaintiffs, the partners at the material time of a firm of Guernsey Advocates, have applied pursuant to rule 86 of the Royal Court Civil Court Rules, 2007 to restore an action in which they claim £20,556 from the Defendant in respect of the balance of unpaid fees for professional services provided to him and disbursements in accounts rendered in the summer of 2009. The Defendant is resisting that claim and counterclaiming a larger amount from the Plaintiffs, together with the return of £10,500 which the Defendant paid to the Plaintiffs following his first Court appearance in this matter. The Plaintiffs have lodged a full Defence to that Counterclaim, to which an equally full Replique was filed on behalf of the Defendant on 22 January 2010, at which stage the pleadings closed.

2. The case was being progressed from that point with reasonable despatch. Disclosure lists and then witness statements were exchanged in March and June 2010 respectively. Because a witness in the case was leaving Guernsey, application was made to take his evidence before a Commissioner pursuant to the provisions of the Loi Relative à L'Examen des Temoins à Futur of 1908. That application was rejected by Lieutenant Bailiff Sir de Vic Carey on 28 July 2010. Instead, the learned judge granted leave to take the evidence of the witness by video link at the trial. Thereafter, the progress made to bring this matter to trial rather dramatically slowed.

3. On behalf of the Defendant, on 26 August 2010 Advocate Greenfield wrote to Advocate Merrien, who represents the Plaintiffs. His letter enclosed a copy of some emails. This was being done in accordance with the ongoing duty of disclosure contained in rule 70 of the 2007 Rules. The letter ended "*We should be grateful for your views as to the proposed directions to progress this matter to trial.*" No reply on behalf of the Plaintiffs was forthcoming.

4. On 29 June 2011, Advocate Merrien caused an email to be sent to Advocate Greenfield to which was attached a draft of some possible agreed directions to progress the case on which Advocate Merrien sought Advocate Greenfield's comments. The message records that it was being sent because Advocate Greenfield had telephoned Advocate Merrien the day before but the Advocates had not been able to speak to each other because Advocate Merrien was unavailable. This email did not elicit a response.

5. On 18 August 2011, Advocate Merrien caused a further email to be sent to Advocate Greenfield chasing for a reply to his previous message about the proposed directions. He also wrote "*Unless we therefore hear from you within the next seven days we will be obliged to place this matter back before the Court seeking the appropriate directions.*" Within 20 minutes, a reply was sent on behalf of Advocate Greenfield by his secretary indicating that Advocate Greenfield was away until 31 August 2011 and enquiring whether a response could await his return.

6. Matters then drifted to 18 November 2011 when Advocate Merrien again caused an email enquiry to be made of Advocate Greenfield. In the intervening months, Advocate Greenfield had not responded to either of Advocate Merrien's requests for comments on the proposed directions. On this occasion, however, Advocate Greenfield replied the same morning, indicating that his client had taken the view that "*there had been no real attempt to progress*

this matter … and therefore [the Plaintiffs] had effectively abandoned it." He further asked "*Do you now need to restore the claim?*" This was the first suggestion that the matter may have become périmée.

7. Within minutes, Advocate Merrien replied indicating that the Plaintiffs "*most certainly [wish] to pursue the claim*", drawing attention to the correspondence on directions that had passed between them. He also pointed out that "*If you believe we need to restore then it is for you to raise but as we are well within the prescription period the summons could be re-issued and raising such an issue just increases costs for all parties for no real purpose.*" That email produced an even swifter response from Advocate Greenfield stating "*If the matter is perimee (and I have not checked whether that is the case or not) then I do not think it is a question for us to take the point. It is automatic.*" Advocate Greenfield requested that he be allowed 14 days, rather than the 7 days proposed, in which to take instructions.

8. On 12 December 2011, Advocate Merrien sent an email to Advocate Greenfield indicating that, because the 14 days requested to provide a response had elapsed, an application for directions in the matter had been listed for the Interlocutory Court on 16 December 2011. The following day, Advocate Greenfield's colleague responded: "*In terms of your application for directions dated 29 November 2011 it remains our view that your clients' action is now périmée and that this is a matter that will need to be dealt with first. We will be advising the Court of our view on Friday. We assume that you will want to adjourn your application on Friday so that the Court can give directions regarding the Péremption point?*"

9. The application to restore the action was dated 28 December 2011. The application does not admit that the Plaintiffs' action is périmée but, if it is, seeks its restoration in light of the chronology I have just set out. On 6 January 2012, the Court fixed a timetable for materials to be filed prior to the hearing, which was subsequently held on 18 July 2012. I am grateful to Advocates Merrien and Greenfield for the assistance given by their succinct and helpful written and oral submissions.

The Law

10. Péremption is a legal procedural bar of great antiquity. As noted in the cases to which I will turn in more detail shortly, it was dealt with in Terrien's Commentaires du Droit Civil tant public que privé, observé au pays & Duché de Normandie, Livre IX, Chap. XXXIX as follows:

> "*En toutes clamours & procedures où il y a interruption d'an & de jour, l'interruption est au prejudice des demandeurs: & n'est tenu le defendeur plus responder au demandeur sur la clamour ou demande, s'il n'est monstré procedure puis an & jour.*"

In William Place Investments Ltd v States of Guernsey (1995) 20.GLJ.52, the Bailiff, Sir Graham Dorey, helpfully translated a passage from page 313 of Gallienne's Traité de la Renonciation par la Loi Outrée as follows:

> "*A Cause in our jurisdiction is perimée in plain Law by the effluxion of a particular period of time set by the Law, that is to say, it is not necessary that the Defendant makes a formal demand to the Court to state that the Péremption has been acquired. The Defendant can wait until the Plaintiff continues his action and then oppose it by putting in his Exception of Péremption. But the Péremption can be set aside after time has run, either by an express renunciation of it on the part of the Defendant or by his tacit renunciation: for example, by not furnishing a péremption Exception when he could do so when the Plaintiff resumes his action. It is thus also displaced when the Defendant furnishes his Defences and takes certain other procedures, or if he furnishes some Act or some judgement which contradicts the other party.*"

11. Before the Royal Court Civil Rules, 1989 "*it was impossible for the Court to revive an action which had become perimé and which had been prescribed. In that year the Rules of Court were changed*" (see Haines v Guernsey Annandale Tile Company (1980) Limited (unreported, 13 May 1997, Royal Court)). The relevant rule is now set out in rule 86 of the Royal Court Civil Rules, 2007 (previously rule 50 of the 1989 Rules):

> "*Where an action becomes périmée –*
>
> *(a) the Court's powers to make orders for costs are not prejudiced, and*
>
> *(b) any party to an action may apply to the Court for an order that the action be restored.*"

12. In the most recent decision of this Court to which I was referred, IFS Investments Ltd v Manor Park (Guernsey) Limited (unreported, 13 April 2010), Lieutenant Bailiff Newman QC indicated (at para. [26]) that:

> "*The purpose of the rules about peremption are clear. Parties are expected to make progress in litigation at a reasonably expeditious pace.*"

I endorse that analysis. Accordingly, cases which were incapable before 1989 of being revived can now, through the exercise of the Court's wide discretion under rule 86, be restored to the Rôle. This step can be taken whether or not the prescription period has expired, although in respect of a matter such as the present action, where the prescription period has some years to run, subject to any arguments about abuse of process, if an action, once it has become périmée, is not restored, it can be re-commenced. Under rule 86, a plaintiff is inviting the indulgence of the Court and restoration will not automatically be granted. If granted, it may also be on terms.

13. The stage of seeking restoration should, of course, not be reached if Advocates are being vigilant, complying with other provisions of the 2007 Rules. At the conclusion of his judgment in Haines v Guernsey Annandale Tile Company (1980) Limited, Deputy Bailiff Carey expressed his view that:

> "*I hope now that with Le Moigne v Hargetion and this case Advocates will review their files and their systems to make sure that cases are kept alive so that the Court does not have to be asked to make orders of the kind being sought here.*"

In this case, those words of wisdom were ignored. Hence this application to restore. The vigilance required was not turned into appropriate action before the deadline to take an appropriate step passed. In his oral submissions, Advocate Merrien pointed to there being a certain courtesy between Advocates. That approach is commendable because discourtesy should be eschewed by all those practising at the Guernsey Bar, but it should not be at the expense of failing to comply with procedural rules that exist to ensure that litigation before the Court is progressed in a timely manner.

14. In Guernsey Annandale Tile Company (1980) Limited v Haines (1997) 24.GLJ.82, the Court of Appeal set out the approach to take when dealing with an application to restore an action (at page 89F per Southwell JA):

> "*Rule 50 [now rule 86] gives to the Royal Court a discretionary jurisdiction to order the restoration of actions which have become périmés or have in other circumstances been removed from the Roll. 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 discretion which have not been included in Rule 50 itself.*

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 the 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 becoming périmé;

(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.

In my judgment this is the correct approach to applications under Rule 50 to be adopted by the Royal Court and the Court of Appeal, and it would be an incorrect approach simply to adopt the principles applied in English cases in relation to the automatic striking out of County Court actions."

15. Those factors have been applied in subsequent cases (see also the endorsement of the Court of Appeal in Ogier v Grand Havre Holdings Limited [2007-08] GLR N15). In particular, in Stoneman v Pannell Kerr Forster (1999) 27.GLJ.69, Deputy Bailiff Day identified that the burden is on the plaintiff to show an appropriate case for restoration and that, by reference to the fifth of the relevant circumstances listed by Southwell JA:

> "*In the absence of the Guernsey factors (by which I would stress I mean not only those of the kind to be found in Le Moigne and Haines, but similar factors which should be given equal weight in deciding where justice lies), in the absence of some or all of such factors, the task of the plaintiffs in discharging the burden of persuading the Royal Court to show indulgence to them when Causes have been allowed to become périmées, and thereby prescribed, will necessarily and proportionately be that much greater.*"

I see no reason to depart from any of these principles and will, therefore, follow the same sort of approach when considering where the justice lies in the Plaintiffs' application to restore.

Discussion

Relevant dates

16. The first question I need to resolve is the date from which time runs. In Advocate Greenfield's submissions, he suggested that the last procedural step took place on 28 July 2010 when the Court dealt with the application to take evidence from a witness leaving the jurisdiction. Whilst that was the last occasion on which the case featured before the Court, I consider that I must have regard to any subsequent steps of a procedural nature, especially when they have been performed in accordance with the requirements of the 2007 Rules. By way of example, the parties may have agreed, or had imposed upon them, a timetable of directions relating to disclosure and inspection. Compliance with those stages in the

proceedings, which would not involve appearing before the Court, must surely be taken into account as being steps that prevent time from running against a plaintiff.

17. In this case, the letter sent by Advocate Greenfield on 26 August 2010, quite properly fulfilling his client's ongoing disclosure duties in accordance with rule 70 of the 2007 Rules, was, in my judgment, such a procedural step. I therefore find that time did not start to run until that date, rather than from 28 July 2010. It may be a small difference, but in a case involving months rather than years, it is potentially significant. It means that the action will have become périmée should Advocate Merrien fail to persuade me that something occurred within a year and a day, ie, before 28 August 2011.

18. In the William Place Investments case, the Bailiff ruled that "*A defendant who takes active steps to further litigation, tacitly sets péremption to run afresh.*" In Henniger v Robinson [2006-06] GLR N10, Lieutenant Bailiff Talbot QC decided that what was needed to avoid an action becoming périmée was "*to take some active procedural steps on an inter partes basis*" (see, eg, para. [52]). The approach in the Henniger case was expressly adopted by Lieutenant Bailiff Hancox at first instance in Ogier v Grand Havre Holdings [2005-06] GLR N29, drawing attention to the differentiation "*between interchanges and correspondence passing between the Advocates and their clients on the one hand, and the more formal procedural steps taken in Court on the other*" (see para. [29]). Finally, in the IFS Investments case, Lieutenant Bailiff Newman QC stated (at para. [9]):

> "*I do not accept the submission that a letter to the Greffe from a firm of Advocates is inevitably a step in the action which could prevent an action from going périmée.*"

The question is, therefore, whether the correspondence between the Advocates constitutes a sufficient step to set péremption running afresh.

19. Advocate Merrien caused two emails to be sent to Advocate Greenfield before 28 August 2011. The first, on 29 June 2011, arose because Advocate Greenfield has telephoned but been unable to speak with Advocate Merrien. It is clear from the contacts made in June 2011 that both sides had it in mind that the litigation, which had been dormant by then for some months, needed to be progressed. However, no response from Advocate Greenfield was forthcoming and, rather than make an appropriate application to the Interlocutory Court, which would, in my view, certainly have produced the effect of re-starting time running, Advocate Merrien chose to revert through correspondence very close to the time at which a year and a day would elapse. It would have been a comparatively simple and cost-effective step to have taken to lodge an application for directions and then to adjourn that application by consent to enable discussions to continue. Indeed, Advocate Merrien openly acknowledged at the hearing that, looking back now, this matter would not have been dealt with in the same way.

20. Adopting the test applied in Henniger v Robinson (supra), I do not find that one side proposing draft directions and receiving no substantive response from the other side constitutes taking "*some active procedural steps on an inter partes basis*". Consequently, I have reached the conclusion that the action became périmée on 28 August 2011.

21. On a similar basis, I regard the next "*active procedural step on an inter partes basis*" to have occurred when an application was made to the Interlocutory Court dated 29 November 2011. In my view, the correspondence that re-commenced some 10 days earlier suffers from the same consequence as the correspondence in June and August 2011. This means that, for the purposes of the restoration application, the relevant period from the time when the action became périmée to when an active step was taken and péremption was raised as a procedural bar to proceeding was three months and one day.

Position of counterclaim

22. Although not strictly relevant to the application I am required to determine, the question about what the status of the counterclaim is arose during the hearing. Advocate Greenfield very fairly accepted that if the main action is périmée then the same reasoning applies to the counterclaim. However, restoration of the claim does not automatically lead to restoration of the counterclaim, which would require a separate application. That said, it seems to me to be likely that similar reasoning would apply to the counterclaim as applies to the main claim and so I regard the consequences for the counterclaim as a relevant factor to bear in mind when considering whether to exercise my discretion to restore the Plaintiffs' action.

The five Haines factors

23. Advocate Greenfield criticised the Plaintiffs for not lodging evidence explaining the lack of action on their behalf. Whilst I would normally expect an application of this nature to be supported by evidence, in this case the reasons for what has happened can be drawn from the exchanges of correspondence between the Advocates without there being any need to elaborate thereon. I can understand that Advocate Merrien was loathe to put the matter before the Court just for the sake of it, hoping that, because Advocate Greenfield had been raising the question of making progress, some form of agreement between them could be reached. Equally, however, it was perhaps more lax than it should have been for him not to chase Advocate Greenfield for responses quicker than he eventually did, especially when the August vacation period enters into play.

24. Turning to the factors set out by Southwell JA in the Haines case, the first is "*The position of the plaintiff, and the effect on the plaintiff and the plaintiff's case if the action is not restored*". If the action is not restored, the Plaintiffs could only pursue their claim for the fees they allege they are owed by commencing fresh proceedings. They would be well within the prescription period to do so but there may be satellite litigation about whether such a course of action amounts to an abuse of process of the Court. Although the pleadings may be prepared in slightly different ways because of the ways in which the issues have already been aired, there would inevitably be an element of duplicated work. That would produce costs consequences for both parties and, in that regard, I remind myself that the amounts involved in the action (and, to the extent that it is relevant, the counterclaim), are not insignificant or, as Advocate Merrien suggested, "*not negligible*", but equally are not substantial.

25. Saromaje Ltd v Janet Holdings Ltd (1993) 15.GLJ.53 offers an example of a case where the prescription period had not elapsed (and the delay after the matter became périmée was just six days). In the Stoneman case, Deputy Bailiff Day commented that "*In Saromaje, it was unquestionably the case that if the Cause had not been restored to the Rôle, it would merely have meant that the Plaintiff would have had to issue a fresh summons, which it would not have been in the interests of justice to force him to do*".

26. The second factor is "*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 becoming périmé*". As I have already noted, the period between the action becoming périmée and the next "*active procedural step on an inter partes*" was approximately three months. More importantly, the correspondence passing between the Advocates shows that they were not sitting on their hands and doing absolutely nothing in the interim. I also express my surprise that, in the light of that correspondence, the Defendant caused Advocate Greenfield to write in November 2011 that he believed the Plaintiffs "*had effectively abandoned*" their claim. Such a belief appears to have been premature. In the IFS Investments case Lieutenant Bailiff Newman QC ruled (at para. [8]) that "*the length of time for which the action has been extinguished before an application is launched to restore it is certainly capable of being a factor to take into account in deciding whether to restore*". I agree and conclude that the delay in this case cannot be described as "*inordinate*".

27. The fault for the action becoming périmée lies with Advocate Merrien. However, bearing in mind that the same approach applies to the Defendant's counterclaim as it does to the Plaintiffs' action, I regard Advocate Greenfield's lack of response to Advocate Merrien's email on 29 June 2011, especially when he had initiated contact the previous day, as being a major contributory factor in this action drifting beyond the year and a day deadline. In short, neither side has, in my view, covered itself in glory in assisting each other to progress this matter with the type of expedition that should be expected. It may not be amongst the larger claims litigated before this Court, but parties still deserve a professional service in the conduct of all litigation.

28. The third factor is "*The position of the defendant, and the effect on the defendant and the defendant's case if the action is restored*". In many respects, because of the counterclaim, this is a mirror image of the first factor. If the action is not restored, the Defendant is relieved from defending the Plaintiffs' claim. However, he may well face fresh proceedings because the prescription period has not elapsed. Further, it would mean that the Defendant either has to apply to restore his counterclaim as a standalone action or, if a fresh summons is issued on behalf of the Plaintiffs, raise his counterclaim in the new action or, in the further alternative, decide whether to commence such a claim afresh independently. Whichever of those options might be taken, I strongly suspect that it would involve the parties in undertaking work that has already been undertaken in respect of the current proceedings, thereby increasing the overall costs of resolving the disputes between them.

29. If the action is not restored, it would mean that the disputes between the parties, which may in this case be as relevant as the amounts of money involved, would remain unresolved unless and until fresh proceedings are commenced. That uncertainty would, I believe, be unfortunate for all concerned. It strikes me as highly likely that one or other of the parties will want the allegations and counter-allegations resolved by the Court. If, as seems to be the case here, a refusal to restore the action will inevitably lead to fresh proceedings, in the absence of a strong argument against restoration, such a factor points towards exercising the discretion under rule 86 in favour of the Plaintiffs.

30. I do not believe that the fourth and fifth factors are relevant to my consideration of this case. Neither party is asserting any impecuniosity or anything particularly pertinent to this litigation. Indeed, the case appears to have progressed to the stage that is was heading towards the final run-up to fixing a trial, which makes it even more of a shame that matters slipped to the extent they did. Although the Guernsey factors are absent, the threshold for the Plaintiffs in seeking the Court's indulgence, to which Deputy Bailiff Day referred in the Stoneman case, is arguably lower in a case like this where then matter is not yet prescribed (cf the Saromaje case).

Overriding objective

31. I understand from Counsel that they are not aware of any application for restoration of an action under rule 86 being dealt with under the 2007 Rules. Accordingly, this is the first occasion on which such an application is also subject to the overriding objective in rule 1 of those Rules "*to deal with cases justly*". I have, therefore, tested my provisional conclusion that this is an appropriate case in which to exercise my discretion to restore the action against the matters set out in rule 1(2).

32. If dismissal of the Plaintiffs' application to restore leads, as I believe it will, to fresh proceedings being commenced, that will not save expense (para. (b)) or allow the disputes between the parties to be resolved expeditiously (para. (d)), although I also acknowledge the competing argument that there has been an absence of expedition in progressing this case following the ruling of the Court on 28 July 2010 and Advocate Greenfield's disclosure letter the following month. It will also potentially lead to more of the Court's resources having to be allocated to this matter, if only going through the phases of the procedure for tabling the

Cause and moving the matter on to the Rôle des Causes en Preuve, which is where the current action has reached (para. (e)). As regards proportionality (para. (c)), I also take the view that the balance of the justice between the parties lies in favour of restoring the current action because of the costs already incurred and the size of the claim (and counterclaim) and the importance of resolving the allegations and counter-allegations made by the parties.

33. Because I accept the submissions of Counsel that a decision to restore the action will not automatically restore the counterclaim, "*ensuring that the parties are on an equal footing*" (para. (a)) will not be met until the counterclaim is also restored, assuming the Defendant still wishes to pursue it. That is not something I can order on this application. However, in the light of my reasoning and conclusion, I would hope that Counsel can amicably resolve that question, whether by Advocate Merrien confirming in writing that the Plaintiffs will not take an Exception de Péremption, through a Consent Order formally put before the Court or in some other manner. This approach would be consistent with rule 1(4) ("*The parties are required to help the Court to further the overriding objective*").

34. Accordingly, having regard to the factors listed in rule 1(2), restoring this action to the Rôle des Causes en Preuve would deal with this case justly and so further the overriding objective.

Conclusion

35. I must first stress that I have no wish to erode the foundations on which the principles of péremption rest. It is a particularly Guernsey concept and deserves to be respected as such. However, rule 86 of the 2007 Rules (and its predecessor rule 50) demonstrates that the Court has seen fit to introduce a discretion, which must of course be exercised judicially, to restore actions that have become périmée. It is no longer an absolute procedural bar. However, those involved in litigation must be alive to the need to take time limits seriously and aim to proceed with all matters before the Court expeditiously or face the consequences. I echo the hope expressed by Deputy Bailiff Carey in the Haines case that this decision will serve as a timely reminder of the need to avoid cases becoming périmée when it is not the intention that they are being abandoned.

36. My decision to order that the Plaintiffs' action be restored to the Rôle des Causes en Preuve turns on the particular circumstances found in this case. Whilst one might reasonably conclude that there can be no excuse for an Advocate representing a firm of Advocates as his clients to miss a vitally important date by which to take appropriate action, I have taken into account that there were steps being taken to resolve the question of further directions. This was not a case in which the Plaintiffs, through their representative, did absolutely nothing. Moreover, the timescales involved, whilst not as close to the péremption date in the Saromaje case, do not involve the lengthy delays seen in other cases where the Court chose not to exercise its discretion. Therefore, in the light of the length of the delay, the correspondence passing between the parties' Advocates and the fact that the prescription period has not elapsed and the likelihood of fresh proceedings being commenced, in my judgment, the interests of justice fall the right side of the line for restoration and so I grant the Plaintiffs' application.

Ancillary matters

37. Because the need for this application arose because Advocate Merrien did not take a step before 28 August 2011 when it would have been simple to do so, the costs associated with this application appear to me to be attributable to the Plaintiffs. In saying that, I recognise that the Defendant may have chosen to waive his entitlement to raise the Exception de Péremption that was "gifted" to him by Advocate Merrien's choice not to take an "*active procedural steps on an inter partes basis*" but, in the circumstances of this case, I would be minded to order that the costs of this restoration application should be paid by the Plaintiffs

on the recoverable basis. If Counsel wish to argue against such an order, I will, in due course, hear their submissions on the question of costs.

38. As I have already indicated, this matter appeared to be close to the final stages before a trial date would be fixed as long ago as the second half of 2010. A further two years have now passed. In those circumstances, I encourage the parties to attempt to agree directions up to a pre-trial review to take place at the earliest practicable time, which can then be set out in a Consent Order to be put before the Court no later than 28 days from the handing down of this judgment or, in default of such agreement, I direct that an application to the Court for directions must be made within the same timeframe. My reason for doing so is to ensure that this case does not slip through the cracks again. It must now be progressed towards its conclusion with all reasonable despatch.